

SJC10669

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK COUNTY

NO. 2009-P-1166

COMMONWEALTH

V.

JOHN W. CANADYAN, JR.

---

BRIEF AND RECORD APPENDIX FOR THE DEFENDANT  
ON APPEAL FROM A JUDGMENT OF THE CHELSEA DISTRICT COURT

---

BETH L. EISENBERG  
BBO #554630

ATTORNEY FOR DEFENDANT

COMMITTEE FOR PUBLIC COUNSEL SERVICES  
Special Litigation Unit  
21 McGrath Highway  
Somerville, MA 02143  
617-623-0591  
[beisenberg@publiccounsel.net](mailto:beisenberg@publiccounsel.net)

November, 2009.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ISSUE PRESENTED.....1

CONSOLIDATED STATEMENT OF THE CASE  
AND THE FACTS.....1

    A.    Background Facts  
          Concerning GPS Monitoring and  
          Homeless Shelters.....4

    B.    The Preliminary Surrender  
          Hearing.....10

    C.    The Final Surrender Hearing.....19

    D.    Disposition.....23

ARGUMENT

    I.    THE PROBATIONER WAS DEPRIVED OF DUE PROCESS  
          OF LAW, WHERE (1) THE JUDGE'S RETROACTIVE,  
          INVALID CONSTRUCTION OF THE HOMELESS  
          PROBATIONER'S MANDATORY GPS MONITORING  
          CONDITION TO INCLUDE HIS FULFILLMENT OF  
          CONDITIONS OF EMPLOYMENT AND HOUSING  
          WAS BOTH UNFORESEEABLE AND DEVOID OF  
          RECORD SUPPORT, AND (2) THE JUDGE'S  
          CONCLUSION THAT THE HOMELESS PROBATIONER  
          WAS EXCLUSIVELY RESPONSIBLE FOR HIS  
          INABILITY TO COMPLY WITH GPS MONITORING,  
          AND THAT THE PROBATION DEPARTMENT BORE NO  
          RESPONSIBILITY, WAS BASELESS AS A MATTER  
          OF FACT AND LAW .....24

A. The judge's determination that the homeless probationer had violated his condition to be GPS-monitored by failing to find a home and a job was legally erroneous and so devoid of factual support as to be invalid under the Due Process Clause of the Fourteenth Amendment and article 12 of the Declaration of Rights.....24

B. The judge erred in finding the probationer's noncompliance inexcusable, where the quantum of credible evidence more than satisfied the showing required by the Supreme Court that the indigent probationer had made bona fide, reasonable efforts to comply.....31

C. The judge violated the probationer's rights to due process of law by absolving the State from proving that it had provided means by which the probationer could, but wilfully refused to, comply with mandatory GPS monitoring.....40

CONCLUSION.....48

ADDENDUM.....49

CERTIFICATE OF COMPLIANCE.....61

RECORD APPENDIX.....62

TABLE OF AUTHORITIES

Cases

Bearden v. Georgia,  
461 U.S. 660 (1983).....29, 31,  
37, 39

Black v. Romano,  
471 U.S. 606 (1985).....19, 32

Bouie v. City of Columbia,  
378 U.S. 347 (1964).....38

Butler v. State,  
486 S.W.2d 331 (Tex. 1972).....36

Carradine v. United States,  
420 A.2d 1385 (D.C.Cir. 1980).....38

Commissioner of Insurance v. First Nat'l Bank,  
352 Mass. 74 (1967).....46

Commonwealth v. Ammons,  
1998 Mass.Super.LEXIS 426.....36

Commonwealth v. Arroyo,  
451 Mass. 1010 (2008).....34

Commonwealth v. Christian,  
46 Mass. App. Ct. 477 (1999), *aff'd in part*  
*on relevant grounds*,  
429 Mass. 1022 (1999).....37

Commonwealth v. Cory,  
454 Mass. 559 (2009).....3, 46

Commonwealth v. Delaney, 425 Mass. 587 (1997),  
cert. denied, 522 U.S. 1058 (1998).....26

Commonwealth v. Gomes,  
407 Mass. 206 (1990).....39

<u>Commonwealth v. Holmgren,</u> 421 Mass. 224 (1995).....	41
<u>Commonwealth v. Kendrick,</u> 446 Mass. 72 (2006).....	27
<u>Commonwealth v. Lally,</u> 55 Mass. App. Ct. 601 (2002).....	26
<u>Commonwealth v. Power,</u> 420 Mass. 410 (1995), cert. denied, 516 U.S. 1042 (1996).....	27
<u>Commonwealth v. Robinson,</u> 444 Mass. 102 (2005).....	45
<u>Commonwealth v. Ruiz,</u> 453 Mass. 474 (2009).....	26, 27 28, 40
<u>Commonwealth v. Zone Book, Inc.,</u> 372 Mass. 366 (1977).....	45
<u>Donneil v. State,</u> 377 So. 2d 805 (Fla. 1979).....	36
<u>Douglas v. Buder,</u> 412 U.S. 430 (1973).....	28
<u>Gagnon v. Scarpelli,</u> 411 U.S. 778 (1973).....	30, 32
<u>Grayned v. Rockford,</u> 408 U.S. 104 (1972).....	27
<u>Herold v. State,</u> 52 Md.App. 295 (1982).....	36
<u>Humphrey v. State,</u> 290 Md. 164 (1981).....	34
<u>Johnson v. State,</u> 62 Md.App. 548 (1985).....	36

<u>Massachusetts Coalition for Homeless v. Secretary of Human Services,</u> 400 Mass. 806 (1987).....	44
<u>Morrissey v. Brewer,</u> 408 U.S. 471 (1972).....	30, 32
<u>People v. Bowman,</u> 423 N.Y.S.2d 242 (1980).....	32, 39
<u>People v. Romero,</u> 192 Colo. 106 (1976).....	36
<u>People v. Silcott,</u> 177 Colo. 451 (1972).....	36
<u>People v. Williams,</u> 229 Ill.App.3d 677 (1992).....	41
<u>State v. Archuleta,</u> 812 P.2d 80 (Utah App. 1991).....	30
<u>State v. Bleasdale,</u> 69 Ohio App.3d 68 (1990).....	33
<u>State v. Budgett,</u> 146 N.H. 135 (2001).....	28
<u>State v. Jacobsen,</u> 238 Neb. 511 (1991).....	36
<u>State v. Modtland,</u> 695 N.W.2d 602 (Minn.2005).....	30
<u>State v. Moretti,</u> 50 N.J. Super. 223 (1958).....	36
<u>State v. Nakamura,</u> 59 Haw. 378 (1978).....	36

State v. Oyler,  
92 Idaho 43 (1968).....25, 36

State v. Pleasant,  
508 So.2d 113 (La. 1987).....36

Tate v. Short,  
401 U.S. 395 (1971).....39-40

Thomas v. State,  
672 So.2d 587 (Fla. 1996).....36

United States v. Boswell,  
605 F.2d 171 (5th Cir. 1979).....36

United States v. Cabot,  
325 F.3d 384 (2d Cir. 2003).....27

United States v. Morin,  
889 F.2d 328 (1st Cir. 1989).....32

Williams v. Illinois,  
399 U.S. 235 (1970).....39

Constitutional Provisions

United States Constitution,

Fourteenth Amendment.....1, 24,  
29, 39,  
40, 41

Massachusetts Declaration of Rights,

Article One.....39

Article Ten.....39

Article Twelve.....1, 24,  
39, 40,  
41

Statutory Provisions

G.L. c.6, § 167.....13  
G.L. c.6, § 178C.....2, 6  
G.L. c.6, § 178K.....6  
G.L. c. 265, § 13B.....2  
G.L. c.265, § 47.....passim  
G.L. c.276, § 98.....45  
G.L. c.276, § 99.....44

Other Authorities

American Heritage Dictionary of  
the English Language (4th ed. 2006).....46  
N.P. Cohen, Probation and Parole  
(2d ed. 1999).....28, 41  
C.J.S. Constitutional Law  
(2005 ed.).....28  
Webster's Third New Int'l.  
Dictionary (2002 ed.).....45  
<http://www.mass.gov/legisl/>.....44

ISSUE PRESENTED

Whether the probationer was deprived of due process of law under the Fourteenth Amendment to the United States Constitution and article 12 of the Declaration of Rights, where (a) the judge's retrospective, invalid construction of the homeless probationer's condition of mandatory GPS monitoring to include his fulfillment of conditions of employment and housing, was both unforeseeable and devoid of record support; and where (b) the judge's conclusion that the homeless probationer was exclusively responsible for his inability to comply with GPS monitoring, and that the Probation Department bore no responsibility, was baseless as a matter of fact and law.

CONSOLIDATED STATEMENT OF THE CASE AND THE FACTS

The probationer, a fifty-four year old man with no previous criminal record (Sent.Tr. 3, 8, 12),<sup>1/</sup> was

---

<sup>1/</sup>The three volumes of transcript of the probation surrender hearing will be signaled by volume and page thus "(Tr.vol./page)", and cited as follows: February 23, 2009, volume 1; March 9, 2009, volume 2; March 24, 2009, volume 3. The one-volume transcript of the October 15, 2007 sentencing hearing will be cited by page as "(Sent.Tr. page)". The Record Appendix will be cited as "(R. )". The Addendum will be cited as "(Add. )."

charged by criminal complaint on July 30, 2007 in the Chelsea District Court, docket number 0714CR002626, with two counts of indecent assault and battery on a child under the age of fourteen, G.L. c. 265, § 13B (R.1). On October 15, 2007, the probationer tendered a plea of guilty to both counts of the complaint, and was sentenced (Singer, J.) as follows: on count one, eighteen months to be served in the house of correction, with thirty-one days of that sentence deemed served (R.3). As to count two, a concurrent sentence of five years of straight probation, i.e., until October 15, 2012, with various terms and conditions imposed by the court in connection therewith (R.3,6).

The sole probationary condition relevant to the instant appeal was the imposition of global positioning system (GPS) monitoring, made mandatory upon the probationer by G.L. c.265, § 47<sup>2/</sup> (R.8, Add.57). The

---

<sup>2/</sup>Indecent assault and battery on a person under the age of fourteen is a "sex offense" as defined at G.L. c.6, § 178C, and probation following conviction thereupon triggers the mandatory application of G.L. c.265, § 47. See Addendum at 53, 57. The alleged dates of the offenses to which the probationer pled guilty were July 11, 2007, and thus, the constitutional ex

probationer was otherwise in compliance with both the general and special conditions of probation (Tr.2/15-18), which included sex offender evaluation and treatment; providing a DNA sample and registering as a sex offender; and "stay[ing] away from all children under 18 years old" (R.9).

The apparatus used for GPS monitoring by the Department of Probation ordinarily consists of three components: the non-removable ankle shackle, with an attached electronic device that emits radio-frequency signals; the GPS cellular phone, which both transmits and receives GPS signals, and which must be kept within ten feet of the ankle apparatus at all times; and a so-called "docking port", into which the GPS cellphone is placed overnight, or at some comparable interval, to recharge the battery of the GPS cellphone (R.12). For homeless probationers, the Department of Probation distributes the ankle shackle and the GPS cellphone, along with a charger for the GPS cellphone (Id.). For a homeless individual to successfully use these devices,

---

<sup>2/</sup>(CONTINUED FROM PREVIOUS PAGE)  
post facto proscriptions set out in Commonwealth v. Cory, 454 Mass. 559, 560 (2009) are not applicable here.

however, there must be regular, reliable overnight or comparable temporal access to an electrical outlet (Id.).

A. **Background Facts Concerning GPS Monitoring and Homeless Shelters**

On or about December 20, 2008, the probationer was discharged from custody on count one, and began serving the remainder of his concurrent probationary sentence on count two (Tr.1/4). The probationer was homeless and indigent (Tr. 2/11, R.4, 30). He took up residence in the New England Center for Homeless Veterans (hereafter, "the NECHV Shelter" or "the Homeless Shelter"), where he lived continuously following his release from custody (Tr. 1/6, 14, 17, R.30).

On December 23, 2008, the probationer reported to the probation office at the Chelsea District Court (Tr.2/10). At that meeting, he was advised by his probation officer that the technical requirements of the GPS monitoring devices used by the Commissioner of Probation, and to which he would be subject, required an available telephonic land-line, exclusively dedicated to the use of the GPS cellular phone (Tr. 1/4-5, 2/46-47, R.12-14).

The use of a telephonic land-line was not available at the NECHV Shelter, however; according to the testimony of Robert Hanafin, a long-time director of the NECHV Shelter, "I receive dozens of calls a month about prospective [sex offender] residents who would need these types of [GPS] devices [while staying at the NECHV Shelter]. We can't open that door. We don't have the secure outlets [or] phone line facilities to facilitate the flood that would enter the [S]helter" (Tr.2/47). Moreover, Hanafin stated that he knew of no other shelters in the Commonwealth of Massachusetts which offer both housing to homeless sex offenders and "facilitate the use of the GPS device" (Tr.2/49).

Likewise, Frederick I. Smith ("Smith"), who appeared as a witness for the probationer, gave identical testimony that there were no homeless shelters in Massachusetts that provide housing compatible with use of the GPS device for homeless sex offenders (Tr.1/13-14). Smith, who works at the St.

Francis House, a day shelter in Boston,<sup>3/</sup> has been working there with the homeless sex offender population for fourteen years (Tr.1/12). Smith asserted that the probationer's predicament of homelessness was evidence of a growing problem among convicted sex offenders generally (Tr.1/12).<sup>4/</sup>

The evidence established that the probationer had informed Vito Aluia, Chief Probation Officer of the Chelsea District Court ("Aluia" or "P.O. Aluia") that

---

<sup>3/</sup>Smith described the work of St. Francis House as "serv[ing] about a thousand meals a day, provid[ing] emergency clothing, counseling, mental health services, rehabilitation programming," and providing limited housing through fifty-six single room occupancy (SRO) units (Tr.1/12).

<sup>4/</sup>At the final revocation hearing, the court accepted in evidence a Boston Globe article dated June of 2007, describing the incidence of homelessness among convicted sex offenders as "a critical issue of grave concern", with 65% of Level 3 offenders in Massachusetts reporting that they were living at homeless shelters (R.31). The probationer is a Level 3 offender (Tr.2/34).

A Level 3 sex offender is a designation given to a "sex offender," as defined in Mass. Gen. Laws ch. 6, § 178C, for whom the sex offender registry board has determined that the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination of the sex offender's registration information, G.L. c.6, § 178K(2)(c). Add. at 54.

the NECHV Shelter would not allow a GPS cellular phone to be "hook[ed] up" to a dedicated telephone outlet in the Shelter (Tr.2/10-15, 47). Aluia testified that he then called the Commissioner of Probation, who suggested that Aluia contact the Shelter directly (Tr.2/12).<sup>5/</sup> Aluia inquired of the Shelter whether the probationer could use a telephone line to charge the cellular phone, and was told "no" (Tr.1/27, 2/13).

Deputy Commissioner of Probation Paul Lucci then advised Aluia that Probation could provide a "temporary hook-up" of the cellular phone directly to an electrical outlet for recharging (Tr.2/12-13).<sup>6/</sup> However, the NECHV Shelter refused this arrangement as well (Tr.2/95). Aluia testified that in fact, "every [Massachusetts] shelter [has] refused to allow the residents to have access to an outlet" (Tr.2/95). NECHV Shelter director Hannafin confirmed that he had

---

<sup>5/</sup>Aluia also testified that he sought help from the Office of Probation's Electronic Monitoring (ELMO) unit (Tr.2/12), but this was evidently unsuccessful.

<sup>6/</sup>The probationer also inquired of the Shelter's director about using an electrical outlet to charge a GPS cellular phone, and was told "no" (Tr.1/27, 2/12).

been called about setting up an arrangement for the probationer with a dedicated telephone line or alternatively, an electrical outlet arrangement, but that "[w]e don't have dedicated phone lines to do that. And then the second inquiry was made about a cellular phone type of a GPS set-up, and I again [explained] ... that we didn't do that either" (Tr.2/46).

Lucci then proposed an idea wherein the probationer "would have to come to [a Probation office] in the area, sit here for six hours and have the thing (*sic*) recharged" (Tr.2/20). However, Aluia testified that such an arrangement was unworkable, because G.L. c.265, § 47 requires the probationer to be monitored "at all times,"<sup>2/</sup> and all the courthouses were closed

---

<sup>2/</sup>G.L. c.265, § 47 provides, in relevant part, as follows:

Any person who is placed on probation for any offense listed within the definition of "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, shall, as a requirement of any term of probation, wear a global positioning system device, or any comparable device, administered by the commissioner of probation, at all times for the length of his probation for any such offense. ... . (Add. 57-58) (emphasis added).

on weekends (Tr.2/20-21). While G.L. c.265, § 47 specifically requires geographic monitoring of the probationer by the Commissioner of Probation through the administration of GPS or a "comparable device" distributed to probationers (Add.57), Aluia testified that "there is no alternative. I do not know of any alternative. Whether one exists or not, I do not know. I believe I would have been told by the Commissioner's office if there was an alternative" (Tr.2/21-22).

On December 24, 2008, the probationer was caused by his probation officer to appear before the Chelsea District Court (Gailey, J.) (Tr.1/3-4, R.4). After hearing, Judge Gailey entered an order that "[the] Def[endant] is not required to comply with [the] bracelet program temporarily, due to his temporary residence in a shelter which precludes it. This order is to be reviewed 1/9/09" (R.4).

According to Aluia, at the next court date of January 9, 2009,<sup>2/</sup> the probationer was advised by the

---

<sup>2/</sup>There is no entry on the Chelsea District Court docket reflecting any kind of hearing held in January of 2009 (R.4).

court (Brant, J.) that he must "be on the [GPS] bracelet within six weeks or he should be served a surrender notice" (Tr.1/4). On February 19, 2009, not having been set up for GPS monitoring, the probationer was served with a Notice of Probation Violation and Hearing which alleged, as the exclusive cause for surrender, that the probationer was out of compliance because he had "failed to be set up for the GPS monitoring system" (R.8). No other basis for surrender was alleged, and indeed, P.O. Aluia acknowledged on the record that in all other respects, the probationer was in compliance with his probation (Tr.2/15-18).

**B. The Preliminary Surrender Hearing**

At the preliminary surrender hearing, the probationer's newly-appointed public defender (R.4) advised Judge Singer that the probationer had no immediate alternatives to his current homelessness: his daughter, who lived locally and was willing to have the probationer stay with her, was foreclosed from doing so because he had been prohibited by the court from contact with children under the age of eighteen, including his own grandchildren, as a condition of

probation (Tr.1/5, Sent.Tr.16,23). The probationer also had a sister in Canada and a brother living in Michigan, but neither living arrangement appeared feasible in the short term (Tr.1/5, 7-8, 10). As to Michigan, the question appeared to be whether that State would accept for interstate transfer and supervision "a sex offender [on probation] who is [both] homeless" and subject to mandatory GPS monitoring (Tr.1/8).<sup>9/</sup>

To mitigate his present homelessness, the probationer had begun looking for employment after release from the house of correction in December of 2008, but he remained unemployed (Tr.1/12-13, 15). In response to questions directed to him by Judge Singer at the preliminary surrender hearing about what job search efforts he had made on the previous Friday,<sup>10/</sup>

---

<sup>9/</sup>The docket does not reflect that at the preliminary hearing, counsel for the probationer filed a motion and memorandum of law for a stay of GPS monitoring (R.10). However, the transcript reflects that these pleadings were made part of the record, having been filed (Tr.1/5) and argued (Tr.1/27-30, 2/91).

<sup>10/</sup>The judge questioned the probationer directly; he did not take the stand (Tr.1/18-21).

for example, the probationer stated that he had used the public library to go online and seek employment opportunities, and that he also used the premises of an organization called JobNet "because they allow you access to their computers" for job searches (Tr.1/19). He stated that his job search efforts had included "knock[ing] on" at least "twenty [doors]," but that this only secured him two job interviews (Tr.1/20). Despite the fact that it had been an "incredible winter" for snowfall, as the judge herself observed (Tr.2/117), the probationer went on foot to many of the jobs that he applied for (Tr.1/21). Indigence and unfamiliarity made transportation especially difficult for him where a potential job opportunity was farther away, such as "Andover or some place like that" (Tr.1/21). Prior to his incarceration, the probationer had been employed by United Parcel Service (UPS), and upon release, he called UPS and tried to get re-employed; when the probationer spoke to his previous boss, however, the man told him "no way" (Tr.1/21).

Frederick Smith (pp. 5-6, ante) testified that with respect to employment, "[t]he stigma" of being a

convicted sex offender was "a big factor" impeding the probationer's ability to secure work and housing (Tr.1/22). According to Smith, "[t]he amount of jobs available to ex-offenders, sex offenders, has dried up tremendously in the last five years" (Tr.1/22).

Smith had been involved in the probationer's efforts to obtain employment. He testified to knowing of "probably half a dozen applications that [the probationer] either filled out or phone calls that [the probationer] made" (Tr.1/18). Smith himself made "several phone calls" to help the probationer access "what we call CORI-friendly" employers,<sup>11/</sup> but even formerly CORI-friendly employers, such as Home Depot, were now using stringent screening protocols on all potential applicants, "[a]nd obviously, a sex offense precludes anybody from getting [an] interview" (Tr.1/14, 18, 22-23). Smith also called a friend who ran a shelter, and inquired whether they could use "a utility person to clean up after the shelter is

---

<sup>11/</sup>"CORI" is the commonly-used acronym for "criminal offender record information", defined at G.L. c.6, § 167 (Add. 51-53).

closed," but when Smith's friend learned that the probationer was a sex offender, he said that "he was sorry, but he couldn't hire him" (Tr.1/18).

"It is virtually impossible for a homeless sex offender to get employment these days," Smith asserted (Tr.1/18). His testimony was emphatic on this point: "I've got to be honest with you, in the last five years, I don't know of a single sex offender who has a regular job. If they're working, they're self-employed, generally" (Tr.1/14).

With respect to housing, Smith testified that the probationer was currently on a waiting list for St. Francis House's "housing and rehabilitation program", and he estimated that by August or September of 2009, "and quite possibl[y] ... before then" if the probationer found employment, either a single room occupancy unit at the St. Francis House or a room in a rooming house could become available for occupancy<sup>12/</sup> (Tr.1/13, 15-18). Such an arrangement would be compatible with the use of GPS monitoring devices currently

---

<sup>12/</sup>Smith testified on February 23, 2009.

administered by the Commissioner of Probation (Tr.1/4-5, 2/12-13).

In the meanwhile, Smith continued to assist the probationer in his efforts to find housing and employment (Tr.1/15). He saw the probationer on a daily basis, held meetings with him two to three times a week, but despite the probationer's efforts to find employment and housing, "nothing so far" had been successful (Tr.1/15, 18).

Finally, the judge reviewed an unidentified "activity log" on the record, which she described as containing "perhaps 18 entries [reflecting potential job contacts] ... over a period of 30 days,"<sup>13/</sup> and she

---

<sup>13/</sup>The judge's description of the "activity log" of employment searches, which she indicated bore the instructions that "you must list either 18 job contacts you made in the last 30 days or prior contacts and other job search activities which must total 24 hours of effort in the past 30 days" (Tr.1/18-19), suggests that she was reviewing a two-page xeroographed document that was admitted at the final revocation hearing with one other document as Exhibit 13 (Tr.2/78, R.34). The documented job searches in the "activity log", which defense counsel represented to the court were requirements of "the Food Stamp Program", appear to constitute 16 separate searches equaling approximately 18 hours of time, and evidently were made between December 23, 2008 and at least January 26, 2009 (R.34).

remarked that while "[m]aybe that satisfies the Food Stamp people, ... it's hardly a rigorous job search" (Tr.1/19).

Following the receipt of the parties' evidence at the preliminary hearing,<sup>14/</sup> the judge seized upon the probationer's *unemployment*, although it was not a probationary condition,<sup>15/</sup> and stated that in her view,

---

<sup>13/</sup> (CONTINUED FROM PREVIOUS PAGE)

The second page of this poorly xerographed document (see judge's comments, Tr.1/39), reflecting six of the 15 job searches, does not exhibit dates (R.35).

<sup>14/</sup>Aluia offered a very brief testimonial account, under oath, regarding the probationer's noncompliance with his GPS condition. He did not explain *why* the probationer was presently out of compliance with the GPS monitoring condition, merely that this was the case (Tr.1/3-4).

<sup>15/</sup>The standard Chelsea District Court form "Order of Probation Conditions" ("Probation Order") that was used on October 15, 2007 to memorialize the probationer's conditions includes a list of "special conditions" numbered 10 through 19 that can be checked off, signifying that any of them have been specifically ordered by the court (R.9). Number 10 is captioned "Employment/School", and requires the probationer to "[r]emain employed or make reasonable efforts to obtain employment ... and provide verification as required." This was not checked off (Id.). Moreover, nowhere in the Probation Order is there any specific requirement that the probationer must find permanent housing (Tr.2/16-17, R.9).

Neither employment nor housing is a probationary condition on the Plea Agreement sheet endorsed by Judge

(CONTINUED ON NEXT PAGE)

the probationer held a "defeatist attitude" and was "not making the effort" to find a job (Tr.1/25). The judge allowed that while a convicted sex offender, classified as a level 3 offender by the Sex Offender Registry, would have a "much harder" time finding work "in this economy, perhaps in the winter when it's harder to get around," (*id.*), this simply meant that with the goal of obtaining GPS-compatible housing, the probationer should have been pursuing employment "as a *full-time proposition*" (*id.*) (emphasis added). The judge continued:

[T]he Defendant didn't know he'd be without a job [following his plea of guilty][?] What was he thinking? He didn't know he would be homeless. What was he thinking? I told him that he wasn't going to be living with his daughter because I said he couldn't live with any children.

\*\*\*\*\*

When I place a person on probation *with a requirement that they have full-time*

---

<sup>15</sup> (CONTINUED FROM PREVIOUS PAGE)

Singer on October 15, 2007 (R.6), nor does the transcript of the sentencing hearing reflect that either was mentioned as a probationary condition.

employment<sup>[16/]</sup> and I say or document that you have a job search in which you went to no less than two places a job (*sic*) looking for employment, that's an ordinary situation. [This probationer is faced with] ... a more desperate need to get employment than some other people. And he doesn't seem to feel desperate about it.

(Tr.1/30,32) (emphases added). On the heels of these observations, the judge added that "the burden is on the probationer to comply with his probation. *It is not up to the Probation Department to do any of the things that would enable him to achieve compliance.* Obviously, they have to do their job in the sense of referring people to programs and making the necessary connections. ... [T]he onus is on the defendant to comply" (Tr.1/39) (emphasis added).

Concluding that there was probable cause to believe that the probationer had violated his probation "for [his] failure to have a GPS monitoring device set up as required, both by [his] plea and the statute, Chapter 265, § 47," the judge denied the request for a stay (Tr.1/29-30), and then ordered the probationer

---

<sup>16/</sup>See n.15, ante.

held pending his final hearing (R.37),<sup>17/</sup> over counsel's vigorous objection that incarceration, based on this evidence, was tantamount to punishing the probationer for his indigency (Tr.1/38-39). The probationer was taken into custody and held until the next hearing date of March 9, 2009 (R.37).

**C. The Final Surrender Hearing**

Following the testimony of Aluia, as described ante at pp. 4 and 6-10, the probationer presented four witnesses of his own at the final surrender hearing on March 9, 2009: Brian Mooney, Jose Gonzalez, Robert Hannafin and Emily Reisine. Mooney was a "veterans representative" at JobNet Career Center in Boston (JobNet), an organization affiliated with the Massachusetts Department of Employment (Tr.2/25-27). Between January 23, 2009 and February 9, 2009, Mooney held three meetings with the probationer, provided him with job search materials, and helped him create a

---

<sup>17/</sup>Despite "the absence of valid cause tracing to the probationer's conduct," Black v. Romano, 471 U.S. 606, 621 (1985) (Marshall, J., concurring), Aluia sought the probationer's incarceration pending the final hearing (Tr.1/34).

usable resume (Tr.2/27-29). Mooney also directed the probationer to use of "the resource room at JobNet," where job search services were available (Tr.2/29). The probationer's JobNet record, admitted at the hearing as Exhibit 3 (R.38), reflected that he had used the resource room to conduct forty-four employment searches between January 23 and February 18, 2009 (Tr.2/29,32, R.38).<sup>18/</sup> Mooney's testimony corroborated Frederick Smith's testimony given at the preliminary hearing with respect to the intensified difficulty of "find[ing] work if one were a level 3 sex offender" given the already "very high" rate of unemployment for the general population (Tr.2/37-38).

Jose Gonzalez,<sup>19/</sup> the probationer's case manager at

---

<sup>18/</sup>The probationer's use of the JobNet resource room was recorded by "swip[ing] his card" to get in (Tr.2/29); Exhibit 3 (R.38) reflects that out of forty-seven total searches recorded between the dates of January 23, 2009 and February 18, 2009, forty-four -- not "twenty-five" as Mooney approximated (Tr.2/32) -- were categorized as "job searches" (R.38). The judge later declared these, and similar job-seeking efforts of the probationer, as "border[ing] on the pathetic" (Tr.2/100).

<sup>19/</sup>A second caseworker from the NECHV Shelter, Emily Reisine, testified regarding the assistance that she provided to the probationer in order to expedite his

the NECHV Shelter, testified that he also worked with the probationer through February 17, 2009 to find employment, and that the probationer made telephone calls from Gonzalez's office to "CORI-friendly" agencies offering services relevant to the probationer's circumstances, such as "ABCD, Project Act, Project Hope, [and] Impact," which provided help in obtaining employment (Tr.2/63-64, 67-68, 79). Gonzalez additionally referred the probationer to the Moving Ahead Program (MAP), an organization assisting with housing, and to a program called Community Work Service (CWS), assisting with employment searches (Tr.2/67, 69). The probationer brought a CWS application to his meeting with Gonzalez, and together, they filled out the application and Gonzalez faxed it to CWS (Tr.2/69).<sup>20/</sup>

The probationer also provided Gonzalez with

---

<sup>19/</sup>(CONTINUED FROM PREVIOUS PAGE)

reception and utilization of various services at the Shelter (Tr.2/51-62). Robert Hanafin, the NECHV Shelter director, testified as described at pp. 5 and 7-8, ante (Tr.2/44-49).

<sup>20/</sup>The CWS application was admitted as Exhibit 9 (Tr.2/70, R.39).

documentation that he kept of his own efforts to obtain both work and housing.<sup>21/</sup> The documentation included a work list entitled "Job Search Activity Log" admitted as Exh. 13 (R.34), reflecting searches between December 29, 2008 and January 26, 2009 (Tr.2/74). The probationer also filled out four housing applications between February 10 and February 17, 2009, and provided copies of these to Gonzalez (Tr.2/77).

Upon the close of the evidence, the judge declared the probationer in violation of his probation, rejecting his claim that compliance was currently impossible, despite his efforts (Tr.2/100-104). She wrote: "[The probationer] has not made reasonable or adequate efforts to secure employment, thus housing that would allow him to get GPS hook up" (R.41). The probation officer requested that the court revoke probation and impose a two-year sentence (Tr.2/104). Without waiving the probationer's defense of inability to comply, defense counsel proposed alternatives to

---

<sup>21/</sup>Gonzalez acknowledged that as to this documentation, he had no personal knowledge whether the probationer actually went to the places documented (Tr.2/79).

incarceration (Tr.2/107, 110-113). The matter was continued for disposition to March 24, 2009 (Tr.2/119-121). In the interim, the probationer was released from custody (Tr.2/119-121).

**D. Disposition**

On March 24, 2009, P.O. Aluia reported to Judge Singer that the Probation Department had solved the GPS monitoring problem by implementing an arrangement "[a]s of this past weekend", whereby the probationer had been provided by the Probation Department with a GPS monitor that had a battery life of twenty-four hours, and which the probationer was obligated to recharge daily at 7:00 a.m., seven days per week, at Probation's "ELMO office" (Tr.3/2-3). The finding of violation was not withdrawn, however; rather, it established the basis for newly-imposed, additional special conditions as a consequence of re-probation (R.42). In accordance with these new conditions, the probationer was specifically required to attend "New Directions for Men", a treatment program (R.42), to be geographically excluded from the City of Revere (id.), and to make "reasonable efforts to obtain employment", viz., "two employment

efforts per day" (*id.*).

The probationer's notice of appeal from the final order finding him in violation of probation was timely filed (R.43), and the case docketed in this Court on June 10, 2009.

### ARGUMENT

#### I.

THE PROBATIONER WAS DEPRIVED OF DUE PROCESS OF LAW, WHERE (1) THE JUDGE'S RETROACTIVE, INVALID CONSTRUCTION OF THE HOMELESS PROBATIONER'S MANDATORY GPS MONITORING CONDITION TO INCLUDE HIS FULFILLMENT OF CONDITIONS OF EMPLOYMENT AND HOUSING WAS BOTH UNFORESEEABLE AND DEVOID OF RECORD SUPPORT, AND (2) THE JUDGE'S CONCLUSION THAT THE HOMELESS PROBATIONER WAS EXCLUSIVELY RESPONSIBLE FOR HIS INABILITY TO COMPLY WITH GPS MONITORING, AND THAT THE PROBATION DEPARTMENT BORE NO RESPONSIBILITY, WAS BASELESS AS A MATTER OF FACT AND LAW.

A. The judge's determination that the homeless probationer had violated his condition to be GPS-monitored by failing to find a home and a job was legally erroneous and so devoid of factual support as to be invalid under the Due Process Clause of the Fourteenth Amendment and article 12 of the Declaration of Rights.

In rejecting the probationer's homelessness and unemployment as brute facts to explain his inability to comply with GPS monitoring, the court adjudged these circumstances as actual proxies for, i.e., *equivalents to*, a violation of the GPS monitoring condition,

reasoning in writing that having a home (and intrinsically, the income to afford one) were independently integral to compliance with GPS monitoring (R.41). Thus, she held him responsible *qua* probationer for fulfilling these conditions, too.

The judge openly expressed the view that the probationer - and only the probationer - was accountable for his inability to comply, since he should have reasonably anticipated the consequences of unemployment and homelessness when he pleaded guilty (Tr.1/30,32), even if he had not known he would need a home in order to be GPS-compliant (Tr.2/101-102). As she put it, "[h]e is responsible for the consequences of his actions. Not the economy, not Probation, not the Court" (Tr.2/102). Compare State v. Oyler, 92 Idaho 43, 46 (1968) ("[h]arshly unrealistic would be a rule that by acceptance a probationer waives his standing to object to a probationary condition on grounds of its impossibility"). Instead, she held the probationer to a ludicrously high standard of demonstrating extraordinary efforts to find housing and employment, even though neither housing nor employment was a

condition of his probation. Having absolved the Probation Department of any responsibility for this problem, the judge rejected the probationer's evidence of reasonable efforts to comply, despite marginal circumstances in an indisputably abysmal economy (Tr.2/100-101). Indeed, the probationer ought to be "pounding the pavement eight, ten hours a day" looking for work, the judge said, and that given the serious economic recession, "*even reasonable efforts*" were likely to be useless (Tr.2/101) (emphasis added). This construction of the probationer's probation contract, and what was expected of him pursuant to its terms, violated the probationer's due process right to be given a reasonable opportunity to know what the probation order actually required of him, so that he might act accordingly. Commonwealth v. Ruiz, 453 Mass. 474, 478 (2009), citing Commonwealth v. Delaney, 425 Mass. 587, 592 (1997), cert. denied, 522 U.S. 1058 (1998).

Probationers are entitled to clear guidance as to "when their actions or omissions will constitute a violation of their probation." Commonwealth v. Lally,

55 Mass. App. Ct. 601, 603 (2002). Because the constitutional rule against vague statutory enactments applies equally to probation conditions, Commonwealth v. Power, 420 Mass. 410, 421 (1995), cert. denied, 516 U.S. 1042 (1996), due process requires "that a defendant sentenced to probation receive fair warning of conduct that may result in the revocation of probation." Ruiz, 453 Mass. at 479, citing Commonwealth v. Kendrick, 446 Mass. 72, 75 (2006) (condition of probation must provide "reasonable guidance" as to prohibited conduct so that people of "common intelligence" will understand its meaning). United States v. Cabot, 325 F.3d 384, 385 (2d Cir. 2003), citing Grayned v. Rockford, 408 U.S. 104, 108 (1972) (same). Neither the transcript of the sentencing hearing nor the probation contract itself (R.9) reflects that any warning was given the probationer that he must have a home, or find a home, in order to be tracked by GPS monitoring.<sup>22/</sup>

---

<sup>22/</sup>The record is wholly devoid of any description, explanation or instructions to the defendant at sentencing concerning the consequences of GPS

"Courts have deemed notice to be of particular importance where, as here, the conduct prohibited by a condition of probation is noncriminal: while probationers are 'generally held to be obligated to obey the criminal law, even when this condition is not expressly stated,' [1 N.P. Cohen, Probation and Parole, §7:18, at 7-34 (2d ed. 1999)], [<sup>22/</sup>] where 'deprivation of the defendant's conditional liberty ... rests upon the commission of a non-criminal act, the defendant must be given some form of warning to ensure that he or she understands, in plain and certain terms, the conditions of his or her sentence.' 16C C.J.S. Constitutional Law § 1669, at 608 (2005), citing State v. Budgett, 146 N.H. 135, 769 A.2d 351 (2001)."

Commonwealth v. Ruiz, 453 Mass. at 479 n.7. See also Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam), and cases cited (trial court's finding that

---

<sup>22/</sup>(CONTINUED FROM PREVIOUS PAGE)

monitoring, other than the judge's cursory admonition at the sentencing hearing that the probationer would be subject to "the bracelet". Sent.Tr. 13, 16, 23.

<sup>23/</sup>Hereafter, the volume, section and page citation to the Cohen treatise shall be "\_\_\_Cohen §\_\_\_, at \_\_\_."

probationer's traffic citation constituted equivalent of an "arrest" that probationer was obligated to report to probation officer "without delay" was "so totally devoid of evidentiary support as to be invalid" under the Fourteenth Amendment).

Moreover, in the face of uncontroverted, substantial evidence that the probationer had made good faith, reasonable efforts to comply with -- and submit to -- the GPS requirement, the judge nonetheless found that he was wilfully noncompliant because his efforts to secure adequate housing were "unreasonable", "inadequate", and "bordering on pathetic" (Tr.2/100). But where noncompliance with a probationary condition is demonstrably attributable to indigence, and "the probationer has made all reasonable efforts to [meet the condition], and yet cannot do so through no fault of his own," Bearden v. Georgia, 461 U.S. 660, 665 (1983), the Supreme Court has held that it is fundamentally unfair to attribute wilfulness to the probationer's noncompliance, and to condemn him as a violator. Id. at 669 (indigent probationer's inability to pay fine despite "reasonable efforts" constituted

"lack of fault" that rendered revocation "fundamentally unfair"). See also State v. Modtland, 695 N.W.2d 602, 605-606 (Minn.2005) (in comporting with the procedural due process required under Morrissey v. Brewer, 408 U.S. 471, 489 [1972] and Gagnon v. Scarpelli, 411 U.S. 778, 782 [1973], court must find, *inter alia*, "that the violation was intentional or inexcusable"); State v. Archuleta, 812 P.2d 80, 84 (Utah App. 1991) (wilful violation of probation "merely requires a finding that the probationer did not make bona fide efforts to meet the conditions of his probation").

Thus, Judge Singer's determinations that the probationer should have made *exceptional* efforts to resolve his homelessness and unemployment in order to be compliant with the probationary condition of mandatory GPS monitoring, and that the efforts he *did* make were inadequate to the task, were both legally erroneous and "so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment" and article 12 of the Declaration of Rights. Douglas v. Buder, 412 U.S. at 432.

- B. The judge erred in finding the probationer's noncompliance inexcusable, where the quantum of credible evidence more than satisfied the showing required by the Supreme Court that the indigent probationer had made bona fide, reasonable efforts to comply.

"It is generally agreed that a probationer cannot be held responsible for not performing a condition of probation that is impossible to perform." 2 Cohen, § 22:33 at 22-46. See also Bearden v. Georgia, 461 U.S. at 669 n.10 (where indigence drives noncompliance, Court cites "[n]umerous decisions by state and federal courts [that] have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine[,] and approving instances where courts distinguish between the improper revocation of probation "where the defendant did not have the resources to pay restitution and had no way to acquire them ... from [legitimately] revoking probation where the defendant had the resources to pay or had negligently or deliberately allowed them to be dissipated in a manner that resulted in his inability to pay").

While there are no reported appellate cases in Massachusetts that assess the defense of impossibility as justification for noncompliance with a probationary condition, numerous courts around the country have recognized that failure to comply ought not be actionable where it was the result of extenuating circumstances through no fault of the probationer, and reflecting factors beyond his control. In response to the government's presentation of proof, a probationer "is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition." Black v. Romano, 471 U.S. at 612. See also Gagnon v. Scarpelli, 411 U.S. at 790; Morrissey v. Brewer, 408 U.S. at 488. United States v. Morin, 889 F.2d 328, 332 (1st Cir. 1989) (probationer has right to present court with mitigating circumstances).

In People v. Bowman, 423 N.Y.S.2d 242 (1980), for example, the judge accepted the defendant's plea provided that she would undergo psychiatric treatment at a specific facility. Id. at 243. The institution

refused to accept the probationer as a patient, however, as did other institutions appropriate to her condition. Id. The court revoked the defendant's probation, and she appealed, contending that the record "[did] not support a finding that she violated probation . . . ." Id. The appellate court agreed: "[s]ince the evidence indicated that the defendant acted in good faith in an attempt to carry out the conditions of the imposed probation, in trying circumstances over which she had no control, we deem it unseemly to stigmatize her as a violator of probation." Id.

In State v. Bleasdale, 69 Ohio App.3d 68 (1990), the probationer's conditions of probation required that he be accepted by, and successfully complete, appropriate drug programs. Id. at 69. The probationer was accepted into the program, but terminated shortly thereafter because he presented with a range of mental illness that the program was not equipped to treat. Id. at 69-70. A notice of revocation followed, and the trial court revoked probation. Id. The appeals court reversed: "[i]n this case, there is no willful or

intentional violation of the conditions of appellant's probation. The evidence shows that appellant was cooperating with the program. The termination of the appellant was due to the program's inability to properly minister to his case." Id. at 72. "This is an unfortunate situation to which the framework of the law does not provide an adequate remedy, and we must adhere to the established rule that probation may not be violated except for a willful departure from the terms thereof." Id. (internal citations omitted, emphasis in original). Compare Commonwealth v. Arroyo, 451 Mass. 1010, 1011 (2008) (rescript) (decision to revoke probation is to be based upon whether violation has occurred, and discretionary determination of whether revocation is warranted).

And in Humphrey v. State, 290 Md. 164 (1981), the defendant was admitted to probation on the condition that he receive "[d]rug treatment", but he was unable to obtain a placement despite his best efforts. Id. at 165-166. At the probation revocation hearing, the State's only witness was the probationer's probation officer, who testified that "[a]t all times the

probationer wanted to be enrolled in a drug rehabilitation program," and that "both the probationer and the [probation] officer repeatedly attempted to obtain a placement in various community-based treatment programs. Their efforts failed." Id. The court reluctantly revoked probation, telling the probationer: "... None of [these programs] want you. So I don't know what to do with you. ... You don't belong in jail. You need help but where can I get it for you." Id. at 167. In reversing the revocation order, the Maryland Court of Appeals observed, *inter alia*, that

the evidence establishes that the probationer was at liberty for only two weeks after placed on probation and that throughout that entire period he made repeated good faith efforts to obtain a placement from various community-based drug treatment programs. He was denied admission to these programs ... . Thus, the record shows that the probationer was deprived of the opportunity to participate in a community-based drug treatment program because of factors beyond his control. Because the probationer repeatedly tried to comply with the special condition, engaged in no act of misconduct affecting others during the probationary period, and was prevented from complying with the special condition because of fact factors beyond his control, the record does not support a finding that the probationer acted in violation of the special condition of his probation.

Id. at 169, and cases cited.<sup>24/</sup> Based upon the evidence before her, there was no reasonable basis for Judge Singer to conclude that the probationer's noncompliance was inexcusable. The probationer had

---

<sup>24/</sup>For additional authorities recognizing impossibility of compliance, see Commonwealth v. Ammons, 1998 Mass.Super.LEXIS 426, \*10-\*11 (Volterra, J.) (failure to conform to the terms of the DNA collection statute); United States v. Boswell, 605 F.2d 171, 173-75 (5th Cir. 1979) (failure to make restitution); Johnson v. State, 62 Md.App. 548 (1985) (failure to appear in court cannot provide basis for revocation if offender was in jail when absent from court); People v. Romero, 192 Colo. 106, 107-08 (1976) (failure to make payment for attorney's fees); People v. Silcott, 177 Colo. 451, 452-54 (1972) (failure to make child support payments); Thomas v. State, 672 So.2d 587, 589 (Ct. App. Fla. 4th Cir. 1996) (failure to attend scheduled meeting because car broke down); Donneil v. State, 377 So. 2d 805, 805 (Fla. App. 1979) (failure to complete drug rehabilitation program); State v. Nakamura, 59 Haw. 378, 380-83 (1978) (failure to be accepted in residential drug treatment program); State v. Jacobsen, 238 Neb. 511 (1991) (failure to complete inpatient treatment program where hospital denied him admission); State v. Oyler, 92 Idaho at 44-47 (failure to "refrain from the use of alcoholic beverages"); State v. Moretti, 50 N.J. Super. 223, 228-29, 238-50 (1958) (failure to obtain gainful employment); Butler v. State, 486 S.W.2d 331, 332-34 (Tex. 1972) (failure to "work faithfully at suitable employment"); State v. Pleasant, 508 So.2d 113, 114 (Ct. App. La. 4th Cir. 1987) (failure on account of illiteracy to obtain employment so as to pay court costs). Also see Herold v. State, 52 Md.App. 295 (1982) (probation revocation should not be ordered if violation results from factors beyond offender's control and not involving offender's fault).

appeared responsibly at the Probation office to be set up on GPS (Tr.2/10), and even in the face of technical difficulties, he was cooperative. See Commonwealth v. Christian, 46 Mass. App. Ct. 477, 482, *aff'd in part on relevant grounds*, 429 Mass. 1022 (1999) ("[a] cooperative disposition toward probation requirements is ... a minimum requirement of the probationer").

The probationer demonstrated that from December 23, 2008 through at least February 18, 2009, he had been working with no less than three different individuals to find housing and employment, and that throughout those months, despite the dismal prospects for a homeless Level 3 sex offender, he had sought employment by knocking on doors (Tr.1/20), searching online day after day at JobNet (Tr. 1/19, 2/20, R.34), submitting written applications for work (Tr.1/13) and housing (Tr.2/77), telephoning prospective employers (Tr.1/18), and maintaining contact with agencies providing employment and housing assistance (Tr.2/63-69, 79). Accordingly, the evidence more than satisfied the Supreme Court-approved showing of bona fide, reasonable efforts required of a probationer who asserts that his

indigence is the obstacle to his ability to comply.

Bearden v. Georgia, 461 U.S. at 672.

It defied fundamental notions of substantive due process of law for the judge to reach beyond the evidence of impossibility and to castigate the probationer for his failure to be clairvoyant at sentencing about his future homelessness and unemployment ("[t]he Defendant didn't know he'd be without a job[?] What was he thinking? He didn't know he would be homeless. What was he thinking?") (Tr.1/30). See Carradine v. United States, 420 A.2d 1385, 1389-1390, and cases listed at nn.11-14 (D.C.Cir. 1980) (citing numerous authorities for principle that in order to deem a condition "implied", it must be "so clearly implied that a probationer, in fairness, can be said to have notice of it"). The judge's unforeseeable construction of the probationer's probationary obligations deprived him of due process of law "in the sense of fair warning that his contemplated conduct constitute[d]" a violation of his probation. Douglas v. Buder, 412 U.S. at 432, citing Bouie v. City of Columbia, 378 U.S. 347 (1964) (court's idiosyncratic

interpretation of probationary conditions violated due process of law).

Although Judge Singer did not revoke the probationer's probation, she found that he was responsible for violating his probation, and on this basis denied the request for a stay, and ordered his temporary incarceration during the pendency of the revocation proceeding (R.37), entered a finding of violation on his record (R.41), and modified his conditions of ongoing probation based thereupon (R.42). In assessing the treatment of indigents in our criminal justice system, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." Bearden v. Georgia, 461 U.S. at 665. The finding of a violation, resulting in the stigma of being a contemnor despite his reasonable efforts to comply, People v. Bowman, 423 N.Y.S.2d at 243, constitutes punishment solely on account of indigency, and such punishment violates the Equal Protection Clause of the Fourteenth Amendment and articles 1, 10 and 12 of the Declaration of Rights. Commonwealth v. Gomes, 407 Mass. 206, 212 (1990). Williams v. Illinois, 399 U.S. 235 (1970);

Tate v. Short, 401 U.S. 395 (1971).

Accordingly, the judge's determination that the probationer violated his conditions of GPS monitoring because he had no home and no job, and that he had made insufficiently extraordinary efforts to secure these things, constituted an unforeseeable application of his obligation to comply with GPS monitoring, and was so "totally devoid of support" in law or in fact as to be invalid under the Due Process Clause of the Fourteenth Amendment, and article 12 of the Declaration of Rights. Douglas v. Buder, 412 U.S. at 432, and cases cited.

C. The judge violated the probationer's rights to due process of law by absolving the State from proving that it had provided means by which the probationer could, but wilfully refused to, comply with mandatory GPS monitoring.

It is black-letter law that the principles of due process apply to probation revocation proceedings. Commonwealth v. Ruiz, 453 Mass. at 478, and cases cited. Where a probationer is alleged to have violated a term or condition of his probation, the burden of proof is on the Commonwealth, and the quantum of proof to be satisfactorily produced is proof by a preponderance of the evidence. Commonwealth v.

Holmgren, 421 Mass. 224, 225-226 (1995). "Irrespective of the standard of proof, it is agreed that the government shoulders both the burden of producing sufficient evidence of the violation of probation (burden of production), and the burden of persuading the decision-maker that the alleged violation occurred (burden of persuasion)." 2 Cohen § 26:14 at 26-35-36.

The judge's refusal to draw the conclusions from the probationer's evidence that he urged stemmed from her unequivocal position that the Commissioner of Probation bore no responsibility to implement an alternative monitoring system in response to the dilemma faced by the homeless probationer (Tr.1/39, 2/100). This constituted a violation of the probationer's rights to due process under the Fourteenth Amendment to the United States Constitution and article 12 of the Massachusetts Declaration of Rights, in that it excused the Commonwealth in entirety from meeting its statutory obligations, and thus from proving the probationer was in violation, because he *could have, but would not comply*. Compare People v. Williams, 229 Ill.App.3d 677, 678-679 (1992) (court did

not require State to prove its case **by** a preponderance of evidence, nor even to present any evidence where "it told the defendant that it was 'up to him' to prove he was in compliance. ... [T]his was erroneous, since by doing this the court improperly shifted the burden of proof to the defendant").

The record unmistakably reflects the shifted burden. In addition to her comments at the preliminary hearing, the judge stated at the close of the evidence that she was *affronted* by the probationer's suggestion that Probation bore any responsibility in this calculus:

I reject, and on behalf of Probation, resent the implication that these failures to comply are somehow the responsibility of Probation. If the State has a GPS system, they're not obligated to have numerous kinds of systems. ... if there are devices that would satisfy the purposes of the [GPS] Statute that they don't use, it's the [probationer's] obligation to find them, not [P]robation's.

(Tr.2/100).<sup>25/</sup> This was error.

---

<sup>25/</sup>Defense counsel had previously argued that "there may be other devices out there that we don't know about ... I don't know whether the probation department has access to any, but ... under the Statute, it's permitted" (Tr.1/27). At the final surrender hearing, counsel argued: "[I]t's unfortunate, but the [proba-

Where G.L. c.265, § 47 specifically obliges the Commissioner of Probation to "administer" the probationer's GPS device, "or any comparable device" as a prerequisite condition to the GPS monitoring of a qualified probationer, then it is, indeed, up to the Commissioner of Probation to enable the probationer to achieve compliance, so that his indigence and homelessness place him at no greater peril of revocation than any other probationer. The Commissioner's statutory responsibility works *in pari materia* with two additional legislative imperatives.

First, to the degree that the issue may be one of funding, the determination of whether GPS monitoring under G.L. c.265, § 47 is an adequately funded mandate<sup>25/</sup> falls specifically to the Commissioner. See

---

<sup>25/</sup> (CONTINUED FROM PREVIOUS PAGE)

tioner's] failure falls with the agency that is given the authority by the Statute to choose this device. It's unfortunate that they can't find a device. It's unfortunate that further inquiries were not made by the [Probation] Department or by Chief Probation Officer Aluia to recommend a further alternative to the Commissioner's Office, which is explicitly permitted (*sic*) by the language of the Statute so that a homeless person could comply with their probation" (Tr.2/87).

<sup>26/</sup>In Fiscal Year 2008, the General Court specifically  
(CONTINUED ON NEXT PAGE)

G.L. c.276, § 99 (~~making it incumbent~~ upon Commissioner to advise the Legislature of the funding necessary to adequately administer probationary programs) (Add. 59). See also Massachusetts Coalition for Homeless v. Secretary of Human Services, 400 Mass. 806, 819 (1987) (if funds appropriated to furnish services statutorily required are insufficient to allow the agency to comply with its obligation, the agency has "an obligation to bring its inability to comply ... to the attention of the Legislature and to ask that it appropriate an adequate sum or that it provide some other solution to the dilemma"). After more than two years of administering mandatory GPS monitoring of probationers, the responsibility to obtain sufficient funding is one that, absent catastrophe or unusual circumstances, the Commissioner ought to be able to predict with a

---

<sup>26/</sup>(CONTINUED FROM PREVIOUS PAGE)

allocated \$2,771,000 to the budget of the Commissioner of Probation "for costs ... *to ensure effective supervision* of probationers who are monitored through global positioning system bracelets" (emphasis added). The same amount was allocated in Fiscal Year 2009; and no identifiable amount was allocated in 2010.

Information obtained at <http://www.mass.gov/legis/> (last visited November 9, 2009).

reasonable degree of accuracy.

Second, G.L. c.276, § 98, as amended through St. 1993, c.12, § 12, holds the Commissioner of Probation responsible for supervising "all probation programs within the trial court" and evaluating the adequacy of probation services provided "in each court of the [C]ommonwealth" (Add. 58).

Framed by these statutory obligations, the Commissioner's responsibility to "administer" mandatory GPS monitoring pursuant to G.L. c.265, § 47, although undefined in the statute, must be interpreted according to its "usual and accepted meaning[] . . . . We derive [a word's] usual and accepted meaning[] from sources presumably known to the statute's enactors, such as [its] use in other legal contexts and dictionary definitions." Commonwealth v. Robinson, 444 Mass. 102, 105 (2005); Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977). In this context, the term "administer" bears the dual connotation of managing or supervising the execution, use, or conduct of GPS monitoring, as well as "met[ing] out" (as in "dispens[ing]") punishment. See Webster's Third New Intl. Dictionary

27. (2002).<sup>27/</sup> Commonwealth v. Cory, 454 Mass. at 572 (mandatory GPS monitoring is punitive).

Officer Aluia testified that his supervisors, up to and including the Commissioner himself (Tr.2/12), had been apprised of the problem facing the probationer as a result of his homelessness, but that no one in his agency had devised a workable solution to the problem, short of handing the probationer a revocation notice (Tr.2/21-22). Yet in the final analysis, the Commissioner could obviously solve the problem, at least for this individual probationer, by providing him with a device powered by a battery that could hold a charge for twenty-four hours at a time, and by arranging for the probationer's daily visit to a seven-day-a-week charging locale at the "ELMO" office of the Probation Department (Tr.3/2-3). To paraphrase the observations of the Supreme Judicial Court in Commissioner of Ins. v. First Nat'l Bank, 352 Mass. 74,

---

<sup>27/</sup>In addition, the American Heritage Dictionary of the English Language 22 (Fourth Edition 2006) defines "administer" similarly: "To have charge of; manage. . . . To give or apply in a formal way . . . . To apply as a remedy . . . . To direct the taking of (an oath) . . . . To mete out; dispense . . . ."

79-80 (1967), "the Commissioner's obligations of administration ... entail a duty to exercise a broad surveillance over the operations of [probation services] with a view to instituting procedures and recommending changes which might prevent or reduce the likelihood" of such difficulties as were suffered by this probationer.

For all these reasons, it was the Commonwealth's burden to prove, with respect to the mandatory use of GPS monitoring equipment under G.L. c.265, § 47, that the office of Probation had afforded means to the probationer by which he *could, but would not* comply. It was not the probationer's burden, either in law or in fact, to come up with an alternative solution to the present monitoring system, or to be held responsible for the absence of one. The judge failed to place the burden of proof where it belonged, and this violated the probationer's rights to due process of law. The finding of violation must be vacated as error.

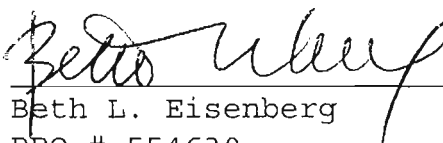
CONCLUSION

Based upon the foregoing points and **authorities**, the judge's finding that the probationer "violated" probation must be reversed and vacated, and the modified probation order issued as a result of the finding of a violation must be vacated.

Respectfully submitted,

JOHN W. CANADYAN, JR.

By his attorney,



Beth L. Eisenberg

BBO # 554630

COMMITTEE FOR PUBLIC COUNSEL SERVICES

Special Litigation Unit

21 McGrath Highway

Somerville, MA 02143

617-623-0591

[beisenberg@publiccounsel.net](mailto:beisenberg@publiccounsel.net)

November, 2009