

## **25 Critical Cases Every Criminal Lawyer Must Know: Bail and Conditions of Release**

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Lynn S. Feigenbaum: All right. So we're moving on to bail and conditions here, and I think Amanda's going to kick us off. Amanda M. Sheehan: So the first decision that is highly relevant with respect to bail is the Brangan decision, something that every attorney needs to read if they haven't. It's been around for some time now, but I would say it's the case that really changed the landscape of bail. A defendant's financial resources had been referenced in prior decisions, but this was a case that made everyone aware that now a judge really had to factor into that bail analysis the defendant's ability to afford bail. Amanda M. Sheehan: And some key takeaways from the case are that while a judge must consider that, it doesn't mean that a judge can't set a bail that a defendant can't afford. Right? A defendant or, pardon me, a judge has multiple factors that they have to take into consideration, weigh and balance against each other when making decision on what bail should be. But the defendant's ability to afford that bail is one of those considerations. And one of the important things to remember, because it unfortunately gets misstated by attorneys, Amanda M. Sheehan: and so ADA should be -- prosecutors should be aware of this, and attorneys should be aware not to say this is that affordable bail is not a constitutional right. So under the bail statute Section 57, Section 58, the presumption is release. But in any case, bail is always going to be a consideration. Arguments are made by both sides, but it's ultimately up to the judge and the judges. When this came down, really, then began taking that into consideration so that people were not being held improperly on bails, that where there was nothing else, Amanda M. Sheehan: they were held on high cash bills that they just couldn't afford. Amanda M. Sheehan: The next case to discuss within bailing conditions is the Escobar case. This is a recent decision that came down, I don't remember when, in 2022, but this was a highly contested case, very big decision because it changed the world of dangerousness hearings. So hearings to detain an individual pursuant to Section 58-A of Chapter 276.

And essentially what happened was, prior to this, on a charge of assault and battery, dangerous weapon, Amanda M. Sheehan: the Commonwealth could move to hold a person, detain a person, or move for dangerous assistant conditions on that charge. However, Escobar was the case that was ultimately decided and determined that it was not a charge on which the Commonwealth could move for dangerous under 58-A. The reason being, so 58-A allows the Commonwealth to move for dangerousness on three different types offenses. The statute enumerates several of those offenses, Amanda M. Sheehan: and then there are offenses that involve allegations of abuse, or there are offenses that have as an element of them the use of force against another. And Escobar dove into Vieira and Seoni cases that in addition to reading Escobar, you should read as well to really understand the rationale and the reasoning here. But they said that essentially because an assault and battery by a means of a dangerous weapon can be committed recklessly or wantonly, that there is no element of force. Amanda M. Sheehan: And so if it doesn't involve allegations of abuse, it is not a charge on which the Commonwealth can move. A good example of this is on the second slide, where it references an incident of smashing a car window and punching a window or smashing a car window, and it causes the glass to break. And that glass then injures an individual, that glass can be considered a dangerous weapon. It is an assault and battery by means of a dangerous weapon. Amanda M. Sheehan: It was intentional. Pardon me. It was reckless, and maybe not an act that was intended to be caused against the person, but there's that transference that allows for it to be an assault and battery dangerous weapon. But because it was done recklessly and because there is no element of force in that particular charge, it is not a charge that the Commonwealth can move on anymore. So it completely eliminated the ability to do that unless, as I said, there is abuse, allegations of abuse. Amanda M. Sheehan: And the reason that they also did this, they take the categorical approach is because at the stage of a 58-A hearing, it is just a judge who is hearing this. It's not a jury who's hearing the facts. So it's unlike when someone's charged with armed career criminal and a jury has the opportunity to hear the facts of whatever the predicate offenses are, and they are making a determination as a fact finder as to whether or not those are predicates that then allow a person to be convicted. We're not at that phase. A jury is not hearing the facts and making that decision.

Amanda M. Sheehan: And so the court did not feel that a judge at that stage was in a position to do that. So a categorical approach, as opposed to a factual one has to be employed. Lynn S. Feigenbaum: So under bailing, conditions are going to be the imposition of GPS monitoring. We have both Norman and Feliz here, but it's important to note that Norman is conditions of release versus Feliz, which is post-conviction. The case law is very clear that it is a constitutional search under Article 14 and it is a balancing test between a governmental interest versus an individual. Lynn S. Feigenbaum: Right? So under Norman, which deals with pretrial release, I think going back to something that Annie said, it's really important to just sort of understand the facts in which these situations have come up and the facts in which the court is really addressing. And in Norman, Norman had a possession of Class B out of the BMC, the Central Division of the Boston Municipal Court in July of 2015 and he was placed on a GPS monitor with the condition being that he had Lynn S. Feigenbaum: to stay out of Boston. He wasn't from Boston. The judge didn't want him back in Boston. Put a GPS monitor on him in order to determine that. About a month later, there's a home invasion in Medford and the police do not have any leads to start with. So they contact Elmo and they say, hey, is there anybody who was on a GPS monitor in that area? And unfortunately for Mr. Norman, he was in the area and he was put in a photo array and the victim of the home invasion picked him out. Lynn S. Feigenbaum: And after he was charged, he argued that, well, the imposition of my GPS out of the Central Division of the Boston Municipal Court was incorrect. And so I'm moving to suppress this information, which was quite frankly, the only thing that was had at the time. And so therefore, every piece of evidence against Mr. Norman started with that information. Lynn S. Feigenbaum: There was the allowance of that motion to suppress. The Commonwealth appealed on a couple of different grounds, one of which stating, well, Mr. Norman consented to the putting on the GPS, he signed the form. The court found that was not a free and voluntary consent because it was a condition of release. But then the court said, hey, look, there needs to be some limitation on when a GPS can be affixed to an individual Lynn S. Feigenbaum: because we are talking about a constitutional issue here. So the three conditions that are on there ensure the defendant's return for trial, safeguard the integrity of the judicial process, keeping the defendant away from a victim or witness, and then to

ensure the safety of not only victim, but any individual or the community. I just want to note, keep in mind, you know, as a member of the Commonwealth, it's really slim -- sorry. It's a really fine line that you're walking there Lynn S. Feigenbaum: because you want to argue that it's necessary to ensure the safety of not only a victim, but an individual in the community, but you're also not arguing dangerousness. So just beware there as sort of like a practice point of when that may be coming. So those are things you should be considering if you're arguing as a prosecutor. And certainly, if the Commonwealth is not asking for GPS, that meets one of those three things, as a defense attorney, certainly should be arguing against it. Lynn S. Feigenbaum: And the judge should not affix a GPS monitor unless the Commonwealth can meet one of those three factors. In Feliz, which is post-conviction, that also deals with the privacy invasion on an individual versus the Commonwealth's particularized interest. In Feliz, he was convicted of distribution of child pornography. He was automatically under Chapter 265, Section 47, Lynn S. Feigenbaum: required to be fixed with a GPS monitor because the statute says if you have been convicted of these certain enumerated sex offenses, that you will be monitored on GPS. And the court held that the statute is indeed over inclusive because it's not a given that just because you're charged with a certain crime that the governmental interest is going Lynn S. Feigenbaum: to outweigh your personal privacy interest. This is a case from 2019, but the findings were made in February 2018, and I thought that they were very interesting. So I just wanted to share some of those with you all. So, probation, it came in through evidence at the evidentiary hearing that probation was monitoring approximately 5,000 people Lynn S. Feigenbaum: at that time, and 3,400 of them were on GPS. And that meant 34% of the total -- sorry, there were 1,700 alerts, which meant that 34% of the people who were on GPS were getting these numerous, numerous alerts. And that was the problem that Feliz said, look, this is the imposition that it has on me. Lynn S. Feigenbaum: And now we've all -- Feliz actually does a really good job of putting forth how Elmo works, how Elmo is noted that there's some sort of violation, whether somebody goes into an area that they're not supposed to go, a dead battery, not picking up a signal. And Feliz argued, hey, look, I go to work. And then I'm called, I'm told that I have an alert that there's no signal on my GPS, and I need to go outside Lynn S. Feigenbaum: and walk around until they say, OK, yeah,



we have a signal. You can go back inside. And so that balancing test was seen in Feliz's favor because he had a non-contact offense. What the court did not say, speaking of sort of categorical approaches that Amanda referred to earlier, the court did not say non-contact offenses, no GPS contacted offenses, GPS. It certainly did not say that. It said that it's indeed one factor. Lynn S. Feigenbaum: And it also listed some of the particularized interests that the Commonwealth could say. You know, your risk of reoffense, your risk to an individual victim, some other probation violation. And I know that last year, Annie brought up a really good point that I'm going to steal from her now so that she doesn't have the opportunity to say it, but I'm going to just say it before she can is that if your risk of re-offense is to a particular, let's say, family member, your risk of re-offense is to a particular population, and you are no longer exposed to that population, then the Commonwealth can't necessarily say, that you have a risk offense because a lot goes into the experts that decide whether or not somebody is at a risk of re-offense. And if you're at a low risk of re-offense and you're not going to be exposed to that population for which was your victim, that the Commonwealth is going to have a harder time. But the court didn't go so far as to say that just because it's a non-contact offense that the Commonwealth isn't going to be able to meet its burden. Anne Iglehart: Yeah, and I think as a practice point, and I know we've talked about this, Lynn, in prior years, and Amanda and Claudia, please weigh in as well. It can seem like a GPS is obvious. And then when you really start looking at it, looking at data, talking to experts, you may find that you have a better argument than you thought you had. And that's probably true for the Commonwealth as well, that it may not seem like it's reasonably related, and then you think about it and you're like, you know what? Actually, yeah. I think that a lot of us can benefit from reaching out to people on other panels to sort of thinking creatively about these cases. Because if you have someone like what Lynn is saying, if you have, like, an incest offender, a GPS isn't going to do anything if you're saying he can't -- he needs to stay away from schools, but that's not where he's going. It's an offense within the home. You need to think differently about how you monitor that and enforce conditions. And it maybe you have an adult daughter who doesn't have contact with him and doesn't want him near her house. So just because someone's an incest offender doesn't mean the Commonwealth can't get

their GPS. Anne Iglehart: But that you should think about this creatively, because I only started thinking about these arguments and I got on the STP panel, and I think people do sort of work as well. When you start having contact with all these statisticians who do data about reoffending, it opens up a new way of thinking. And I'm sure there are people here who have a civil background or who've worked in family law who are, oh, there's an argument to be made about X, Y, and Z that we're not thinking of. This area seems to me kind of ripe for development, and I think we could all be having more fulsome hearings with more data and sort of like statistics than we currently are doing.