SJC-13212

COMMONWEALTH vs. TIMOTHY M. RODERICK.

Plymouth. April 4, 2022. - September 16, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Rape. Global Positioning System Device. Practice, Criminal, Probation. Constitutional Law, Search and seizure, Privacy. Search and Seizure, Probationer, Expectation of privacy. Privacy.

Indictments found and returned in the Superior Court Department on December 30, 2016.

A motion to vacate a condition of probation, filed on June 2, 2021, was heard by Jeffrey A. Locke, J.

The Supreme Judicial Court granted an application for direct appellate review.

Edward Crane for the defendant.
Johanna S. Black, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. In Commonwealth v. Feliz, 481 Mass. 689, 690-691 (2019), S.C., 486 Mass. 510 (2020) (Feliz I), we held that global positioning system (GPS) monitoring as a condition of

probation constitutes a search under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution, as recognized by the United States Supreme Court in Grady v. North Carolina, 575 U.S. 306, 309 (2015). Consequently, in order for such a condition of probation to be constitutional, the government must establish that its interest in imposing GPS monitoring outweighs the privacy intrusion occasioned by the monitoring. See Feliz I, supra at 701.

This case requires us to determine whether GPS monitoring as a condition of probation is constitutional as applied to the defendant, a first-time offender convicted of rape. The Commonwealth asserts that GPS monitoring will further its interests in enforcing the court-ordered exclusion zone surrounding the victim's home, deterring the defendant from engaging in criminal activity, and assisting authorities in investigating any future criminal activity by the defendant.

We conclude that the Commonwealth has not established how the imposition of GPS monitoring in this case would further its interest in enforcing the exclusion zone. Although the Commonwealth has demonstrated that GPS monitoring might aid in deterring and investigating possible future criminal activity by the defendant, in the circumstances here, those interests alone do not justify the depth of the intrusion into the defendant's

privacy that GPS monitoring entails. Accordingly, the imposition of GPS monitoring on the defendant as a condition of probation would constitute an unreasonable search in violation of art. 14.

1. Background. The victim and the defendant met and became friends sometime in 2016. At that time, the victim primarily was living in a tent in Connecticut, but she periodically would visit Massachusetts and spend the night at the defendant's house in Wareham. While she stayed overnight, the victim repeatedly made clear to the defendant that their friendship was strictly platonic.

One evening in early June of 2016, the victim became intoxicated and fell asleep on the defendant's bedroom floor. When she awoke the next morning, the defendant was standing in the room and told her that he had "had sex with [her] body last night." The victim then noticed what she believed was the presence of semen in her body. Shortly thereafter, she obtained a sexual assault examination at a nearby hospital, which showed that male sperm were present in her vagina. The defendant subsequently contacted police and told the investigating officer that he twice had had sex with the victim on the night of the alleged rape, but asserted that she had been conscious and consenting.

Following a jury trial, the defendant was convicted on two indictments charging him with rape, G. L. c. 265, § 22 (b).[1] He was sentenced to four years of incarceration on the first indictment, followed by three years of probation on the second. As a condition of probation, the judge ordered the defendant to submit to GPS monitoring pursuant to G. L. c. 265, § 47, which at that time required the imposition of GPS monitoring as a condition of probation for individuals who were convicted of most sex offenses, including rape. See Commonwealth v. Guzman, 469 Mass. 492, 496 (2014) (where defendant was convicted of enumerated sex offense and sentenced to probation, GPS monitoring was mandatory under G. L. c. 265, § 47). The judge also imposed a one-half mile "exclusion zone" around the victim's residence and place of employment, which the defendant was not to enter.

A few weeks before he was expected to be released from prison, the defendant moved to vacate the condition of GPS monitoring, pursuant to our decision in Feliz I, 481 Mass. at 701, on the ground that it constituted an unreasonable search in violation of art. 14. At a hearing on the motion, the

[1] The defendant also was tried on three indictments charging indecent assault and battery, G. L. c. 265, § 13H, based on statements he made to police about his prior conduct. At the close of the Commonwealth's case, the judge directed verdicts of not guilty as to those charges.

prosecutor stated that she had been unable to contact the victim, and therefore was unsure whether the victim had a particular domicil or home address that could be used as the basis of an exclusion zone.

Concluding that GPS monitoring as a condition of probation was reasonable, the judge denied the defendant's motion. The judge ordered the Commonwealth to continue its efforts to determine the victim's home address and indicated that he would reconsider his ruling if the Commonwealth could not create a "meaningful" exclusion zone. After the hearing, but before the defendant was released from prison, the Commonwealth obtained the victim's home address and was able to configure the defendant's GPS device so that it would issue an alert to the probation department if the defendant entered that exclusion zone. The defendant timely appealed from the ruling on his motion to vacate the condition of GPS monitoring to the Appeals Court, and we granted his application for direct appellate review.

2. Discussion. In support of its contention that GPS monitoring would be appropriate here, the Commonwealth relies on three principal interests that it claims collectively outweigh the intrusion on the defendant's privacy: enforcing the court-ordered exclusion zone, deterring and investigating future crime, and punishing the defendant. The defendant argues that

the Commonwealth did not establish how GPS monitoring would further these interests, and therefore did not satisfy its burden of proving the reasonableness of the search. Specifically, the defendant asserts that the Commonwealth did not satisfactorily demonstrate that an exclusion zone would be established, nor did it provide sufficient reason to believe that the defendant poses a risk of recidivating.

As stated, GPS monitoring constitutes a search under art. 14 and the Fourth Amendment. See Commonwealth v. Johnson, 481 Mass. 710, 718, cert. denied, 140 S. Ct. 247 (2019). See also Grady, 575 U.S. at 309. Because GPS monitoring as a condition of probation is imposed without a warrant, such monitoring is "'presumptively unreasonable,' and, therefore, presumptively unconstitutional." Commonwealth v. Norman, 484 Mass. 330, 335 (2020), quoting Commonwealth v. White, 475 Mass. 583, 588 (2016). Nonetheless, GPS monitoring of probationers may be constitutional if the Commonwealth establishes that such a search is reasonable. See Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974) (Commonwealth bears burden of proving reasonableness of warrantless search). See also Feliz I, 481 Mass. at 705. GPS monitoring is reasonable if "the government's interest in imposing GPS monitoring outweighs the privacy intrusion occasioned by GPS monitoring." See id. at 701. This

inquiry turns on a "constellation of factors," analyzed in the totality of the circumstances. Id.

In evaluating the privacy intrusion occasioned by GPS monitoring, a reviewing court considers the incremental effect of the search on the probationer's privacy. See id. To do so, the court first examines the "the expectation of privacy of the person subject to the search." See Landry v. Attorney Gen., 429 Mass. 336, 348 (1999), cert. denied, 528 U.S. 1073 (2000). The court then considers the extent to which GPS monitoring would intrude upon this expectation of privacy by evaluating, inter alia, the "nature of the [search] and its manner of execution" (quotations and citations omitted), see Feliz I, 481 Mass. at 704, as well as the character and quantity of the information that would be revealed by the search, see Garcia v. Commonwealth, 486 Mass. 341, 354 (2020).

The extent of the government's interest in imposing GPS monitoring turns on the extent to which the search advances a legitimate government interest. See Feliz I, 481 Mass. at 700. See also Johnson, 481 Mass. at 719. Crucially, the Commonwealth must "establish how GPS monitoring, when viewed as a search, furthers its interests" (emphasis in original). Feliz I, supra at 705. In weighing the strength of the government's interest, the court considers the probationer's risk of recidivism and the danger posed to society should he or she reoffend; as the

probationer's risk of reoffense and degree of dangerousness increases, so too does the weight of the government's interest. See id.

Although ordinarily we review a judge's decision on a motion to vacate a condition of probation for an abuse of discretion, see Commonwealth v. Goodwin, 458 Mass. 11, 16 (2010), we conduct an independent review where, as here, the judge's decision was based on a constitutional determination, see Commonwealth v. Moore, 473 Mass. 481, 484 (2016). In doing so, we accept findings of fact by a judge who saw and heard the witnesses, unless those findings are clearly erroneous, but consider the constitutionality of the search de novo. See Commonwealth v. Feliz, 486 Mass. 510, 514 (2020).

a. Privacy interests. Like all probationers, the defendant has "a significantly diminished expectation of privacy." See Moore, 473 Mass. at 485. Probationers have a diminished expectation of privacy compared to the general population; they do not enjoy the "absolute liberty" to which others are entitled because they "are on the continuum of [S]tate-imposed punishments" and are assumed to be "more likely than the ordinary citizen to violate the law" (quotation and citations omitted). See Garcia, 486 Mass. at 351-352.

The Commonwealth argues that the defendant's expectation of privacy is further diminished because the Sex Offender Registry

Board (SORB) has classified him as a level two sex offender. Accordingly, the defendant's "registration information," including his name, age, physical characteristics, home and work addresses, and convictions, is made publicly available online. See G. L. c. 6, §§ 178D, 178F. In the Commonwealth's view, the public dissemination of this information reduces the defendant's over-all expectation of privacy.

The defendant indeed does have a diminished expectation of privacy in his registration information, given the public availability of such information for level two offenders. See Doe v. Attorney Gen., 426 Mass. 136, 142 (1997) ("One does not have a constitutional right to privacy in information that is readily available"). It does not necessarily follow, however, that the defendant's expectation of privacy in his real-time location information is concomitantly diminished. An individual may lose his or her expectation of privacy in some information, yet retain an expectation of privacy in separate, materially distinct information. See Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n, 403 Mass. 692, 703-704 (1989) (statutory scheme requiring individuals to submit to searches of their person "[did] not diminish the reasonable expectations of privacy that all [individuals] have in urinating and in the chemical content of their urine"). See also Katz v. United States, 389 U.S. 347, 351-352 (1967) (individual in

public, glass telephone booth forfeited expectation of privacy in his physical actions, but maintained expectation of privacy in contents of his telephone conversation); Trujillo v. Ontario, 428 F. Supp. 2d 1094, 1103 (C.D. Cal. 2006), aff'd, 270 Fed. Appx. 518 (9th Cir. 2008) ("while a person may not have [a reasonable expectation of privacy] from one type of search, he or she reasonably may expect privacy with respect to another").

The defendant's registration information is materially distinct from the information produced by GPS monitoring. See State v. Grady, 372 N.C. 509, 531, 537-538 (2019) (noting differences between sex offender registration information and data from GPS monitoring). Cf. Landry, 429 Mass. at 346 (convicted individuals have reduced expectation of privacy in their identity, and therefore reduced expectation of privacy in their deoxyribonucleic acid profile, which is used "for identification purposes only"). As a level two offender, the defendant's publicly available registration information is relatively static and limited; his registration information generally is updated only once per year and provides minimal insight into his personal life.[2] See Commonwealth v. Cory, 454

[2] Level two sex offenders who are not homeless "must register annually in person at the local police station." Commonwealth v. Domino, 465 Mass. 569, 581 n.7 (2013). See G. L. c. 6, §§ 178F; 178F 1/2. Level two sex offenders who are homeless must appear in person at their local police station every thirty days to verify that their registration information

Mass. 559, 570 (2009). By contrast, data from GPS monitoring is dynamic and extensive, revealing the defendant's minute-by-minute movements in real time. See Johnson, 481 Mass. at 717. Thus, GPS monitoring is "dramatically more intrusive and burdensome" than the registration requirements imposed on the defendant. See Cory, supra. Accordingly, the defendant's expectation of privacy in his real-time location information is no different from that of other probationers.

Indeed, courts in other jurisdictions similarly have concluded that the publication of registration information does not diminish an individual's expectation of privacy in his or her real-time location information. See, e.g., Park v. State, 305 Ga. 348, 354-355 (2019) (although sex offender registration requirements "reveal information such as the convicted sex offender's address . . . this has nothing to do with State officials searching that individual by attaching a device to his

---

"remains true and accurate." See G. L. c. 6, § 178F 1/2. Additionally, all level two sex offenders must notify SORB of any changes to their home and work addresses. Commonwealth v. Williamson, 462 Mass. 676, 677 (2012). See G. L. c. 6, §§ 178E-178F 1/2. This registration data is compiled by SORB and made available to the public via an online database. See G. L. c. 6, § 178D. This database includes a level two sex offender's name, home address, work address, offense of conviction, physical characteristics (such as the offender's age, sex, race, height, weight, and eye and hair color), and photograph, if available. Id. The database also includes whether the offender has been adjudicated a "sexually violent predator," as well as whether the offender is in compliance with his or her registration requirements. Id.

body and constantly tracking that person's movements" [emphasis in original]); Grady, 372 N.C. at 531 (rejecting argument that "defendant's provision of limited information [pursuant to sex offender registration requirements] . . . meaningfully reduces his expectation of privacy in his body and in his every movement every day for the rest of his life," given material differences between publicly available registration information and information revealed through GPS monitoring). But see Belleau v. Wall, 811 F.3d 929, 934-935 (7th Cir. 2016) (GPS monitoring has only slight effect on individual's privacy "given the decision by Wisconsin . . . to make sex offenders' criminal records and home addresses public"); H.R. v. New Jersey State Parole Bd., 242 N.J. 271, 290-291 (2020) (defendant had "a severely diminished expectation of privacy" in part because, as a "Tier III sex offender," he was required to notify certain members of public about his sex offender status and periodically to provide registration information that would be made publicly available).

GPS monitoring works a significant intrusion on a probationer's existing, albeit diminished, expectation of privacy. See Garcia, 486 Mass. at 351-352. To effectuate GPS monitoring, the probation department must attach a GPS device to the defendant's person, in such a way that the defendant cannot remove the device; this significantly burdens the defendant's

liberty interest in bodily autonomy and integrity. See Cory, 454 Mass. at 570 (recognizing that act of "physically attach[ing] an item to a person, without consent and also without consideration of individual circumstances," burdens wearer's liberty). See also Feliz I, 481 Mass. at 704 ("The physically intrusive dimensions of GPS monitoring are relevant" to analyzing its reasonableness). Because of its visibility and cultural salience, the device serves as a "modern-day 'scarlet letter,'" Commonwealth v. Hanson H., 464 Mass. 807, 815-816 (2012), that may "expos[e] the [defendant] to persecution or ostracism," Cory, supra at 570 n.18. Moreover, the device necessarily requires some amount of maintenance, which at best is an inconvenience and at worst is a threat to the defendant's livelihood. See, e.g., Norman, 484 Mass. at 339 (probationer must ensure that battery for device remains charged at all times and connectivity is maintained; this may require "travel[ing] to a location where the device can be charged," or signal can be found, even if doing so results in frequent absences from employment). "In addition, despite an individual's best efforts to comply with the strictures of GPS monitoring, [maintenance] issues can lead to the issuance of arrest warrants, thereby subjecting the individual to the indignity and dangers of an arrest" (citations omitted). Id.

The information exposed through GPS monitoring is uniquely revealing. GPS monitoring "provides the government with a 'detailed, encyclopedic, and effortlessly compiled' log of the individual's movements." Garcia, 486 Mass. at 354, quoting Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018). This "data is stored indefinitely," with little oversight as to when and how it may be examined. See Feliz I, 481 Mass. at 705. See also Johnson, 481 Mass. at 727 (law enforcement may review without warrant historical GPS location data to determine whether probationer was near scene of crime, even where probationer had completed term of probation and crime under investigation was unrelated to crime for which probation had been imposed). Such extensive location information provides the government with "a highly detailed profile, not simply of where [the defendant] go[es], but by easy inference, of [his or her] associations -- political, religious, amicable and amorous, to name only a few -- and the pattern of [his or her] professional and avocational pursuits." See Commonwealth v. McCarthy, 484 Mass. 493, 504-505 (2020), quoting Commonwealth v. Connolly, 454 Mass. 808, 834 (2009) (Gants, J., concurring). This, in turn, "'chills associational and expressive freedoms[,]' potentially 'alter[ing] the relationship between citizen and government in a way that is inimical to democratic society'" (alterations in original). Garcia, supra at 354-355, quoting Commonwealth v.

Augustine, 467 Mass. 230, 248 n.33 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015).

b. Government interest. The Commonwealth asserts that GPS monitoring primarily would assist in enforcing the court-ordered exclusion zone around the victim's residence by notifying authorities should the defendant come within one-half mile of her address. In this way, the Commonwealth argues, GPS monitoring would further its interest in protecting the public by ensuring the victim's "sense of safety, security and well-being."

We agree that the Commonwealth has a compelling interest in protecting the public by ensuring compliance with court-ordered exclusion zones. See Feliz I, 481 Mass. at 702-703. Exclusion zones ensure that defendants stay away from victims, thereby protecting victims' safety by providing them with "a safe haven." See Commonwealth v. Habenstreit, 57 Mass. App. Ct. 785, 787 (2003). See also Cory, 454 Mass. at 572. Thus, where the crime of which a defendant has been convicted was committed against a specific, identified victim, the Commonwealth may have a strong interest in enforcing exclusion zones in order to prevent further victimization of that individual. Compare Feliz I, supra at 705 (no "geographically proximate victim" existed who could benefit from exclusion zone where defendant was convicted of offense of child pornography).

Nonetheless, GPS monitoring furthers this interest only where the GPS device is configured effectively to notify authorities should a defendant enter prohibited areas. See id. at 692 n.5, 705-706 (Commonwealth did not demonstrate how interest in enforcing order to refrain from loitering near schools, parks, and day care centers would be achieved by GPS monitoring where defendant's device could not practically be configured to issue alert if he entered such locations). When a device has not been, or cannot be, so configured, authorities would not receive alert messages notifying them that an individual inappropriately had entered into an exclusion zone, and police therefore would be unable to respond within a meaningful time frame. See id. at 705. Indeed, probation officers generally will not review a probationer's location information unless they receive an "alert" from a probationer's GPS device. See id. at 695. Accordingly, in order to rely upon a purported interest in enforcing an exclusion zone, the government must establish that the device will be configured effectively to contain such a zone. See id. at 705.

The Commonwealth maintains that it satisfied this burden by submitting, for the first time on appeal, documentation indicating that it created an exclusion zone around the victim's home address approximately three weeks after the hearing on the motion challenging the imposition of GPS monitoring. The

relevant question, however, is whether the search "was justified at its inception," not whether it was justified post hoc. See Feliz I, 481 Mass. at 708, quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). Where, as here, a search is conducted pursuant to a judicial order, we evaluate the reasonableness of the search at the time it was ordered, rather than at the time it was conducted. See, e.g., Maryland v. Garrison, 480 U.S. 79, 85 (1987) ("Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued").

Accordingly, we must determine whether the Commonwealth demonstrated that an exclusion zone would be configured in the defendant's GPS device based solely on the evidence before the motion judge. See Johnson, 481 Mass. at 726 n.14 (declining to consider evidence not before motion judge). At the motion hearing, the prosecutor told the motion judge that she had been unable to contact the victim. The prosecutor expressed some doubt as to whether she had a working telephone number for the victim and also said that she did not know whether the victim had a residential address or other domicil that could be used to create an exclusion zone. The judge did not explicitly find that the Commonwealth would be able effectively to configure an exclusion zone in the defendant's GPS device. He did appear, however, to have assumed as much; the judge concluded that GPS

monitoring would further the government's interest in enforcing the exclusion zone and also observed that the existence of an exclusion zone distinguished this case from Feliz I, 481 Mass. at 705. The judge ordered the prosecutor to continue her attempts to obtain the victim's address and said that he would entertain a motion to reconsider if a "meaningful" exclusion zone could not be configured.

Assuming that an effective exclusion zone could and would be created, without making such a finding or having been presented with evidence to support that finding, was error. Judges may "not infer or assume the existence of facts that might justify the governmental intrusion." See Guiney v. Police Comm'r of Boston, 411 Mass. 328, 332 (1991). Nor may judges shift the burden of proof onto the defendant. See Antobenedetto, 366 Mass. at 57. Yet, by instructing the defendant to file a motion to reconsider if an exclusion zone could not be configured, the judge placed the burden on the defendant to prove the absence of facts supporting the reasonableness of GPS monitoring, rather than appropriately placing the burden on the Commonwealth to prove the existence of such facts.[3]

[3] In the circumstances here, for instance, the judge might have continued the hearing briefly so as to allow the Commonwealth additional time in which to locate the victim prior to the defendant's release from incarceration.

In any event, the evidence before the motion judge did not provide any basis to conclude that an exclusion zone would be, or even could be, configured in the defendant's GPS device. Given the Commonwealth's inability to contact the victim and the uncertainty concerning her living situation, the creation of an exclusion zone was simply an "unsubstantiated possibilit[y]," something the Commonwealth hoped, but could not demonstrate, that it would be able to achieve. See Guiney, 411 Mass. at 332 ("The reasonableness of a [warrantless search] cannot fairly be supported by unsubstantiated possibilities"). Absent evidence that an effective exclusion zone would be configured in the defendant's GPS device, the Commonwealth could not establish how GPS monitoring would further its interest in enforcing the court-ordered exclusion zone. See id. at 331, quoting O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 332 (1990) (Greaney, J., concurring) ("the important constitutional right of privacy established by art. 14 should not be overruled by abstract goals of safety and integrity" [quotations and alteration omitted]).

The Commonwealth asserts that, even without an effective exclusion zone, GPS monitoring would protect the public by deterring future criminal behavior by the defendant and by enabling law enforcement officers to investigate more effectively any subsequent crimes. See Feliz I, 481 Mass. at 709 ("Where . . . a defendant's exclusion zones have not been

entered into the [GPS] monitoring system . . . , GPS monitoring's deterrent potential appears linked primarily to its possible post hoc investigative use").

We have recognized that the government has a valid interest in deterrence and investigation where the Commonwealth provides sufficient evidence that a defendant poses a demonstrable risk of reoffending. See id. The Commonwealth contends that SORB's classification of the defendant as a level two sex offender satisfies this burden. In classifying the defendant as a level two sex offender, SORB necessarily found that there was a "moderate" risk that the defendant would commit a sex offense in the future. See G. L. c. 6, § 178K (2) (b). See also Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 651 (2019) (Doe No. 496501) (SORB may classify individual as level two offender only after finding moderate risk that individual will commit new sex offense).

The defendant concedes that a court properly could consider his SORB classification level as some indication that he poses a risk of reoffending, but he maintains that a classification determination "cannot be solely dispositive" of the matter. In the defendant's view, treating SORB classification levels in such a way would be contrary to our statement in Feliz I, 481 Mass. at 700-701, that GPS monitoring requires an

"individualized determination[] of reasonableness" based on "the totality of the circumstances (citation omitted)."

We do not agree. There is a difference between treating a defendant's SORB classification level that the defendant poses a moderate risk of reoffense as sufficient evidence to establish that the defendant poses at least some risk of reoffending, and treating the classification level as determinative of the reasonableness of the search. A defendant's risk of reoffense is only one factor among many that reviewing courts consider in making ultimate determinations with respect to the reasonableness of a search. See Norman, 484 Mass. at 337-338.

Furthermore, relying on a defendant's classification level does not deprive the defendant of an individualized determination. Indeed, SORB classifications are the product of individualized determinations, which must be supported by clear and convincing evidence, and which a defendant may challenge at a hearing where the defendant may cross-examine witnesses and introduce contrary evidence. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 298, 300-303 (2015) (discussing process of challenging SORB classification decisions, and holding that SORB bears burden of proving appropriateness of its classifications by clear and convincing evidence); Doe, Sex Offender Registry Bd. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 596 (2013) (when

classifying offenders, SORB must make "individualized determinations of the likelihood of recidivism"). Where SORB already has evaluated a defendant's risk of reoffense, a judge need not reinvent the wheel by conducting an independent factual examination of the issue. See Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109 (2014).

Accordingly, SORB's determination that the defendant should be classified as a level two offender was sufficient to establish that the defendant posed some moderate risk of reoffending. Thus, the Commonwealth established that GPS monitoring would further its interest in deterring and, if necessary, investigating future sex offenses.[4] Cf. Feliz I, 481 Mass. at 705-706 (Commonwealth could not rely on interest in deterrence and investigation where it did not "present[] evidence sufficient to indicate that [the] defendant pose[d] a threat of reoffending").

The Commonwealth also argues that GPS monitoring would further its interest in retribution. Retribution is a valid goal of probation, see Commonwealth v. Lapointe, 435 Mass. 455,

[4] SORB's "determination of risk focuses solely on the risk of sexual recidivism, that is, the risk that the offender will commit a new sexual offense, not the risk that he or she will commit any criminal offense" (emphasis in original). See Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 651 (2019).

459 (2001), which may be achieved through GPS monitoring, see Cory, 454 Mass. at 579 (GPS monitoring "promote[s] the traditional aims of punishment," including retribution). Nonetheless, retribution is secondary to the principal goals of probation: rehabilitation of the defendant and protection of the public. See LaPointe, supra. Indeed, probation long has been considered "an act of grace" more than an act of retribution, a means of protecting the public while sparing the probationer from incarceration. See Martin v. State Bd. of Parole, 350 Mass. 210, 213 (1966), quoting Escoe v. Zerbst, 295 U.S. 490, 492 (1935). Accordingly, the government's interest in retribution carries only de minimis weight.

c. Assessing the balance. We turn to the appropriate balancing of the interests here. Had the Commonwealth satisfactorily demonstrated at the motion hearing that an exclusion zone would be configured in the defendant's GPS device, the case before us would be straightforward. There is little question that the Commonwealth's interest in enforcing the exclusion zone around the victim's home, in conjunction with its interest in deterring and investigating future sex offenses, would have outweighed the incremental privacy intrusion occasioned by GPS monitoring in the instant case. Nonetheless, we cannot consider interests that were not sufficiently established before the motion judge. See Horsemen's Benevolent

& Protective Ass'n, Inc., 403 Mass. at 705 (declining to consider asserted interests that "are merely speculative" and "have no basis in the record").

Based on the record before the motion judge, essentially the only interest the Commonwealth established was an interest in deterring and, if necessary, investigating future sex offenses by the defendant. The reasonableness of the search therefore rests upon whether this interest outweighed the concomitant intrusion upon the defendant's privacy. See Feliz I, 481 Mass. at 691.

The Commonwealth's interest in deterrence and investigation is stronger where a conviction is based on a crime of greater severity. See Commonwealth v. Cruzado, 480 Mass. 275, 284 (2018), quoting United States v. Hensley, 469 U.S. 221, 229 (1985) (government interest "in solving crimes and bringing offenders to justice . . . is particularly strong 'in the context of felonies or crimes involving a threat to public safety'"). A defendant's risk of recidivism, even if relatively low, carries particular weight if reoffense would pose a significant threat to the public. See Garcia, 486 Mass. at 355-356. The Commonwealth's interest therefore is strengthened by the fact that the defendant was convicted of rape, "one of the most serious crimes punishable by law." See Commonwealth v. Sherman, 481 Mass. 464, 473 (2019). See also Doe No. 496501,

482 Mass. at 659 ("contact offenders are generally more dangerous than noncontact offenders").

At the same time, the defendant has no previous history of sex offenses, and no prior convictions. See Feliz I, 481 Mass. at 706 (considering that defendant had "no prior record of a sex offense" in evaluating risk of recidivism). He successfully complied with all of the conditions of his pretrial release for the period of nineteen months pending trial, nine of which involved GPS monitoring. Compare id. at 707 (defendant's compliance with sixteen months of conditions of pretrial release, including nine months of GPS monitoring, "would have provided no suggestion at sentencing that he would fail to comply with the terms of probation"). Accordingly, although the defendant's SORB classification level provides some reason to believe that he might recidivate, he has no history of doing so. Cf. Johnson, 481 Mass. at 718-720 (GPS monitoring was reasonable as applied to defendant with "lengthy criminal history" and record of probation violations). The government has less of an interest in monitoring a potential recidivist than a proven one. See Garcia, 486 Mass. at 355-356 (government had "significant interest" in imposing GPS monitoring in light of defendant's "repetitive, relatively recent, and dangerous . . . criminal conduct," which indicated that "risk of recidivism was not fanciful").

On the other hand, the degree of intrusion upon the defendant's privacy occasioned by GPS monitoring is aggravated by the fact that the defendant was ordered to wear a GPS device for three years.[5] Cf. Johnson, 481 Mass. at 712 (defendant was subject to GPS monitoring for six months). Because the physical intrusion of the device would continue for years, the resulting burdens upon the defendant's liberty interest are greater than they would be given a shorter period of monitoring. See Garcia, 486 Mass. at 354 (physically intrusive nature of GPS monitoring has impact on wearer's liberty interest). Moreover, monitoring that takes place over the course of years allows the government to amass and indefinitely to store a staggering quantity of data, providing insights that would not be possible with a shorter term of surveillance. See Commonwealth v. Mora, 485

[5] The motion judge indicated that he would "consider vacating [the] GPS requirement after [eighteen] months, upon motion by the defendant" if the defendant successfully complied with the conditions of probation (emphasis added). This language indicates that vacatur of the GPS condition was discretionary, not mandatory; what ultimately was imposed was three years of GPS monitoring. Compare Commonwealth v. Feliz, 486 Mass. 510, 513 n.5 (2020) ("the language of the condition simply provided that the defendant could seek [early] relief," but did not guarantee early relief). That the judge reserved the discretion to remove the condition at some future point is inconsequential given that judges always retain such discretion. See Commonwealth v. Goodwin, 458 Mass. 11, 18 (2010) ("Where a defendant has performed so well on probation and made such rehabilitative progress that the conditions imposed on him should be relaxed, a judge may eliminate or modify a probation condition . . .").

Mass. 360, 373 (2020) (privacy interest turns in part on duration of surveillance).

Balancing each of the established interests and their respective weights, we conclude that the Commonwealth did not meet its burden of establishing the constitutionality of the warrantless search.

3. Conclusion. The order denying the defendant's motion to vacate the condition of GPS monitoring is reversed. The matter is remanded to the Superior Court for entry of a modified order of probation that does not include the condition of GPS monitoring.

So ordered.