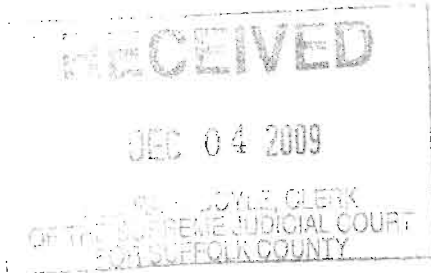


COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. 2009-0599



COMMONWEALTH

v.

RALPH GOODWIN

**DEFENDANT'S OPPOSITION TO COMMONWEALTH'S PETITION
FOR EXTRAORDINARY RELIEF PURSUANT TO G.L. C. 211, § 3**

G. L. C. 211, § 3 IS NOT THE PROPER VEHICLE FOR THE COMMONWEALTH TO SEEK REVIEW OF THE JUDGE'S ORDER IN THIS CASE AND THE COMMONWEALTH'S PETITION SHOULD BE DISMISSED

While the Supreme Judicial Court has the power, under G.L. c. 211, § 3 over all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly available, in this case, the Commonwealth has an adequate remedy available in the normal course of appeal. The Commonwealth relies on Commonwealth v. Pelletier, 449 mass. 392, 395 (2007), in suggesting that G.L. c. 211, § 3 is the proper vehicle to seek review of the sentencing judge's action. However, the posture of this case is quite different from the posture of Pelletier. In Pelletier, the Commonwealth sought review of the actions of the plea judge who denied the Commonwealth the right to introduce evidence on the subsequent offense portion of a criminal complaint. It was not a review of the judge's actions on sentencing.

The Supreme Judicial Court exercises its general superintendence power sparingly, and only when the party seeking relief demonstrates both error that cannot be remedied under the ordinary review process and a substantial claim of violation of substantive rights. "We exercise our general superintendence power under G.L. c. 211, § 3 in exceptional circumstances only" Care and Protection of Zita, 455 Mass. 272, 274 (2009).

The Commonwealth has a right of appeal of the final order of the court. They are not alleging error that cannot be remedied under the ordinary review process, nor are they claiming a substantial claim of violation of substantive rights. The judge conducted a full hearing on the merits of the Commonwealth's request and afforded them the opportunity to offer any new evidence or information (an opportunity that the Commonwealth declined to exercise, relying instead on resubmitting only information that had been previously provided to and considered by the sentencing judge in 1990).

THE COMMONWEALTH HAS CONFLATED TWO SEPARATE AND
DISTINCT ISSUES: WHAT CONSTITUTES PUNISHMENT
AND WHAT CONSTITUTES AN EX POST FACTO LAW

The Commonwealth argues that Commonwealth v. Cory, 454 Mass. 559 (2009) stands for the proposition that the discretionary imposition of GPS monitoring in an individual case is not considered punishment. This argument is, in fact, completely contrary to the holding in Cory. In its extensive discussion of Mendoza-Martinez factors, the Court states "There is no context

other than punishment in which the State physically attaches an item to a person, without consent and without consideration of individual circumstances, that must remain attached for a period of years (17) and may not be tampered with or removed on penalty of imprisonment. Such an imposition is a serious affirmative constraint.(18)" Cory, at 570.

In footnote (18), the Court goes on to elaborate on the punitive effect of GSP monitoring. "To the extent that the ankle bracelet portion of the GPS device is potentially visible to the public, it may have the additional punitive effect of exposing the offender to persecution or ostracism, or at least placing the offender in fear of such consequences. Cf. Smith v. Doe, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting) (affirmative restraint established by "profound humiliation and community-wide ostracism" of sex offender registry); Note, Who Are the People in your Neighborhood? Due Process, Public Protection, And Sex Offender Notification Laws, 74 N.Y.U.L. Rev. 1451, 1467-1469 (1999) (describing acts of violence against registered sex offenders). Cf. Also N. Hawthorne, The Scarlet Letter 58 (1871) ("Ah, but...let her cover the mark as she will, the pang of it will always be in her heart")"

The Commonwealth further argues that the SJC held that mandatory imposition of GPS monitoring pursuant to G.L. c. 265 §47 (the Commonwealth actually references G.L. c. 276, § 47) was punishment precisely because "it applies without exception to


convicted sex offenders sentenced to a probationary term, regardless of any individual determination of their dangerousness or risk of reoffense." Cory, at 562. However, what the Court actually says is that "The sanction appears excessive, however, to the extent that it applies without exception to convicted sex offenders..."

The Commonwealth's reliance on the final paragraph of the Cory opinion (before the Court's conclusion) and the reference to the discretionary imposition of GPS monitoring is misplaced. The SJC refers to **sentencing judges** (emphasis added) having the discretionary power to impose GPS monitoring as a condition of probation. In this case, they are seeking a modification of the defendant's probationary terms, absent an appropriately filed revise and revoke motion, an allegation of a violation of probation, or a change in circumstances, and not that the GPS monitoring be imposed by the sentencing judge, at the time of sentencing.

Finally, the Commonwealth argues that the discretionary imposition of GPS monitoring does not constitute punishment. The Commonwealth is substituting punishment for ex post facto law. The imposition of GPS monitoring in the exercise of judicial discretion does not implicate ex post facto considerations, however, the Court has clearly stated that it is punishment. In her order of October 9, 2009, Superior Court Justice Kathe M. Tuttmann acknowledges that a judge in certain circumstance has

discretion to impose a GPS device as a condition of probation. But "in the posture of the present case, however, where the defendant has not violated any of the terms or conditions of his probation, it would be impermissible to add a probationary condition that, as our Supreme Judicial Court has held, amounts to punishment. Cory, supra."

Respectfully submitted:
Ralph Goodwin
By his Attorney,


Jeannine E. Mercure
BBO# 559323
1000 Cambridge Street, Suite A
Cambridge, Massachusetts 02141
(617) 868-7005

Dated: September 8, 2009

CERTIFICATE OF SERVICE

I, Jeannine E. Mercure, hereby certify and affirm that I have served a true copy of the within Notice of Appeal on the Commonwealth by delivering a copy of same to the Middlesex District Attorneys Office via first class mail this 3rd day of December, 2009.


Jeannine E. Mercure

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2009-0599

Middlesex Superior Court
No. MICR-1990-0607

COMMONWEALTH

vs.

RALPH GOODWIN

RESERVATION AND REPORT

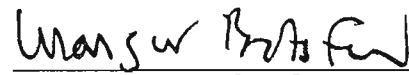
This case came before the Court, Botsford, J., presiding, on the Commonwealth's Petition for Relief pursuant to G.L. c. 211, sec. 3. The issue presented is whether a judge has the authority to impose a global positioning system (GPS) monitoring device as an additional condition of probation in a probation modification proceeding.

I reserve and report this case without decision for determination by the Supreme Judicial Court for the Commonwealth. The case shall be reported on the following record:

- 1) the Commonwealth's Petition for Relief pursuant to G.L. c. 211, sec. 3, along with attachments;
- 2) the Defendant's Opposition;
- 3) the docket sheet in SJ-2009-0599; and
- 4) this Reservation and Report.

The Commonwealth shall be designated as the appellant. The defendant shall be designated as the appellee. The case shall be

heard during the April 2010 sitting. The parties shall consult with the Clerk of the Supreme Judicial Court for the Commonwealth regarding the service and filing of briefs.



Margot Botsford
Associate Justice

Entered: January 19, 2010