

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-11861

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT-APPELLEE,

v.

JOHN DOE,
PETITIONER-APPELLANT.

ON APPEAL FROM A REPORTED QUESTION FROM
THE EASTERN HAMPSHIRE DISTRICT COURT

**AMICUS CURIAE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
IN SUPPORT OF THE PETITIONER**

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union of Massachusetts (ACLUM) is a non-profit, statewide membership organization, an affiliate of the national ACLU, dedicated to the defense of civil rights and civil liberties in the Commonwealth.

This appeal centers on whether statutorily-mandated GPS monitoring applies to defendants who have not been convicted but who have been given a continuance without a finding disposition on a sex offense charge. The Court has invited amicus briefs on this issue:

Whether a defendant who admits to sufficient facts for violation of a sex offense and receives a continuance without a finding with probationary conditions, is subject to mandatory GPS monitoring during the term of his probation pursuant to G. L. c. 265, § 47; what if any significance the Supreme Court's recent ruling in *Grady v. North Carolina*, 575 U.S. ____ (March 30, 2015), has in this context.

Because GPS monitoring constitutes a continuous, intrusive search, this case demands a thorough analysis of statutory construction as well as constitutional issues of search and seizure and cruel or unusual punishment. ACLUM has consistently argued in this Court, through both amicus and direct participation, against abridgement of the constitutional guarantee to be free from unreasonable

searches and seizures. See, e.g., *Commonwealth v. Carkuff*, 441 Mass. 122 (2004); *Commonwealth v. Rodriguez*, 430 Mass. 577 (2000); *Horsemen's Benevolent and Protective Ass'n., Inc. v. State Racing Comm'n*, 403 Mass. 692 (1989). ACLUM also has defended constitutional rights in numerous cases relating to sentencing or conditions of probation. See, e.g., *Diatchenko v. Dist. Atty. for the Dist.*, 466 Mass. 655 (2013); *Commonwealth v. Pyles*, 423 Mass. 717 (1996); *Commonwealth v. Power*, 420 Mass. 410 (1995); *Atty. for the Suffolk Dist. v. Watson*, 381 Mass. 648 (1980).

STATEMENT OF THE ISSUE

Whether, to avoid serious constitutional concerns about unreasonable searches and seizures and cruel or unusual punishment, G.L. c. 265, § 47 must be interpreted not to mandate GPS monitoring for defendants who have agreed to a disposition of "continuance without a finding" of guilt.

STATEMENT OF THE CASE AND FACTS

On February 1, 2013, John Doe was charged in the Eastern Hampshire District Court with one count of indecent assault and battery on a person fourteen or over. Doe's Appendix ("A-") 1. On January 17, 2014, Doe accepted a disposition of a continuance without a finding (CWOFF) for five years with conditions including GPS monitoring with exclusion zones. A-2. In

the Commonwealth's written sentencing recommendation, it had mentioned nothing about GPS monitoring. A-8. On January 22, 2014, the Court denied Doe's Motion to Modify his Condition of Probation-GPS Monitor. A-4, 10. However, it reported the following question: "Whether the provisions of Mass. General Law c. 265, Section 47 applies to a defendant who was placed on a Continuance Without a Finding for a violation of c. 265, section 13H." A-14. On May 16, 2014, after holding an evidentiary hearing, the Court allowed a stay of the GPS monitoring condition. A-23. This Court took up the reported question *sua sponte*.

Sentencing and subsequent hearings revealed that Doe, a full-time college student, has no prior criminal record. A-26; Brief for Appellant ("Doe Br.") 8. He suffers from cognitive and emotional impairments which do not amplify his risk of sexual recidivism. A-26. He is "actively engaged in treatment" and compliant with all terms of probation which include weekly in-person meetings and calls with his probation officer. A-26, 27, 29. His treatment -- unimpeded by GPS tracking -- is the best way to control his impairments. A-26. Otherwise, as the Court reasoned, public safety could be reduced by GPS's imposition. A-27. Defense counsel filed an exhibit that demonstrated the harms GPS monitoring would cause to Doe's health

and proposed more effective alternatives. Doe Br. 14. After the GPS bracelet was attached to Doe's body, those harms became manifest. Supp. App. III:11. According to testimony by his treating doctor, Doe had become so isolated from others and so anxious about his bracelet properly working that his depression and risk for suicide had significantly increased. Supp. App. IV:9-10, 11-12. Another doctor stated in a letter that Doe posed no security risk if the GPS were removed. A-27.

In its order allowing Doe's motion to stay, the Court concluded that Doe "presents no risk of flight and no danger to the community." A-26. His treating doctor's testimony was not only credible but "compelling." *Id.* After considering several other factors, the Court found, without qualification, "absolutely no benefit to [imposing] the GPS system [on Doe] at this time." A-27. The Court ended with a call for a return to individualized sentencing:

It was and is the court's wish that it has discretion whether or not to impose GPS in cases involving continuances without a finding and not simply be required to impose the condition without regard to the circumstances of individual cases and individual defendants. The court believes that the interests of justice are better served by deciding individual cases based on the facts, circumstances and the sound

discretion of the judges of the Commonwealth of Massachusetts.

A-28.

SUMMARY OF ARGUMENT

Introduction. A continuance without a finding (CWOFF), under G.L. c. 278, § 18, is a "dispositional request" instead of a "guilty finding." Because such disposition is not a conviction, it falls outside the mandatory GPS sanction of G.L. c. 265, § 47. The Commonwealth's contrary construction is foreclosed by the canon of constitutional avoidance, under which a statutory interpretation must be rejected if it raises serious constitutional concerns and an alternative interpretation is not plainly contrary to legislative intent. *DeBartolo Corp. v. Fla. Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, the Commonwealth's interpretation raises two sets of serious constitutional questions.

1. Applying § 47's GPS mandate following a CWOFF disposition would raise serious questions about a probationer's right to be free of unreasonable searches and seizures. Tracking people via GPS monitoring is a "search." *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015).

Imposing this tracking following CWOFF dispositions would raise serious questions about whether these searches are unreasonable. While the

state and federal constitutions require that searches of probationers be grounded in reasonable suspicion, applying § 47 would impose relentless, 24/7, and potentially years-long tracking of a person's body without any individualized assessment of risk or dangerousness. The homogenization of all sex offenders undermines the bedrock principle that searches find their justification in *individualized* suspicion, a shortcoming which is exacerbated when applied to those who have accepted a CWOFF.

Finally, as part of its Fourth Amendment and article 14 analysis of the "totality of the circumstances," this Court should consider the extreme unreliability of the GPS tracking technology. These malfunctions put Doe and other probationers at constant risk of unjust arrest even when they assiduously follow the rules of GPS monitoring. *Infra* pp. 17-22.

2. Applying § 47's GPS mandate following a CWOFF disposition would also raise serious questions about article 26's prohibition against cruel or unusual punishments. Where a court has decided that a defendant poses no risk to the public, imposing the GPS device, with no other purpose except as a "scarlet letter" form of punishment, is cruel. It is particularly cruel to apply such mandatory shaming

upon defendants who have CWOFF dispositions because these dispositions are supposed to relieve defendants of burdensome, collateral consequences while providing the possibility to earn dismissal of the charges. Mandatory GPS monitoring is also unusual. It is not automatically imposed for any other violent or non-violent offenses in Massachusetts, nor mandated in any other state, except Florida with significant limitations, for those accepting CWOFF dispositions for a sex offense. Interpreting § 47 to apply to CWOFF dispositions would, therefore, render Massachusetts an outlier. *Infra* pp. 26-30.

ARGUMENT

To avoid serious constitutional questions about unreasonable searches and cruel or unusual punishments, G.L. c. 265, § 47 must be interpreted not to mandate GPS monitoring for people whose cases are merely continued without a finding.

The Massachusetts legislature mandates continuous GPS monitoring, without an individualized dangerousness determination, for anyone placed on probation for a sex offense. G.L. c. 265, § 47. This Court has construed § 47 to apply "only to convicted individuals[.]" *Commonwealth v. Raposo*, 453 Mass. 739, 748 (2009). The question here is whether the class of convicted sex offenders subject to automatic GPS monitoring includes people against whom a sex-offense

charge was continued without a finding (CWOFF). It does not.

Although a CWOFF disposition follows an admission to sufficient facts, it is not a conviction under Massachusetts law. *Commonwealth v. Villalobos*, 437 Mass. 797, 802 (2002). Instead, the defendant "requests[s] that a guilty finding not be entered, but rather the case be continued without a finding" of guilt. G.L. c. 278, § 18. If the request is accepted, then the case is continued "conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation," and after such compliance, will be dismissed without a finding of guilt. *Id.* For that simple reason, as Doe has shown, a CWOFF disposition is not a conviction and cannot trigger GPS monitoring under § 47. Doe Br. 19-33.

The canon of constitutional avoidance supplies an additional reason to reach that same conclusion. Under this canon, "the presence of a serious constitutional question under one interpretation of a statute [is] a strong indication that a different possible interpretation of that statute should be adopted[.]" *Baird v. Attorney General*, 371 Mass. 741, 745 (1977). If there exists a reasonable interpretation of a statute, under which "the constitutional issue can be avoided," then courts will adopt the constitutionally

safer statutory interpretation and thereby avoid having to resolve the serious constitutional questions raised by the competing interpretation. *Id. Cf. DeBartolo*, 485 U.S. at 575 ("otherwise acceptable" statutory interpretation must be rejected if it raises serious constitutional concerns and an alternative is not "plainly contrary" to legislative intent); *Myers v. Commonwealth*, 363 Mass. 843, 854 (1973) (laws should be "interpret[ed] . . . so as to avoid a danger of unconstitutionality") (citation omitted); *Commissioners of Pub. Works v. Cities Serv. Oil Co.*, 308 Mass. 349, 360 (1941) (statutes are to be interpreted "in the light of the Constitution and of the common law").

Here, the Commonwealth's interpretation -- that CWOFF dispositions in sex-offense cases automatically require GPS monitoring under § 47 -- raises not one but two serious constitutional questions. The first concerns the protection against unreasonable searches, and the second concerns the protection against cruel or unusual punishments.

I. Interpreting § 47 to impose GPS monitoring following CWOFF dispositions would raise serious constitutional questions under the Fourth Amendment and article 14.

"The integrity of an individual's person is a cherished value of our society." *Schmerber v. California*, 384 U.S. 757, 772 (1966). To guard this

value, both the Fourth Amendment and article 14 protect persons and their property from "unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359 (1967); *Commonwealth v. Porter P.*, 456 Mass. 254, 260 (2010). The inquiry into whether an unconstitutional search has occurred therefore involves two steps: (1) did the government conduct a search in the constitutional sense and, if so, (2) was that search unreasonable. See *Commonwealth v. Alvarez*, 422 Mass. 198, 209 (1996).

Here, the answer to the first question is clearly yes. The U.S. Supreme Court recently held that GPS monitoring of a probationer is a Fourth Amendment search. *Grady*, 135 S. Ct. at 1370. As a result, whether GPS monitoring following CWOFF dispositions violates the Fourth Amendment -- and article 14 -- turns on whether it is "reasonable."

"The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* As shown below, it is at least a serious question whether imposing GPS monitoring for all sex-offense CWOFF dispositions would be a reasonable search under either the Fourth Amendment or article 14.

A. Continuous GPS tracking of probationers constitutes a search under the Fourth Amendment and article 14.

The U.S. Supreme Court's holding in *Grady v. North Carolina* confirmed that GPS tracking of a probationer via a body-worn device constitutes a search under the Fourth Amendment. 135 S. Ct. at 1370. The Court made clear that a government action "designed to obtain information . . . by physically intruding on a subject's body" is a search, regardless of whether it occurs during a criminal investigation or in a post-disposition program. *Id.* at 1371. There is nothing that distinguishes the GPS tracking at issue here from that in *Grady*.

As for article 14, this Court has already held that "extended GPS electronic surveillance by the government" triggers an individual's reasonable expectations of privacy. *Commonwealth v. Rousseau*, 465 Mass. 372, 382-83 (2013). The GPS surveillance at issue here is particularly egregious because it continues in a probationer's home where her expectation of privacy is at its zenith. This Court has recently recognized that tracking people rather than cars is "especially problematic," because it permits the state to track someone not only when they are driving on public roads but also when they are in "private spaces." *Commonwealth v. Augustine*, 467 Mass. 230, 252-53 (2014) (discussing historical cell site

location information). Continuous GPS monitoring not only has the "potential" but has as its very purpose "to track a [person attached to a GPS device] in constitutionally protected areas[]" like the home. *Id.* at 249; see also *United States v. Karo*, 468 U.S. 705, 715 (1984). Two weeks of such tracking is already "more than sufficient to intrude upon the defendant's expectation of privacy safeguarded by art. 14." *Augustine*, 467 Mass. at 254-255. If the Commonwealth prevails here, Doe will be monitored 24/7 for years without any conviction of any crime or any demonstration of reasonable suspicion.

B. There are serious constitutional questions as to whether the continuous and suspicionless GPS tracking of individuals subject to probation after a CWOFF for a sex offense is reasonable.

This Court has left open the question of whether continuous GPS monitoring of a sex offender on *post-conviction* probation violates the Fourth Amendment. *Commonwealth v. Guzman*, 469 Mass. 492, 497 (2014). The U.S. Supreme Court has likewise been careful to distinguish between parolees, for whom suspicionless searches may be reasonable, and probationers, who enjoy greater privacy protections. See *Samson v. California*, 547 U.S. 843, 850 (2006). There are grave constitutional doubts as to whether probationers generally may lawfully be subject to continuous GPS

tracking. These questions are even more serious with respect to individuals on probation after accepting a CWOFF on a sex offense.

The Constitution considers the individual to be its paramount concern. With respect to a search of a probationer and/or her home, it must be predicated upon individualized suspicion. "The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." *United States v. Knights*, 534 U.S. 112, 121 (2001); *see also McInnis v. Maine*, 638 F.3d 18, 22 (1st Cir. 2011). Even outside the probation context, if the effect of the search is arbitrary, capricious or harassing, then it is prohibited. *See Samson*, 547 U.S. at 856.

This Court has already held that despite a probationer's more restricted right to privacy, blanket searches of a probationer and his or her home are unconstitutional. *Commonwealth v. LaFrance*, 402 Mass. 789, 790 (1988). Such searches must be based upon reasonable suspicion -- a standard that both "protect[s] the public interest, and protects a probationer from unwarranted intrusions into her

privacy." *Id.* at 793; see also *Knights*, 534 U.S. at 121.

The GPS search of a probationer resembles the search at issue in *LaFrance* with updated technology. As a result, an unremitting search and seizure of a probationer through the attachment of a GPS device must also be supported by, at minimum, reasonable suspicion of a crime or violation of probation. The relative ease with which law enforcement may now use GPS devices to obtain a breathtaking amount of information about a person's movements cuts strongly in favor of a reasonable-suspicion requirement. Not only is there a constant *threat* of a physical search, see *LaFrance*, 402 Mass. at 795, there is a constant, *actual* electronic search throughout probation, during which an officer can access the resulting information at any time. "The GPS consists of 24 satellites orbiting the earth. It determines the location of offenders wearing the receiver 24 hours a day, seven days a week." Massachusetts Probation Service, *Electronic Monitoring Program Fact Sheet 2014 1* (2014), available at <http://www.mass.gov/courts/docs/probation/elmofactsheet.pdf>. See also 42 U.S.C. § 16981(a)(1)(C)(ii) (2006) (conditioning federal grants for state sex offender monitoring programs upon

the state's use of a device that "permit[s] continuous monitoring of offenders 24 hours a day").

Because individualized risk assessment is absent, mandatory GPS surveillance relies on speculation that without the attachment of a GPS device, a particular individual may commit a crime or otherwise violate the terms of his probation. This hunch-based intrusion on privacy is anathema to the values of the Fourth Amendment and article 14. "[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (striking down Georgia's statute requiring drug tests for all candidates running for state office). Indeed, this Court has cautioned against intrusions that "serve safety or deterrence values which are merely speculative, and have no basis in the record." *Horsemen's Benev.*, 403 Mass. at 705 (striking down requirement of licensees of racing program to submit to a urine specimen); see also *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (reasoning that the "general importance" of the government's interest in combating "drunk driving [which] continues to exact a terrible toll on our society[,]" did not "justify departing from the

warrant requirement without showing exigent circumstances[.]”).

Surveillance based on an individual's status as a sex offender is also problematic. Sex offenders do not comprise a homogenous group. Otherwise, the Sex Offender Registry Board would not exist to delineate offenders by three levels of risk and the legislature would not allow any offender a favorable disposition which could lead to dismissal of the charge(s). Statistics from the Massachusetts Department of Corrections also show that the general recidivism rate is significantly lower for all sex offenders than for those who have committed other crimes against the person (22% for the former; 40% for the latter) and for those who have committed other types of crimes. Massachusetts Department of Corrections, *Recidivism of 2002 Released Department of Corrections Inmates* pp. vi, 21 & tbl.17 (2009), available at <http://www.mass.gov/eopss/docs/doc/research-reports/recidivism/rec2002.pdf>. The U.S. Sentencing Commission has also urged Congress to revise the federal Sentencing Guidelines (even though they are now advisory) in order to “more fully differentiate among offenders based on their culpability and sexual dangerousness.” United States Sentencing Commission, *Federal Child Pornography Offenses* 311 (Dec. 2012),

available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

Defendants convicted of sex offenses have their risk of recidivism reduced by certain static factors. First, the longer that a sex offender has remained offense-free in the community, the less likely he will re-offend. *Id.* at 301. Second, first-time sex offenders have a lower sexual recidivism risk than those with a prior sex conviction. *Id.* Third, employed offenders are less likely to have a criminal sexual history. *Id.* at 196-97. Section 47 takes none of these significant factors into account.

These shortcomings are exacerbated when § 47 is applied not only to convicted sex offenders, but also to individuals who have accepted a CWOFF on a sex offense. A CWOFF is not a conviction under Massachusetts law; it is a way to allow a defendant to “avoid[] the consequences of having a criminal conviction.” *Villalobos*, 437 Mass. at 802 (quoting *Pyles*, 423 Mass. at 722 n.7) (alteration in original). It is particularly unreasonable to subject individuals, who have not been convicted of any crime and who may have their charges dismissed, to these intrusive GPS devices. If GPS tracking of probationers

generally raises serious questions of unsettled law, GPS tracking of individuals on probation following a CWOFF raises “grave doubts upon that score.” *Doe v. Sex Offender Registry Bd.*, 452 Mass. 764, 771 (2008) (quoting *Commonwealth v. Joyce*, 382 Mass. 222, 226 n.5 (1981)).

C. GPS monitoring of probationers also involves undue risk that a probationer’s liberty will be unjustly curtailed because of device failures.

To determine whether a search is reasonable under the Fourth Amendment and article 14, a reviewing court must examine “the totality of the circumstances.” *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118)). As a part of this inquiry, the Court should consider the particularly invasive nature of the unreliable GPS tracking technology at issue here.

Section 47’s mandate rests on the premise that GPS monitoring can reliably track and produce arrests of willful violators of probation. But for more than a few probationers, the GPS bracelets are failing. The mandate also rests on the assumption that there is some follow-up about whether a device alert is the fault of the device/cell coverage or the fault of the probationer. But there is apparently no follow-up. See Editorial, *GPS Tracking Glitches Illustrate Need for Caution*, MASS. LAW. WKLY. (July 23, 2015); Pat Murphy, *Criminal Defense Lawyers Confounded by ELMO Tracking-*

System Glitches, MASS. LAW. WKLY. (July 9, 2015); Mike Beaudet, *Ankle Bracelet Breakdown: Mass. Losing Track of Criminals*, MyFoxBoston (Apr. 26, 2015), <http://www.myfoxboston.com/story/28886713/ankle-bracelet-breakdown-mass-losing-track-of-criminals>.

Non-violation innocuous alerts are common, which makes the technology very labor intensive and causes some critics to question the reliability of GPS as a tracking tool. It is also crucial to emphasize that these GPS devices only allow officials to track the offender's whereabouts when everything works properly and when the offender/defendant cooperates.

Lisa Bishop, *The Challenges of GPS and Sex Offender Management*, 74(2) FED. PROBATION 33, 33 (2010); see also Gaylene S. Armstrong & Beth C. Freeman, *Examining GPS Monitoring Alerts Triggered by Sex Offenders: The Divergence of Legislative Goals and Practical Applications in Community Corrections*, 39 J. CRIM. JUST. 175 (2011) (study in Maricopa County, Arizona, found that the majority of violations, by a wide margin, were for technical failures of the GPS monitoring equipment, generally caused by signal loss, followed by intentional tampering with the equipment).

As for GPS's unreliability, Massachusetts currently uses 3M Electronic Monitoring as its vendor. Scott Croteau, *Massachusetts' Troubled GPS Monitoring System Replaced*, WORCESTER TELEGRAM & GAZETTE (Feb. 22, 2012), <http://www.telegram.com/apps/pbcs.dll/>

article?AID=/20120222/NEWS/102229941/0/COLUMN67; see Amicus Addendum ("Amicus Add.") 15. In 2011, California cut off all 3M bracelets after two rounds of testing because, according to one official, they were so faulty that they "posed a public safety emergency." Paige St. John, *Parolee GPS Ankle Monitoring: Major Flaws Found in Vendor's System*, L.A. TIMES (March 31, 2013), <http://articles.latimes.com/2013/mar/31/local/la-me-ln-major-flaws-found-in-parolee-gps-monitoring-devices-20130331>.

The Lowell Superior Court has recently had "at least five or six people who are on probation who have not violated the terms of their probation who have been arrested[.]" Amicus Add. 20. After dismissing yet another GPS violation, the Court (Brieger, J.) held a hearing about the Electronic Monitoring Program (ELMO) system and its procedures under the Commissioner of Probation. *Id.* at 3-6; *Commonwealth v. Rouleau*, Docket No. 1381-cr-1443.¹ The Court questioned Danny Pires, the program manager for ELMO, on these topics and his responses are alarming. *Id.* at 7-33. Finding afterward that the system is "broken", *id.* at 21, Judge Brieger suspended her imposition of GPS bracelets on defendants. Lisa Redmond, *Lowell Judge Pulls Plug on GPS Bracelets*, LOWELL SUN (Mar. 27, 2015),

¹ Counsel obtained a transcript of this proceeding from the Committee for Public Counsel Services.

http://www.lowellsun.com/news/ci_27797458/lowell-judge-pulls-plug-gps-bracelets.

Pires stated that ELMO uses T-Mobile to power the cell service even though its coverage in Massachusetts is poorer than Verizon. Amicus Add. 24. No one knows what kind of cell coverage a probationer has or whether the type of building in which the probationer lives will interfere with the signal. *Id.* at 11, 20. Pires admits that "you just don't know whether it's cell coverage, whether it's the offender that's actually blocking the signal purposely." *Id.* at 13. Just going into one's basement could set off an alert. *Id.* at 11-12, 20. Pires did not specifically know about 3M's maintenance programs. *Id.* at 27.

As for any follow-up as to the reason behind an alert, it is limited to an ELMO employee calling the probationer and leaving a message even though the probationer would also not have cell phone service if signal loss is due to a poor cell coverage area. *Id.* at 18-19. The ELMO employee then calls the chief probation officer on duty with the basic signal information. *Id.* at 19, 28. ELMO employees are not probation officers and have no legal training. *Id.* at 8-9. Whether or not a warrant then issues is left to the unfettered discretion of the chief probation officer. *Id.* at 28-29. No one knows whether a bracelet

is defective before a warrant issues. *Id.* at 28. With a warrant, Probation can hold a person in custody for up to 72 hours or until the next court sitting. G.L. c. 279, § 3.

Since no one apparently ascertains cell coverage before attaching the GPS bracelet upon a probationer, the probationer's later innocent act of doing laundry in his/her basement can set off a false alarm and threaten the probationer with arrest or humiliation. See *Doe v. Bredesen*, 507 F.3d 998, 1002 (6th Cir. 2007) (recounting that probationer "had to stand in the rain, for over thirty minutes, for all his neighbors to see, while the probation office attempted to fix the [signal] problem."); see also Frank Jaehoon Lee, Note, *Severing the Invisible Leash: A Challenge to Tennessee's Sex Offender Monitoring Act in Doe v. Bredesen*, 44 U. C. DAVIS L. REV 683 (2010). Whether probationers are given any warnings as to the effect of cell coverage before GPS tracking begins is unclear. "Due process . . . requires that a defendant sentenced to probation receive fair warning of conduct that may result in the revocation of probation." *Commonwealth v. Ruiz*, 453 Mass. 474, 479 (2009).

Since no one knows how many defective bracelets exist in Massachusetts, Amicus Add. 27, there are apparently no audits of the effectiveness of the

bracelets or the monitoring system. The constant anxiety that one may be arrested by unknowingly stepping in the wrong spot demonstrates the unreasonableness of mandatory GPS monitoring. For a mentally ill probationer, the anxiety becomes an even more cruel weight for him/her to bear. Because the ELMO system is unreliable and individuals are continually getting arrested through no fault of their own, Judge Brieger's suspension of GPS monitoring should be state-wide. "[W]e don't lose liberty in this country because somebody's software is not working." Amicus Add. 23.

II. Interpreting § 47 to impose GPS monitoring following CWOFF dispositions would also raise serious constitutional questions under article 26.

Article 26 of the Massachusetts Declaration of Rights provides: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." MASS. CONSTIT. ART. 26. The principles governing article 26 are well-established. "[I]t is 'a precept of justice that punishment for crime should be graduated and proportioned to [the] offense,'" *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)), and the offender. *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 669 (2013).

Punishment may be cruel or unusual in manner as well as length. *Id.*

The GPS requirement contained in § 47 is "punitive in effect" due to "the substantial burden on liberty" imposed "as part of the sentence for certain crimes." *Commonwealth v. Cory*, 454 Mass. 559, 572 (2009). "There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances Such an imposition is a serious, affirmative restraint." *Id.* at 570. In addition to this restraint on liberty, the Court has recognized that GPS monitoring is "a modern-day scarlet letter." *Commonwealth v. Hanson H.*, 464 Mass. 807, 815 (2013)(internal quotations omitted)(citing *Cory*, 454 Mass. at 570 n.18).

Under a strictly due process analysis, this Court upheld GPS monitoring for defendants convicted of a crime set forth in § 47 because such tracking of convicted offenders, without an individualized risk assessment, rationally related to the goals of public safety and rehabilitation. *Guzman*, 469 Mass. at 499-500. But a CWOFF is specifically employed as a means to *avoid* conviction. As *Commonwealth v. Duquette*, 386 Mass. 834, 843 (1982) makes clear, the purposes of a CWOFF include avoiding risks to job security and

community and family ties associated with criminal conviction.² In light of the differences between a conviction and a CWOFF, there is at least a serious question whether mandatorily imposing GPS monitoring on the latter is sufficiently disproportionate so as to offend article 26.³

² This Court's statement from *Duquette* on the purpose of a CWOFF bears repeating in its entirety:

We recognize that the 'continuance without a finding' is a procedure which often serves the best interests of both the Commonwealth and the defendant. The benefit to a defendant is obvious: he may be able to avoid a trial and 'earn' a dismissal of the indictment or complaint, thereby avoiding the consequences of having a criminal conviction on his record. These advantages would be especially appealing to a first offender or a defendant whose job security or family situation might be threatened by a conviction. The Commonwealth avoids the more time-consuming process of trial and sentencing. Statutes or court rules specifically authorizing practices similar to the continuance without a finding have been adopted in many jurisdictions. See Annot. 4 A.L.R.4th 147 (1981). It has been suggested that such 'pre-trial diversion' programs reduce the risk of recidivism for first time offenders, enable a defendant to preserve his community and family ties, and help reduce court backlogs.

Duquette, 386 Mass. at 843 (citing A.W. Campbell, Sentencing § 104 (1978); J.S. Williams, Sentencing and Corrections 88-90 (1974)).

³ This Court has sometimes indicated that prohibitions on cruel or unusual punishment may apply only to measures undertaken as part of a criminal sentence, i.e., after a conviction, and that the Commonwealth's treatment of individuals prior to

"Analysis of disproportionality occurs 'in light of contemporary standards of decency which mark the progress of society.'" *Diatchenko*, 466 Mass. at 669, quoting *Good v. Comm'r of Correction*, 417 Mass. 329, 335 (1994). To determine whether a punishment violates article 26, courts examine "three objective considerations (1) the nature of the offender and the offense in light of the degree of harm to society, (2) sentencing provisions in other jurisdictions for similar offenses; and (3) sentences for more severe offenses within the Commonwealth." *Commonwealth v. Alvarez*, 413 Mass. 224, 234 (1992). Each of these considerations strongly suggests that applying mandatory GPS monitoring to defendants who have accepted CWOFF dispositions could violate article 26.

Nature of the Offender and Offense: When a case is continued without a finding, the offense has not been proved. G.L. c. 278, § 18. Rather, the charge remains in limbo. *Id.* By accepting the CWOFF, the

conviction or absent conviction is best considered under a due process rubric. *Miga v. City of Holyoke*, 398 Mass. 343, 350 (1986). But this Court has also noted that the prohibition on cruel or unusual punishment may provide standards, by analogy, for the Commonwealth's treatment of those who have not been convicted of a crime. *Id.* at 350 ("While the Eighth Amendment does not serve as a direct source or rights for a person in protective custody, the Federal courts have applied Eighth Amendment analysis by analogy to determine what protections detainees are afforded pursuant to the principles of substantive due process.")

defendant is avoiding - or likely believes he or she is avoiding- the stigma of conviction. *Duquette*, 386 Mass. at 843. The imposition of GPS's "modern-day scarlet letter" - a measure that carries with it all the stigma of conviction - is inappropriate when imposed upon a defendant whom the court has determined should not be adjudicated guilty in light of the circumstances of the alleged offender and the offense.

Sentencing Provisions in Other Jurisdictions for Similar Offenses: Massachusetts is one of twenty eight states that have some form of mandated GPS monitoring for some classifications of sex offenders.^{4,5} Only one

⁴ Many other states allow but do not mandate GPS monitoring for probationers.

⁵ Alabama's courts may declare a person convicted of a sexually violent offense as a "sexually violent predator." Ala. Code § 15-20A-19(b). People so categorized "upon release from incarceration, shall be subject to electronic monitoring . . . for a period of not less than 10 years. . ." Ala. Code § 15-20A-20(c); Alaska mandates GPS monitoring for parolees where aggravating factors contributed to their crimes (not specific to sex crimes). (Alaska Stat. Ann. §§ 33.16.150(g); 12.55.155). Arizona mandates GPS only for level three sex offenders who have been "convicted . . . of a dangerous crime against children," which crimes are limited to contact offenses. Ariz. Rev. Stat. Ann. § 13-902. Arkansas requires GPS monitoring for sex offenders after incarceration only. Ark. Code Ann. § 12-12-923(G). California law mandates GPS for sex offenders only where they must register as sex offenders and have been committed to prison and released on parole. Cal. Penal Code §§ 3004(b), 3010.10. Delaware requires GPS for contact offenses by those classified as Tier III offenders only. Del. Code Ann. tit. 11, § 4121(u). Georgia law mandates GPS for

those found by Sexual Offender Registration Review Board to be sexually dangerous predators. Ga. Code Ann. § 42-1-14(e). Idaho requires GPS for the duration of probation or parole for those determined to be sexually violent predators. Idaho Code Ann. § 20-219. Indiana mandates GPS tracking only in the case of parolees identified as sexually dangerous predators. Ind. Code Ann. § 35-38-1-7.5(2). Illinois requires GPS monitoring only for those convicted of crimes that would qualify them as sexually violent predators (i.e., contact offenses). 730 Ill. Comp. Stat. Ann. 5/3-3-7(a)(7.7). Kansas's mandate of electronic monitoring for certain crimes applies only to those who have been previously incarcerated for their crimes. Kan. Stat. Ann. § 22-3717(u). Louisiana requires GPS only for sexually violent predators. La. Rev. Stat. Ann. 15:560.4. Maine requires GPS monitoring only for those convicted of gross sexual assault against a person under the age of twelve. Me. Rev. Stat. tit. 17-A, § 1231(1-A) (as amended). Maryland requires GPS monitoring only for those who have committed or attempted sexually violent contact offenses. Md. Code Ann., Crim. Proc. § 11-723(3)(i). Michigan law mandates GPS tracking only for those convicted of a contact sexual offense. Mich. Comp. Laws Ann. § 750.520n. Missouri requires GPS tracking for repeat sexual offenders only. Mo. Ann. Stat. § 217.735(4). Montana requires GPS for sexually violent predators and level three sex offenders. Mont. Code Ann. § 46-23-1010. New Mexico requires GPS monitoring for sex offender parolees only. N.M. Stat. Ann. § 31-21-10.1(E). North Carolina requires GPS as a condition of probation where a court determines it is required and the person has committed a contact offense. N.C. Gen. Stat. Ann. §§ 15A-1343(a1)(6), 14-208.40(a)(1-3); Oklahoma requires GPS monitoring for habitual or repeat sex offenders only. Okla. Stat. Ann. tit. 22, § 991a(A)(13). Oregon requires "active tracking" (which may include GPS tracking) of those who have been incarcerated for certain sex crimes. Or. Rev. Stat. Ann. § 144.103(2)(c). Rhode Island requires GPS monitoring for those who commit first degree child molestation sexual assault, have been determined to be high risk offenders (level 3), or who have committed multiple sex offenses. R.I. Gen. Laws Ann. § 11-37-8.2.1(b). South Carolina's laws require GPS monitoring

other state -- Florida -- mandates GPS monitoring as a condition of the continuance prior to dismissal on a not-guilty plea, and even that is with significant application limitations⁶ not present in § 47.

Therefore, Massachusetts's application of § 47 to require GPS monitoring for CWOFF defendants facing charges for sexual offenses, regardless of whether they pose a risk to the public, would be unique in the panoply of statutorily required or authorized GPS monitoring in the fifty states.

Sentences for More Severe Offenses within the Commonwealth: This comparison demonstrates the unusual nature of mandated GPS under a CWOFF. The mandated imposition of GPS monitoring to defendants who pose no threat to the public is the only instance in which a purely punitive condition is automatically

for contact offenses only. S.C. Code Ann. § 23-3-540(A). Virginia requires GPS monitoring for those who fail to register as sex offenders or who have been convicted of certain sex offenses for a second time. Va. Code Ann. § 19.2-295.2:1(B). West Virginia requires a court determination that a person is a sexually violent predator before mandating GPS. W. Va. Code Ann. §§ 62-11D-3(a), 15-12-2a. Wisconsin statutes require GPS monitoring only for those placed on probation, parole or supervised release after committing a contact offense. Wis. Stat. Ann. § 301.48 (2)(a)&(b).

⁶ The Florida law mandates GPS monitoring only for sex crimes with a victim under 15 for which Florida's version of a CWOFF ("withholding adjudication") is generally not available. See, Fla. Stat. Ann. § 948.30(3)(a); Fla. Stat. Ann. § 775.08435.

imposed upon a probationer. There is no other similar situation in the Massachusetts criminal justice system.

Mandated probationary terms themselves are unusual.⁷ One exception are the probationary terms for operating under the influence in violation of G.L. c. 90, § 24D, include mandatory driver's education programs and suspension of the defendant's driver's license. G.L. c. 90, § 24D. However, in contrast to mandated GPS for defendants who pose no threat to the public, these probationary conditions fulfill the traditional probationary purposes of protection of the public and rehabilitation. Comparison with other laws of the Commonwealth reveals no similarly punitive measure mandated to be imposed upon a non-dangerous defendant whose case has been resolved with a CWOFF.

⁷ This is understandable given this Court's usual admonition (cited *supra*) that "[t]he success of probation as a correctional tool depends on judges having the flexibility at sentencing to tailor probation conditions to the circumstances of the individual defendant and the crime that he committed." *Commonwealth v. Goodwin*, 458 Mass. 11, 16 (2010); See also, *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998) ("These goals [of probation] are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.") (citing *Malone v. United States*, 502 F.2d 554, 556-557 (9th Cir.1974), *cert. denied*, 419 U.S. 1124 (1975)).

In sum, the imposition of mandated GPS on CWOFF probationers would be unusual to the point of uniqueness both in Massachusetts and across the country. In addition, the punitive nature of GPS monitoring and the lack of any conviction to underlie and justify the harsh strictures of that punishment raises serious questions about whether applying § 47 to non-dangerous CWOFF defendants would violate article 26.

CONCLUSION

This Court should hold that G.L. c. 265, § 47 does not apply to those individuals who have accepted a disposition of continuance without a finding on a sex offense based on statutory construction and avoidance of serious constitutional questions that a contrary interpretation would trigger.

Respectfully submitted,
American Civil Liberties Union
of Massachusetts,

by its counsel,

1/s/ William C. Newman

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Dated: August 24, 2015

ADDENDUM

ADDENDUM TABLE OF CONTENTS

1. Transcript Of Hearing In *Commonwealth v. Rouleau*, Docket No. 1381-cr-1443 (Middlesex Superior Court, Lowell) (Brieger, J., presiding)

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Superior Court
Brieger, J.

Commonwealth

vs.

Rodger Rouleau

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1381CR01443

APPEARANCES:

Assistant District Attorney Anne M. Paruti on behalf of the
Commonwealth

Attorney Gregory D. Oberhauser on behalf of the Defendant

Lowell Superior Court
Friday, 20 March 2015
Hearing Re: Elmo Bracelet
9:16

LINDA M. RATTIGAN
OFFICIAL COURT REPORTER

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	COURT
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Danny Pires

EXHIBITS

NUMBER	DESCRIPTION	PAGE
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(no exhibits)

1 THE CLERK: Next matter before the Court,
2 Commonwealth vs. Rodger Rouleau, number three on the list.

3 MS. PARUTI: Good morning, Your Honor. Anne
4 Paruti for the Commonwealth.

5 THE COURT: Good morning, Ms. Paruti.

6 MR. OBERHAUSER: Greg Oberhauser for Mr.
7 Rouleau.

8 THE COURT: All right. Good morning, Mr.
9 Oberhauser. Good morning, Mr. Rouleau.

10 THE DEFENDANT: Good morning.

11 MS. PARUTI: Your Honor, this is a case that is
12 currently pending in this session. We're scheduled this
13 afternoon for a motion to suppress. On a prior date Mr.
14 Rouleau had been arrested on a GPS violation. And the
15 Court, I was not present on that day, I was in the Woburn
16 Superior Court, but I understand that Probation Officer
17 Bowden, who was assigned to the pretrial supervision of
18 this case, had brought it forward to the Court's attention
19 at that time when Mr. Rouleau came in under arrest for a
20 warrant that had been issued based on a violation. The
21 Court, it's my understanding, had expressed an interest in
22 hearing from a representative from Elmo. I have Mr.
23 Daniel Pires present in the courtroom today. He works
24 for, he's a manager in the Elmo program that is overseen
25 by the Office of the Commissioner of Probation. He is

1 present. I have him here today to answer whatever
2 questions the Court wanted to put to him. I'm not sure of
3 the scope of this inquiry. Frankly, I've never had --
4 procedurally I'm not sure where I stand. I have spoken to
5 Mr. Pires. I'm happy to direct him or I'm happy to just
6 offer him to the Court if the Court has questions for him
7 directly. I don't know if you want that to occur at
8 sidebar on the record or if you'd like him to take the
9 stand. I expect that he would be able to speak to what
10 happened specifically in this case, that is the sort of
11 procedural posture, what triggered the response from the
12 Elmo employees who were on call and then what happened
13 thereafter. As the Court knows, there are different
14 organizations and agencies really that come into play
15 whenever there is a perceived violation. In this case I
16 expect Mr. Pires would explain to the Court that there was
17 some sort of mechanical issue which he'll explain where
18 the device itself wasn't able to connect with the
19 monitoring system which is cellular based. And that when
20 the Elmo staff attempted to call Mr. Rouleau, they were
21 not able to get in contact with him because he did not
22 answer the phone and his voice mailbox was full. I expect
23 Mr. Pires will then explain what the next steps were that
24 they took. And then, as the Court knows, obviously you've
25 had experience in the past few months with warrants being

1 issued. A different person, that is an on-call chief,
2 then asked that the warrant be issued and that's what
3 happened in this case.

4 THE COURT: I do have experience with this,
5 which is why we're having this hearing. Mr. Oberhauser,
6 how would you propose to proceed?

7 MR. OBERHAUSER: I think if we have him on the
8 stand, allow for questions. I think you have some issues
9 there. I have a few that I would like to follow up with.
10 There's been some additional problems with the Elmo with
11 my client in the last week and a half to two weeks. And I
12 may put him on the stand to explain it.

13 MS. PARUTI: Your Honor, I have to say I really
14 don't think that this is an appropriate venue for Mr.
15 Pires to be -- first of all, I don't think it's proper for
16 me really to question him. I don't think it's proper for
17 counsel to cross-examine him. This is not an evidentiary
18 issue that affects the posture of the evidence in this
19 case. I worked with Mr. Pires to get him here because I
20 know the Court wished to speak with him. I think it's
21 most appropriate if the Court puts questions to Mr. Pires,
22 specifically if you're trying to determine what the issue
23 with the GPS has been. I know that the Court has
24 experienced some or expressed frustration with the GPS
25 system in general based on things that have happened in a

1 number of cases. And I think this was the last one where
2 the Court decided that we needed to get Mr. Pires.

3 THE COURT: Yes, I tend to think that Mr. Pires
4 testimony under oath is unnecessary. And I don't think
5 it's appropriate, necessarily, for him to be questioned by
6 counsel. I agree that there are serious serious problems
7 with the Elmo system and that they have affected the
8 rights of a number of defendants in this session since
9 January, which is why I am having this hearing. It is an
10 inquisitorial kind of hearing not an evidentiary hearing
11 and it does not necessarily affect the evidence in Mr.
12 Rouleau's case, I agree with that. I think that, as I
13 have now seen again this morning we have a very active
14 police department in every town in Middlesex County and
15 people are arrested in the middle of the night for
16 perceived violations of their electronic monitoring
17 conditions, some of which may be accurate but most of
18 which I found to be completely baseless. And that's why I
19 want to inquire how the ability to issue arrest warrants
20 has been delegated to a state agency that does not operate
21 on the theory of probable cause.

22 And so I'm going to ask Mr. Pires simply to come to
23 counsel table with Ms. Paruti. And, Mr. Rouleau, you may
24 also come to counsel table in the back with your lawyer,
25 Mr. Oberhauser. And I will ask Mr. Pires questions. And,

1 to the extent that you would like to pose questions, Mr.
2 Oberhauser, I will certainly permit that because it is
3 your client's rights that were, in my view, improperly
4 abridged in this case.

5 So, Mr. Pires, thank you for your appearance here
6 today. If you could start by explaining to me exactly who
7 you are and what your job is and a little bit of
8 background about the Elmo program.

9 MR. PIRES: Sure. Good morning, Your Honor. My
10 name is Danny Pires. I am a program manager for the
11 Electronic Monitoring Program. I have worked with the
12 Electronic Monitoring Program for about eleven years now
13 since the inception of the GPS program. In regards to if
14 there is anything specific you want me to talk about about
15 the Electronic Monitoring Program.

16 THE COURT: Why don't you tell me exactly how a
17 person who is on electronic monitoring is monitored and
18 what happens if there is a violation and what triggers a
19 violation.

20 MR. PIRES: Okay. So there's a GPS component.
21 There is we call them the W, it's called a bracelet. That
22 bracelet keeps track of the GPS points of the probationer
23 or offender that's on the program. There is a point a
24 minute that the W, which is the bracelet, stores in the
25 bracelet. The bracelet is the brains basically in regards

1 to it calls out severally and gives the information via
2 the server to our system. And that's where the alerts are
3 derived.

4 THE COURT: And where does that go, where does
5 that information go?

6 MR. PIRES: It's a software, it's cellular
7 based, it goes into the server, which is our GPS vendor is
8 3M Electronic Monitoring, which is a company based out of
9 Florida.

10 THE COURT: Who is monitoring those signals?

11 MR. PIRES: We are.

12 THE COURT: Who is "we"?

13 MR. PIRES: The Electronic Monitoring Program.

14 THE COURT: And where is that located?

15 MR. PIRES: It's located in Clinton,
16 Massachusetts. It's the actual Probation Training
17 Academy. It's an old armory and we have basically our
18 headquarters there, center. We have approximately, you
19 know, fifty or so employees.

20 THE COURT: Are they probation office employees?

21 MR. PIRES: They're more out of the Office of
22 the Commissioner of Probation. We're not probation
23 officers but, you know, we do work under the Officer of
24 the Commissioner of Probation, correct.

25 THE COURT: And what kind of training do you

1 receive?

2 MR. PIRES: We receive significant training, of
3 course, from the vendor, all of our employees, in regards
4 to the system, the equipment, the software, you know, and
5 all that kind of stuff.

6 THE COURT: Do you have any legal training?

7 MR. PIRES: Excuse me, legal?

8 THE COURT: Legal.

9 MR. PIRES: No.

10 THE COURT: Do you understand what probable
11 cause is?

12 MR. PIRES: I do.

13 THE COURT: All right. What do you think
14 probable cause is?

15 MR. PIRES: Well, with regards to there has to
16 be probable cause in regards to a violation of probation.

17 THE COURT: And what is that?

18 MR. PIRES: The offender has to do something
19 that violates a condition of probation.

20 THE COURT: All right. And who is making those
21 decisions?

22 MR. PIRES: In regards to the warrants that are
23 being issued, Your Honor?

24 THE COURT: Yes.

25 MR. PIRES: There is an on-call chief that is on

1 call after hours. Basically, the week is divided into
2 two. Starting on Sunday night at midnight to 4:30 p.m. on
3 Friday there is one chief that basically takes all the
4 calls. And those calls are, of course, after 4:30,
5 typical court hours, until 8:00 o'clock in the morning.

6 THE COURT: Who is the chief that took the call
7 in Mr. Rouleau's case?

8 MR. PIRES: Actually, I do not know that.
9 That's information I can get fairly quickly.

10 THE COURT: Yes.

11 MR. PIRES: I don't know, the warrant maybe has
12 it, I'm not sure. But that's information that I would be
13 able to get quickly for you, Your Honor.

14 THE COURT: All right. So, in Mr. Rouleau's
15 case exactly how was the violation received and acted on?

16 MR. PIRES: So, again, just going over all the
17 information yesterday, the alert and how everything was
18 handled, there was an alert I want to say at approximately
19 3:45 p.m. The alert is called "unable to connect." Like
20 I said earlier, what happens is that bracelet calls
21 severally and an "unable to connect" alert is that that
22 bracelet, for whatever reason, will not call out because
23 of the cell coverage.

24 THE COURT: And what are the reasons that would
25 cause that?

1 MR. PIRES: There are many variables, Your
2 Honor. Of course, being in an area where cell coverage is
3 not good is one of them. You know, it could be in a
4 basement. You know, depending on a building, an older
5 building with, depending on the makeup of the building.
6 Again, there's a lot of variables that can cause. Just
7 like if you have a cell phone and you're in a basement or
8 somewhere where there is no cell coverage.

9 THE COURT: All right. And if a probationer has
10 a house that is in a place where there is little or no
11 cell coverage, how is that handled?

12 MR. PIRES: Great question, Your Honor. What
13 happens is we have about five percent of our population
14 that actually we call it the two-piece unit. And that
15 unit is usually for those people who live where their
16 house is in a bad cell coverage area and we give them the
17 two-piece unit. That two-piece unit, the key to that is
18 it works off a land line. So what happens is all the
19 information is stored, it's like a cell phone. Instead of
20 having -- well, they actually have a smaller bracelet and
21 they have a cell phone as well and that cell phone is
22 tethered to the bracelet so they can't take it away.

23 THE COURT: And what does Mr. Rouleau have?

24 MR. PIRES: He has a one-piece.

25 THE COURT: A one-piece unit?

1 MR. PIRES: Yes.

2 THE COURT: And is he living in an area where
3 there is poor cell coverage?

4 MR. PIRES: You know, I can't specifically speak
5 to that. I don't know. His area could, you know,
6 depending on where he is in the house. You know, he may
7 be in the living room where the cell coverage is fine. He
8 may be in the basement where it's not fine. It's
9 arbitrary.

10 THE COURT: Well, this is precisely why I have
11 great concern because, if there are probationers who are
12 not violating the terms of their probation but the Elmo
13 device makes it seem like they are, there is a warrant
14 issued by somebody who is not a police officer and not a
15 judge that removes that person from liberty. And this
16 does not strike me as a good situation. So how many
17 devices are out there in Middlesex County where people are
18 subject to poor cell coverage and subject to immediate
19 arrest in the middle of the night?

20 MR. PIRES: We have three-thousand people on the
21 electronic monitoring GPS program. In regards to
22 Middlesex I don't know the exact number. I know in
23 regards to Middlesex Superior the caseload is the biggest.

24 THE COURT: Does anyone know who has a one-piece
25 device in an area of poor cell coverage and are those

1 people given any extra consideration before a warrant is
2 issued?

3 MR. PIRES: Yes, yes. There is a lot to it,
4 Your Honor.

5 THE COURT: I want to hear what those things
6 are.

7 MR. PIRES: Yeah. You know, in regards to --
8 again, I'm sorry, I'll try to answer.

9 THE COURT: Well, you say there is a lot to it,
10 that's what I want to know.

11 MR. PIRES: In regards to, you know, there's a
12 lot of variables to it. There are times where, you know,
13 we will never know if just the GPS -- you just don't know
14 whether it's cell coverage, whether it's the offender
15 that's actually blocking the signal purposely. And that's
16 where --

17 THE COURT: Okay. I take that. I take that
18 there are a lot of variables.

19 MR. PIRES: Right.

20 THE COURT: One of the variables is cell
21 coverage.

22 MR. PIRES: Yes.

23 THE COURT: Which is known ahead of time.

24 MR. PIRES: It is. You know, you can actually
25 tell with mapping whether. But, again, if someone is --

1 it can be a good cell coverage area but, if that person is
2 in a basement or somewhere --

3 THE COURT: But we, the Elmo Division, knows
4 where a person lives, knows what kind of house they live
5 in, correct, and where they live geographically. So a
6 person who lives in a questionable coverage area, or has a
7 stone basement, or has some other issue in his house, all
8 those variables ought to be known, correct?

9 MR. PIRES: We don't know that. Electronic
10 Monitoring would not know that.

11 THE COURT: Okay, so that's the issue.

12 MR. PIRES: Yes.

13 THE COURT: So somebody who has questionable
14 cell coverage and is monitored by a state agency, the
15 state agency doesn't know who they're monitoring and where
16 their coverage is. Is that what you're saying?

17 MR. PIRES: At times. You know, of course there
18 is, you know, it's very fluid. There are some that go off
19 the program and come back on the program. Of course, you
20 know, there are court proceedings every day and the P.O.s
21 have the equipment in their office. And for them to
22 actually know exactly, you know, does he have an old
23 building where --

24 THE COURT: Does anybody visit the location?

25 MR. PIRES: I'm not speaking for Probation or

1 the Probation Office. I assume they do house visits and
2 so forth, you know, because of their assessment and risk.

3 THE COURT: But nobody from the Elmo part of
4 this organization ever visits the place where the device
5 is located?

6 MR. PIRES: No.

7 THE COURT: So that there is no assessment from
8 Elmo as to the nature of the cell coverage where the
9 device is located?

10 MR. PIRES: Correct, we do not.

11 THE COURT: So what you're telling me is that at
12 the Clinton office you have somebody who is simply
13 determining whether the cell is connecting to the device.

14 MR. PIRES: It's alert generated. We have our
15 vendor, 3M. So basically we're the call center. So we
16 have, you know, depending on the shift and how many, seven
17 to eight people looking at screens with the alerts coming.

18 THE COURT: So the alerts stop coming but there
19 is no knowledge in Clinton about why they've stopped
20 coming from a person like Mr. Rouleau or a person, for
21 example, like the gentleman who was here just half an hour
22 ago. In other words, the alerts don't come and so
23 therefore a warrant issues automatically?

24 MR. PIRES: No. The alerts come. We handle
25 alerts. For instance, the issue this morning, it was a

1 tampering. So at 12:30 something this morning there was a
2 tamper --

3 THE COURT: There was a tamper alert, correct?

4 MR. PIRES: Correct.

5 THE COURT: In other words, something interfered
6 with the receipt of the data.

7 MR. PIRES: No, no. There was a tamper alert
8 that that bracelet was compromised.

9 THE COURT: Correct, okay. I'm sorry I used the
10 wrong word but the bracelet was compromised.

11 MR. PIRES: Right.

12 THE COURT: But you don't know why.

13 MR. PIRES: No, we don't.

14 THE COURT: Okay. And so, as a consequence, I
15 would assume your agency says, as a matter of public
16 safety because something bad could happen if somebody
17 escapes monitoring, --

18 MR. PIRES: Could be.

19 THE COURT: You immediately issue a warrant from
20 Clinton, am I correct?

21 MR. PIRES: What happens is our monitoring
22 center takes that information, for instance, in that case
23 there was a 12:30 whatever happened there was a tamper.
24 So the bracelet was compromised.

25 THE COURT: Well, it was not a tamper. There

1 was an alert, correct?

2 MR. PIRES: The alert is called a tamper.

3 THE COURT: I understand. But in this case you
4 will have to agree with me there was no tamper.

5 MR. PIRES: I think, looking at the case, yes I
6 would, you know. The thing is we don't know that because
7 we're not --

8 THE COURT: Precisely. That's precisely my
9 point.

10 MR. PIRES: Right, exactly.

11 THE COURT: And so you have been delegated
12 authority by, I assume, a state statute, Ms. Paruti, or
13 some kind of Probation policy to issue an arrest warrant
14 by calling the Tewksbury Police Department.

15 MS. PARUTI: Your Honor, I don't know the answer
16 to that. I think it would be helpful if Mr. Pires
17 explained -- I don't think he's explained to the Court in
18 this case what happened after the "unable to connect"
19 alert came in. Because I think it's just a little
20 unclear. My understanding is that it wasn't an
21 immediately issued warrant. And I think Mr. Pires can
22 speak to what happened specifically in this case.

23 THE COURT: Thank you. Would you do that?

24 MR. PIRES: Yes, in regards to the "unable to
25 connect," okay. So what happens is, you know, that

1 bracelet was not able to connect with the satellite so
2 we're not getting the information. So there are measures
3 in regards to making sure that we are properly monitoring
4 the offenders. So what happens is these alerts that are
5 derived from the software, we get the alerts and then we
6 have a protocol. We start working that alert. So, when
7 that "unable to connect" alert happened, we tried to
8 figure out what the situation is and, you know, to avoid a
9 warrant.

10 THE COURT: What do you do to figure out what
11 the situation is?

12 MR. PIRES: We make a phone call.

13 THE COURT: To whom?

14 MR. PIRES: To the probationer.

15 THE COURT: Okay.

16 MR. PIRES: Yes. And then what happens is the
17 probationer in this particular case, Mr. Rouleau, when the
18 call was made to the cell phone, it went to voice mail and
19 we had no way to contact the probationer. And then from
20 there we follow up our steps. We call the P.O., I think
21 it was at 3:45 in the afternoon. The P.O., I forget the
22 day, was not in. So a second P.O. was called, a message
23 was left with the AC P.O. At that time it ended up being
24 4:30 after hours. I think it was -- I'm not sure exactly
25 but maybe 4:45. That's where our on-call chief was

1 called. Again, because we don't have the authority. Our
2 office doesn't have the authority to issue warrants.

3 THE COURT: So this was at 4:45 on a Friday
4 afternoon, I suppose.

5 MR. PIRES: I'm not sure it was a Friday.

6 MR. PARUTI: I think February 23rd may have been
7 a Monday. I can check my phone.

8 THE COURT: Mr. Oberhauser, was it a Friday
9 afternoon?

10 MR. OBERHAUSER: No, I believe it was the 23rd
11 and I think that was a Monday afternoon.

12 THE COURT: Okay.

13 MR. PIRES: So, of course, the on-call chief is
14 given all the pertinent information, exactly what was the
15 alert, what was happening, of course the information.
16 They assess the risk and so forth. And, again, I think in
17 this case because --

18 THE COURT: So it's the acting on-call chief.
19 What is the title of the person who made the decision to
20 issue a warrant?

21 MR. PIRES: The on-call chief. And those on-
22 call chiefs consist of chief probation officers and some
23 regional supervisors from the Office of Commissioner of
24 Probation. So that person, and again I don't know who the
25 specific chief was at the time.

1 THE COURT: Does that person have any
2 understanding of whether or not the probationer lives in a
3 poor cell coverage area?

4 MR. PIRES: That person will only know what we,
5 you know, what the Electronic Monitoring Center will give
6 them.

7 THE COURT: And you don't know that.

8 MR. PIRES: Again, no one would know that.

9 THE COURT: No one knows whose monitoring system
10 is being used in an area of poor cell coverage?

11 MR. PIRES: You can go into the maps. Like I
12 said before, you can tell if the cell coverage is poor or
13 not poor. But, you know, if someone is in a basement,
14 that's the issue. You know, there's times where you may
15 be like geographically in a good cell coverage area but
16 where you are.

17 THE COURT: I get that. None of that is a
18 violation of a term of probation. And I will be
19 conservative to estimate that I have had at least five or
20 six people who are on probation who have not violated the
21 terms of their probation who have been arrested, put in
22 jail and stayed in jail until they were transported to
23 this courtroom only then to be released despite the fact
24 that they had not violated the terms of their probation.
25 There is something wrong with the system. I'm not holding

1 you responsible, please understand. You are a cog in a
2 big wheel.

3 MR. PIRES: I totally understand.

4 THE COURT: I am only expressing frustration at
5 a system that's broken. And I frankly don't know exactly
6 how I'm going to fix it but I am not going to let this go.
7 It is not right. Have there been any attempts to improve
8 or fix this equipment? I understood from Ms. McEachern
9 that there was an attempt made recently to replace all of
10 these units. Is that correct?

11 MR. PIRES: No, no. Well, I'm not saying it's
12 not correct. There's portions of it that definitely is
13 correct. Our vendor has two different types of equipment
14 in regards to what the cell carrier is. We have T-Mobil,
15 we have AT&T. What we're doing now is we are -- the
16 majority of the equipment is T-Mobil which works a lot
17 better in metro areas in Middlesex County. Our vendor
18 also is going forward with, in July, there is going to be
19 another Verizon bracelet that's going to be coming out
20 which, of course, the Massachusetts Verizon coverage is
21 the best in Massachusetts. So, in regards to that, yes.
22 I know personally what I'm doing is actually looking at
23 everybody in the program that is having issues with unable
24 to connect.

25 THE COURT: How many of the people in the three-

1 thousand on electronic monitoring are having issues with
2 the "unable to connect"?

3 MR. PIRES: And, again, there are variables in
4 regards to issues. You know, I was specifically looking
5 at Middlesex Superior. We have two-hundred and something
6 cases and there is a tremendous amount of data and reports
7 that we can get out of the software. And the "unable to
8 connects," you know, if there were three or four that were
9 significant in regards to trying to figure out what the
10 best piece of equipment for that is. I thought there
11 would be more but there is only three or four.

12 THE COURT: I've seen more than that in Lowell.

13 MR. PIRES: Yes. And what's happening is in
14 regards to our data, you know, I want to say six, seven
15 months ago there was a lot more of the "unable to
16 connects." And through our office and vendors, you know,
17 through attrition and getting T-Mobil out there it has
18 diminished in half.

19 THE COURT: There is still half, so a lot of
20 people. I appreciate that you're aware of the situation
21 and I am sure that none of this is happening because of
22 any evil intent. But it is simply administratively
23 improper to run a system in this fashion from my vantage
24 point because there are constitutional standards that I
25 don't have to explain to you about how someone loses their

1 liberty. And we don't lose liberty in this country
2 because somebody's software is not working. It just isn't
3 right. So, Mr. Oberhauser, is there anything else that
4 you wanted to add? And I'll come back to you, Ms. Paruti.

5 MR. OBERHAUSER: A couple of things, Your Honor.
6 And I'll just list them out and you can ask the questions,
7 if you think they are appropriate. But, first off, I find
8 it -- I'd like to know who made the decision to go with T-
9 Mobil and AT&T. Those are horrible coverage in this area.
10 Verizon does control it, as he acknowledges. The second
11 thing is does the software --

12 THE COURT: Let's just get an answer to that.
13 Who does make that decision?

14 MR. PIRES: The majority, all the equipment
15 coming out right now into Middlesex Superior is the T-
16 Mobil units.

17 THE COURT: And how does that get chosen?

18 MR. PIRES: That's what they have.

19 THE COURT: Who is they?

20 MR. PIRES: That's what the Probation Department
21 has. That's what we give to the Probation Department.
22 There is really not a choice. That's what is given.

23 THE COURT: Who is given that?

24 MR. PIRES: Actually me personally.

25 THE COURT: So you chose --

1 MR. PIRES: That's what our vendor has.

2 THE COURT: Your vendor being 3M?

3 MR. PIRES: 3M, yes, for electronic monitoring.

4 THE COURT: And is T-Mobil an effective
5 coverage, does it have effective coverage in Middlesex
6 County?

7 MR. PIRES: Yes.

8 THE COURT: As good as Verizon or AT&T?

9 MR. PIRES: Not as good as Verizon, no. As
10 AT&T, yes.

11 THE COURT: Okay.

12 MR. OBERHAUSER: Does the software give better
13 description to the failure or nonresponsive bracelet? In
14 Mr. Rouleau's case it turned out that the bracelet was
15 defective. And does the software give a better definition
16 of what's going on with the failure?

17 MS. PARUTI: I didn't know that had been
18 established that his bracelet was defective.

19 MR. OBERHAUSER: They had to replace it.

20 MS. PARUTI: Right, but I don't know who has
21 that information. I don't have that information. I was
22 not informed of that.

23 THE COURT: I'm not surprised. I'm not
24 surprised that anybody known anything about the effective
25 working of any of this equipment. So nothing that you're

1 saying about the District Attorney's Office would surprise
2 me. The fact that it's been replaced is highly suggestive
3 of the fact that somebody has acknowledged that it wasn't
4 working.

5 MR. PIRES: In this specific case we actually
6 never received that piece of equipment back. I'm not sure
7 exactly the details on it. When somebody gets arrested,
8 you know, that bracelet is probably still at the jail or
9 wherever it is. I'm assuming it went back on a couple of
10 days later. It was the 25th when it was back on with
11 another piece of equipment that was in the office. So I'm
12 not sure.

13 THE COURT: Not sure of what?

14 MR. PIRES: I'm not sure of why that particular
15 bracelet went on. But I'm assuming the bracelet that he
16 had prior was not in the office.

17 MR. OBERHAUSER: Your Honor, we checked. When I
18 got to Ayer District Court on Tuesday, the bracelet from
19 the Probation Department in Ayer sat there and said it's
20 working functionally, it was showing green. He was held
21 again overnight a second night, brought in here and it was
22 determined from the probation officer here in this court
23 that it was defective, they had to replace it. They did
24 that, he left probably around 5:00, 5:30 that night.

25 THE COURT: And how long was he in custody?

1 MR. OBERHAUSER: He was held two nights.

2 MS. PARUTI: And, again, I think my point, Your
3 Honor, is that I'm not sure that Mr. Pires is the person
4 to talk about that.

5 MR. OBERHAUSER: He's here for that purpose.

6 MS. PARUTI: He's not here for that, he's not a
7 probation officer who is supervising this defendant.

8 THE COURT: I understand.

9 MS. PARUTI: And I just don't think it's fair to
10 put him, Mr. Pires, in that position to answer for other
11 people and for issues over which he had no involvement.

12 MR. OBERHAUSER: If I may interject, I
13 apologize. But I thought your order was directed towards
14 Elmo, somebody who had knowledge of exactly how this
15 operation is supposed to work.

16 THE COURT: That was my order.

17 MR. OBERHAUSER: Okay.

18 THE DEFENDANT: May I?

19 MR. OBERHAUSER: No.

20 THE COURT: No. So anything else?

21 MR. OBERHAUSER: Judge, I think some additional
22 questions as to the maintenance of these items is needed
23 to find out the number of failures. I think we were
24 getting close to that answer but we didn't get that.

25 THE COURT: Do you know how many failures or how

1 many defective bracelets are out there?

2 MR. PIRES: No, I don't.

3 MR. OBERHAUSER: Could you get the answer?

4 MS. PARUTI: And, again, I object. I don't this
5 is the proper venue for this type of inquisition. I
6 understand the Court's frustration, most definitely. But
7 I think this is something that is not appropriate to be
8 litigated in this context.

9 THE COURT: Understood. Anything else?

10 MR. OBERHAUSER: Just what type of maintenance
11 goes on with these programs.

12 THE COURT: What kind of maintenance programs do
13 you have?

14 MR. PIRES: I can't specifically go into what
15 the vendor actually particularly does. But we have a
16 person, an account manager, that goes through all the
17 pieces of equipment that come through our office and sends
18 back ones that have to be sent back.

19 THE COURT: Does anybody monitor the bracelets
20 as they are being used by the probationer to make sure
21 they are effective as opposed to defective?

22 MR. PIRES: Yes, the software does.

23 THE COURT: No human being?

24 MR. PIRES: Correct.

25 THE COURT: All right. And if there is a chance

1 that there is a defective bracelet which is for some
2 reason not sending or not receiving a signal which turns
3 into an alert in Clinton, is there anyone who determines
4 whether the bracelet is defective before an arrest warrant
5 is issued?

6 MR. PIRES: I would have to say no. I'm not
7 really sure in regards to the defective. And that's where
8 all the what is defective and what is not defective --

9 THE COURT: All right. So let me ask you the
10 question in a different way. If there is an alert and the
11 phone call is made and the probationer doesn't answer the
12 phone, which is what happened here, is there an automatic
13 arrest warrant issued?

14 MR. PIRES: No.

15 THE COURT: What is the next step?

16 MR. PIRES: The next step is the on-call chief
17 gets called and that chief is given all the detailed
18 information regarding that case and then makes a decision.
19 You know, depending on the on-call chief, one chief may
20 make a different decision. So I can't answer that is
21 there an automatic warrant.

22 THE COURT: But the warrant is called for by the
23 on-call chief based on the information that he or she
24 receives from your office which is not personally involved
25 but simply analyzing the electronic signals.

1 MR. PIRES: Correct.

2 THE COURT: All right.

3 MR. OBERHAUSER: One last thing, Your Honor. Of
4 all the calls that go to the on-call chief I wonder what
5 the percentage is of arrest warrants that are issued. And
6 I think, in the alternative, with the five cases that you
7 referenced here, all have been not founded in probable
8 cause, I think, after being brought in. Why aren't they
9 instructing the police just to go and do kind of a
10 wellness check to see what's going on and let them make a
11 determination if there -- not that they are an expert in
12 it but they just walk in and arrest and say you've got to
13 talk to Probation as opposed to calling back to the on-
14 call chief and saying, "You know, he's here, the thing is
15 beeping green, there's no problem." Or, like the prior
16 individual, he's an eighty-year-old man who fell down and
17 needs medical attention.

18 THE COURT: I agree, Mr. Oberhauser. I don't
19 think Mr. Pires is authorized to make those kinds of
20 decisions. But it seems to me that prior to arrest
21 warrants issuing a well-being check by the local police
22 department is a much more legally defensible choice than
23 to deprive someone of their liberty without any
24 intervention by a human being. Human beings make
25 decisions, machines give signals. And so I intend to make

1 it clear to the commissioner and I will make findings
2 based on what you have said. I appreciate your candor. I
3 know that you are not necessarily making the decisions
4 that are being carried out in the field and I have made
5 that clear. There is a breakdown in this system and I
6 will make some findings. I do not intend to place people
7 on electronic monitoring until this is worked out and
8 until this system can be explained to me in a fashion
9 where I think human beings are deciding whether there is
10 probable cause to remove someone from liberty. And I will
11 not be permitting other people's software to make those
12 decisions in cases where I have jurisdiction.

13 MS. PARUTI: Could I just ask one follow-up
14 question, Your Honor?

15 THE COURT: Yes.

16 MS. PARUTI: My question is, in cases where,
17 such as in this case, where there is an "unable to
18 connect" signal which triggers a response from the Elmo
19 monitoring system, if the representatives who are
20 responding to that alert that the bracelet or the W device
21 is unable to connect, if they're able to actually reach
22 the probationer in the manner that's been provided to
23 them, i.e., whatever telephone number was provided by the
24 probationer, what happens in that circumstance?

25 MR. PIRES: Ultimately I know there's cases

1 where the warrant is avoided.

2 THE COURT: Well, at 12:30 this morning an
3 eighty-three-year-old man fell down the stairs. His wife,
4 a nurse, was called and a warrant still issued. He was in
5 jail all night.

6 MR. PIRES: I agree with you, Your Honor. What
7 happened in the facts of the case was a strap tamper that
8 the bracelet was compromised. We don't know it's on that
9 offender.

10 THE COURT: That's why I think they need to send
11 a police officer for a well-being check before a warrant
12 is issued. It didn't happen last night. It hasn't
13 happened in any of the cases where I have had probationers
14 in here with defective bracelets. Every single case where
15 I have had a person with a "could not connect" signal it
16 has been the fault of the software and not the person.

17 MR. PIRES: Those five or six cases that you
18 refer to I don't know what those cases are.

19 THE COURT: I understand that.

20 MR. PIRES: I can't tell you that it's defective
21 equipment because there are a lot of variables.

22 THE COURT: Nobody knows. That's the problem,
23 nobody can tell me because nobody knows because nobody is
24 keeping track because it's not built into the system. So
25 it's ineffective and I think there are legal problems with

1 it and I will take those on. This is a problem for me to
2 resolve at this point. And I appreciate your candor, as I
3 have said before.

4 MR. PIRES: I understand.

5 THE COURT: All right. Now is there anything
6 else, Ms. Paruti?

7 MS. PARUTI: No, Your Honor. I just want to
8 clarify, I wasn't talking about a tamper situation. I was
9 asking him specifically about an "unable to connect" which
10 is different, I understand, from his testimony. But I
11 just want to be clear on what we're asking about in an
12 unrelated case.

13 THE COURT: All right. I appreciate that. Mr.
14 Oberhauser, anything?

15 MR. OBERHAUSER: I think you asked a lot of
16 questions that we still don't have answers to. I would
17 not have a problem continuing this to when we have
18 somebody from the software or Elmo in here to answer
19 questions because I think it's a problem that you've
20 identified and taken on as a concern. But, if there is
21 going to be an attempt to rectify this, we have a ton of
22 questions that you asked that we don't have answers to.

23 THE COURT: I understand that. I think, to the
24 extent that some of the procedural safeguards that I
25 thought were in place are not in place. And that's what I

1 needed to hear from somebody who could tell me that. So
2 there are no procedural safeguards that I consider to be
3 effective in place and that is what I will take up with
4 somebody who is in a position to make those decisions to
5 modify or suspend this program, if necessary. I
6 understand that this is part of probably a statutory and
7 regulatory system that is bigger than this small piece.
8 But this is broken and I will take that up. So, as far as
9 I'm concerned, I have sufficient information to take the
10 next step and I will do so.

11 So thank you very much for coming today.

12 MR. PIRES: Thank you.

13 THE COURT: Thank you, Mr. Rouleau.

14 MR. OBERHAUSER: Would it be possible to ask
15 that his GPS be released?

16 THE COURT: I'm not in a position to do that at
17 this point. I think that I will certainly instruct you,
18 Mr. Pires, to the extent that you can make sure that this
19 happens, is that if there is ever a "do not connect"
20 signal from this probationer's machine, that there be a
21 police officer sent to do a well-being check before a
22 warrant is issued. I would like to order that in every
23 case. I cannot do that until I've had further opportunity
24 to review this. But I think that in this case, having had
25 one snafu already which deprived him of his liberty for

1 two evenings, I would like to make sure that a well-being
2 check happens before another arrest warrant is issued.

3 All right?

4 MR. PIRES: Yes.

5 THE COURT: Thank you.

6 Hearing concluded at 9:55 on March 20, 2015.

CERTIFICATE

COMMONWEALTH OF MASSACHUSETTS

I, Linda M. Rattigan, official court reporter in and for the Commonwealth of Massachusetts, hereby certify:

That the foregoing is a verbatim transcript, prepared by me, of the proceedings an inquiry regarding the Elmo Monitoring System, GPS, in the matter of Commonwealth vs. Rodger Rouleau held on March 20, 2015 at which I was present.

I certify further that I am not a party interested in the outcome of the proceedings and am not related to any of the parties.

Linda M. Rattigan
Official Court Reporter

Date

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R. App. P. 16(e)(references to the record); Mass. R. App. P. 16(f)(reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h)(length of briefs); Mass. R. App. P. 17 (brief of amicus curiae); Mass. R. App. P. 18(appendix to the briefs); and Mass. R. App. P. 20(form of briefs, appendices and other papers).

1/s/ William C. Newman

William C. Newman

CERTIFICATE OF SERVICE

I, William C. Newman, counsel for **AMICUS**, hereby certify that I have served two copies of this **BRIEF OF AMICUS CURIAE** by mailing, first-class postage prepaid on this 24TH day of August, 2015 to all counsel of record:

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No. SJC-11861

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT-APPELLEE,

v.

JOHN DOE,
PETITIONER-APPELLANT.

ON APPEAL FROM A REPORTED QUESTION FROM
THE EASTERN HAMPSHIRE DISTRICT COURT

***AMICUS CURIAE* BRIEF OF
THE AMERICAN CIVIL LIBERTIES
UNION OF MASSACHUSETTS
IN SUPPORT OF THE PETITIONER**