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# **STRENGTHENING THE GUARD: THE USE OF GPS SURVEILLANCE TO ENFORCE DOMESTIC VIOLENCE PROTECTION ORDERS**

*Amanda Rhodes\**

## **Abstract**

This essay examines the use of GPS surveillance in enforcing domestic violence protection orders. Part I explores the rationale for using GPS surveillance in domestic violence situations. Part II addresses the primary constitutional concerns associated with GPS monitoring in the domestic violence context. Finally, Part III examines the effectiveness of GPS surveillance in domestic violence cases.

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## INTRODUCTION

On Valentine's Day 2009, Tiana Notice frantically called 911, exclaiming that her "ex-boyfriend just stabbed [her] to death."<sup>1</sup> James Carter Jr. stabbed Tiana at least 18 times on the deck of her apartment.<sup>2</sup> In addition to murder, Carter was charged with violating a protective order issued against him on behalf of Tiana.<sup>3</sup> Tiana's story is not unique; many domestic abusers have violated protective orders and subsequently murdered their former partners.<sup>4</sup>

Due in part to tragic deaths like Tiana's, global position monitoring system (GPS) surveillance is becoming more common tool to track in domestic violence cases.<sup>5</sup> GPS surveillance is a necessary and effective tool for law enforcement personnel to protect victims of domestic violence. Part I of this essay explores the rationale for using this service to combat domestic

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<sup>1</sup> Christine Dempsey, *Jury Hears 911 Call from Tiana Notice*, HARTFORD COURANT, Oct. 14, 2011, [http://articles.courant.com/2011-10-14/news/hc-carter-notice-trial-1015-20111014\\_1\\_pt-cruiser-tiana-notice-alvin-notice](http://articles.courant.com/2011-10-14/news/hc-carter-notice-trial-1015-20111014_1_pt-cruiser-tiana-notice-alvin-notice).

<sup>2</sup> *Id.*; Christine Dempsey, *Carter Said He Stabbed Tiana Notice, Defendant's Brother Testifies*, HARTFORD COURANT, Oct. 18, 2011, [http://articles.courant.com/2011-10-18/news/hc-carter-notice-1019-20111018\\_1\\_james-carter-tiana-notice-brandon-carter](http://articles.courant.com/2011-10-18/news/hc-carter-notice-1019-20111018_1_james-carter-tiana-notice-brandon-carter).

<sup>3</sup> Dempsey, *Carter Said He Stabbed Tiana Notice, Defendant's Brother Testifies*, *supra* note 2, at 2.

<sup>4</sup> See generally Liam Ford, *Global Eye to be Kept on Abusers*, CHI. TRIB., Aug. 5, 2008, <http://www.chicagotribune.com/news/local/chi-domestic-violence-080805,0,4035794.story> (discussing the death of Cindy Bischof, who was murdered by her ex-boyfriend); Ronnie Ellis, *Steve Nunn Served with EPO, Put on Administrative Leave*, NEWS & TRIB., Feb. 25, 2009, <http://newsandtribune.com/archive/x518756620/Steve-Nunn-served-with-EPO-put-on-administrative-leave> (discussing the death of Amanda Ross, who was shot to death by her former fiancé).

<sup>5</sup> Shelley M. Santry, *Can You Find Me Now?*, 29 QUINNIPIAC L. REV. 1101, 1102 (2011). For an overview of the development of GPS technology and the various devices used by law enforcement personnel, see Ian Herbert, *Where We Are With Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence*, 16 BERKELEY J. CRIM. L. 442, 466-488 (2011). See also EDNA EREZ ET AL., GPS MONITORING TECHNOLOGIES AND DOMESTIC VIOLENCE: AN EVALUATION STUDY x (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238910.pdf> ("Since 2000, twenty-one states and the District of Columbia have enacted legislation mandating or recommending that justice agencies employ GPS to protect victims of DV during the pretrial period; several other states are in the process of considering such legislation").

violence. Part II addresses the primary constitutional arguments against the government's use of such technology. Finally, Part III discusses its overall effectiveness.

### **PART I: THE NECESSITY OF GPS MONITORING IN DOMESTIC VIOLENCE CASES**

All three women had had restraining orders against the men who finally killed them, legal papers saying that the men had to keep away. Maybe they were the last three women in New York to know what all emergency-room nurses know, and cops' wives know, too: that restraining orders are a joke, made, as they say, to be broken.<sup>6</sup>

In the best-selling novel *Black and Blue*, renowned author Anna Quindlen decries the perceived ineffectiveness of protection orders in domestic violence cases.<sup>7</sup> The evidence suggests, however, that, most of the time, protection orders lessen instances of abuse. As one author notes, “[r]eports indicate some 86% of the women who received a protection order state the abuse either stopped or was greatly reduced.”<sup>8</sup>

As evidenced by this statistic, a civil protection order can be a valuable tool for a domestic abuse victim to use against an abuser. A restraining order works to prevent future abuse by prohibiting the abuser to from contacting the

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<sup>6</sup> ANNA QUINDLEN, *BLACK AND BLUE* 78 (1998).

<sup>7</sup> *Id.* Anna Quindlen is the author of three best-selling novels, one of which is *Black and Blue*. *Black and Blue* tells the story a woman who has been subject to years of abuse at the hands of her husband.

<sup>8</sup> See *Domestic Violence Statistics*, A.B.A., available at [http://www.americanbar.org/groups/domestic\\_violence/resources/statistics.html](http://www.americanbar.org/groups/domestic_violence/resources/statistics.html) (citing James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response* (1999)) (last visited Sept. 30, 2012) (“Reports indicate some 86% of the women who received a protection order state the abuse either stopped or was greatly reduced.”). But see Mary Ann Scholl, *GPS Monitoring May Cause Orwell to Turn in his Grave, But Will it Escape Constitutional Challenges? A Look at GPS Monitoring of Domestic Violence Offenders in Illinois*, 43 J. MARSHALL L. REV. 845, 845-50 (2010) (noting that “[t]hree women are killed each day by an intimate partner, many of whom are known to have had orders of protection. . . . the [protection] order is often, in effect, nothing more than a piece of paper”).

victim; if the abuser resides with the victim, the abuser must relocate.<sup>9</sup> As such, a protective order also serves to re-establish the independence of the victim.<sup>10</sup>

Despite its benefits, a civil protective order in a domestic violence case can be particularly difficult to enforce, given the intimate relationship between both parties.<sup>11</sup> The abuser is familiar with the victim's usual daily routine and social habits, and knows her friends and family.<sup>12</sup> This knowledge provides the abuser with several opportunities to harass or abuse the victim and thereby violate the protection order.<sup>13</sup> The rationale behind GPS surveillance is to curb these violations by eliminating the abuser's ability to commit them without detection.<sup>14</sup> As one judge noted:

[The GPS program] drives the message home to the offender that there is to be no contact, that the no-contact order is going to be supervised and that there are repercussions if there is any contact. Likewise, I think it gives the victim some added sense of security. It puts some teeth into an oral order: 'stay away and have no contact'. You can tell somebody that, but if you actually have a device or system in place that's really going to measure it and make sure that there isn't contact, that helps across the board. It enhances a temporary protection order; it puts some teeth into it.<sup>15</sup>

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<sup>9</sup> Edna Erez et al., *Electronic Monitoring of Domestic Violence Cases – A Study of Two Bilateral Programs*, 68-JUN Fed. Probation 15, 16 (2004).

<sup>10</sup> See Santry, *supra* note 5, at 1106 n.40 (noting that civil protection orders “advance the autonomy and independence of the battered woman from the abuser”).

<sup>11</sup> See Erez et al., *supra* note 9, at 16.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## PART II: THE CONSTITUTIONALITY OF GPS MONITORING

### A. *Fourth Amendment Concerns*

The “search and seizure” provision of the Fourth Amendment presents the primary constitutional hurdles to GPS monitoring of alleged domestic violence perpetrators. The Fourth Amendment provides, specifically, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” by the government.<sup>16</sup> The government’s use of a tracking device to monitor the actions of a citizen implicates the Fourth Amendment’s protection against privacy violations without consent or due process.<sup>17</sup>

One possible response to this argument is that the alleged abuser did, in fact, consent to GPS surveillance.<sup>18</sup> Upon violating a protective order, the alleged abuser has two options for punishment: incarceration or GPS monitoring.<sup>19</sup> The alleged abuser that chooses GPS monitoring impliedly consents to the intrusive nature of electronic surveillance.<sup>20</sup> Under established Fourth Amendment law, an individual that consents to a search and seizure cannot later claim that it was unreasonable.<sup>21</sup>

Barring the consent argument, Fourth Amendment jurisprudence focused on the two-part “reasonable expectation of privacy” test articulated by Justice Harlan in *Katz v. United States*.<sup>22</sup> The constitutionality of a Fourth Amendment search depends first on the subjective expectation of privacy.<sup>23</sup> Upon finding that the individual did have a subjective expectation of privacy,

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<sup>16</sup> U.S. CONST. amend. IV.

<sup>17</sup> Santry, *supra* note 5, at 1113. *See also* Scholl, *supra* note 8, at 856 (“[O]ne constitutional concern is whether electronic monitoring invades the privacy rights of offenders because one can reasonably expect to have privacy in one’s own movements and whereabouts.”).

<sup>18</sup> Scholl, *supra* note 8, at 856.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See Katz v. U.S.*, 389 U.S. 347 (1967).

<sup>22</sup> *Id.* at 361 (Harlan, J., concurring); *see* Santry, *supra* note 5, at 1110-11.

<sup>23</sup> *Katz*, 389 U.S. at 361.

the court then asks whether this subjective expectation of privacy is one that society considers objectively “reasonable.”<sup>24</sup>

Until recently, the Supreme Court had not, however, directly addressed the constitutional applicability of these Fourth Amendment principles to GPS monitoring.<sup>25</sup> In *United States v. Jones*, the Supreme Court held that attaching a GPS monitor to a car and subsequently using it to observe the car’s movements on public roads constituted a Fourth Amendment “search.”<sup>26</sup> *Jones*, however, distinguished the rationale of *Katz*, which asserts that the Fourth Amendment “right of the people to be secure in their persons” follows the individuals and is not limited to a physical “place.” Justice Scalia’s majority opinion, instead, relied on the “trespassory theory of searches,” which focuses on the property rights protected by the Fourth Amendment.<sup>27</sup> Scalia did not consider whether the defendant possessed a reasonable expectation of privacy in his conduct.<sup>28</sup>

According to the majority, the use of GPS monitoring constituted a “search” because law enforcement personnel “physically occupied private property for the purpose of obtaining information.”<sup>29</sup> Again, the Supreme Court did not address whether the search was reasonable, as the government failed to raise it at the appellate court level.<sup>30</sup> This property-based analysis establishes a “minimum” degree of constitutional protections but provides little guidance in the context of electronic, non-physical monitoring of alleged abusers.<sup>31</sup> In fact, as the Court noted in *Jones*, “[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to

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<sup>24</sup> *Id.*

<sup>25</sup> See *U.S. v. Jones*, 132 S. Ct. 945 (2012).

<sup>26</sup> *Id.* at 949.

<sup>27</sup> Matthew Radler, *Privacy is the Problem: United States v. Maynard and a Case for a New Regulatory Model for Police Surveillance*, 80 GEO. WASH. L. REV. 1209, 1226- (2012).

<sup>28</sup> *Id.*; *Jones*, 132 S. Ct. at 950. (“But we need not address the Government’s contentions [that Jones had no reasonable expectation of privacy], because Jones’s Fourth Amendment rights do not rise or fall with the *Katz* formulation.”)

<sup>29</sup> *Jones*, 132 S. Ct. at 949.

<sup>30</sup> *Id.* at 954.

<sup>31</sup> See *id.* at 955 (Sotomayor, J., concurring) (“In cases of electronic or other novel modes of surveillance that do not depend upon the physical invasion on property, the majority opinion’s trespassory test may provide little guidance.”).

*Katz* analysis.”<sup>32</sup> *Katz* privacy analysis establishes that the Fourth Amendment protections “the right of the people to be secure in their persons,” *Jones* focuses on the property protections provided by the Fourth Amendment.<sup>33</sup>

The constitutionality of GPS surveillance depends on whether GPS surveillance amounts to just electronic signals or the “physical[] occup[ation] of private property?”<sup>34</sup> As an individual cannot be trespassed upon, it appears that the *Katz* analysis would still apply.<sup>35</sup> Such an analysis would be simple if the law enforcement personnel used only a “reverse tagging” GPS surveillance system.<sup>36</sup> “Reverse tagging” is a GPS technology that records data only if the alleged abuser enters a location prohibited by the protection order.<sup>37</sup> Reverse tagging does not constantly monitor the alleged abuser’s whereabouts; rather, it only recognizes the victim when in the areas forbidden by the protection order.<sup>38</sup> With reverse tagging, law enforcement personnel and the victim can protect against violations of the protection order, but the alleged abuser’s location is unknown when he is not in violation of the order.<sup>39</sup> Under such circumstances, an individual could not have a reasonable expectation of privacy when he is unlawfully present in an area,<sup>40</sup> and GPS monitoring would, thus, not violate Fourth Amendment rights against unreasonable search and seizure. Constant GPS monitoring, or a GPS system

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<sup>32</sup> *Id.* at 953.

<sup>33</sup> U.S. CONST. amend. IV; *id.* at 949.

<sup>34</sup> *See Jones*, 132 S. Ct. at 949.

<sup>35</sup> *See id.* at 955; *see also supra* text accompanying note 35.

<sup>36</sup> *See Scholl*, *supra* note 8, at 857.

<sup>37</sup> *See Leah Satine, Maximal Safety, Minimal Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy*, 43 HARV. C.R.-C.L. L. REV. 267, 268 (2008). When “reverse tagging” is used “[t]he batterer wears only the signal receiving component of the GPS device, while the monitoring unit, which reads the location data captured by the signal receiver, is placed with the endangered woman. Preferably, multiple monitoring units are used, one that the woman wears on her person and others that are placed in each of the woman's liberty zones. The monitoring units read location information from a distance. The signal receiver could be designed so that the distances at which information is read correspond with, but do not exceed, the bounds of the liberty zones designated by the civil protective order.” *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Santry*, *supra* note 5, at 1113-14 & n.101 (citing *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005) for the notion that “there is no reasonable expectation of privacy in illegal activity”).



transmits data regardless of the alleged abuser's location relative to a forbidden zone, however, may be too invasive under the *Katz* analysis.<sup>41</sup>

Even if deemed a physical trespass, *Jones* demands inquiry of whether the trespass is intended to gather information.<sup>42</sup> In *Jones*, FBI agents used GPS to monitor the car's movements over 28 days for the purpose of investigating whether the defendant was trafficking drugs.<sup>43</sup> The sole purpose of the GPS surveillance was to gather evidence to be used in a prosecution.<sup>44</sup> In a domestic violence case, the primary purpose of the GPS monitor is to protect the victim by deterring the alleged abuser from contacting the victim, not to gather evidence for an ongoing criminal investigation.

### ***B. Equal Protection Concerns***

The Fourteenth Amendment to the U.S. Constitution provides that “[n]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>45</sup> In light of this amendment, GPS surveillance presents some equal protection concerns for indigent offenders and minorities.

#### *1. Indigent offenders*

In *Griffin v. Illinois*, the Supreme Court concluded that a “State can no more discriminate on account of poverty than on account of religion, race, or color.”<sup>46</sup> Many state statutes require that the alleged abuser pay for all or a portion of the GPS surveillance cost,<sup>47</sup> a policy that implicates the equal protection clause of the Fourteenth Amendment for indigent individuals.<sup>48</sup> Law enforcement may avoid this equal protection challenge by implementing

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<sup>41</sup> Scholl, *supra* note 8, at 857.

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 948.

<sup>44</sup> *Id.*

<sup>45</sup> U.S. CONST. amend. XIV.

<sup>46</sup> *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

<sup>47</sup> ANN H. CROWE ET AL., OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY 20 (2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/197102.pdf> (“[A]t least 26 states require the offender to pay a portion of the costs involved; however, none of these states exclude offenders who are unable to pay from participating in the program.”).

<sup>48</sup> *Id.* at 47 (“[W]hile it is acceptable to charge offenders a fee for use of electronic supervision technologies, programs should not disqualify offenders from the program solely because of their inability to pay a fee. To do so would be discriminatory.”).

a sliding scale fee.<sup>49</sup> In fact, Kentucky utilizes a sliding scale fee that determines the amount the alleged abuser must pay based upon where he falls within the current Federal Poverty Guidelines.<sup>50</sup> Alternatively, the state could require that an alleged abuser perform community service instead of requiring him to pay GPS program costs<sup>51</sup> or simply incur the costs of electronic monitoring.<sup>52</sup>

## 2. *African-American Men*

Another equal protection concern is that GPS monitoring could disproportionately affect African-American abusers.<sup>53</sup> Some state courts, influenced by the stereotype of African-American men as aggressive and violent, may be more likely to enforce GPS surveillance on that particular group.<sup>54</sup> Additionally, the tendency of officials to identify Black men as more likely to engage in other illegal activities<sup>55</sup> may become a self-fulfilling prophecy if the GPS implicates the accused in another crime. A state legislature should ensure that its domestic violence GPS monitoring policy does not result in a discriminatory impact against African-Americans, particularly men.<sup>56</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> KY. REV. STAT. ANN. § 403.761(9)(b) (West 2010) provides: “If the court determines that a respondent is indigent, the court may, based on a sliding scale established by the Supreme Court of Kentucky by rule, require the respondent to pay the costs imposed under this section in an amount that is less than the full amount of the costs associated with operating the global positioning monitoring system in relation to the respondent or providing the petitioner with an electronic receptor device.” *See also* Santry, *supra* note 5, at 1115-16 & n.116.

<sup>51</sup> CROWE ET AL., *supra* note 47, at 47.

<sup>52</sup> In fact, a recently amended California statute authorizing GPS surveillance states that “[i]f the court determines that the defendant does not have the ability to pay for the electronic monitoring, the court may order the electronic monitoring to be paid for by the local government that adopted the policy authorizing electronic monitoring.” *See* 2012 Cal. Legis. Serv. Ch. 513 (A.B. 2467) (WEST) (amending CAL. PENAL CODE § 136.2 (West 2010)).

<sup>53</sup> *See generally* Alanna Buchanan, *A Racial Justice Perspective on Monitoring Domestic Violence Offenders Using GPS Systems*, 43 HARV. C.R.-C.L. L. REV. 271 (2008).

<sup>54</sup> *Id.* at 271-72.

<sup>55</sup> *Id.* at 271.

<sup>56</sup> *Id.* at 273. (“[A] policy that includes a GPS system must be designed to minimize racially disparate impact before being enacted or enforced.”).

### C. Procedural Due Process Concerns

Under the Fourteenth Amendment, the government must adhere to certain procedures before depriving an individual of his or her freedom.<sup>57</sup> In the domestic violence context, a GPS surveillance program could be subject to a procedural due process challenge if it fails to weigh the risk each individual abuser poses to the victim and the community.<sup>58</sup> In response to this concern, many statutes provide for an individualized determination of whether GPS monitoring is appropriate.<sup>59</sup> Such a statute should tailor the system to “the identity of the wearer and the area where the wearer is tracked.”<sup>60</sup> Law enforcement personnel can employ a “uniform dangerousness assessment protocol” to determine the danger the alleged abuser poses to the victim.<sup>61</sup>

### D. Court Decisions

Despite these constitutional issues, courts have decided relatively few cases concerning the use of GPS in the domestic violence context. Recently, a California appellate court addressed this issue in *People v. Holiday*.<sup>62</sup> This case concerned defendant Ezell Holiday’s separation from his wife, B.H., following two abusive episodes.<sup>63</sup> Among the charges in the felony complaint

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<sup>57</sup> CROWE ET AL., *supra* note 47, at 22. See U.S. CONST. amend. XIV §1. (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>58</sup> Scholl, *supra* note 8, at 860; Santry, *supra* note 5, at 1114-15.

<sup>59</sup> Scholl, *supra* note 8, at 860-61.

<sup>60</sup> See Zoila Hinson, *GPS Monitoring and Constitutional Rights*, 43 HARV. C.R.-C.L. L. REV. 285, 285 (2008).

<sup>61</sup> See *id.* at 286. (“Section 1 of the [Massachusetts] statute requires the executive office of public safety to adopt a ‘uniform dangerousness assessment protocol’ to determine which abusers are most likely to injure their domestic partners and thus to decide who should be fitted with a GPS tracking device.”).

<sup>62</sup> *People v. Holiday*, 2012 WL 1015787 (Cal. App. 2012).

<sup>63</sup> In February of 2010, Holiday attacked B.H. in their home. *Id.* at \*1. Specifically, Holiday pushed her onto a bed and then attempted to choke her. *Id.* Once B.H. tried to leave, Holiday pulled a knife on her and told her she was not permitted to leave the house. *Id.*

The next episode occurred two months later. *Id.* Holiday had moved out of their home and B.H.’s boyfriend had moved in. *Id.* On April 17th, Holiday waited outside the home and

filed against Holiday were “corporal injury on a spouse, while personally using a deadly weapon and causing great bodily injury . . . and assault while personally using a deadly weapon.”<sup>64</sup>

Holiday entered a guilty plea on the felony assault charge, and the court dismissed the domestic violence charge pursuant to a *Harvey* waiver.<sup>65</sup> Prior to sentencing, a probation officer recommended GPS surveillance, citing concern for B.H.’s safety, Holiday’s “despondent” mental state, and the fact that Holiday’s results on the “Spousal Assault Risk Assessment” placed him in the high-risk group.<sup>66</sup> At the sentencing hearing, the court granted probation and issued a domestic violence criminal protective order.<sup>67</sup> Moreover, the court had required that Holiday “[p]articipate in electronic monitoring, specifically Global Positioning System (GPS) to monitor [his] location *if directed by [the probation officer]*.”<sup>68</sup> Despite Holiday’s objection, the court imposed the condition, noting this was a domestic violence offense.<sup>69</sup>

On his appeal, Holiday asserted that the trial court abused its discretion and violated Holiday’s “basic” constitutional by requiring GPS monitoring at the direction of his probation officer.<sup>70</sup> According to Holiday, this GPS

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attacked B.H. with a two-foot long knife. *Id.* Holiday struck B.H. on the arm, partially severing an artery, nerve and tendon. *Id.* at \*1-\*2.

<sup>64</sup> *Id.* at \*1.

<sup>65</sup> *Id.* See EDWARD A. RUCKER & MARTIN B. OVERLAND, 1 Cal. Crim. Practice: Motions, Jury Instr. & Sent. § 9:3 (3d ed.). (“Ordinarily, the court cannot consider facts underlying a dismissed count in imposing sentence. A *Harvey* waiver permits a trial court to consider facts underlying dismissed counts in determining the appropriate punishment for the offenses of which the defendant was convicted.”). See generally *People v. Harvey*, 25 Cal.3d 754 (Cal. 1979) (representing the origin of the *Harvey* motion).

<sup>66</sup> *Holiday*, 2012 WL 1015787 at \*2.

<sup>67</sup> This order prohibited Holiday from contact with B.H. or her boyfriend and also forbade Holiday from being within 100 feet of B.H. or her boyfriend. *Id.*

<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Id.* at \*2. During the sentencing hearing, the judge stated that he was going to impose the GPS condition because “[t]his is a domestic violence offense. There’s a stay-away order that the defendant not have contact, direct or indirect, nor come within one hundred yards of the protected persons’ home, or person, or car. The GPS device might serve as evidence if he does violate.” *Id.*

<sup>70</sup> *Id.* Holiday failed to articulate which “basic” constitutional rights were infringed upon.

surveillance was “not reasonably related to the [assault conviction] nor designed to serve any other purpose.”<sup>71</sup>

The appellate court, however, affirmed that the trial court properly exercised its discretion in imposing probation with GPS surveillance for several reasons.<sup>72</sup> California law will generally sustain a probation condition unless it is 1) unrelated to the crime the abuser committed, 2) unrelated to conduct that is actually illegal, and 3) prohibitive of conduct that is not reasonably related to “future criminality.”<sup>73</sup> First, the court reasoned, GPS monitoring related to Holiday’s confessed crime – domestic violence.<sup>74</sup> Though the court had dismissed the domestic violence charge pursuant to a *Harvey* waiver, it could still consider the charge in imposing probation conditions.<sup>75</sup> In regards to the second factor, the court noted that the GPS condition was reasonable, because Holiday would only have to wear a GPS device unless directed to do so by his probation officer in response to threatening behavior.<sup>76</sup> It would only bar him from criminal activities.<sup>77</sup> Lastly, and most notably, the court reasoned that “the GPS condition serve[d] as a deterrent to future criminal conduct” by informing the police of his whereabouts and would also likely dissuade Holiday from violating the protective order in the future.<sup>78</sup>

Almost six years prior to reaching its decision in *Holiday*, the same appellate court decided *People v. Randolph*.<sup>79</sup> In this case, defendant Randy Randolph pled guilty to corporal injury to a spouse.<sup>80</sup> The trial court placed

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<sup>71</sup> *Id.* at \*1.

<sup>72</sup> *Id.* at \*3.

<sup>73</sup> *Id.* at (citing *People v. Olguin* (2008) 45 Cal.4th 375, 379

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *People v. Randolph*, 2006 WL 2949314 (Cal. App. 2006).

<sup>80</sup> *Id.* at \*1. In 2003, Randy Randolph inflicted facial injuries upon his then-wife, including two black eyes. *Id.* Less than a year later, Randolph attacked his girlfriend. *Id.* Specifically, he pushed her three times, slammed her up against a wall, and then sat on her and choked her.

Randolph on formal probation for a three-year period.<sup>81</sup> One condition of Randolph's probation was that that he "submit to continuous electronic monitoring by a [GPS] device, or other device as directed by [his] probation officer."<sup>82</sup>

On appeal, Randolph argued that the GPS condition was unreasonable based upon the facts of his case, constitutionally overbroad, and violative of his constitutional rights.<sup>83</sup> The appellate court upheld the trial court's decision to impose a GPS surveillance condition.<sup>84</sup> Noting that "the crime of domestic violence justifies increased surveillance and protection as noted by the [California] Legislature," the court found that the GPS condition supported a compelling state interest in preventing future instances of domestic violence.<sup>85</sup> Moreover, this compelling interest "justified the restriction on [Randolph's] right to associate with whomever he desires and his right to privacy."<sup>86</sup> The court determined that the GPS monitoring condition was necessary to (1) dissuade Randolph from "concealing future criminality" and (2) guarantee that Randolph complied with his probation terms.<sup>87</sup> Because neither Holiday nor Randolph specifically articulated which constitutional provision the state violated when it imposed a GPS probation condition, the court could not examine the merits of their arguments. Nonetheless, it is apparent that the judiciary supports the use of GPS surveillance in the domestic violence context.

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*Id.* When his girlfriend began to yell for help, Randolph bit her hands and her forearm. *Id.* Pursuant to Randolph's plea deal, the state dismissed the charges stemming from his attack against his girlfriend. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Like in *Holiday*, Randolph failed to articulate the specific constitutional rights violated.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*4.

<sup>86</sup> *Id.* at \*5.

<sup>87</sup> *Id.* Notably, the court mentioned the societal impact of domestic violence. ("Domestic violence is not only a private harm, but it also affects society as a whole.").

### PART III: EFFECTIVENESS OF GPS MONITORING IN DOMESTIC VIOLENCE CASES

GPS surveillance is an effective tool in domestic violence cases. In June 2012, the U.S. Department of Justice published *GPS Monitoring Technologies and Domestic Violence: An Evaluation Study*.<sup>88</sup> Edna Erez, Peter R. Ibarra, and Oren M. Gur, faculty in the University of Illinois at Chicago Department of Criminology, Law and Justice, authored the study along with William D. Bales from the College of Criminology and Criminal Justice at Florida State University.<sup>89</sup> According to their research, “GPS defendants stayed away from the exclusion zones from which they were banned, thereby showing that GPS monitoring buttresses the no contact orders of the court – at least in regards to physical contact taking place within the programmed exclusion zones.”<sup>90</sup> Moreover, the study demonstrated that an individual subject to GPS monitoring is “significantly less likely to be arrested for a subsequent domestic violence crime in the long term.”<sup>91</sup>

Victims’ experiences with GPS monitoring further demonstrate its importance.<sup>92</sup> Many women found that GPS surveillance allowed them to re-establish a sense of control over their own lives.<sup>93</sup> Victims felt safer in their own homes and the constant fear with which they were accustomed began to dissipate.<sup>94</sup> One victim in particular stated, “once [the abuser] was put on the

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<sup>88</sup> See EREZ ET AL., *supra* note 5.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 147.

<sup>91</sup> *Id.* at 70. See also *id.* at 147. (“The study also shows...GPS enrollment has a long-term prophylactic effect on recidivism (either for domestic violence or for overall offending)...”).

<sup>92</sup> *Id.* at 97. (“[V]ictims deeply appreciated the relief that they received from the incessant abuse and harassment, the increased number of areas they could visit, and the peace of mind they experienced knowing that their abuser could no longer ignore restraining/protection orders without consequences.”).

<sup>93</sup> Erez et al., *supra* note 9, at 18.

<sup>94</sup> *Id.*

GPS and couldn't contact me, I felt free.”<sup>95</sup> Some victims even preferred GPS surveillance for their abusers over serving jail time.<sup>96</sup>

Even some of the alleged abusers found GPS monitoring to be beneficial. Most notably, GPS surveillance shielded alleged abusers from false accusations.<sup>97</sup> They could maintain their current employment, whereas serving jail time would have likely resulted in termination.<sup>98</sup> In contrast, other alleged abusers found the GPS monitoring program to be demanding and burdensome.<sup>99</sup> Some expressed the concern that GPS was too intrusive and resulted in their lives becoming transparent.<sup>100</sup>

Despite the benefits of GPS surveillance, the technology does have limitations. GPS monitoring does not ensure physical protection of the victim.<sup>101</sup> It only warns the victim and law enforcement personnel when the alleged abuser is within a restricted location.<sup>102</sup> As one alleged abuser noted, “If your intent was to go out there and hurt and murder somebody, [GPS] is not going to stop you.”<sup>103</sup> By the same token, it does not prevent the alleged abuser from using a proxy, such as a current girlfriend, friend, or family member, to harass or abuse the victim.<sup>104</sup> The most glaring limitation to GPS monitoring is that it is a temporary answer to what is often a long-term

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<sup>95</sup> EREZ ET AL., *supra* note 5, at 97.

<sup>96</sup> *Id.* at 98. One victim stated: “[I]n some ways it's probably a whole lot better that they put him on a GPS system versus putting him in jail. Because he may be nasty to me, but he's not going out [and committing new crimes], he's still an active contributing member of society whereas if they had put him in jail and then let him out, he wouldn't be.” *Id.*

<sup>97</sup> *Id.* at 121 (“Some former defendants spoke about how their tracking histories had given them an alibi after the alleged victim had accused them of harassing her at a specific time and location. . .”).

<sup>98</sup> *Id.* at 109. (“Many clients noted that the GPS program allowed them to keep their jobs, as sitting in jail would have likely resulted in their termination at work, and for this benefit they expressed gratitude to the program.”).

<sup>99</sup> *Id.* at 109-12.

<sup>100</sup> *Id.* at 117-18.

<sup>101</sup> Edna Erez & Peter Ibarra, *Making Your Home a Shelter: Electronic Monitoring and Victim Re-entry in Domestic Violence Cases*, 47 BRIT. J. CRIMINOL. 100, 115 (2007).

<sup>102</sup> *Id.*

<sup>103</sup> EREZ ET AL., *supra* note 5, at 112.

<sup>104</sup> See EREZ ET AL., *supra* note 5, at 102; see also Erez & Ibarra, *supra* note 105, at 116.



problem.<sup>105</sup> Most victims grow accustomed to the sense of protection provided by GPS surveillance and revert to their constant state of fear once the alleged abuser graduates from monitoring.<sup>106</sup> One woman stated that she is “back to being totally one hundred percent paranoid” when she leaves her home.<sup>107</sup>

### CONCLUSION

Like any technology, GPS surveillance is not perfect. As noted, GPS monitoring has limitations: it provides no physical protection; it has no effect on a proxy, and it is only a short-term solution.<sup>108</sup> However, these shortcomings are not limited to GPS surveillance. For instance, shelter residence and incarceration of the abuser are similarly temporary.<sup>109</sup> Also, an abuser subject to any punishment can still use a proxy to harass the victim.<sup>110</sup> Finally, most notably, abusers can physically harm victims with or without the GPS surveillance; thus the argument that GPS surveillance does not protect victims is tautological.

Although GPS monitoring has its flaws, it is a necessary and effective tool in protecting victims from “separation assaults.” The remaining states should follow the example of states that have already implemented this technology. Properly drafted statutes can avoid constitutional challenges and ensure the safety of domestic violence victims for years to come.

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<sup>105</sup> Erez & Ibarra, *supra* note 102, at 116.

<sup>106</sup> *Id.* at 116-17.

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* text accompanying notes 105-14.

<sup>109</sup> Erez & Ibarra, *supra* note 102, at 117.

<sup>110</sup> *Id.* at 116.