

Mass. Appellate Briefs

Supreme Judicial Court

Oral Argument Guide

Scheduled arguments for April 5-8, 2010

This Guide is based on the public docket, supplemented with detailed outlines from Mass. Appellate Briefs where available. It is published by Jack Cushman, a private appellate attorney, and not affiliated with the Supreme Judicial Court. For more information, see <http://jackcushman.com/mab/>.

Cases for Monday, April 5

SJC-10542: ROBERT FOXWORTH vs. PETER ST. AMAND

Nature: Murder2 • *Case Type:* Civil • *Route:* Direct Entry:
Certified Question

Parties:

Plaintiff/ **Robert Foxworth**
Appellant John M. Thompson, Esquire, Linda J. Thompson, Esquire
Defendant/ **Peter St. Amand**
Appellee Susanne G. Reardon, A.A.G.

**SJC-10548: KENNETH S. ANSIN vs. CHERYL
A. CRAVEN-ANSIN**

Nature: Domestic Relation/Divorce • *Case Type:* Civil • *Route:* Direct
Appellate Review • *Lower Court Judge:* Lucille A. DiLeo, J.

Parties:

Plaintiff/ **Kenneth S. Ansin**

Appellee David H. Lee, Esquire, Kevin M. Corr, Esquire, Jessica
M. Dubin, Esquire

Defendant/ **Cheryl A. Craven-Ansin**

Appellant Susan E. Stenger, Esquire, Nancy R. Van Tine, Esquire,
Robin M. Lynch Nardone, Esquire

Amicus Request:

*“The issue in this divorce matter is the validity of the postnuptial
agreement and whether it may be specifically enforced. See Fogg v.
Fogg, 409 Mass. 531, 536 (1991).”*

**SJC-10625: COMMONWEALTH vs.
FREDERICK PATTON**

Keywords: Criminal Procedure • First Complaint • Hearsay •
Probation • Sex Offenders

Nature: B • *Case Type:* Criminal • *Route:* Sua Sponte Transfer from
Appeals Court • *Lower Court Judge:* Bernadette L. Sabra, J.

Parties:

Plaintiff/ **Commonwealth**

Appellee David B. Mark, A.D.A., Kristen L. Spooner, A.D.A.

Defendant/ **Frederick Patton**

Appellant Rebecca Rose, Esquire

Amicus Request:

“Whether a videotape of a SAIN (Sexual Abuse Intervention Network) interview of a four-year-old child was sufficient evidence to support a revocation of probation; whether the defendant’s motion for a new hearing on the probation revocation was correctly denied after the Commonwealth had filed a nolle prosequi on the indecent assault charge that was the basis for the revocation.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether the judge in a probation revocation hearing properly relied on a videotape of a four-year-old girl in revoking the defendant’s probation, even though she later recanted her testimony.

Facts: The defendant’s probation was revoked after his four-year-old granddaughter reported that he had touched her sexually. The Commonwealth submitted hearsay evidence of the child’s report, including most significantly a videotaped interview of the child conducted several days after the incident. The defendant submitted the report of a private investigator, who claimed that the child had recanted her story in his presence, and had also previously done so with her father and mother.

The judge found that the videotaped interview was credible, and revoked the defendant’s probation for a previous (apparently non-sexual) conviction. The Commonwealth later dropped charges against the defendant, on the grounds that the parents reported that the child had recanted, and refused to grant the Commonwealth access to interview her. The defendant moved for reconsideration of the probation revocation, and was denied.

The defendant failed to appeal either the revocation or reconsideration in a timely manner. He then filed a motion for new trial, arguing that his counsel had been ineffective in failing to appeal.

Issues:

1. Availability of review. In general, a defendant may appeal probation revocation only through timely appeal or motion for reconsideration. Commonwealth v. Ferguson, 63 Mass. App. Ct. 909, 910 (2005). The defendant argues, however, that ineffective assistance of counsel in filing the appeal justifies review; his counsel ignored his request to appeal, and thus was ineffective *per se*. The Commonwealth does not seriously contest the issue, but argues that no appeal would have been successful -- a question that turns on the next points.
2. Reliability of Hearsay. Hearsay is admissible in probation revocation proceedings where it bears substantial indicia of reliability. The defendant argues that this hearsay was not reliable because (1) the judge did not make the findings required in G.L. c. 233, § 81; (2) there was no indication that the child knew the difference between truth and lying, or the significance of her statements; (3) the statements were directly contradicted by the child's later recantations; and (4) elements of the videotape itself were unreliable, such as leading questions and sing-song answers. The Commonwealth responds that G.L. c. 233, § 81 is not the standard for admission of hearsay, that the video itself is not as unreliable as the defendant would have it, and that it was up to the judge to weigh it against contradictory evidence.
3. Reconsideration following nolle prosequi. The SJC, in its request for amicus briefs, asked "whether the defendant's motion for a new hearing on the probation revocation was correctly denied after the Commonwealth filed a nolle prosequi on the indecent assault charge that was the basis for the revocation." In the request for reconsideration, the defendant argued that the nolle prosequi deprived the judge of jurisdiction to hear the revocation, which was founded on the issuance of a criminal complaint. The defendant does not raise that argument in his main or reply brief, and it appears to be waived.

Discussion: This is on first blush a troubling case, where the defendant's probation was revoked on the basis of an allegation that

was later recanted, and a criminal charge that was later dropped. However, on further examination of the available materials it seems much less remarkable -- the Commonwealth presented strong evidence of the child's allegation, the defendant presented weaker evidence of recantation, and the judge performed her customary duty in weighing the evidence.

The Court will have to make new law to the extent that it decides whether review is available by motion for new trial, after defense counsel fails to appeal from a probation revocation. Although it is difficult to see why review should not be available, and the Commonwealth does not present a reason, the Court may simply avoid the issue by ruling that no such appeal would have been availing.

**SJC-10616: SHAWN DRUMGOLD
vs. COMMONWEALTH**

Keywords: Civil Procedure • Criminal Law • Criminal Procedure • Summary Judgment

Nature: Suit Agst Govt Entity • *Case Type:* Civil • *Route:* Direct Appellate Review • *Lower Court Judge:* D. Lloyd Macdonald, J.

Parties:

Plaintiff/ **Shawn Drumgold**
Appellee Rosemary Curran Scapicchio, Esquire, Michael W. Reilly,
Esquire
Defendant/ **Commonwealth**
Appellant Catherine E. Sullivan, A.A.G., Gwen A. Werner, A.A.G.

Amicus Request:

*“The issue presented is the construction of the Massachusetts Erroneous Convictions Act, G. L. c. 258D, specifically the eligibility provisions, including the requirement that plaintiffs show they received judicial relief, vacating or reversing a felony conviction, on grounds that “tend to establish” their actual innocence. This case will be paired for argument with *Guzman v. Commonwealth*, SJC-10563.”*

Mass. Appellate Briefs Analysis:

Question Presented: What proof must a former convict offer at summary judgment to establish that his exoneration qualifies him to sue the Commonwealth for erroneous felony conviction, pursuant to G.L. c. 258D, § 1?

Facts: The plaintiff, Shawn Drumgold, was convicted of a gang-related murder on the testimony of a number of witnesses who claimed to have seen him planning for or en route to and from the shooting. Fourteen years later, a judge vacated Drumgold's conviction and granted a new trial.

Drumgold had moved for new trial on the basis of three witness recantations, and allegedly newly-discovered evidence that another person had committed the murder and that Drumgold had an alibi. The Commonwealth had *also* moved for new trial, on the basis that one witness had mental issues, and another had ties to police, neither of which had been disclosed to Drumgold for cross-examination. The judge granted the Commonwealth's motion, emphasizing that she was not making a finding as to Drumgold's specific grounds for relief, or as to his actual innocence or guilt.

Drumgold sued the Commonwealth pursuant to G.L. c. 258D, § 1, which waives sovereign immunity for incarcerated persons "who have been granted judicial relief ... on grounds which tend to establish the innocence of the individual." A second judge declined to grant the Commonwealth summary judgment on the basis of sovereign immunity, ruling that there was a material issue of fact as to whether

Drumgold's relief "tend[ed] to establish" his innocence.

The Commonwealth pursued an interlocutory appeal, and the SJC granted direct appellate review.

Issues: The central issue of the case is what evidence "tend[s] to establish" innocence, and thus permits the plaintiff to proceed to trial. This is wholly separate from the plaintiff's burden at trial, which will require him to prove actual innocence by clear and convincing evidence. G.L. c. 258D, § 1(C)(vi).

The judge relied on the recent case of Guzman v. Commonwealth, 74 Mass. App. Ct. 466 (2009), which will be argued alongside this case as SJC-10563. In Guzman, the Appeals Court interpreted "tend to establish" to mean "probative of the proposition that the claimant did not commit the crime" -- in other words, the plaintiff need merely show that the evidence improperly included or excluded at trial would have been relevant to the jury's evaluation of guilt.

The Commonwealth argues that: (1) Drumgold did not meet the Guzman standard, because the grounds relied on by the new trial judge were related to procedural fairness rather than substantive innocence; and (2) the Guzman standard itself is overbroad, failing to achieve the gatekeeping role intended by the legislature.

Discussion: The Commonwealth's proposed distinction between procedural and substantive grounds for new trial is not persuasive, at least in this case. The new trial was granted because the Commonwealth failed to disclose viable grounds for cross-examination of witnesses. The reason nondisclosure was "procedurally unfair" was that it affected the jury's perception of Drumgold's *actual* innocence. There may be cases where a person is released from incarceration on grounds unrelated to innocence -- such as evidence obtained by an unconstitutional search -- but this is not one.

The challenge to Guzman itself is more interesting. The central question is whether the judge should evaluate the weight of the plaintiff's evidence at summary judgment, when he or she decides

whether the basis for overturning the conviction "tend[s] to establish" innocence. The court in Guzman put the emphasis on "tend," holding that the contested evidence must affect the balance in the question of the defendant's guilt, but not actually tip the scale. The Commonwealth would put the emphasis on "establish," and require the contested evidence to tip the scale and establish the defendant's innocence.

This question is essentially a matter of policy -- should the Court favor the policy that waivers of sovereign immunity are construed narrowly, or the policy that issues of fact are not decided at summary judgment? I am inclined to think that the Guzman approach is more workable, and the question of whether evidence establishes innocence is better left for trial. If the Legislature had intended the plaintiff to first prove innocence to one standard before the judge, and then to a higher standard before the jury, it would have spelled out that procedure.

**SJC-10563: HUMBERTO GUZMAN
vs. COMMONWEALTH**

Nature: Miscellaneous • *Case Type:* Civil • *Route:* Further Appellate Review • *Lower Court Judge:* Diane M. Kottmyer, J.

Parties:

Plaintiff/ **Humberto Guzman**
Appellant Steven J. Rappaport, Esquire
Defendant/ **Commonwealth**
Appellee Catherine E. Sullivan, A.A.G.

Cases for Tuesday, April 6

SJC-10568: COMMONWEALTH vs. WAYNE MIRANDA

Keywords: Constitutional Law • Criminal Procedure •
Professional Responsibility

Nature: Murder2 • *Case Type:* Criminal • *Route:* Direct Appellate
Review • *Lower Court Judge:* Eleanor S. Garsh, J.

Parties:

Plaintiff/ **Commonwealth**

Appellee David J. Gold, A.D.A., Rachel Eisenhaure, A.D.A., David
B. Mark, A.D.A.

Defendant/ **Wayne Miranda**

Appellant Robert F. Shaw, Jr., Esquire

Mass. Appellate Briefs Analysis:

Question Presented: Whether a witness to a crime can be compensated for their testimony by a third party, contingent on obtaining an indictment or conviction.

Facts: The defendant was convicted of second-degree murder after two witnesses implicated him in a nighttime shooting in New Bedford. The witnesses were compensated by the New Bedford Chamber of Commerce for their testimony: each received \$3,000 for grand jury testimony leading to an indictment, and another \$2,000 for trial testimony leading to conviction. Payment was conditioned on certification by the district attorney's office. The witnesses, who were the defendant's neighbors, were not implicated in the killing.

Issues: The defendant argues that New Bedford's program constitutes payment for favorable testimony of a fact witness, and thus violates a

number of rules. In particular, (1) New Bedford's program violates the Rules of Professional Conduct 3.4(g), which bars payment to witnesses conditioned on the outcome of a case; (2) plea agreements contingent on conviction violate the test of fundamental fairness, *Commonwealth v. Ciampa*, 406 Mass. 257, 261 (1989), with other jurisdictions in accord; and (3) G.L. c. 268A, § 3 criminalizes payment for testimony under oath. The defendant therefore requests a new trial, with testimony by the two witnesses excluded.

Discussion: The New Bedford program, as described by the defendant, presents a straightforward case of payment conditioned on favorable testimony. While the Court is unlikely to go so far as to rule that participation in the program violates the criminal code, the defendant has a strong claim that the testimony against him should be excluded.

The defendant is careful to present a narrow challenge against cash payment for testimony, contingent on conviction. The challenge raises broader issues, however. Should statements be excluded, for example, if payment is conditioned on arrest, but the same witness is later called at trial? Although the Court is unlikely to reach such questions in this case, it may well raise issues regarding a range of community policing programs in the future.

SJC-10586: GLOBAL NAPS, INC. vs. MARTHA AWISZUS & others

Keywords: Administrative Law • Employment • Legal Malpractice • Loss of Chance • Maternity Leave

Nature: Malpractice: nonmedical • *Case Type:* Civil • *Route:* Direct Appellate Review • *Lower Court Judge:* Raymond J. Brassard, J.

Calendar Notes: Atty Goodman (phv NY) will argue for appellees.

Parties:

Plaintiff/ **Global Naps, Inc.**
Appellant Evan M. Fray-Witzer, Esquire, John J. Barter, Esquire
Defendant/ **Martha Awiszus,** **Jackson Lewis LLP,**
Appellee **Winokur, Serkey &** **David Kerman**
 Rosenberg PC, Winokur, David J. Kerman, Esquire
 Winokur, Serkey &,
 Winokur, Winokur,
 Serkey &
 William C. Saturley,
 Esquire, Joseph Callanan,
 Esquire

Amicus Request:

“Whether a Superior Court judge properly accorded substantial deference to a “guideline” published by the Massachusetts Commission Against Discrimination that requires an employer to provide written notice to a female employee who is absent from work by reason of childbirth if the employer does not plan to guarantee maternity leave benefits beyond the eight weeks specified in the Massachusetts Maternity Leave Act, G. L. c. 149, s. 105D.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether employers are required to comply with the Mass. Maternity Leave Act (MMLA) for leaves of over eight weeks, if they do not tell employees otherwise.

Facts: Global NAPS (Global) told an employee that she could take eight weeks of maternity leave, or ten weeks if she gave birth by C-section. The employee gave birth by C-section. After her ninth week of maternity leave, Global terminated her employment for failure to return to work.

The employee filed a claim pursuant to the MMLA, and won damages of approximately \$1 million. Global's attorneys failed to file a timely appeal on the issue of liability. In the present case, Global has sued

the attorneys for malpractice.

Issues:

MMLA claim. The attorneys' liability for negligence turns on whether Global's appeal would have been successful if filed. The issue is therefore whether the employee had a valid claim under the MMLA. (The employee did not file under other theories, such as contract or estoppel.)

The MMLA itself requires that a person who is absent from employment “for a period not exceeding eight weeks for the purpose of giving birth” must be restored to employment. G.L. c. 149, § 105d. However, the Mass. Commission Against Discrimination has issued a guideline stating that “An employer may grant a longer maternity leave than required under the MMLA. If the employer does not intend for full MMLA rights to apply to the period beyond eight weeks, however, it must clearly so inform the employee in writing prior to the commencement of the leave.” The trial judge extended MMLA rights and remedies beyond eight weeks on the basis of that guideline, apparently holding that the guideline filled a gap in the MMLA where the statute left unclear what terms would apply to maternity leave over eight weeks. Global argues that the statute is perfectly clear that it applies only to leave lasting less than eight weeks.

Loss of chance. Global argues a second, novel cause of action – that its attorneys' negligence deprived it of the chance to settle for a lower figure prior to appellate resolution. Loss of chance has been recently recognized in the medical malpractice context in Massachusetts. *Matsuyama v. Birnbaum*, 452 Mass. 1 (2008); *Renzi v. Paredes*, 452 Mass. 38 (2008). Global hopes (but wisely does not place primary reliance on the hope) that the Court will extend that theory of harm to legal malpractice claims as well.

Discussion: MCAD's position is likely wise as policy; as counsel for the attorneys observed, if an employer is not required to inform employees of their diminished rights when taking more than eight

weeks of leave, the employer could largely circumvent the MMLA by encouraging the employee to take extended leave and then firing her once her eight weeks expired – as indeed happened here. However, it is not at all clear that MCAD has the power to extend statutory damages beyond eight weeks on that basis – particularly in a “guideline” as opposed to a “regulation.”

Although it does not raise the same constitutional issues, this case may foreshadow another argument relating to MCAD's interpretation of the MMLA – its recent announcement that it would apply the MMLA to male employees, even though the statute's language applies only to females.

**SJC-10576: CITY OF SPRINGFIELD vs.
MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE
& another**

Nature: c. 25, s. 5 • *Case Type:* Civil • *Route:* Direct Entry: Single Justice Reservation & Report • *Lower Court Judge:* Francis X. Spina, J.

Calendar Notes: Atty Caldwell (phv--Dist. of Col.) will argue for Comcast.

Parties:

Plaintiff/ **City of Springfield**
Appellant Harry P. Carroll, Esquire, Edward M. Pikula, Esquire
Intervener/ **Comcast Cable Communications,**
Appellee Paul D. Abbott, Esquire, Jennifer Alcares, Esquire
Defendant/ **MA Dept. of Telecommunications & Cable**
Appellee Thomas A. Barnico, A.A.G.

Amicus Request:

“Whether a decision of the Department of Telecommunications and Cable (DTC) with respect to cable rates is reviewable in this court or is preempted by Federal law; whether a DTC decision impaired Springfield’s cable contract, exceeded DTC’s authority, violated due process, or was otherwise not in accordance with law.”

**SJC-10589: BULLDOG INVESTORS GENERAL &
others vs. SECRETARY OF
THE COMMONWEALTH**

Keywords: Administrative Law • Civil Procedure • Constitutional Law • First Amendment • Personal Jurisdiction • Securities

Nature: Administrative law • *Case Type:* Civil • *Route:* Sua Sponte Transfer from Appeals Court • *Lower Court Judge:* Judith Fabricant, J.

Parties:

<i>Plaintiff/ Appellant</i>	Bulldog Investors General Andrew Good, Esquire, Philip G. Cormier, Esquire	Opportunity Partners, L.P., Full Value Partners, L.P., Opportunity Income Plus Fund, LP, Kimball & Winthrop, Inc., Full Value Advisors, LLC, Spar Advisors, LLC, Phillip Goldstein, Steven Samuels, Andrew Dakos, Rajeev Das Andrew Good, Esquire
<i>Defendant/ Appellee</i>	Secretary of the Commonwealth Pierce O. Cray, A.A.G.	

Amicus Request:

“Whether the Secretary of the Commonwealth is authorized to exercise personal jurisdiction over a non-resident in a regulatory proceeding under G. L. c. 110A, the Massachusetts Uniform Securities Act.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether the Secretary of the Commonwealth has the power to impose a fine on out-of-state persons who market unregistered securities to a Massachusetts resident.

Facts: Bulldog, an out-of-state company, maintained a website offering information on its hedge funds, which were unregistered securities. An unregistered security is essentially one for which detailed disclosure statements have not been filed with state or Federal agencies. A Massachusetts resident requested information from Bulldog via a web form, and a Bulldog partner replied via email with further materials, knowing the recipient's location. (In an interesting twist, the "Massachusetts resident" was apparently an agent of a rival seeking to lure Bulldog into a violation.)

G.L. c. 110A, § 301, forbids offering of unregistered securities unless the offeror has ensured that the potential investor is sufficiently sophisticated. The Enforcement Section of the Securities Division of the Secretary of the Commonwealth found in an administrative proceeding that Bulldog's emailed materials were an “offer,” and issued a \$25,000 fine. Bulldog's c. 30A appeal was denied by a judge of the Superior Court. Bulldog also filed a § 1983 action challenging the enforcement on First Amendment grounds, which apparently is still pending.

Issues:

Personal Jurisdiction. Bulldog argues that the Secretary cannot exercise jurisdiction over out-of-state actors who send a single email to Massachusetts, either under the Secretary's powers in G.L. c. 110A, § 406 et seq., or constitutionally under the due

process clause of the Fourteenth Amendment. As to the latter, Bulldog argues that it has not purposefully availed itself of the Massachusetts forum, sufficient to anticipate liability in the state. The Secretary responds that, where Bulldog was on notice that its email was going to a Massachusetts resident and was barred by Massachusetts law, Bulldog has sufficient contacts with the forum with respect to that email.

“Offer” definition. Bulldog argues that it did not make an offer to the Massachusetts resident. The Secretary responds that the statutory definition of “offer” includes a “solicitation of an offer to buy,” G.L. c. 110A, § 401(i)(2).

First Amendment. Bulldog argues that, whether its information was commercial or noncommercial speech, government regulation of that speech should be strictly evaluated, and that here, banning of the speech at issue was not the least restrictive means to accomplish the government's goal. The Secretary responds that the issue is better resolved in Bulldog's § 1983 action, but in any event that courts apply little or no scrutiny to laws requiring disclosure of investor information.

Discussion: This case presents a test of the state's ability to regulate marketing communications from out-of-state vendors. While Bulldog's communication lies at the minimal end of in-state action, involving a single email sent at the instigation of a competitor, the general principal that the state can require disclosures in such communications seems unremarkable.

SJC-10541: COMMONWEALTH vs. ERIC SNOW & another

Nature: Superintendence, c211, s3 • *Case Type:* Criminal • *Route:* Direct Entry: Appeal from Single Justice Order/Judgment • *Lower Court Judge:* Margot Botsford, J.

Parties:

Plaintiff/ **Commonwealth**
Appellant John E. Bradley, A.D.A.
Defendant/ **James Winquist** **Eric Snow**
Appellee Stephen Neyman, Esquire Robert S. Sinsheimer,
Esquire

SJC-10536: IN RE: WILLIAM H. SHAUGHNESSY

Nature: Bar discipline case • *Case Type:* Civil • *Route:* Direct Entry:
Appeal from Single Justice Order/Judgment • *Lower Court Judge:*
Margot Botsford, J.

Parties:

Plaintiff/ **William H. Shaughnessy**
Appellant Philip D. Moran, Esquire
Defendant/ **Bar Counsel**
Appellee Susan A. Strauss Weisberg, Ass't Bar Counsel, Constance
Vecchione, Bar Counsel

SJC-10612: IN RE: NICHOLAS J. ELLIS

Nature: fraud • *Case Type:* Civil • *Route:* Direct Entry: Single Justice
Reservation & Report • *Lower Court Judge:* Robert J. Cordy, J.

Calendar Notes: Reserve Case

Parties:

Plaintiff/ **Bar Counsel**
Appellant Constance Vecchione, Bar Counsel, Nancy E. Kaufman,
Ass't Bar Counsel
Defendant/ **Nicholas J. Ellis**
Appellee J.W. Carney, Jr., Esquire

Cases for Wednesday, April 7

SJC-10647: COMMONWEALTH vs. RALPH GOODWIN

Keywords: Constitutional Law • Criminal Law • Probation • Sex Offenders

Nature: Superintendence, c211, s3 • *Case Type:* Criminal • *Route:* Direct Entry: Single Justice Reservation & Report • *Lower Court Judge:* Margot Botsford, J.

Parties:

Plaintiff/ **Commonwealth**
Appellant Bethany Stevens, A.D.A.
Defendant/ **Ralph Goodwin**
Appellee Beth L. Eisenberg, Esquire, Jeannine E. Mercure, Esquire

Amicus Request:

“At issue is whether a judge has authority to impose a GPS monitoring device as an additional condition of probation in a probation modification proceeding. Argument is scheduled for April 7, 2010.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether a judge can modify a sex offender's probation to require him to wear a GPS tracking device, absent a probation violation.

Facts: The defendant began the probationary portion of his sentence for a set of sex offense convictions in 2009, after serving 15 years in prison and another four years committed as a sexually dangerous person. Although he committed no probation violation, the

Commonwealth sought modification of the terms of his probation (apparently concerned that he was not taking his medication, among other issues). The judge granted various modifications, but refused to order the defendant to wear a GPS tracking device.

The Commonwealth appealed to the single justice, and the single justice reserved and reported the case to the full bench.

Issues: The judge held that she was barred from imposing GPS monitoring by *Commonwealth v. Cory*, 454 Mass. 559 (2009), which holds that mandatory GPS monitoring is punitive in effect, and therefore cannot not be applied to offenses committed prior to the statute's enactment. The judge reasoned that GPS was therefore punitive generally, and she was permitted to impose punitive terms of probation only in original sentencing or in response to a violation, citing *Commonwealth v. Chirillo*, 53 Mass. App. Ct. 75, 80 (2001).

The Commonwealth argues that *Cory* stands only for the proposition that *mandatory* GPS monitoring triggered by a conviction is punitive, and that GPS monitoring triggered by an individual evaluation is not punitive. The defendant argues that *Cory* stands for the proposition that GPS monitoring is always punitive in effect, and that the mandatory nature of the monitoring at issue in *Cory* was relevant only to an ex post facto balancing test.

SJC-10663: IMPOUNDED CASE

Case Type: Criminal • *Route:* Direct Entry: Single Justice Reservation & Report • *Lower Court Judge:* Margot Botsford, J.

Parties:

*Respondent/***Commonwealth**

Appellee Eitan Goldberg, A.D.A.

Party Name **Amicus**

Impounded David F. Segadelli, Esquire

Petitioner/Appellant

Barbara Kaban, Esquire,
Brian Sullivan, Esquire

**SJC-10623: ONEX COMMUNICATIONS
CORPORATION vs. COMMISSIONER
OF REVENUE**

Keywords: Tax

Nature: Taxation • *Case Type:* Civil • *Route:* Further
Appellate Review

Parties:

Plaintiff/ **Onex Communications Corporation**
Appellee William E. Halmkin, Esquire, Richard L. Jones, Esquire,
Sarah Dawn Wellings, Esquire
Defendant/ **Commissioner of Revenue**
Appellant Kenneth W. Salinger, A.A.G.

Mass. Appellate Briefs Analysis:

Question Presented:

Whether Onex was a manufacturing corporation pursuant to G.L. c. 63 § 42B, and therefore entitled to a sales and use tax exemption, during a period when it was developing specifications for a microchip but had not yet ordered it manufactured.

Facts: Between August 1, 1999 and September 21, 2001 (the “audit period”), Onex designed the hardware and software of a microchip and related systems. The result was a blueprint containing technical specifications of hardware and software components and detailed manufacturing instructions.

Since Onex lacked the sophisticated equipment necessary to produce the microchip internally, Onex outsourced production to IBM. Under the contract, IBM did not have any input into the design of the microchip and had to follow the exact instructions of the blueprint. Onex directed IBM in all facets of production and

manufactured microchips became Onex's property. Onex did not commercially distribute the microchips until after the audit period, in 2002.

During the audit period, Onex made purchases totaling \$2,723,510 on which no sales and use tax was paid. The Commissioner of Revenue assessed unpaid tax, Onex appealed, and the Appellate Tax Board ruled that no tax was owed.

Issues: A corporation that qualifies as either a "manufacturing corporation" or a "research and development corporation" under G.L. c. 63 § 42B is exempt from sales and use tax on purchases used for research and development within the Commonwealth. See G.L. c. 64I § 7(b) and c. 64H §§ 6(r) and (s).

1. Qualification as a Manufacturing Corporation. The Appellate Tax Board determined that Onex was a manufacturing corporation, even though commercial production did not begin until after the audit period, because creation of "technical blueprints capable of minutely directing the manufacture of the [microchips]" was an essential and integral part of the overall manufacturing process. The Commissioner argues that research and development purchases by a "manufacturing corporation" are exempt from sales and use tax only if the corporation is also engaged in actual manufacturing at the time of the purchase.
2. Qualification as a Research and Development Corporation. A foreign corporation that derives more than two-thirds of its receipts, or that incurs more than two-thirds of its expenditures, from research and development activities within the Commonwealth is a research and development corporation. If the SJC agrees that Onex was not a manufacturing corporation, the Commissioner argues that the case must be remanded to decide whether Onex's venture capital funding and bartered services qualify as "receipts."

Discussion:

Although prototypes were developed during the audit period, commercial production did not occur until afterward. The regulations specifically provide that "[m]arket research, research and development, and design and creation of a prototype, although prerequisites to manufacturing, are not manufacturing." 830 C.M.R. § 58.2.1(6)(b)(5). Therefore, it is unlikely that the SJC will affirm the Board's conclusion that Onex is a manufacturing corporation during the audit period. The Commissioner is likely correct that the SJC must remand the case to the Board to make the necessary findings of fact as to whether Onex qualifies as a research and development corporation.

Retroactive qualification as a manufacturing corporation has implications beyond the area of sales and use tax. For example, the Commissioner argues that the Board's decision could retroactively exempt corporations from property tax, causing disruption to the annual assessment scheme in a manner not anticipated by the Legislature.

**SJC-10573: COMMONWEALTH vs.
JOHN AGUIAR**

Nature: Superintendence, c211, s3 • *Case Type:* Criminal • *Route:* Direct Entry: Appeal from Single Justice Order/Judgment • *Lower Court Judge:* Robert J. Cordy, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Kenneth E. Steinfield, A.D.A.
Defendant/ **John Aguiar**
Appellant J.W. Carney, Jr., Esquire

**SJC-10618: MASSACHUSETTS APPEALS COURT
vs. PATRICIA A. WEBER**

Nature: Superintendence, c211, s3 • *Case Type:* Civil • *Route:* Direct
Entry: Appeal from Single Justice Order/Judgment • *Lower Court*
Judge: Francis X. Spina, J.

Parties:

Plaintiff/ **Massachusetts Appeals Court**
Appellee Peter Sacks, A.A.G., Thomas A. Barnico, A.A.G.
Defendant/ **Patricia A. Weber**
Appellant Frederick T. Golder, Esquire

Cases for Thursday, April 8

SJC-08696: COMMONWEALTH vs. MARK McCRAY

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Charles M. Grabau, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Kevin J. Curtin, A.D.A., James W. Sahakian, A.D.A.,
Heather E. Hall, A.D.A.
Defendant/ **Mark McCray**
Appellant John H. LaChance, Esquire

SJC-10365: COMMONWEALTH vs. JESSICA DEANE

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Patrick F. Brady, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Anna E. Kalluri, A.D.A.
Defendant/ **Jessica Deane**
Appellant Chauncey B. Wood, Esquire

**SJC-10472: COMMONWEALTH vs.
JESUS GAMBORA**

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Constance M. Sweeney, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Thomas H. Townsend, A.D.A., Jane Davidson Montori,
A.D.A.
Defendant/ **Jesus Gambora**
Appellant Stewart T. Graham, Jr., Esquire

**SJC-10435: COMMONWEALTH vs.
CHRISTOPHER BANVILLE**

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* John P. Connor, Jr., J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Steven E. Gagne, A.D.A.
Defendant/ **Christopher Banville**
Appellant Chrystal A. Murray, Esquire

**SJC-10636: COMMONWEALTH vs.
THOMAS PORRO**

Keywords: Criminal Law • Criminal Procedure • Jury Instructions •
Lesser Included Offense

Nature: Crim: nonhomicide nondrug • *Case Type:* Criminal • *Route:*
Further Appellate Review - Limited • *Lower Court Judge:* Linda E.

Giles, J.

Calendar Notes: Reserve Case

Parties:

Plaintiff/ **Commonwealth**

Appellee Paul B. Linn, A.D.A.

Defendant/ **Thomas Porro**

Appellant Charles W. Rankin, Esquire, Jonathan P. Harwell,
Esquire

Mass. Appellate Briefs Analysis:

Question Presented: Whether a defendant may be retried on the lesser included offense of assault with a deadly weapon, where the jury should not have been instructed on that offense in the first trial.

Facts: The defendant and a motorcyclist, Frank Merlonghi, shouted threats and obscenities at each other while driving down a two-lane road. At one point the defendant removed his service firearm (he was a customs enforcement official) and allegedly pointed it at Merlonghi. The fight ended a short time later when the defendant swerved sharply, colliding with Merlonghi's motorcycle. Merlonghi was seriously injured.

The defendant was charged with assault and battery with a dangerous weapon ("battery") for striking Merlonghi with his car, and assault with a dangerous weapon ("assault") for threatening Merlonghi with his firearm. The defendant's theory of the case was that he did not realize that Merlonghi was still driving near the rear of his car when he swerved. The jury convicted him of the lesser included offense of assault on the first charge, and acquitted on the second.

The Appeals Court granted a new trial. 74 Mass. App. Ct. 676. The SJC granted the defendant further appellate review, limited to the question of whether retrial is permissible.

Issues: The jury were not initially instructed on assault as a lesser included offense of battery; they were, however, instructed on assault with respect to the firearm. After deadlocking as to the question of battery with the car, they asked the judge whether they could convict on assault as a lesser included offense. The judge instructed that they could, using the same law he had given them as to the alleged firearm assault.

The defendant argued before the Appeals Court that this instruction was improper because: (1) his counsel did not have the opportunity to discuss the lesser included offense at closing argument, depriving him of his right to counsel; (2) assault may be accomplished either by attempted battery *or* by intentionally placing the victim in fear of battery, and the second is not a lesser included offense of battery; and (3) there was testimony that his car had earlier swerved toward Merlonghi and then swerved away, so it was possible that the jury convicted him for that unindicted act, rather than the actual battery. Finally, the defendant argued that there was no evidence from which the jury could find attempted but not actual battery; the jury should not have received the instruction in the first place, so retrial was barred.

The Appeals Court agreed, as to (3), that the jury could have convicted on unindicted conduct, and the conviction was improper. However, the Appeals Court found that the jury might properly have convicted the defendant of attempted battery for the collision itself, and so ordered a new trial.

Discussion: The fundamental question is whether a jury could properly convict of assault, as opposed to assault and battery, on an indictment charging that the defendant's car actually collided with and caused injury to the victim. The defendant argues effectively that an instruction should not be given on a lesser included offense where there is no basis for acquitting of the greater offense yet convicting of the lesser one. The logic would run like this: if the additional elements of battery over attempted battery were undisputedly established, and

the jury implicitly acquitted the defendant of battery, then the jury must necessarily have found insufficient evidence for one of the elements of attempted battery, and retrial would constitute double jeopardy.

Neither the Appeals Court nor the Commonwealth seriously addressed that argument, and on the available record it seems persuasive.