COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12744

COMMONWEALTH OF MASSACHUSETTS,

APPELLANT,

V.

ERIC NORMAN,

DEFENDANT-APPELLEE

ON APPEAL FROM THE MIDDLESEX COUNTY SUPERIOR COURT

BRIEF OF AMICUS CURIAE THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL IN SUPPORT OF THE DEFENDANT-APPELLEE

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STATEMENT OF INTEREST

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the twentieth century's most important legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing, criminalization, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies. Issues around the legal limits of conditions of pretrial release are closely related to our coalition work with community-based organizations to transform the pretrial system in Massachusetts, including a recent presentation to the Special Commission on Bail Reform established by the legislature in 2018.

STATEMENTS OF THE CASE AND FACTS

Amicus Curiae adopts the statements of the case and facts as set forth by Defendant-Appellee Eric Norman.

STATEMENT OF ISSUES

This appeal raises significant questions of constitutional and statutory law with profound consequences for the day-to-day administration of Massachusetts's criminal legal system. We support Defendant-Appellee's contention that imposing GPS monitoring as a condition of pretrial release was constitutionally unreasonable in Mr. Norman's case, as was the search of historical GPS data collected by the probation department's electronic monitoring center, without individualized suspicion or judicial oversight, in an unrelated criminal investigation; that issue is not discussed herein, as the parties' briefs, in particular Defendant-Appellee Norman's Supplemental Brief, sufficiently illuminate the issue. However, we write to urge the court to clarify the scope of statutory authority to impose liberty-restricting conditions of pretrial release under the Commonwealth's general bail statute, G.L. c. 276, § 58.

As this Court considers the constitutional dimensions of imposing a GPS monitor in this case and of a subsequent search of data from that GPS, the pending appeal raises broader questions about the underlying statutory authority to impose conditions of pretrial release:

1. In cases that do not involve domestic abuse, does G.L. c. 276, § 58—the general bail statute—provide authority to set conditions of pretrial release for purposes *other than* assuring return to court for future appearances or preserving the integrity of the judicial process?

2. If § 58 authorizes pretrial conditions for purposes other than assuring return to court or preserving the integrity of the judicial process, are additional procedural protections required for constitutional sufficiency?

Though broader than the issues presented on appeal here, these questions bear significantly on this case, where the conditions imposed were burdensome deprivations of liberty for a defendant presumed innocent pretrial. We urge the court to clarify for lower courts the purpose of, and scope of authority to impose, conditions of pretrial release under § 58—an issue that daily affects criminal defendants in district and municipal courts throughout the Commonwealth.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Commonwealth, judges[2] routinely impose GPS monitoring—and other restrictions or obligations that similarly impede pretrial liberty or invade reasonable expectations of privacy—as a condition of pretrial release in ways that may exceed the purposes of conditions under the general bail statute (*infra* 8–11).

[1] As this Court has stated, the bail statute that governs in Superior Court is § 57. *See, e.g.*, Brangan v. Commonwealth, 477 Mass. 691, 697 (2017) (citing Querubin v. Commonwealth, 440 Mass. 108, 111 (2003); Serna v. Commonwealth, 437 Mass. 1003, 1003 (2002); G.L. c. 276, § 57).

[2] "We use the term 'judge' here as a shorthand reference to the entire range of judicial officers who are authorized to set bail under G.L. c. 276, §§ 57 and 58." *Brangan*, 477 Mass. at 694 n.3.

By its plain text and its statutory context, the general bail statute, G.L. c. 276, § 58, authorizes judges to impose conditions of pretrial release for two limited purposes: to assure the defendant's return to court and to preserve the integrity of the judicial process in the pending case (*infra* 11–17). Many common pretrial conditions—a GPS or SCRAM monitor, a broad exclusion zone, a curfew, mandatory drug and/or alcohol testing, and other conditions that significantly burden pretrial liberty—have tenuous relationships to assuring return to court and preserving the integrity of the judicial process, and therefore may commonly be imposed for unauthorized purposes (*infra* 17–23). Further, judges are not presently required to justify conditions as necessary to achieve a lawful statutory purpose. Accordingly, in cases like Mr. Norman's where conditions of pretrial release are imposed under § 58, conditions that seriously restrain pretrial liberty may be statutorily inappropriate as well as constitutionally suspect (*infra* 23–31).

I. Conditions of pretrial release can only be imposed for certain purposes and in certain circumstances, subject to specific statutory authority.

The power to impose conditions of pretrial release does not derive from the inherent authority of the court; rather, this Court has confirmed that the power to impose such conditions is allowed by statute.[3] The legislature has authorized

[3] "The power to impose pretrial conditions on release from custody is not essential to the function of the judiciary." Commonwealth v. Dodge, 428 Mass. 860, 865–66 (1999). *Id.* at 866 (finding the judge lacked authority to impose pretrial conditions

judges to set pretrial conditions in enumerated situations, subject to specific procedural protections, and for specific purposes.

Until a legislative amendment in 2006,[4] the general bail statute did not authorize judges to impose conditions on defendants pretrial. In 1999 in *Commonwealth v. Dodge* this Court held that "no explicit statutory authority exists under G.L. c. 276, § 58, to make a defendant's pretrial release subject to conditions."[5] The court reached this conclusion in view of the entire statutory framework for pretrial conditions of release, reasoning that

> where the Legislature has provided in three separate statutes the specific circumstances under which bail may be made subject to conditions, we find no implication in the detailed general bail statute that any bail determination not falling within the specific provision of those three statutes can be made subject to conditions. Such a reading of G.L. c. 276, § 58, would render the other three statutes superfluous.[6]

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on the defendant's release under G.L. c. 276, § 58, reasoning in part that such authority could not be read into the statute since it was expressly granted elsewhere in §§ 42A, 58A, and 87).

[4] G.L. c. 276, § 58, as amended by St. 2006, c. 48, § 8. The bill which adopted this language into the statute was an act aimed at reducing gang violence. *See* 2006 Mass. Legis. Serv. Ch. 48 (S.B. 2242) ("The first paragraph of section 58 of chapter 276 of the General Laws, as so appearing, is hereby amended by adding the following sentence:— If the justice or clerk or assistant clerk of the district court, the bail commissioner or master in chancery determines it to be necessary, the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release.").

[5] *Dodge*, 428 Mass. at 865.

[6] *Id.*

The *Dodge* Court reviewed the express grants of authority to impose conditions in G.L. c. 276, §§ 42A, 58A, and 87.[7] In reviewing the scope of statutory authority, the Court followed standard principles of statutory interpretation: beginning "with the language of the statute itself, and 'presum[ing], as [it] must, that the Legislature intended what the words of the statute say.' '[C]lear and unambiguous' statutory language must be given its ordinary meaning . . . . However, when the language of a criminal statute plausibly can be found ambiguous, the rule of lenity requires that the defendant receive the benefit of the ambiguity."[8]

Each of the three cited statutes provides specific contexts, and identified government interests, for conditions of pretrial release: § 42A authorizes imposing conditions in domestic abuse cases, to protect the safety of an alleged victim, after a hearing and finding;[9] § 58A authorizes imposing conditions based on the defendant's dangerousness,[10] which must be proven by clear and convincing

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[7] *Id.* at 866.

[8] Commonwealth v. Dayton, 477 Mass. 224, 225–26 (2017) (citations omitted).

[9] G.L. c. 276, § 42A ("[T]he court may, in lieu of or in addition to any terms of bail or personal recognizance, and after a hearing and finding, impose such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence.").

[10] "Conditions are designed not only to assure the appearance of an individual at future court proceedings, but also to restrict the conduct of that individual such that he will not 'endanger the safety of any other person or the community.'"

evidence at an evidentiary, adversarial hearing; and § 87 authorizes imposing supervised pretrial probation, subject to the defendant's consent, to vindicate interests including rehabilitation and deterrence,[11] which do not otherwise apply pre-disposition when a defendant is still presumed innocent.[12] These provisions in other statutory sections give judges authority to set conditions of pretrial release for the purpose of safety, deterrence, or rehabilitation—as specified—but also require heightened procedural protections for defendants: either an evidentiary, adversarial hearing or voluntary, knowing, and intelligent consent.

II. In most cases, the general bail statute allows judges to impose conditions of pretrial release only for limited reasons: as an alternative to cash bail to assure return to court and as necessary to preserve the integrity of the judicial process in the pending case.

This Court has affirmed time and again that "[t]he purpose of § 58 is 'to assure compliance with [the] laws and to preserve the integrity of the judicial

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Commonwealth v. Madden, 458 Mass. 607, 613 (2010) (quoting G.L. c. 276, § 58A (2)).

[11] Commonwealth v. Tim T., 437 Mass. 592, 596 (2002) ("a probationary period commensurate with the severity of the crime and of sufficient length to accomplish the desired rehabilitative purpose").

[12] G.L. c. 276, § 87 ("The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty . . . ."); *see also Tim T.*, 437 Mass. at 596 ("A defendant placed on pretrial probation in this manner has not pleaded guilty or admitted to facts sufficient to support a finding of guilt.").

process by exacting obedience with its lawful orders.'"[13] The general bail statute codifies a presumption of release, enshrining the constitutional presumption of innocence into the Commonwealth's statutory framework.[14] However, the statute allows judges to impose monetary restrictions—cash bail or personal surety—in order to assure appearance in court. The purpose of bail under § 58 is to reasonably assure the defendant's return to court for future appearances;[15] as this court made clear in *Brangan*, "a judge may not consider a defendant's alleged dangerousness in setting the amount of bail . . . . Using unattainable bail to detain a defendant because he is dangerous is improper."[16]

Beyond money bail, as amended in 2006 and again in 2018, the statute also contemplates that judges may impose additional or alternative nonfinancial conditions in certain contexts and for certain purposes. Before delving into these

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[13] Commonwealth v. Morales, 473 Mass. 1019, 1020 (2016) (quoting Paquette v. Commonwealth, 440 Mass. 121, 129 (2003)).

[14] *See*, *e.g.*, G.L. c. 276, § 58 (". . . shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk, bail commissioner or master in chancery determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person before the court."); *see also*, *e.g.*, *Paquette*, 440 Mass. at 126 (citing *Dodge*, 428 Mass. at 865) ("The preferred result under G.L. c. 276, § 58, is release on personal recognizance . . . . 'This statute "was not intended to give the courts discretion to deny bail but rather to establish the right of the accused, in most circumstances, to be admitted to bail."'" (quoting Commonwealth v. Finelli, 422 Mass. 860, 863 (1996))).

[15] *Brangan*, 477 Mass. at 692 ("[T]he giving of security serves to assure that the defendant will appear in court when called to do so.").

[16] *Id.* at 706.

recent amendments, we note that "[t]he Legislature is presumed to be aware of existing statutes when it amends a statute or enacts a new one. In addition, when two or more statutes relate to the same subject matter, 'they should be construed together so as to constitute a harmonious whole,' create a consistent body of law, and give full effect to the expressed intent of the Legislature."[17] The general bail statute was amended in both 2006 and 2018 to allow judges to impose nonfinancial pretrial conditions in criminal cases, either as an *alternative* to cash bail or personal surety in order to assure appearance in court or as an *additional* pretrial obligation or restriction.

The 2018 amendment, which builds upon this Court's *Brangan* decision, allows judges to impose alternative nonfinancial conditions in the bail context for the purpose of assuring return to court. The statute reads, "a higher than affordable bail may be set if neither alternative nonfinancial conditions nor a bail amount which the person could likely afford would adequately assure the person's appearance before the court."[18] While this language makes clear that the purpose of *alternative* nonfinancial conditions is to assure return to court, this provision does

[17] *Paquette*, 440 Mass. at 130 (citations omitted).

[18] G.L. c. 276, § 58; *see also Brangan*, 477 Mass. at 701 ("Where, based on the judge's consideration of all the relevant circumstances, neither alternative nonfinancial conditions nor an amount the defendant can afford will adequately assure his appearance for trial, it is permissible to set bail at a higher amount, but no higher than necessary to ensure the defendant's appearance.").

not expressly limit the purpose of any potential *additional* nonfinancial condition(s), separate and apart from the bail determination.

The language allowing judges to impose additional pretrial conditions originated in 2006, when the legislature added a sentence to the end of the first paragraph in § 58: if a judge "determines it to be necessary, the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense . . . ."[19] The salient phrase here, meriting clarification by this Court, is "determines it to be necessary." The statute does not expressly specify what these conditions must be "necessary" to achieve.

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[19] G.L. c. 276, § 58. The same paragraph identifies that the reason for imposing bail *or alternative nonfinancial conditions* pursuant to § 58 is to assure the appearance of the person before the court, whereas under § 58A, the court may determine that someone poses a danger to the safety of another person or the community:

> Except in cases where the person is determined to pose a danger to the safety of any other person or the community under section 58A, bail shall be set in an amount no higher than what would reasonably assure the appearance of the person before the court after taking into account the person's financial resources; provided, however, that a higher than affordable bail may be set if neither alternative nonfinancial conditions nor a bail amount which the person could likely afford would adequately assure the person's appearance before the court.

By its plain language, the provision in § 58 allowing for "specified restrictions on personal associations or conduct" does not invoke the *safety* of an alleged victim or witness or the concept of threat or danger. Reading this language in the context of the rest of this statute as well as the suite of statutory sections that govern pretrial release, we note that the legislature uses the word safety, danger, or threat when it aims to protect alleged victims or witnesses.[20] Those words do not appear in the language added to § 58, paragraph one in 2006,[21] even though that language was adopted as part of an emergency Senate bill to reduce gang violence. Further, the word "safety" does appear later in § 58: in paragraph three, when addressing allowable conditions in domestic abuse cases, and in paragraph seven, when addressing bail revocation.[22]

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[20] G.L. c. 276, § 42A ("such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence"); Commonwealth v. Madden, 458 Mass. 607, 613 (2010) ("Conditions are designed . . . to restrict the conduct of that individual such that he will not 'endanger the safety of any other person or the community.'" (quoting G.L. c. 276, § 58A(2))); G.L. c. 276, § 58 (allowing consideration of "the safety of the alleged victim, any other individual or the community" when setting bail and conditions on a person's release in cases alleging domestic abuse).

[21] G.L. c. 276, § 58 ("If the justice or clerk or assistant clerk of the district court, the bail commissioner or master in chancery determines it to be necessary, the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release.")

[22] G.L. c. 276, § 58, para. 3 ("Any person authorized to take bail for such violation may impose conditions on a person's release in order to ensure the appearance of the person before the court and the safety of the alleged victim, any other

Although the final sentence in paragraph one was adopted in an anti-gang-violence bill, where safety is certainly paramount, the plain language does not aim to protect the *safety* of victims and witnesses so much as to ensure their testimony will not be influenced, tainted, or disrupted, interfering with the administration of justice or compromising the integrity of the judicial process. By the plain language of the text, as compared to the remainder of the statute, and in the context of the broader statutory scheme for pretrial release considered as a whole, [23] the authorization to set pretrial conditions of release in routine cases under § 58 is

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individual or the community . . . ."); *id.* § 58, para. 7 ("If the court determines that the release of said person will seriously endanger any person or the community and that the detention of the person is necessary to reasonably assure the safety of any person or the community, the court may revoke bail on the prior charge and may order said person held without bail pending the adjudication of said prior charge, for a period not to exceed sixty days.").

[23] Should the Court find the plain language of the statute ambiguous, the lenity doctrine would likewise counsel in favor of this read of the statute, which protects the defendant's rights by limiting the lawful purpose of conditions of pretrial release. This Court has observed on many occasions that conditions of release are burdensome deprivations to defendants' liberty interests. *See, e.g.*, *Madden*, 458 Mass. at 613 ("[R]elease on personal recognizance is significantly different from release subject to conditions, given that conditions for pretrial release typically infringe on an individual's liberty interests."); Commonwealth v. Cory, 454 Mass. 559, 569–70 (2009) (finding that GPS monitoring is a significant restraint that affirmatively burdens liberty through intrusive continuous reporting of the person's location plus "the physical attachment of the GPS bracelet, which serves as a continual reminder of the State's oversight"); Commonwealth v. Weston W., 455 Mass. 24, 34 (2009) (holding that strict scrutiny applied to evaluate a juvenile curfew ordinance because "curfews represent a particularly sweeping restriction on the right to free movement, requiring a person to remain in a confined area for long periods of the day or night").

limited to conditions that are necessary to preserve the integrity of the judicial process in the pending case and assure appearance in court.

III. The general bail statute does not authorize judges to impose pretrial conditions to promote deterrence, rehabilitation, or punishment because these values do not apply when a defendant is still lawfully presumed innocent.

"[P]retrial releasees are ordinary people who have been accused of a crime but are presumed innocent."[24] This Court has repeatedly considered the statutory and constitutional boundaries for imposing liberty-restricting conditions in probationary or quasi-probationary contexts, including pretrial probation imposed pursuant to § 87 and pretrial diversion imposed pursuant to G. L. c. 276A.[25] This Court has upheld the imposition of GPS monitoring for "legitimate probationary purposes" including "deterring the probationer from engaging in criminal activity and detecting such criminal activity if it occurs."[26] However, where a defendant is

[24] United States v. Scott, 450 F.3d 863, 871 (9th Cir. 2006).

[25] *See*, *e.g.*, Jake J. v. Commonwealth, 433 Mass. 70, 74–75 (2000) (addressing the power of the court to impose, and revoke, pretrial probation requiring the defendant's consent pursuant to § 87 in a juvenile case); Commonwealth v. Newberry, 483 Mass. 186, 198 (2019) (finding that pre-arraignment pretrial diversion allowed the judge to order conditions of release such as GPS monitoring by the probation department at the defendant's request and with the defendant's consent).

[26] Commonwealth v. Johnson, 481 Mass. 710, 719 (2019) (citing United States v. Knights, 534 U.S. 112, 120–21 (2001); Commonwealth v. Feliz, 481 Mass. 689, 703–04, 707–08 (2019); Commonwealth v. Lapointe, 435 Mass. 455, 459 (2001)), *cert. denied sub nom.* Johnson v. Massachusetts, No. 19-5008, 2019 WL 4922844 (U.S. Oct. 7, 2019). Of course the permissibility of GPS monitoring in any individual case also depends on the requisite constitutional balancing, even in a

still presumed innocent in a pretrial setting,[27] and where the imposition of pretrial conditions lacks the constitutional safeguards of an evidentiary hearing (in situations involving alleged threat or danger, as in §§ 42A or 58A) or express consent (as in pretrial probation under § 87 or pretrial diversion under G.L. c. 276A, § 5), the purposes of probation do not apply.

The primary purposes of probation are rehabilitation and protection of the public, with punishment, deterrence, and retribution as secondary purposes.[28] This

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probationary context. *Feliz*, 481 Mass. at 691 ("To comport with art. 14, prior to imposing GPS monitoring on a given defendant, a judge is required to conduct a balancing test that weighs the Commonwealth's need to impose GPS monitoring against the privacy invasion occasioned by such monitoring.")

[27] Although § 58 does not expressly codify the presumption of innocence, another component of the bail statutes does. Section 58A(6) states, "Nothing in this section shall be construed as modifying or limiting the presumption of innocence." G.L. c. 276, § 58A(6); *see also Madden*, 458 Mass. at 610. Further, "Massachusetts tradition holds that judges must, upon request, instruct the jury that the defendant is 'presumed to be innocent.'" Commonwealth v. Drayton, 386 Mass. 39, 46 (1982) (citing Commonwealth v. Madeiros, 255 Mass. 304, 315–16 (1926); Commonwealth v. Anderson, 245 Mass. 177 (1923)).

[28] Commonwealth v. Obi, 475 Mass. 541, 547 (2016) ("the condition substantially advanced the public safety, rehabilitation, and deterrence goals of probation"); *Cory*, 454 Mass. at 566–67 ("[W]hile probation is a type of criminal sentence with goals that include punishment, deterrence, and retribution, '[t]he primary goals of a probationary sentence are rehabilitation of the probationer and protection of the public.' Rehabilitation and public protection may suggest more of a civil than a criminal orientation." (quoting Commonwealth v. Power, 420 Mass. 410, 414 (1995))); Commonwealth v. Pike, 428 Mass. 393, 403 (1998) ("This court has named rehabilitation of the probationer and protection of the public as the principal goals of probation. . . . Other goals of probation include punishment, deterrence, and retribution. . . . These goals are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime." (citations omitted)).

Court recently confirmed that the rehabilitative and public safety purposes of probation and pretrial probation also apply in the quasi-probationary context of pretrial diversion.[29] By contrast, "[t]he purpose of § 58 is 'to assure compliance with [the] laws and to preserve the integrity of the judicial process . . . .'"[30] Whereas "deterring the probationer from engaging in criminal activity and detecting such criminal activity if it occurs" is a "legitimate probationary purpose[]," [31] such purposes are not contemplated in the traditional pretrial setting, where a defendant stands on their innocence. Further, while probation conditions may lawfully vindicate goals of public safety, rehabilitation, and deterrence, "such restrictions are not without limits, and merit 'special scrutiny.' The more tenuous the relationship between a given condition and the goals of probation, and the more extensively a constitutional right is burdened, the less likely the condition is to be permissible."[32] For example, even in a probationary context, an exclusion zone that

[29] *Newberry*, 483 Mass. at 196 ("Although the legislative history for the adult pretrial diversion statute is scant, we understand that its purpose, as with pretrial diversion for juveniles, is to provide rehabilitative programming so that individuals can address the underlying conditions that lead to their criminal behavior. Treating the cause of the behavior is intended to reduce recidivism, increase public safety, and allow the individual to participate as a productive member of society, without incurring the serious collateral consequences (and concomitant difficulty in productive participation) that may arise from a criminal record.").
[30] *Morales*, 473 Mass. at 1020 (quoting *Paquette*, 440 Mass. at 129).
[31] *Johnson*, 481 Mass. at 719–20 (citations omitted).
[32] *Obi*, 475 Mass. at 547 (citation omitted).

burdens the fundamental right to interstate travel has been held unconstitutional by this Court.[33]

In dicta, the *Brangan* Court noted that a defendant's dangerousness may be considered as a factor in setting conditions of release;[34] the footnote expounding on this dicta uses the word "dangerousness" only in the context of pretrial probation imposed under § 87, where the defendant's consent is required and where conditions may be lawfully imposed to vindicate the goals of probationary supervision. The footnote goes on to explain the limited instances where conditions of release may be set under § 58 pursuant to *other* specific purposes (safety in cases of domestic abuse, restrictions on contact with victims or witnesses who may testify, and to assure return to court).[35] At no point in footnote 18 does the *Brangan* Court suggest that judges may set conditions under § 58 based on dangerousness or otherwise import probationary purposes into the pretrial context.[36] Indeed, this

[33] *Pike*, 428 Mass. at 401–02 ("The condition of the defendant's probation banishing him from the Commonwealth is invalid and his sentence must be revised accordingly.").
[34] *Brangan*, 477 Mass. at 706 ("[A] defendant's dangerousness may be considered as a factor in setting other conditions of release.").
[35] *Id.* at 706 n.18.
[36] Of course, this read of the Court's dicta is not definitive; it is up to the Court to explicate and construe the statute. Commonwealth v. Dayton, 477 Mass. 224, 227 (2017) ("[W]here the Commonwealth agrees that this court has discussed the relevant language of the statute only in nonbinding dicta, it can hardly be said that we have 'explicated' the statute or put our 'judicial construction' on it—quite the opposite, at least until today. It is one thing to infer the Legislature's intent based

Court has indicated that setting pretrial conditions under different statutes is a "matter[] of substance, not merely of form."[37] The situation in *Johnson* was categorically different; the condition of pretrial release in *Johnson* was imposed pursuant to pretrial probation under § 87, requiring – and obtaining – the defendant's consent.[38] By contrast, conditions of pretrial release imposed pursuant to § 58 cannot be justified as punishment, rehabilitation, or deterrence.

Lower courts may require more guidance on the scope of authority to impose pretrial conditions under § 58. Although § 58 does not appear to authorize judges to impose conditions to vindicate purposes of community safety, deterrence, or rehabilitation—as a defendant has not yet been proven to have committed a crime or to threaten any individual or the community—the "Reasons for Ordering Bail Form" used in the Superior Court appears to elide the reasons for imposing conditions that are permissible under §§ 58 and 58A. The form includes a section on "Additional Conditions," which gives the recited rationale that the conditions

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on an implied awareness of our express holdings; it is quite another to infer it based on dictum in our opinions.").

[37] *Jake J.*, 433 Mass. at 76–77.

[38] Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 304 (2017) ("Indeed, as a condition to his consented-to pretrial release, the defendant agreed to wear the device at all times and to permit continuous supervision of his whereabouts by the probation department's monitoring of the device and its transmissions."), *review denied*, 477 Mass. 1112 (2017); *see also Jake J.*, 433 Mass. at 74 ("This section authorizes the court to place a juvenile on pretrial, predisposition probation subject to conditions with the juvenile's consent.").

imposed are "necessary and sufficient reasonably to assure the safety of any other person and the community and the defendant's appearance at future court proceedings." That language borrows from both § 58 ("the defendant's appearance at future court proceedings") and § 58A ("assure the safety of any other person and the community"), even though an earlier section of the same form accurately states: "Because the Commonwealth has not moved to detain the defendant as dangerous under G.L. c. 276, § 58A, in setting the amount of bail I have not considered whether release of the defendant will endanger the safety of any other person or the community." Meanwhile, the form used in the district courts does not appear to require any justification for additional conditions.[39]

Similarly, the probation department would benefit from clarity as to the purpose of conditions imposed pretrial under § 58 versus under §§ 42A, 58A, or 87, as well as compared to conditions of probation. As codified in the recent justice reform legislation in 2018, the probation department oversees pretrial services in Massachusetts.[40] While there are certain distinctions in how probation manages pretrial releasees as compared to probationers—for example, defendants released pretrial are not required to pay the standard probation fee or the specific GPS fee if

[39] Copies of both forms are enclosed in Appendix I.
[40] *See* G.L. c. 276, § 99G.

a GPS was imposed[41]—probation officers may oversee both populations, potentially losing track of the distinctly limited purposes served by conditions in a pretrial setting. Judges, probation officers, the staff of the probation department, and criminal defendants would all benefit from greater clarity in the scope of lawful authority to impose and enforce pretrial conditions.

IV. The record is silent as to whether the conditions imposed in Mr. Norman's case to stay out of Boston and to wear a GPS were justified as necessary to assure return for future court appearances or to preserve the integrity of the judicial process in his case.

Defendant-Appellee Eric Norman was arraigned in the Dorchester Division of the Boston Municipal Court on July 23, 2015 for possession with intent to distribute a Class B substance, subsequent offense, and two motor vehicle violations. The arraignment judge imposed cash bail and ordered two additional conditions of pretrial release: (1) stay out of Boston and (2) a GPS monitor. As Mr. Norman's charges were ineligible to invoke § 58A and did not involve abuse offenses pursuant to §§ 42A or 58, par. 3, the statutory authority for setting conditions of release at arraignment must derive from the general bail statute, § 58, par. 1. In such a case, like Mr. Norman's, the allowable purposes of pretrial

[41] *See* G.L. c. 276, § 87A; *see also* Wendy Sawyer, *Punishing Poverty: The High Cost of Probation Fees in Massachusetts*, Prison Policy Initiative (Dec. 8, 2016), https://www.prisonpolicy.org/probation/ma_report.html; Massachusetts Trial Court, District Court Department, Potential Money Assessments in Criminal Cases (2015), https://www.mass.gov/files/documents/2016/08/pt/potential-moneyassessment-criminalcases.pdf.

conditions of release under § 58 are limited to: (1) assuring return to court and (2) conditions necessary to preserve the integrity of the judicial process.

In its reply brief, the Commonwealth argues that the GPS in Mr. Norman's case was justified to enforce an exclusion zone, to ensure that Mr. Norman would appear in court "even though he faced serious charges, to allow the defendant to be located if he did not appear, and to ensure he did not commit any new crimes while on pretrial release."[42] First, the record appears to lack evidence that these conditions—an exclusion zone of the entire city of Boston and a GPS monitor—were imposed because the arraignment judge determined these conditions were necessary to achieve these purposes identified by the Commonwealth on reply, let alone the limited, lawful purposes of conditions of pretrial release under § 58 outlined above. Second, the only justification among those proffered by the Commonwealth that is lawful under the statute is to assure return to court.

The Commonwealth posits that the GPS monitor was imposed to enforce an exclusion zone of the entire city of Boston, which the Commonwealth describes as "an area where [Mr. Norman] had repeatedly been charged with drug distribution."[43] The Commonwealth does not interrogate whether that exclusion zone itself was lawfully imposed for a purpose contemplated by the statute. The

[42] Commonwealth's Reply at 15.
[43] *Id.*

Commonwealth appears to link that condition to a deterrent value: preventing the commission of future crime or a subsequent arrest, based on the defendant's history of having been convicted of a similar offense on one prior occasion.[44] In other words, the articulated purpose of enforcing the exclusion zone is another formulation of the Commonwealth's proposition that a GPS monitor—a significant restraint that affirmatively burdens a defendant's liberty through its physical attachment to the defendant's body and constant monitoring of the defendant's location by the State[45]—can be imposed pretrial under § 58, without the defendant's consent, in order to prevent future arrests.

The Commonwealth's assertion that judges may impose a pretrial GPS condition to "ensur[e] that defendants do not commit additional crimes while awaiting trial"[46] erodes the presumption of innocence twice-over—(1) it presumes any new criminal charge filed while awaiting trial on an un-adjudicated criminal charge would be an "additional" crime (rhetorically eliminating the possibility that the person is innocent of the already pending charge) and (2) it presumes a new criminal allegation, in the form of an arrest and filed charge, establishes that the

[44] *See id.* at 15 n.6.
[45] *See Cory*, 454 Mass. at 569–70; *see also, e.g.*, *Feliz*, 481 Mass. at 702; *Johnson*, 481 Mass. at 716–18.
[46] Commonwealth's Reply at 15.

defendant *committed* a new crime.[47] Just as the Commonwealth erodes the presumption of innocence by rhetorical flourish, so too does the imposition of GPS for reasons that extend beyond the lawful statutory purpose for pretrial conditions under § 58: ensuring return to court and preserving the integrity of the judicial process.

The Commonwealth cites *Josh J. v. Commonwealth* for its assertion, a case that concerns bail revocation.[48] The Commonwealth's reliance on *Josh J.* is inapt to support the proposition that judges may impose additional liberty-restricting conditions of pretrial release to prevent future arrests; as *Josh J.* makes clear, the legislature has devised the *bail warning* in § 58 and *bail revocation* in §§ 58 and 58B to prevent new arrests while released pending trial.[49] Pursuant to § 58, a judge must explicitly advise the defendant as a condition of release that bail may be revoked if the defendant is charged with a new crime while released. Nothing in

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[47] By contrast, the statutory language reads "should said person be charged with a crime during the period of his release, his bail may be revoked . . . ." G.L. c. 276, § 58.

[48] 478 Mass. 716, 721 (2018).

[49] *See, e.g.*, G.L. c. 276, § 58 ("The person authorized to admit the person to bail shall provide as an explicit condition of release for any person admitted to bail pursuant to this section or section fifty-seven that, should said person be charged with a crime during the period of his release, his bail may be revoked in accordance with the third paragraph of this section."); *Josh J.*, 478 Mass. at 722 ("A critical component of our holding in *Paquette* was that, prior to releasing a defendant on bail, § 58 requires that the judge explicitly advise the defendant that bail may be revoked if the defendant commits a new crime while on release." (citing *Paquette*, 440 Mass. at 126)).

the statutory scheme suggests the legislature has contemplated that courts would impose additional, liberty-restricting conditions to achieve that same purpose of specifically deterring a new criminal charge. Yet the Commonwealth's argument that a GPS can be lawfully imposed to prevent any "additional crimes" from being committed would allow the imposition of a GPS on *any defendant* charged with *any crime*. It would frustrate the well-defined statutory scheme and create unnecessary redundancy to read § 58 in a way that would allow judges to impose additional conditions for the purpose of preventing future arrests.[50] Rather, additional conditions that restrain the liberty of pretrial releasees are appropriately circumscribed to those necessary to assure return to court and to preserve the integrity of the judicial process in the pending case.

The Commonwealth also posits that the GPS monitor was imposed to be able to locate the defendant upon a missed court appearance. Here the Commonwealth does not argue the GPS would assure return to court; rather, the Commonwealth appears to argue a GPS can be used to locate the defendant *after* a potential missed appearance. Once again, the legislature has already devised express remedies at the Commonwealth's disposal for how to respond when a defendant is absent from court while facing pending criminal charges. Imposing a

[50] *See Paquette*, 440 Mass. at 126 ("The import of this clear statutory language is that the liberty interest of a person admitted to bail is conditional; if the person violates the explicit condition of his release, then his liberty can be curtailed.").

GPS in order to allow the defendant to be located upon an absence from court before trial is inconsistent with the statutory scheme. Should a defendant facing a criminal charge fail to appear in court, the judge can issue a default warrant, and the Commonwealth can bring a new charge under § 82A;[51] the general bail statute does not contemplate the imposition of a GPS for post-facto resolution of a potential pretrial default.

In a case like Mr. Norman's, none of the lawful statutory purposes appears to have been invoked. Mr. Norman was charged with possession with intent to distribute—not a case involving an alleged victim or domestic abuse. Accordingly, the purpose of ensuring the safety of an alleged victim, any other individual, or the community was not authorized in his case. Similarly, at the time of the GPS condition being imposed, Mr. Norman was not subject to bail revocation as he did not have a pending criminal charge. Nevertheless, the municipal court judge set the broad condition of an exclusion zone of the entire City of Boston, a condition extreme in its scope and a substantial restriction on pretrial liberty. Further, he also imposed a condition of a GPS electronic monitor, which additively and substantially impedes a defendant's liberty. It is not clear from the record what statutory purpose of § 58 these conditions were contemplated as necessary to fulfill.

[51] G.L. c. 276, § 82A.

CONCLUSION

It is a core tenet of our constitutional system and statutory framework that a criminal defendant is presumed innocent until proven guilty beyond a reasonable doubt. When a criminal accusation is leveled against a defendant, the defendant retains significant liberty interests, especially as compared to a probationer or person convicted of a crime. Unless a judge determines that pretrial conditions imposed under § 58 are necessary to reasonably assure the defendant's return to court or to preserve the integrity of the judicial process, the conditions are unauthorized under the purposes of pretrial conditions in § 58. Even when the precise privacy implications of a GPS monitor are not triggered, the liberty interests at stake for *any* conditions imposed pretrial are substantial. To allow judges to chip away at the presumption of innocence, imposing conditions that are not necessary to achieve a lawful statutory purpose, compromises the foundation of our criminal system.

For years this Court has recognized that "the imposition of GPS monitoring is singularly punitive in effect."[52] Citing precedent from this Court, in 2012 the

[52] Commonwealth v. Selavka, 469 Mass. 502, 505 n.5 (2014); *see also Feliz*, 481 Mass. at 705; *Cory*, 454 Mass. at 570 ("There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment.").

Appeals Court explained, "GPS monitoring conditions are a form of punishment that are materially different and more onerous than other terms of probation or parole, and that the imposition of GPS monitoring conditions, coupled with exclusion zones, is an intrusive, burdensome, and 'serious affirmative restraint' on liberty that is punitive in effect."[53] The effect of the dual conditions of GPS monitoring and an exclusion zone is certainly no less punitive in a pretrial context, where a defendant like Mr. Norman is presumed innocent. Further, in "sign[ing] a GPS equipment contract to establish that monitoring, the acceptance cannot be viewed as consent, where imposition of GPS monitoring itself does not meet the requirements of art. 14."[54]

While GPS monitoring may be "singularly punitive" and necessitates robust constitutional scrutiny, many pretrial conditions have serious effects on a person's life and liberty. Just as the *Brangan* Court evaluated the effects of long-term pretrial detention in construing the constitutional requirements of a standard bail determination, so too should this Court evaluate the practical effects of any liberty-restricting condition. A stay away order or exclusion zone can render someone homeless, interrupt treatment regimens, limit access to public transit, or disrupt social relationships and vital sources of stability; a GPS can render someone

[53] Doe v. Massachusetts Parole Bd., 82 Mass. App. Ct. 851, 858 (2012) (quoting *Cory*, 454 Mass. at 570).
[54] *Feliz*, 481 Mass. at 702.

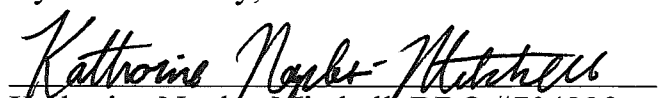
jobless because of its associated stigma and visible symbolism of involvement in the criminal system; curfews, mandatory drug or alcohol testing, a SCRAM bracelet, check-ins with pretrial services or Community Corrections: all of these routine pretrial restrictions and obligations burden liberty to different degrees and create independent sources for future liberty restrictions; with each new condition comes the opportunity for a defendant to violate that condition and be subjected to bail revocation and statutorily permitted pretrial detention.

For the foregoing reasons, amicus respectfully requests that this Court grant Defendant-Appellee's requested relief and clarify the scope of statutory authority to impose conditions of pretrial release under G.L. c. 276, § 58.

Respectfully submitted,

Amicus Curiae Charles Hamilton Houston Institute for Race and Justice at Harvard Law School

By their attorney,



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October 17, 2019

MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(h); Mass. R. App. P. 17; Mass. R. App. P. 18; and Mass. R. App. P. 20. This brief uses Times New Roman, size 14 font, contains 7,265 non-excluded words, and was drafted in Microsoft Word 2016.

Katharine Naples-Mitchell

MASS. R. APP. P. 13(E) CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on October 17, 2019, I caused two copies of the Amicus Curiae Brief of the Charles Hamilton Houston Institute for Race and Justice to be served by U.S. mail on the following counsel for Defendant-Appellee Eric Norman:

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APPENDIX I

FINDINGS AND ORDER REGARDING BAIL	DOCKET NUMBER	Trial Court of Massachusetts The Superior Court
CASE NAME: Commonwealth v.	COURT NAME AND ADDRESS	

☐ Bail Set at Arraignment ☐ Petition for Review of Bail ☐ Review of Bail Set by Magistrate ☐ Changed Circumstances

After hearing, ☐ The defendant is released on personal recognizance.
☐ Bail is set at $ _____ cash, or $ _____ surety ☐ and with the conditions stated.
☐ The petition for review of bail is denied.
☐ This decision is without prejudice to reconsideration on further showing of: _____

Dangerousness

☐ **58A Motion Filed.** The Commonwealth has moved to detain the defendant as dangerous under G.L. c. 276, § 58A, and after a hearing, I find there are conditions of release, including considerations of bail, that will reasonably assure the safety of other individuals and the community and that will reasonably assure the defendant's appearance at future court proceedings.

☐ **No 58A Motion Filed.** Because the Commonwealth has not moved to detain the defendant as dangerous under G.L. c. 276, § 58A, in setting the amount of bail I have not considered whether release of the defendant will endanger the safety of any other person or the community.

Ability to Pay (check all that apply)

☐ The defendant has been found indigent.

☐ The defendant has the ability to post bail of $_____ cash. This finding is based upon:
☐ Probation intake ☐ Representation of: _____ ☐ Other: _____

☐ I have not been presented with sufficient credible information to determine the defendant's ability to post bail.

Reasons for Setting Bail. I find that:

☐ The amount of bail that the defendant is able to post is sufficient reasonably to assure the defendant's appearance at future court proceedings on the conditions stated, if any.

☐ An amount of bail greater than the defendant is able to post is necessary reasonably to assure the defendant's appearance at future court proceedings and no alternative, less restrictive financial or nonfinancial conditions will suffice to assure the defendant's presence at future court proceedings.

In setting bail, I have considered the following factors:

☐ The charged offense (strength of case/nature and circumstances/potential penalty).
Explain: _____

☐ The defendant's background (family ties/residence status/employment/history in community/mental illness/substance abuse). Explain: _____

☐ The defendant's criminal history (convictions/crimes while on bail or court supervision/probation violations).
Explain: _____

☐ Restraining orders (alleged conduct is "abuse" or violates a restraining order/history of restraining orders).
Explain: _____

☐ The defendant's flight risk (use of an alias/false identification/failure to appear at court proceedings/flight to avoid prosecution). Explain: _____

☐ Duration of pretrial incarceration to date. Explain: _____

☐ Other. Explain: _____

Additional Conditions

☐ No additional conditions are required.

☐ If the defendant posts bail, the defendant shall abide by the conditions set forth in the Order of Pretrial Conditions of Release, which are necessary and sufficient reasonably to assure the safety of any other person and the community and the defendant's appearance at future court proceedings.

Date: _____ _____ Superior Court Justice (Form 10/31/2017)

REASONS FOR ORDERING BAIL G.L. c. 276, § 58	DOCKET NO.	Trial Court of Massachusetts District Court Department
ME OF DEFENDANT	COURT DIVISION	BAIL AMOUNT Cash: _____ Surety: _____

In addition to the Defendant's financial resources as determined by

- ☐ Probation intake
- ☐ Representations of: _____
- ☐ Other evidence: _____

the Court relied on the following factors in setting bail:

1. ☐ The nature and circumstances of the offense charged.
2. ☐ The potential penalty the defendant faces.
3. ☐ The defendant's family ties.
4. ☐ The defendant's employment record.
5. ☐ The defendant's history of mental illness.
6. ☐ The defendant's reputation and length of residence in the community.
7. ☐ The defendant's record of convictions.
8. ☐ The defendant's present drug dependency or his or her record for illegal drug distribution.
9. ☐ The defendant's record of flight to avoid prosecution.
10. ☐ The defendant's fraudulent use of an alias or false identification.
11. ☐ The defendant's failure to appear at a court proceeding to answer to an offense.
12. ☐ The fact that the defendant's alleged acts involve "abuse" as defined by G.L. c. 209A, § 1.
13. ☐ The fact that the defendant's alleged acts constitute a violation of a temporary or permanent order issued under G.L. c. 208, §§ 18 or 34B; G.L. c. 209, § 32; G.L. c. 209A, §§ 3,4, or 5; or G.L. c. 209C, §§ 15 or 20.
14. ☐ The defendant's history of orders issued against him or her under the aforementioned sections.
15. ☐ The defendant's status of being on bail pending adjudication of a prior charge.
16. ☐ The defendant's status of being on probation, parole or other release pending completion of sentence for any conviction.
17. ☐ The defendant's status of being on release pending sentence or appeal for any conviction.

Further explanation:

For the reasons outlined above, bail has been set at its current amount because the Court finds that the risk that the above-named defendant will flee or otherwise fail to appear before the Court as required is such that no alternative, less restrictive financial or non-financial conditions will suffice to assure his or her appearance at future court proceedings.

JUSTICE	DATE
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