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SUBJECT: Constitutionality of Allowing Law Enforcement to Access Electronic Monitoring Data for Adjudicated Juveniles — LB 1010.

REQUESTED BY: Senator Michael Flood
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Melissa R. Vincent, Assistant Attorney General

INTRODUCTION

Neb. Rev. Stat. § 43-250 (Cum. Supp. 2020) governs the disposition of juveniles taken into temporary custody for various reasons. LB 1010 amends § 43-250(1)(c) to allow the court or a probation officer to place a juvenile on electronic monitoring as an alternative to secure detention and to share the data from the electronic monitoring device with law enforcement "immediately upon request." On March 23, 2022, you requested an opinion from our office concerning the legality of this amendment, specifically whether "there are any privacy and or other legal issues that would prevent law enforcement from accessing the data of an electronic monitoring device on an adjudicated juvenile" and whether this provision is "constitutional as it pertains to adjudicated juveniles."

As a preliminary observation, § 43-250 does not distinguish between adjudicated and unadjudicated juveniles, and when limited to the former, is triggered only if the juvenile is placed on electronic monitoring after being taken into temporary custody for a specified reason. Having read the testimony from the Judiciary Committee's hearing on LB 1010, it appears this amendment is intended to apply to juveniles who have been placed on electronic monitoring as a condition of their probation. If so, that objective may be more effectively accomplished by LB 1010 (AM2435), which amends Neb. Rev. § 43-2,108 (Cum. Supp. 2020) to state that "any court order that places a juvenile on electronic

monitoring shall also state whether the data from such electronic monitoring device shall be made available to a law enforcement agency immediately upon request by such agency."[1] With that understanding, and for the reasons discussed below, we conclude that a statute allowing law enforcement to access a juvenile probationer's electronic monitoring data without first obtaining a warrant is constitutional.

ANALYSIS

The fundamental question presented here is whether authorizing law enforcement to access a juvenile probationer's electronic monitoring data without a warrant violates the Fourth Amendment. For purposes of this analysis, we note that the Fourth Amendment to the U.S. Constitution affords the same protection as article I, § 7, of the Nebraska Constitution. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *U.S. v. Mathews*, 928 F.3d 968 (10th Cir. 2019) ["*Mathews*"]. When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, an official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Id.* at 975.

However, the Fourth Amendment does not apply with equal force to probationers.[2] The U.S. Supreme Court has long recognized that probationers do not enjoy the absolute liberty to which every citizen is entitled and may be subject to reasonable conditions that deprive them of some freedoms enjoyed by law-abiding citizens. *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *U.S. v. Knights*, 534 U.S. 112 (2001) ["*Knights*"]. As a result, the U.S. Supreme Court has established two exceptions to the Fourth Amendment's warrant requirement in the parolee/probationer context. *Mathews*, 928 F.3d at 975-76. The first exception, generally described as the "special needs search," holds that it is constitutionally permissible for a probation officer to search probationers in compliance with a probation agreement search provision, but without a warrant. *Id.* The second exception, known as the totality-of-the-circumstances exception, authorizes warrantless searches without probable cause (or even reasonable suspicion) by police officers with no responsibility for parolees or probationers when the totality of the circumstances renders the search reasonable. *Id.* at 976. The totality-of-the-circumstances exception is predicated on (1) the reduced (or absent) expectation of privacy for probationers and

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1 Notably, § 43-253 requires any juvenile taken into temporary custody under § 43-250(1)(c) to be brought before a court of competent jurisdiction within 24 hours for a hearing to determine if continued detention or supervision is necessary. Presumably, the court would then enter an order in accordance with § 43-2,108 as amended by AM2435.

2 This statement applies to both adults and juveniles. "No court has ever held that a juvenile is entitled to greater fourth amendment protections by reason of [his or] her minority." *In re Lakisha M.*, 882 N.E.2d 570, 576 (Ill. 2008).

parolees and (2) the needs of law enforcement. *Id.* When the terms of a probation agreement allow officers to search the probationer's person or effects with something less than probable cause, the probationer's reasonable expectation of privacy is "significantly diminished." *Id.* Courts balance this significantly diminished expectation of privacy against the government's interest in apprehending violators of the criminal law. *Id.*

Notably, a primary goal of probation is to protect society from future criminal violations. *Knights*, 534 U.S. at 119. And because the very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law, the government may justifiably focus on probationers in a way that it does not on the ordinary citizen. *Mathews*, 928 F.3d at 976.

As a general matter, a search of a parolee or probationer authorized by state law satisfies the totality-of-the-circumstances exception. *Mathews*, 928 F.3d at 976. Whether a search is authorized by state law is determined by the offender's probation agreement and the state regulations applicable to his or her case. *Id.* Thus, parolee and probationer searches are examples of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law. *Id.*

Based on the foregoing principles, courts in other jurisdictions have found that law enforcement may conduct warrantless searches of a probationer's electronic monitoring data without violating the Fourth Amendment. In both *Commonwealth v. Johnson*, 481 Mass. 710, 119 N.E.3d 669 (Mass. 2019) ["*Johnson*"], and *U.S. v. Jackson*, 214 A.3d 464 (D.C. 2019) ["*Jackson*"], law enforcement conducted warrantless searches of a probationer's historical GPS data for the limited purpose of determining whether the probationer was present at a particular crime scene. After the GPS data implicated the probationer in additional crimes, he moved to suppress it, alleging law enforcement had violated his Fourth Amendment right to be free from unreasonable searches by accessing the data without a warrant. Both courts rejected the probationer's claim, finding he had no reasonable expectation of privacy in the GPS data due to (1) his status as a probationer, (2) his knowledge that his movements were being monitored and recorded by the GPS device, and (3) the existence of either a statute (*Johnson*) or a memorandum of understanding (*Jackson*) that specifically authorized law enforcement to access the probationer's GPS data. As the court in *Johnson* explained:

> ... [A] probationer subject to GPS monitoring as a condition of probation would certainly objectively understand that his or her location would be recorded and monitored to determine compliance with the conditions of probation, including whether he or she had engaged in additional criminal activity, to deter the commission of such offenses, and that police would have access to this location information for that purpose. General Laws c. 276, § 90, which serves the legitimate, even compelling, governmental purpose of detecting and determining whether a probationer engaged in criminal activity during the probationary period, confirms that objective understanding by expressly providing police access to this data.... [C]riminal activity that occurred during the probationary period is of particular concern to the Commonwealth, as it reflects the recidivist nature of the

> probationer.... Accordingly, as opposed to nonprobationers who have their GPS, CSLI, or other precise location information recorded and reviewed by law enforcement without their knowledge, the defendant could not reasonably expect that his whereabouts while subject to GPS monitoring, particularly his whereabouts at the time and place of criminal activity, would remain private from government eyes....
>
> Moreover, the Commonwealth's conduct did not amount to the same type of conduct we have identified in other contexts as intruding on an individual's reasonable expectation of privacy in his or her whereabouts. The record does not describe law enforcement engaged in an effort to map out and analyze all of the defendant's movements over the 6-month probationary period.... Rather, as the defendant recognized in his motion to suppress, the Commonwealth reviewed the defendant's historical GPS location data to determine whether he was present at the general times and locations where various unsolved break-ins may have occurred.... Simply comparing subsets of the defendant's GPS location data recorded while he was on probation to the general times and places of suspected criminal activity during the probationary period is not a search in the constitutional sense. At least in other contexts, society has not recognized a probationer's purported expectation of privacy in information that identifies his or her presence at the scene of a crime as a reasonable one.

481 Mass. at 724-26, 119 N.E.3d at 683-85 (internal citations omitted).

In *Schall v. Martin*, 467 U.S. 253 (1984), the U.S. Supreme Court recognized that crime prevention is a legitimate and compelling state interest that persists undiluted in the juvenile context since the harm suffered by the victim of a crime is not dependent upon the age of the perpetrator. *Id.* at 264-65. The court also recognized that "the harm to society might be even greater in this context given the high rate of recidivism among juveniles." *Id.* at 265. Thus, although *Johnson* and *Jackson* involved adult probationers, we believe the same legal principles apply here since juvenile probationers have no greater expectation of privacy in their electronic monitoring data than their adult counterparts.

CONCLUSION

For the foregoing reasons, we conclude that a statute authorizing law enforcement to access the data from a juvenile probationer's electronic monitoring device without first obtaining a warrant is constitutional.

Very truly yours,

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