CHAPTER 44

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Postconviction Remedies

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§ 44.1 INTRODUCTION

After a finding of guilty is entered and a sentence is imposed, a defendant may pursue a number of avenues in seeking relief from the conviction and sentence. This section will examine postconviction remedies other than direct appeal, which is discussed *infra* in ch. 45.[1] These remedies include: (1) post-trial motions, under Mass. R. Crim. P. 25(b), for entry of a judgment of acquittal, a finding of guilt on a lesser included offense, or a new trial; (2) motions to revise and revoke the sentence, under Mass. R. Crim. P. 29, which must be filed within sixty days of imposition of sentence or certain actions by the appellate court; (3) motions for release from unlawful restraint, under Mass. R. Crim. P. 30(a); (4) motions for a new trial, under Mass. R. Crim. P. 30(b); and (5) petitions to the federal courts seeking issuance of a writ of habeas corpus, pursuant to 28 U.S.C. §§ 2241–2255.

[1] Also discussed *infra* in ch. 45 are the statutory provisions relating to appeals from sentences imposed by the superior court. G.L. c. 278, §§ 28A–28D.

§ 44.2 POST-TRIAL MOTIONS UNDER RULE 25(B)

Mass. R. Crim. P. 25(b) empowers the trial judge, following a guilty verdict by a jury, to grant relief ranging from entry of an acquittal to ordering a new trial.[2] The trial court has broad authority to order such relief.[3] The following section discusses the range of relief available and the limits on the trial judge's generally broad discretion to grant relief from inappropriate jury verdicts.

§ 44.2A. RELIEF AVAILABLE

Rule 25(b) applies only to jury trials.[4] Subparagraph 25(b)(1) authorizes the trial judge to postpone ruling on a Rule 25(a) motion for a required finding of not guilty made at the close of all the evidence until after the case is submitted to the jury. The judge may decide the motion before or after the jury returns its verdict or is discharged without reaching a verdict. Where a Rule 25(a) motion is raised at the close of the prosecution's case, the trial court may permit the Commonwealth to reopen its case for the purpose of augmenting the record [5]

The first sentence of Rule 25(b)(2) allows the defendant to *renew a Rule 25(a) motion* for a required finding within five days after the jury is discharged and to move, in the alternative, for a new trial.

The second sentence of Rule 25(b)(2) authorizes the judge, on motion, to set aside a guilty verdict and order a new trial,[6] to order entry of a finding of not guilty, or to order entry of a finding of guilt of a lesser included offense.[7]

In most cases a separate motion pursuant to Rule 25(b) should be filed after a guilty verdict rather than simply renewing an earlier-filed motion for a required finding of not guilty.[8] Unless the defendant chooses an all-or-nothing approach and prefers to

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[2] Mass. R. Crim. P. 25, along with the other Rules of Criminal Procedure, was adopted by order of the Justices of the S.J.C., to take effect on July 1, 1979. 378 Mass. 842, 896. The substance of Rule 25, however, was given legislative effect in G.L. c. 278, § 11, which provides that if a jury returns a guilty verdict "the judge may on a renewed motion for a verdict of not guilty pursuant to the Massachusetts Rules of Criminal Procedure set aside the verdict and order a new trial, or order the entry of a finding of guilty on any offense included in the offense charged in the indictment or complaint." This statutory provision became effective on the same date that the Rules of Criminal Procedure came into effect. *See* St. 1979, c. 344, § 43A and § 51.

[3] The S.J.C. has recognized that the trial court is vested with "broad postconviction authority" but has counseled that such authority should be used "sparingly." Commonwealth v. Woodward, 427 Mass. 659, 667 (1998).

[4] There is no analogous rule applying to Rule 25(b) in a bench trial. *See* Commonealth v. Smith, 56 Mass. App. Ct. 1117 (2002) (unpublished disposition).

[5] Commonwealth v. Hurley, 455 Mass. 53, 69 (2009) (Commonwealth permitted to reopen case to introduce evidence of identification of defendant as perpetrator).

[6] The trial court in Commonwealth v. Fowler, 425 Mass. 819, 824 (1997), sua sponte reconsidered a timely filed motion under Rule 25(b)(2) after sentencing, and ordered a new trial. The S.J.C. vacated the trial court order finding it to be erroneous as a matter of law. *Fowler, supra,* 425 Mass. at 826 n.15.

[7] Commonwealth v. Walker, 68 Mass. App. Ct. 194, 195-96 (2007).

[8] In Commonwealth v. Johnson, 425 Mass. 609, 613 (1997), the defendant argued that trial counsel was ineffective because, inter alia, he failed to pursue remedies pursuant to Rule 25(b)(2). The court concluded under the facts of that case, that such remedies, had they been pursued, would not have been successful.

ask only for an acquittal,[9] the less perfect remedies of a new trial and a reduction of the verdict should be requested in the new Rule 25(b)(2) motion,[10] in addition to seeking an acquittal.[11]

§ 44.2B. TIMING ISSUES

A renewed motion for a required finding of not guilty, which may seek a new trial in the alternative, must be made within five days of discharge of the jury.[12] Motions seeking the overlapping relief available under the second sentence of Rule 25(b)(2), however, are not subject to the same time limits.[13]

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[9] Once the jury has returned a guilty verdict, and the case has reached the Rule 25(b) stage, there would be little tactical advantage to limiting the request for relief to a full acquittal. In the context of requests for jury instructions, a defendant may choose an all-or-nothing strategy whereby requests for instructions on lesser-included charges are declined. *See* Commonwealth v. Roberts, 407 Mass. 731, 737 (1990); Commonwealth v. Pagan, 35 Mass. App. Ct. 788, 791–92 (1994). A defendant is not, however, entitled to pursue such a strategy over the Commonwealth's objection. Commonwealth v. Woodward, 427 Mass. 659, 663–65 (1998). It is for the jury to determine, however, whether murder is in the first or second degree. Commonwealth v. Vinnie, 428 Mass. 161, 181, cert. denied 525 U.S. 1007 (1998).

[10] A defendant may also seek relief in the form of a "new trial" pursuant to Rule 30, but it may be appropriate to reserve any request for relief pursuant to that rule until there has been an opportunity to research the potential grounds for relief under that rule. In Commonwealth v. Preston, 393 Mass. 318 (1984) an immediate postverdict Rule 30(b) motion was treated as a Rule 25(b)(2) motion for new trial. *See also* Commonwealth v. Carter, 423 Mass. 506, 511 & n.6 (1996).

[11] *See* Commonwealth v. Keough, 385 Mass. 314, 317 (1982) (reading the first sentence of Rule 25(b)(2) as suggesting that a new motion should be filed after a guilty verdict and observing that the earlier motion would not have sought the alternative relief of a new trial). *See also* Commonwealth v. Doucette, 408 Mass. 454, 455–56 (1990) (noting trial judge's broad discretion to allow new trial or reduce verdict, but reviewing only legal sufficiency of evidence because judge was not asked to and did not exercise discretion to award relief); Commonwealth v. Fowler, 425 Mass. 819 (1997) (order of trial court which was expressly entered as "matter of law" rather than "exercise of discretion" was vacated by S.J.C.).

[12] A prerequisite to renewing a motion for required finding after the verdict is returned is the timely filing of such a motion at the close of the Commonwealth's case and at the close of all evidence. *See* Mass. R. Crim. P. 25(a). While such a motion is typically grounded on the sufficiency of the evidence other grounds may also be appropriately raised. *See* Commonwealth v. Bell, 455 Mass. 408, 411 (2009); Commonwealth v. Kwiatowski, 418 Mass. 543, 545 (1994)(indicating that any claim that criminal statute is unconstitutionally vague as applied must be raised at required finding stage).

[13] Commonwealth v. Aguiar, 400 Mass. 508, 511 & n.3 (1987) (citing Commonwealth v. Keough, 385 Mass. 314, 317–18 (1982) (second sentence of Rule 25(b)(2) is "quite apart" from first sentence and imposes no time limit for motions under second sentence)). In Keough the court noted the duplication of relief available under the first and second sentences and questioned the logic of permitting the same relief (i.e., a new trial) to be requested at any time under the second sentence when a motion seeking that relief under the first sentence must be made within five days of the jury's discharge. Keogh, supra, 385 Mass. at 318, n.3. Although the court also speculated in note 3 about the advisability of imposing a time limit on motions under the second sentence, the rule continues to be silent as to any time limitations. See Commonwealth v. Cormier, 41 Mass. App. Ct. 76 (1996) (noting that "motion under rule 25 was untimely as it was not made within five days after the jury was discharged" yet still setting aside conviction, and ordering that acquittal be entered pursuant to Mass. R. Crim. P. 30, where evidence was insufficient to sustain conviction); *See also* Commonwealth v. Guy, 53 Mass.

In addition to these time limits, case law suggests that the trial court loses jurisdiction to entertain postconviction motions once a direct appeal is entered in the appellate court.[14] This problem may be solved in some cases by moving in the appellate court to stay the appeal so that the defendant's motion under Rule 25(b)(2) can be ruled on by the trial court and, if necessary, consolidated with the pending appeal. Although not expressly authorized by rule or statute, motions to stay appeals pending further proceedings in the trial court are often allowed.[15]

§ 44.2C. GROUNDS FOR RELIEF

The standard applicable to a post-verdict motion for a required finding of not guilty is the same as the standard that is applicable before a verdict is returned: "considering the evidence in the light most favorable to the Commonwealth, 'whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "[16] This standard does not permit the trial judge to weigh the evidence or assess the credibility of witnesses.[17] However, while the court must only consider the overall weight of the evidence, presuming credibility, it may nonetheless

App. Ct. 271, 278 (2001) (applications under second sentence of Rule 25(b)(2) are not subject to five-day time limit).

[14] *See* Commonwealth v. Aguiar, 400 Mass. 508, 511 & n.2 (1987) (indicating that in case of appeals of first-degree murder convictions, G.L. c. 278, § 33E effectively deprives trial court of jurisdiction once appeal is entered in S.J.C.). *See also* Commonwealth v. Healy, 393 Mass. 367, 391 (1984) (motion for a new trial should not have been filed in superior court during pendency of appeal); Commonwealth v. Hallet, 427 Mass. 552 (1998) (issues addressed in a timely preappeal motion may be "resurrected" and considered as part of the appeal). Where a defendant raises a claim in a pre-appeal motion for new trial, and the trial judge considers the issue on the merits, the claim will be reviewed as if there were an objection made at trial. Commonwealth v. Smiley, 431 Mass. 477, 490 (2000). Where the trial court chooses not to address such new issues on the merits the issues are not resurrected. Commonwealth v. Oliveira, 431 Mass. 609, 612 (2000); Commonwealth v. Graham, 431 Mass. 282, 286–287, cert. denied 531 U.S. 1020 (2000).

[15] The S.J.C. has endorsed, in part on judicial economy grounds, combining a defendant's direct appeal with the appeal from any denial a motion for new trial under Rule 30(b). *See* Commonwealth v. Preston, 393 Mass. 318, 323 & n.5 (1984) (citing Commonwealth v. Smith, 384 Mass. 519, 524 (1981)).

[16] Commonwealth v. Woodward, 427 Mass. 659, 682 (1998) (quoting Commonwealth v. Cordle, 412 Mass. 172, 175 (1992)). *See also* Commonwealth v. Doucette, 408 Mass. 454, 456 (1990) (in deciding a Rule 25(b)(2) motion for required finding judge must assess the legal sufficiency of evidence by standard set out in Commonwealth v. Latimore, 378 Mass. 671, 677 (1979)); Commonwealth v. Feyenord, 445 Mass. 72, 84 (2005) (in reviewing jury's findings for purposes of Rule 25(b) motion, it is "not essential that inferences drawn from facts and circumstances be necessary inferencece [but rather] it is enough that the inferences drawn from the circumstances be reasonable and possible.").

[17] Commonwealth v. Doucette, 408 Mass. 454, 456 (1990). *See also* Commonwealth v. Woodward, 427 Mass. 659, 682 (1998); Commonwealth v. Torres, 24 Mass. App. Ct. 317, 323–25 (1987), *further app. rev. denied,* 400 Mass. 1104 (1987); Commonwealth v. Pierce, 66 Mass. App. Ct. 283, 290 (2006) (trial court may not consider credibility of witness when ruling on Rule 25(b) motion).

find sufficient grounds to grant relief under Rule 25(b) when there is inconsistent testimony regarding criminal liability.[18]

The trial court has much broader discretion in granting relief in the form of a new trial or a reduction of a conviction to a lesser-included offense.[19] A new trial or verdict reduction may be proper even if the evidence can legally support the jury's verdict.[20] Rule 25(b)(2) empowers the trial judge "to reduce the jury's verdict to guilty of a lesser included offense when, in the judge's discretion, including his or her own view of the credibility of the witnesses and the weight of the evidence, the lesser verdict is required in the interests of justice."[21]

In considering a motion for a reduction of a verdict, the trial judge should weigh the same factors that are appropriately considered on motions to reduce verdicts under G.L. c. 278, § 33E.[22] The Supreme Judicial Court has reduced verdicts in capital cases under its § 33E powers where, inter alia, the verdicts were against the weight of the evidence, where the reduction would produce a more just result, and where a defendant's statement was accepted by the court and warranted a reduction.[23] As the Supreme Judicial Court noted in *Commonwealth v. Woodward*, the "postconviction powers granted by the Legislature to the courts at both trial and appellate levels reflect the evolution of legislative policy promoting judicial responsibility to ensure that the result in every criminal case is consonant with justice."[24] Consistent with this policy, the courts may reduce a verdict to "ameliorate injustice caused by the Commonwealth, defense counsel, or . . . the interaction of several causes."[25] However, as a practical matter, in recent years the Supreme Judicial Court has only rarely exercised its powers under § 33E.[26]

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[18] *See, e.g.,* Commonwealth v. Zanetti, 454 Mass. 449, 469 (2009) (court found insufficient evidence to support guilty verdict in joint venture murder case where eye-witness testimony was inconsistent with prosecution's theory).

[19] *See* Commonwealth v. Doucette, 408 Mass. 454, 455–57 (1990) (describing trial judge's discretion to grant relief other than a required finding under Rule 25(b)(2)). *See also* Commonwealth v. Ghee, 414 Mass. 313, 321 (1993) (describing propriety of discretionary reduction of verdict from murder in first degree to murder in second degree).

[20] Commonwealth v. Woodward, 427 Mass. 659, 666–67 (1998); Commonwealth v. Carter, 423 Mass. 506, 512 (1996).

[21] Commonwealth v. Almeida, 452 Mass. 601, 602-03 (2008); Commonwealth v. Lyons, 444 Mass. 289 (2005); Commonwealth v. Doucette, 408 Mass. 454, 456 (1990) (citing Commonwealth v. Keough, 385 Mass. 314, 318–21 (1982));

[22] Commonwealth v. Randolph, 438 Mass. 290 (2002); Commonwealth v. Millyan, 399 Mass. 171, 189 (1987).

[23] *See* Justice John M. Greaney & James Comerford, THE LAW OF HOMICIDE IN MASSACHUSETTS (Flaschner Judicial Institute 2009) (providing table of cases in which S.J.C. has exercised its powers under § 33E); Commonwealth v. Gaulden, 383 Mass. 543, 555–56 n.9 (1981) *See also* Commonwealth v. Woodward, 427 Mass. 659, 667–68 n.12 (1998) (providing table of all prior reported cases where Commonwealth appealed from verdict reductions by trial court judges).

[24] Commonwealth v. Woodward, 427 Mass. 659, 666 (1998).

[25] Commonwealth v. Woodward, 427 Mass. 659, 666–67 (1998).

[26] *See* Stephanie Roberts Hartung, *The Limits of "Extraordinary Power": A Survey of First-Degree Murder Appeals Under Massachusetts General Laws Chapter 278, § 33E*, 16 SUFFOLK J. OF TRIAL & APP. ADV., no.1 (Winter 2011) (during ten-year period of articles's study, 7.5% of first-degree murder convictions were reversed on appeal and just one was reduced to a lesser offense under the provisions of the statute).

The legal sufficiency of the evidence is not at issue in the trial judge's ruling on a Rule 25(b)(2) motion for entry of a finding of guilt of a lesser offense.[27] Not only is it appropriate for the judge to weigh the evidence, the judge may also rely on the defendant's testimony, if it is credited, in deciding to reduce a jury's verdict.[28] The trial judge's discretion is broad, and its exercise may properly be based on the judge's opportunity to observe the witnesses and his or her own weighing of such factors as intoxication and evidence of intent.[29] The trial judge should not, however, play the role of "thirteenth juror"[30] or "second guess"[31] the jury.

Similar considerations apply to the granting of a new trial on a motion under Rule 25(b)(2).[32] Unlike the constraints on a judge considering a motion for new trial under Rule 30(b),[33] the trial judge is not limited in granting a new trial to situations where an error of law has occurred.[34] Instead, the trial judge is charged with the duty to consider and weigh the evidence and circumstances of the case, and to exercise sound discretion in ruling on the motion.[35]

§ 44.2D. PROCEDURE

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[27] Commonwealth v. Ghee, 414 Mass. 313, 321 (1993) (even where jury verdict is warranted by evidence trial court may properly conclude that reduction of verdict is "more consonant with justice").

[28] In *Woodward*, the trial court stated that there was a view of the evidence suggesting that the circumstances under which the defendant acted were "characterized by confusion, inexperience, frustration, immaturity and some anger, but not malice (in the legal sense) supporting a conviction for second degree murder." Commonwealth v. Woodward, 427 Mass. 659, 669 (1998). The S.J.C. found that the trial judge "did not abuse his discretion in concluding that the jury verdict of murder was not proportionate with convictions in other cases." *Woodward, supra,* 427 Mass. at 670. The S.J.C. further concluded that the trial judge, in order to "correct his own error" in failing to provide a manslaughter instruction, could determine that a reduction in the verdict from murder to manslaughter would be more "consonant with justice." *Woodward, supra,* 427 Mass. at 671 (citing Commonwealth v. Keough, 385 Mass. 314, 321 (1982), and Commonwealth v. McCarthy, 375 Mass. 409, 416 (1978)).

[29] Commonwealth v. Cobb, 399 Mass. 191, 192 (1987); Commonwealth v. Greaves, 27 Mass. App. Ct. 590, 594 (1989). *But see* Commonwealth v. Burr, 33 Mass. App. Ct. 637, 639–44 (1992) (absent justification based on weight of evidence or error of law, court may not rely on appealing personal characteristics of defendant).

[30] Commonwealth v. Carter, 423 Mass. 506, 512 (1996).

[31] Commonwealth v. Gaulden, 383 Mass. 543, 555–56 (1981); Commonwealth v. Millyan, 394 Mass. 171, 188 (1987).

[32] Commonwealth v. Doucette, 408 Mass. 454, 455–56 (1990) (trial judge "has discretion to award new trial on ground that verdict, although supported by legally sufficient evidence, was against weight of evidence"); Commonwealth v. Preston, 393 Mass. 318, 324 (1984) (affirming order setting aside verdict and granting new trial because verdict was against weight of evidence).

[33] *See* discussion of Rule 30, *infra*, at § 44.4.

[34] Commonwealth v. Rolon, 438 Mass. 808, 817-18 (2003); Commonwealth v. Marsh, 26 Mass. App. Ct. 933, 935 (1988) (rescript) (holding that trial judge erred in failing to exercise discretion granted by Rule 25(b)(2)).

[35] *See* Commonwealth v. Preston, 393 Mass. 318, 323–24 (1984); Commonwealth v. Marsh, 26 Mass. App. Ct. 933, 935 (1988).

In contrast to Rule 25(a), which permits the judge to enter a required finding of not guilty on his or her own motion, the trial judge may act under Rule 25(b) only on motion of the defendant. In the case of motions for new trial this requirement is necessary to avoid a double jeopardy bar to the subsequent trial.[36] However, this requirement has not been read to prevent the court from treating a motion made under Rule 30(b) as, in substance and effect, a motion under Rule 25(b)(2).[37] In such a case, the policy concerns which dictate that a new trial be granted only on the defendant's motion are satisfied by the defendant's having moved for a new trial, albeit under a different rule.[38] Where a Rule 25(b)(2) motion is brought in combination with a Rule 30 motion for a new trial, the court may look to the substance of the claims raised in determining how to construct the motion.[39]

§ 44.2E. APPEAL

The rule as originally drafted did not provide for appeals from the trial judge's ruling. But subsequent judicial decisions recognized the Commonwealth's right to appeal from the allowance of motions under Rule 25(b)(1)[40] and (b)(2),[41] and the rule itself was amended in 1983 to expressly recognize the Commonwealth's right to appeal an order under Rule 25(b)(1) or (b)(2) entering either a required finding of not guilty or a reduction of the verdict to a lesser offense. The Supreme Judicial Court has assumed that defendants have similar right to appeal rulings on motions to reduce verdicts.[42]

On appeal, the appellate court will review the trial judge's ruling on a motion for new trial or to reduce a verdict only for an abuse of discretion or error of law.[43] The Supreme Judicial Court has observed that the trial judge's powers to second-guess a jury should be used "sparingly."[44] Historically, such powers have been rarely used, and

[36] *See* Reporter's Notes to Rule 25.

[37] *See* Commonwealth v. Preston, 393 Mass. 318, 321–22 (1984); Commonwealth v. Carter, 423 Mass. 506, 511 & n.6 (1996).

[38] Commonwealth v. Preston, 393 Mass. 318 (1984); Commonwealth v. Carter, 423 Mass. 506 (1996).

[39] In Commonwealth v. Pring-Wilson, 448 Mass. 718, 731 (2007), the S.J.C. deemed that the Commonwealths's appeal from the trial court's grant of a new trial was appropriate, given that the essential nature of the defendant's claims went to Rule 30 issues regarding the fairness of the trial in light of his inability to introduce self-defense evidence. The *Pring-Wilson* court went on to state that the defendant's claim was not focused on the classic Rule 25(b) notion that the verdict went against the weight of evidence.

[40] Commonwealth v. Therrien, 383 Mass. 529, 536 (1981); Commonwealth v. Amirault, 415 Mass. 112 (1993).

[41] Commonwealth v. Gaulden, 383 Mass. 543, 550 (1981).

[42] Commonwealth v. Maillet, 400 Mass. 572, 580 & n.10 (1987).

[43] Commonwealth v. Rolon, 438 Mass. 808, 817-18 (2003) (Supreme Judicial Court will not disturb trial court's order reducting verdict except in cases of abuse of discretion or error of law); Commonwealth v. Millyan, 399 Mass. 171, 188–89 (1987); Commonwealth v. Cobb, 399 Mass. 191, 192 (1987); Commonwealth v. Doucette, 408 Mass. 454, 455–57 (1990); Commonwealth v. Woodward, 427 Mass. 659, 668 (1998). *See* Commonwealth v. Cormier, 41 Mass. App. Ct. 76 (1996) (where Appeals Court ordered case to be remanded for entry of judgment of acquittal).

[44] Commonwealth v. Woodward, 427 Mass. 659, 667 (1998); Commonwealth v. Keough, 385 Mass. 314, 321 (1982); Commonwealth v. Earltop, 372 Mass. 199, 204 (1977).

verdicts have been reduced in a relatively small number of cases.[45] The appellate court will not conduct an independent review on the merits nor substitute its judgment for that of the judge who heard the witnesses at trial.[46] The issue is not whether the appellate court would have reached the same decision but whether the record contains evidence that supports the ruling.[47]

The trial judge should state reasons for the ruling.[48] Where the trial judge's stated reasons for denying relief under Rule 25(b)(2) indicated that the judge mistakenly thought a new trial could be ordered only if an error of law had occurred, a remand was necessary because "[p]ossessed of discretion, the trial judge was bound to exercise it one way or the other."[49] Where the trial court bases its decision on a single perceived error of law, the appellate court may limit its review to that single issue.[50]

A difficult choice may arise where a defendant has successfully obtained a reduction in the verdict under Rule 25(b)(2) but also has meritorious issues on appeal. If the appeal is pursued and results in the entry of an acquittal or dismissal of the indictment without possibility of retrial, this would obviously be an even better outcome from the defendant's point of view. However, where the defendant's successful prosecution of the appeal results in a new trial, he or she may be tried on the original unreduced indictment unless the reduction was required as a matter of law due to insufficient evidence on the greater charge.[51] These risks, if present, should be carefully explained to the defendant before the appeal is pursued.[52]

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[45] The S.J.C. observed in *Woodward*, that in the years since 1979, when Rule 29(b) and G.L. c. 278, § 11 became effective, the Commonwealth has appealed from verdict reductions in only 10 cases. Commonwealth v. Woodward, 427 Mass. 659, 667 (1998). This statistical information suggests that such reductions are allowed very rarely, that the Commonwealth does not typically appeal when such motions are allowed, or that a combination of these factors has resulted in few reported cases concerning such verdict reductions.

[46] Commonwealth v. Woodward, 427 Mass. 659, 668 (1998); Commonwealth v. Cobb, 399 Mass. 191, 192 (1987); Commonwealth v. Linton, 456 Mass. 534, 544 (2010) (appellate court must determine whether "evidence offered by the Commonwealth, together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged"); Commonwealth v. Mullane, 445 Mass. 702, 713-14 (2006); Commonwealth v. Washington, 50 Mass. App. Ct. 167 (2000).

[47] Commonwealth v. Woodward, 427 Mass. 659, 671 (1998); Commonwealth v. Preston, 393 Mass. 318, 324 (1984). *See also* Commonwealth v. Greaves, 27 Mass. App. Ct. 590, 594 (1989) (noting that it is "exceedingly rare" for an appellate court to reverse a discretionary ruling).

[48] Commonwealth v. Gaulden, 383 Mass. 543, 556 (1981); Commonwealth v. Woodward, 427 Mass. 659, 669 (1998).

[49] Commonwealth v. Marsh, 26 Mass. App. Ct. 933, 935 (1988) (rescript).

[50] *See* Commonwealth v. Fowler, 425 Mass. 819, 826 & n.15 (1997).

[51] *See* Commonwealth v. Aguiar, 400 Mass. 508, 512, 515 & n. 9 (1987).

[52] Because the Commonwealth has a right to appeal a judge's discretionary reduction of a verdict under Rule 25(b)(3), there is also some risk that the appellate court may find that the reduction was an abuse of discretion and reinstate the original verdict. Thus there may also be risks attached to a defendant's decision, on consideration of the teachings of *Aguiar*, to accept a reduced verdict and to forego the pursuit of issues on direct appeal of the conviction that might result, at best, in a new trial on the original indictment. Before making such a decision the defendant should determine whether the Commonwealth intends to appeal, and if so, the defendant may elect to pursue appellate rights as well. In *Woodward*, the Commonwealth

§ 44.3 REVISION AND REVOCATION OF SENTENCE

Mass. R. Crim. P. 29 provides a procedure for seeking a sentence reduction.[53] The rule empowers a trial judge, either *sua sponte* or on the defendant's timely written motion, to "revise and revoke such sentence if it appears that justice may not have been done."[54] The Commonwealth no longer has the right to file a motion to revise and revoke.[55] Relief under Rule 29 amounts to an alteration in the defendant's sentence, but does not impact the finding of guilt.[56]

§ 44.3A. JURISDICTIONAL REQUIREMENT OF TIMELY FILING

Rule 29 requires that motions to revise and revoke a sentence must be filed within sixty days of: (1) imposition of sentence;[57] (2) receipt by the trial court of a rescript after affirmance or dismissal of an appeal, or (3) entry of any order or judgment of an appellate court denying review or having the effect of upholding a judgment of conviction.[58] The time limits imposed by the rule are jurisdictional, and the court is

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appealed from the trial court's reduction of the verdict, and from the imposition of a time-served sentence. The defendant also appealed, but notified the S.J.C. that she would waive certain claims in the event that the Court were to uphold the reduction of the verdict, and the sentence as imposed. Commonwealth v. Woodward, 427 Mass. 659, 661–62 (1998).

[53] For a discussion of the superior court's inherent power to reduce or revise sentences and the common law roots of the powers granted by Rule 29, *see* District Attorney for Northern Dist. v. Superior Court, 342 Mass. 119 (1961), and cases cited in Campbell v. Commonwealth, 339 Mass. 695, 697–98 (1959).

[54] *Compare* former Fed. R. Crim. P. 35(b) (as amended by order of the U.S. Supreme Court on April 29, 1985). The Reporter's Notes to Mass. R. Crim. P. 29 indicate that former federal Rule 35(b) was a source for the present Massachusetts Rule 29, and Massachusetts decisions interpreting Mass. R. Crim. P. 29. The present federal Rule 35(b), as amended on October 27, 1986, Pub. L. No. 99-570, Title X, § 1009, limits the trial judge's power to reduce a defendant's sentence to situations where the government moves for such a reduction on the basis of the defendant's "substantial assistance in the investigation or prosecution" of another person.

[55] The authorizing statute, G.L. c. 278, § 29C, was repealed in 1979.

[56] *See* Commonwealth v. McCulloch, 450 Mass. 483, 486-88 (2008).

[57] *See* Commonwealth v. Gilday, 68 Mass. App. Ct. 1119 (2007) (unpublished disposition). This 60-day period "is absolute and may not be extended." Commonwealth v. Callahan, 419 Mass. 306, 308 (1995). The time begins to run on imposition of sentence, not execution. Commonwealth v. Sitko, 372 Mass. 305, 312 (1977). Thus a stay of sentence will not delay the Rule 29 deadline. An appeal of a sentence to the appellate division of the superior court will not extend the 60-day limit applicable to motions under Rule 29(a). *See* Commonwealth v. Callahan, 419 Mass. 306, 308 (1995) (Rule 29(a) motion held untimely even though filed within 60 days of the order of the appellate division increasing defendant's sentence because the appellate division is not an appellate court within the meaning of Rule 29(a)) (citing Mass. R. App. P. 1(c) (the term *Appellate Court* "means the full Supreme Judicial Court, the full Appeals Court, or a statutory quorum of either, as the case may be, whichever court is exercising statutory jurisdiction over the case at bar")).

[58] There is no prohibition against filing more than one motion under Rule 29, so such motions could potentially be filed within 60 days of imposition of sentence, and again within 60 days of the affirmance of the case on appeal. *See* Commonwealth v. Thomas, 400 Mass. 676, 686 (1987).

without power to alter sentences pursuant to this rule if the motion is not timely filed.[59] However, while there are strict statutory time limits under Rule 29, there is no corresponding time limit regarding when the motion must be heard and decided.[60] Nor does the statute mandate a time limit for a motion to reconsider the denial of a Rule 29 motion, although the courts have indicated that it must be done within a reasonable time period.[61]

In addition to the express time limits imposed by the rule,[62] the Supreme Judicial Court has imposed, by decision, limitations of "reasonableness" on the lapse of time between imposition of sentence and request for relief under Rule 29.[63] The policy underlying the rule is to provide a vehicle for a trial court to reconsider whether a sentence was just in light of the facts "as they existed at the time of sentencing."[64] In the Court's view the passage of time may make it too difficult for a judge to rule on a Rule 29 motion based solely on the circumstances in existence at the time the sentence was originally imposed.[65] The Court has provided little guidance as to when a delay becomes so unreasonable as to deprive the trial court of the powers to allow reduction of sentence under Rule 29.[66] The primary consideration suggested as relevant is the

[59] Commonwealth v. Callahan, 419 Mass. 306, 308 (1995); Commonwealth v. Layne, 386 Mass. 291, 295 (1982); Commonwealth v. McNulty, 42 Mass. App. Ct. 955, 956 (1997); Commonwealth v. Cepulonis, 18 Mass. App. Ct. 919, 920 (1984). *See also* Clark, Petitioner, 34 Mass. App. Ct. 191, 192 (1993) (stating that 60-day limit cannot be waived).

[60] *See* Commonwealth v. Bland, 48 Mass. App. Ct. 666 (2000).

[61] Commonwealth v. Downs, 31 Mass. App. Ct. 467, 469 (1991). Motions for reconsideration with respect to certain motions must be filed within 30 days. *See* Commonwealth v. Montanez, 410 Mass. 290, 294 n.4 (1991); Commonwealth v. Balboni, 419 Mass. 42, 43 (1994). The Commonwealth may also file a motion to reconsider a grant of defendant's Rule 29(a) motion. *See* Commonwealth v. McGuinness, 421 Mass. 472 (1995) (affirming judge's change of decision after Commonwealth moved for reconsideration); Commonwealth v. Barclay, 424 Mass. 377 (1997) (Commonwealth's motion for reconsideration was filed approximately two months after defendant's motion to revise and revoke was allowed, and S.J.C. agreed with Commonwealth, holding that original sentence should be reinstated).

[62] Although the plain language of the rule leaves it unclear whether the judge, if acting sua sponte, must act within 60 days of the triggering events, the Court has read this requirement into the rule. Aldoupolis v. Commonwealth, 386 Mass. 260, 269 (1982), *cert. denied*, 459 U.S. 864 (1982); Commonwealth v. McNulty, 42 Mass. App. Ct. 955, 956 (1997).

[63] *See* Commonwealth v. Layne, 386 Mass. 291, 296 (1982) (where appeal remained pending for nine years before the defendant filed his motion to revise and revoke, the delay was excessive and the trial judge's order reducing the sentence was reversed). *See also* Commonwealth v. Barclay, 424 Mass. 377, 380–81 (1997) (where timely filed motion was not marked for hearing until six years after sentencing, delay was excessive and trial court's reduction of sentence was reversed).

[64] Commonwealth v. Layne, 386 Mass. 291, 296 (1982). *See also* Commonwealth v. Sitko, 372 Mass. 305, 313–14 (1977); Commonwealth v. Amirault, 415 Mass. 112, 117 (1993); Commonwealth v. Gaumond, 53 Mass. App. Ct. 912 (2002) (rescript); Commonwealth v De Jesus, 440 Mass. 147 (2003).

[65] *See* Commonwealth v. Goodwin, 458 Mass. 11, 16-17 (2010) (once Rule 29 time limits have lapsed, defendant may not be re-sentenced for same conviction).

[66] See Commonwealth v. McCulloch, 450 Mass. 483, 486-88 (2008) (court noted that interests of justice support reduction of sentence, where, upon reading probation reports, sentencing judge determines that original sentence was too harsh but did not expressly address reasonableness of delay).

extent to which the delay resulted from circumstances within or beyond the defendant's control.[67]

As a matter of strategy, it was once thought that filing the motion and allowing the defendant to serve a portion of his sentence would enhance the chances of success. Such a policy was even encouraged by the trial courts.[68] However, under the current state of the law, at least when the defendant has a viable argument in favor of a sentence reduction the safest course of action is to pursue this remedy by marking the motion for hearing within a reasonable period of time.[69]

§ 44.3B. DEFENDANT'S OPTIONS IF MOTION WAS NOT TIMELY FILED

Because the time limits contained in Rule 29 are jurisdictional, a defendant who has not filed within the prescribed sixty-days must seek a way to restart the sixty-day clock. One possibility is to file a motion for new trial pursuant to Mass. R. Crim. P. 30.[70] Where the defendant can show that the Rule 29 motion was not timely filed because of ineffective assistance of counsel, for example, the trial court may consider vacating the sentence and reimposing it, thereby starting the sixty-day period anew.[71] Because of the availability of the motion for new trial procedure, a petition for relief pursuant to G.L. c. 211, §3[72] should be considered only after other available remedies have failed.[73]

In situations where there is no claim of legal error sufficient to support relief under Rule 30, absent some other procedural vehicle for reopening the sixty-day period, the trial judge is without authority to act on a motion under Rule 29. The sixty-day filing period may not be waived, even with the assent of the Commonwealth.[74] As a practical matter, however, when particularly compelling reasons for reducing a

[67] Commonwealth v. Layne, 386 Mass. 291, 296 (1982); Commonwealth v. Barclay, 424 Mass. 377, 380–81 (1997).

[68] *See* Commonwealth v. McGuinness, 421 Mass. 472, 473 (1995) (trial court advised defendant that motion to revise and revoke would be considered favorably if defendant maintained good institutional record).

[69] Commonwealth v. Barclay, 424 Mass. 377, 380–81 (1997); Commonwealth v. Layne, 386 Mass. 291, 295 (1982).

[70] Motions for a new trial under Rule 30 are addressed *infra* at § 44.4.

[71] *See* Commonwealth v. Stubbs, 15 Mass. App. Ct. 955 (1983); Commonwealth v. Craffey, 68 Mass. App. Ct. 1105 (2007) (unpublished disposition) (noting that where failure to timely file Rule 29 motion is due to ineffective assistance of counsel, "judge should vacate the sentence and reimpose it" so defendant has opportunity to file timely motion under Rule 29).

[72] The relief available through petitions under G.L. c. 211, § 3 is discussed *infra* at § 45.9.

[73] In Cowie v. Commonwealth, S.J.C. for Suffolk County, No. 85-264 (January 13, 1987), Justice Liacos, sitting as a single justice, denied relief pursuant to G.L. c. 211, § 3 to a defendant who claimed that ineffective assistance of counsel caused a failure to file timely notices of appeal. The single justice indicated that the petitioner had a remedy available, in the form of a motion for new trial under Mass. R. Crim. P. 30, that would, if allowed, reopen the time within which a notice of appeal could be filed. *See also* Commonwealth v. Callahan, 416 Mass. 1010 (1994), *aff'd*, 419 Mass. 306 (1995) (where defendant sought relief from denial of motion to revise and revoke from single justice of the S.J.C. pursuant to G.L. c. 211, § 3).

[74] *See* Clark, Petitioner, 34 Mass. App. Ct. 191, 194 (1993) (Appeals Court found that agreement to extend 30-day period could not be accepted by trial court, but suggested that previously imposed sentence could be vacated by trial court).

sentence exist, the possibility of the Commonwealth's assent to a Rule 30 motion may be explored. The Commonwealth may be willing, under certain circumstances, to assent to a Rule 30 motion that would result simply in the same sentence being reimposed, in order to clear the procedural hurdles confronting a defendant, even if the Commonwealth would not assent to a reduction in the sentence. This approach may be worth pursuing where the defendant has a severe and terminal illness[75] or, alternatively, has provided substantial assistance to the Commonwealth.

§ 44.3C. SHOULD A RULE 29 MOTION ALWAYS BE FILED?

The most obvious risk of a motion under Rule 29 is that the trial court is also empowered to increase a sentence. Despite assertions to the contrary in the Reporter's Notes to Rule 29, the trial court has the power, acting sua sponte, within sixty days of imposition of sentence or on a timely defense motion, to impose increases in the original sentence, provided that the defendant is afforded adequate notice and an opportunity to be heard, and that there is a basis for concluding that "justice may not have been done" by the original sentence.[76] The Supreme Judicial Court has rejected claims that a defendant's double jeopardy rights are necessarily violated by a trial court's increasing a previously imposed sentence.[77] Although it would be improper for the trial judge to consider bad acts of the defendant that occurred after imposition of sentence,[78] as a practical matter, a defendant's further criminal conduct or other misconduct after imposition of sentence, including behavior during incarceration, would warrant a cautious weighing of possible risks before filing a Rule 29 motion.

In the absence of serious and substantial reasons not to file a motion[79] under Rule 29, however, it is arguable that the standards for effective representation require defense counsel to file a timely motion to revise and revoke the sentence, whether the case was tried, disposed of by plea, or pursuant to an agreed recommendation.[80]

If a favorable ruling is unlikely at the time of filing, defense counsel should still file the motion with a cover letter to the clerk indicating that the defendant is not requesting a hearing or any other action at that time.[81] Even in cases where the possibility of a reduction in sentence appears to be remote or nonexistent, the passage

[75] The CPCS Training Bulletin for June 1992 suggested that counsel consider filing a motion to revoke and revise a sentence nunc pro tunc, based on the defendant's unawareness of existing grounds at the time of sentencing, such as an HIV infection.

[76] Commonwealth v. Derry, 26 Mass. App. Ct. 10, 12–13 (1988). *See also* Commonwealth v. Carver, 33 Mass. App. Ct. 378, 389-90 (1992) (judge increased original sentence to render it lawful).

[77] Aldoupolis v. Commonwealth, 386 Mass. 260, 271 (1982), *cert. denied*, 459 U.S. 864 (1982).

[78] *See* Commonwealth v. Sitko, 372 Mass. 305, 313–14 (1977).

[79] A motion to revise and revoke will not be fruitful if a minimum mandatory sentence was imposed. In such cases motions to revise and revoke are typically denied without a hearing.

[80] As indicated above, the Appeals Court has suggested that a finding of ineffective assistance may be grounded on a failure to file a motion under Rule 29. Commonwealth v. Stubbs, 15 Mass. App. Ct. 955 (1983); Commonwealth v. Craffey, 68 Mass. App. Ct. 1105 (2007) (unpublished disposition).

[81] A motion that is too general in nature may, however, be subject to challenge on the basis that the grounds of the motion are not set forth in sufficient detail. *See* Commonwealth v. Amirault, 415 Mass. 112, 115–16 & n.6 (1993).

of time may reveal circumstances that were overlooked at the time of sentencing, and that may carry some weight with the sentencing court at a later time. For example, it may be unknown to the defendant, or anyone else at the time of sentencing, that he is harboring the AIDS virus, cancer, or some other terminal illness. If such facts are later revealed, it would be an appropriate consideration for the trial court in modifying a sentence. The Rule 29 procedure is designed to address precisely this problem, but it is unavailable unless a timely motion is filed, and often the deadline for filing such a motion passes before the ultimate and meritorious grounds for relief are discovered.[82]

Where a Rule 29 motion has been filed and already denied with or without a hearing, the defendant may still file a motion to reconsider that decision. No limit is provided by statute on filing a motion to reconsider, but the courts have indicated that it must be done within a reasonable time period.[83]

§ 44.3D. PROCEDURE UNDER RULE 29

Rule 29 requires that the motion to revise and revoke be supported by an affidavit.[84] Such affidavits should be as complete as possible because the rule also authorizes the judge to decide the motion "on the basis of facts alleged in the affidavits and without further hearing."[85] If the court rules without a hearing, the affidavits will be the only factual record for appellate purposes.

Where a defendant does not seek an immediate hearing or ruling on the motion, an affidavit is still required to preserve the defendant's rights under the rule. A more complete supplemental affidavit could be offered at a later time when the defendant requests a hearing on the motion.

When seeking a hearing on a motion under Rule 29, defense counsel should address the request to the clerk sitting with the trial judge at the time of the request.[86] As noted above, the rule provides no specific time limit on the court's power to act if the motion is timely filed, but a hearing should be requested within a reasonable period of time.[87] In most cases defense counsel should also ask the court to issue a writ of

[82] *See* Commonwealth v. Fenton, 442 Mass. 31, 36-37 (2004) (rule governing revocation of sentence establishes rigid jurisdictional time limits for filing of motions).

[83] Commonwealth v. Downs, 31 Mass. App. Ct. 467, 469 (1991). Motions for reconsideration with respect to certain motions must be filed within 30 days. *See* Commonwealth v. Montanez, 410 Mass. 290, 294 n.4 (1991); Commonwealth v. Balboni, 419 Mass. 42, 43 (1994). The Commonwealth may also file a motion to reconsider a grant of defendant's Rule 29(a) motion. *See* Commonwealth v. McGuinness, 421 Mass. 472 (1995) (affirming judge's change of decision after Commonwealth moved for reconsideration); Commonwealth v. Barclay, 424 Mass. 377 (1997) (Commonwealth's motion for reconsideration was filed approximately two months after defendant's motion to revise and revoke was allowed, and S.J.C. agreed with Commonwealth, holding that original sentence should be reinstated).

[84] *See* Commonwealth v. DeJesus, 440 Mass. 147, 151-52 (2003).

[85] Mass. R. Crim. P. 29(b).

[86] Because it is the trial judge who must hear the motion unless she has left the bench or is otherwise unavailable, the motion may be heard in a courthouse other than where the case was tried. *See* Rule 29(d). Special arrangements will have to be made for delivery of the court's records on the case to the court where the trial judge is sitting, and defense counsel should check with the judge's clerk to facilitate this process.

[87] *See* Commonwealth v. Layne, 386 Mass. 291, 295 (1982); Commonwealth v. Barclay, 424 Mass. 377, 380–81 (1997).

habeas corpus to bring the defendant into court because the sentence cannot be altered without the defendant's presence.

Despite the particular formal requirements contained in the rule, a defendant's pro se communications should be liberally construed and treated where appropriate as a motion to revise and revoke sentence under Rule 29.[88]

§ 44.3E. BASIS FOR RELIEF

Although the language in Rule 29 imposes no such restriction, the courts have ruled that only facts in existence at the time of imposition of sentence may be considered under Rule 29.[89] The purpose of a motion to revise and revoke "is to permit a judge to reconsider the sentence he has imposed and determine, in light of the facts as they existed at the time of sentencing whether the sentence was just."[90] A long line of cases has held that the trial court may not grant relief based on positive postconviction conduct or any other post-trial considerations.[91] The courts have made it clear that a motion to revise and revoke may not be used as a substitute for release on parole.[92] Similarly, a Rule 29 motion is not a suitable avenue for modification of the terms and conditions of probation.[93] The fact that postconviction factors may not be considered may work in a defendant's favor to limit the power of a trial judge to consider post-sentencing conduct of the defendant to revise a sentence upward.

When filing a motion for a reduction in sentence, the grounds for the motion should be based on then-existing factors either not presented or not properly taken into account when the court imposed sentence. The courts may consider such factors as the circumstances of a pending or prior offense, impact on the family, medical condition, disparate treatment of codefendants,[94] or a previous mistake concerning parole eligibility under the sentence.[95]

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[88] *See* Commonwealth v. Alers, 16 Mass. App. Ct. 946, *further review denied*, 390 Mass. 1101 (1983) (defendant's letter requesting any available relief treated as Rule 29 motion).

[89] Commonwealth v. Sitko, 372 Mass. 305, 312–14 (1977); Commonwealth v. Layne, 386 Mass. 291, 295 (1982); Commonwealth v. McCulloch, 450 Mass. 483, 486-87 (2008); Commonwealth v. Goodwin, 458 Mass. 11 (2010).

[90] Commonwealth v. Layne, 386 Mass. 291, 295 (1982) (citing Commonwealth v. Sitko, 372 Mass. 305, 312–14 (1977)); Commonwealth v. Gaumond, 53 Mass. App. Ct. 912 (2002) (rescript); Commonwealth v De Jesus, 440 Mass. 147, 151-52 (2003). .

[91] Commonwealth v. Barclay, 424 Mass. 377, 380 (1997); Clark, Petitioner, 34 Mass. App. Ct. 191, 192 (1993) (judge may not consider information concerning conduct of defendant during his incarceration); Commonwealth v. DeJesus, 440 Mass. 147, 151-52 (2003) (court may not consider possible immigration consequences under Rule 29).

[92] In Commonwealth v. Amirault, 415 Mass. 112, 115–16 (1993), the trial court allowed a motion to revise and revoke after the parole board failed to grant parole. The S.J.C. found that such action by the trial court was an "usurpation of the role of the parole board" violating the doctrine of separation of powers. *See also* Commonwealth v. McGuinness, 421 Mass. 472, 476 & n.4 (1995) (noting that judge may not interfere with executive function of parole board by considering postconviction evidence as basis for motion to revise and revoke).

[93] *See* Commonwealth v. Lapointe, 435 Mass. 455, 458 (2001) (noting that better practice would be to challenge probation conditions by way of Rule 30 motion).

[94] *See, e.g.,* Commonwealth v. Derry, 26 Mass. App. Ct. 10 (1988). *But see* Commonwealth v. McGuinness, 421 Mass. 472 (1995) (judge's agreement to entertain motion to revise and revoke after two years if defendant was not paroled was not "promise" or part of sentence or plea bargain and subsequent motion to revise and revoke was permissibly denied).

Of course, as a practical matter the defendant's post-sentencing good behavior may be important to the trial court. There are suggestions in the cases (without analysis) that subsequent cooperation by the defendant with the authorities may properly be taken into account on a motion to revise and revoke sentences.[96] These cases suggest tacit approval for consideration of at least some types of post-sentencing good behavior on Rule 29 motions. If such information is presented, however, there is a risk that any favorable determination by the trial court may be reversed if appealed by the Commonwealth.[97] Care must be taken to articulate legitimate grounds for relief, based solely on factors existing at the time of sentencing, so that any postconviction history also presented will not necessarily undermine a favorable decision.[98]

§ 44.3F. IDENTIFYING THE RELIEF SOUGHT

A defendant may either request a specific reduction in sentence, or generally request a reduction in the court's discretion. In some cases, it will be appropriate to request a reduction that would result in the defendant's immediate release from custody, as, for example, a straight revocation of sentence, a reduction of the sentence to the time already served, or an order suspending the balance of the sentence remaining to be served. In other cases the request will be designed to shorten the defendant's waiting period for parole eligibility. This latter approach relieves the trial judge from making the ultimate decision as to the release date. By leaving that ultimate decision in the hands of the Parole Board, the trial court avoids the appearance of judicial interference in the executive function of granting and denying parole requests.

§ 44.3G. APPELLATE RIGHTS

See also Commonwealth v. McCulloch, 450 Mass. 483 (2008) (lesser sentences imposed on co-defendants deemed insufficient basis for relief where co-defendants pled guilty prior to trial).

[95] Commonwealth v. Layne, 21 Mass. App. Ct. 17, 20 (1985).

[96] *See* Commonwealth v. Alfonso, 19 Mass. App. Ct. 599, 610–11 (1985); Commonwealth v. Wright, 10 Mass. App. Ct. 907 (1980). It is understandable that there would be no appellate cases in the Commonwealth addressing this issue directly. If the trial court allows a motion to revise and revoke, based on a defendant's cooperation with the government, it is not likely to be appealed by either the Commonwealth or the defendant.

[97] *See* Clark, Petitioner, 34 Mass. App. Ct. 191, 192 (1993); Commonwealth v. McGuinness, 421 Mass. 472, 476 & n.4 (1995).

[98] *See* Commonwealth v. Barclay, 424 Mass. 377, 380 (1997) (record strongly suggested, but did not "establish with certainty" that trial court improperly took postconviction conduct into account). In *Barclay* the motion to revise and revoke expressly relied on the defendant's favorable achievements while incarcerated, but the defendant also conceded that the court "could not legally consider" such postconviction factors. The Commonwealth essentially acquiesced in the motion, and it was allowed. Two months later the Commonwealth had a change of heart, and moved for reconsideration, but the trial court denied that motion. The S.J.C. reversed the trial court and reinstated the original sentence. This procedural history is instructive on the issue of the value of presenting postconviction history to the trial court. The trial court, especially if the Commonwealth assents, may allow the motion. In most cases where the Commonwealth assents to such a motion, there would be no appeal, and the favorable ruling of the trial court would go unchallenged. The S.J.C., however, clearly suggested that it did not approve of such a result.

Both the Commonwealth[99] and the defendant have a right to appeal the judge's ruling on a Rule 29 motion. The merits of the motion are addressed to the judge's discretion, and that discretion is very broad. Errors of law have provided more fruitful grounds for appeal, such as where jurisdictional requirements have been violated[100] or where the court has considered improper factors.[101]

§ 44.4 COLLATERAL ATTACKS IN THE STATE COURTS: MOTIONS FOR NEW TRIAL OR RELEASE FROM UNLAWFUL RESTRAINT

Mass. R. Crim. P. 30(a) and (b) provide the principal vehicles under Massachusetts criminal procedure for collateral attacks on convictions and sentences.[102] These provisions consolidate the remedies that were formerly available through the motion for new trial, writ of habeas corpus, and writ of error.[103]

Rule 30(a) provides relief for convicted persons who are imprisoned or restrained[104] in violation of the Constitution or laws of the United States or the

[99] The Commonwealth may appeal from the allowance of a motion to revise and revoke by the superior court pursuant to G.L. c. 278, § 28E. Commonwealth v. Amirault, 415 Mass. 112, 115 (1993). A district court order may be appealed pursuant to G.L. c. 211, § 3. Commonwealth v. Cowan, 422 Mass. 546, 547 (1996). An order of the District Court denying a motion to revise and revoke is immediately appealable to the Appeals Court. *See also* Commonwealth v. McCulloch, 450 Mass. 483 (2008); Commonwealth v. Richards, 44 Mass. App. Ct. 478 (1998).

[100] *See* Commonwealth v. Cepulonis, 18 Mass. App. Ct. 919 (1984); Commonwealth v. Layne, 386 Mass. 291, 295 (1982); Commonwealth v. Barclay, 424 Mass. 377, 380 (1997).

[101] Commonwealth v. Sitko, 372 Mass. 305, 313–14 (1977); Commonwealth v. Amirault, 415 Mass. 112, 115–16 (1993).

[102] *See* Rodriquez v. Spencer, 412 F.3d 29, 33-34 (1st Cir. 2005) (noting that first avenue for postconviction relief under Massachusetts law is direct appeal). In the case of persons convicted of first-degree murder, G.L. c. 278, § 33E imposes particular additional procedural limitations on motions for new trial. Mass. R. Crim. P. 25(b)(2) also provides for relief that is technically collateral in that it is outside the direct appeal route. This provision is discussed *supra* in § 44.2 of this chapter in connection with posttrial motions.

[103] *See* Reporter's Notes, Mass. R. Crim. P. 30. The remedy of the writ of habeas corpus, however, is grounded in the constitution of the Commonwealth, and may still be utilized in specific situations. The constitution of the Commonwealth guarantees: "The privilege and benefit of the writ of habeas corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions." Mass. Const. Part II, c. 6, art. 7. Legislation purporting to eliminate the courts' power to issue writs of habeas corpus may run afoul of the constitution. Hennessey v. Superintendent, Mass. Correctional Inst., Framingham, 386 Mass. 848, 852 & n.3 (1982). A habeas corpus petition is a viable remedy where a petitioner remains incarcerated after his sentence has expired. In re Averett, 404 Mass. 28 (1989) (petition for writ of habeas corpus was filed claiming that petitioners had served their sentences, but that they remained incarcerated due to wrongful forfeiture of "good time"). *See also* Stewart, Petitioner, 411 Mass. 566, 568–69 (1992); In re McCastle, 401 Mass. 105 (1987).

[104] The text of the rule extends its availability to one who is "restrained of his liberty." It is unclear what type of restraint, short of imprisonment, is required, but the S.J.C. has suggested in dicta that a probationary term accompanied by a fine would not suffice. *See* Commonwealth v. Lupo, 394 Mass. 644, 646 (1985). *See also* Rodwell v. Commonwealth, 432

Commonwealth. The motion, which is addressed to the trial judge, may seek either immediate release or a correction of the sentence then being served.

Rule 30(b) authorizes the trial judge[105] to grant a new trial "at any time if it appears that justice may not have been done." The motion judge is required to make findings of fact sufficient to resolve the claimed errors of law.

The following discussion will focus on the procedural requirements and related strategic considerations for seeking relief under Rule 30.

§ 44.4A. TIMING ISSUES

A Rule 30(a) motion may be filed "at any time"[106] provided that the moving party is, at the time of filing, restrained on the conviction or sentence being challenged. However, case law suggests that lengthy delay in filing the motion provides a basis for denying relief.[107] Moreover, Rule 30(a) claim is subject to the waiver provisions of Rule 30(c)(2), so failure to raise a potential claim in an "original or amended motion" may constitute a waiver, and render a filing "untimely."[108]

If the defendant's conviction was for first-degree murder, G.L. c. 278, § 33E mandates different procedures for the filing and appealing of new trial motions.[109]

The Reporter's Notes indicate that the drafters intended motions under Rule 30 to be truly postconviction, meaning after any direct appeal is finally determined.[110] In

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Mass. 1016, 1018 (2000) (relief under Rule 30(a) is intended primarily to provide relief for defendants incarcerated in violation of Federal law or the laws of the Commonwealth).

[105] If the trial judge is unavailable for any reason, another judge will rule on the motion. Commonwealth v. Grace, 397 Mass. 303, 307 (1986) (where motion judge was not trial judge, appellate courts will not afford same broad discretion normally given to rulings by trial judge on Rule 30 motions). *See also* Commonwealth v. Wolinski, 431 Mass. 228 (2000).

[106] Commonwealth v. Ravenell, 415 Mass. 191, 193 (1993) (express provisions of Rule 30(a) permit motion to be filed at any time). *See also* Clarke v. Spencer, 585 F. Supp. 2d 196, 202-03 (D. Mass. 2008) (federal courts treat pending Rule 30(b) motion as application for state postconviction relief which tolled AEDPA's one-year limitations period).

A motion under Rule 30(b) may raise issues for the first time, many years after conviction where the constitutional grounds on which the defendant relies were not sufficiently developed at the time of trial or direct appeal. Commonwealth v. Bonds, 424 Mass. 698 (1997); Commonwealth v. Rembiszewski, 391 Mass. 123, 126 (1984).

[107] Commonwealth v. Real, 19 Mass. App. Ct. 906, 907 (1984) (it was within trial judge's discretion to deny motion on procedural grounds of four-year delay in filing coupled with failure to bring direct appeal).

[108] Rodwell v. Commonwealth, 432 Mass. 1016, 1018 (2000). *See also* Commonwealth v. Montgomery 53 Mass. App. Ct. 350, 354-355 (2001); Commonwealth v. Francis, 411 Mass. 579, 586 (1992) (delay of 20 years; did not reach question of whether intentional delay might constitute waiver).

[109] *See infra*, § 44.4G; *See also* Stephanie Roberts Hartung, The Limits of "Extraordinary Power": A Survey of First-Degree Murder Appeals Under Massachusetts General Laws Chapter 278, § 33E, 16 SUFFOLK J. OF TRIAL & APP. ADV. no. 1 (Winter 2011) (discussing provisions of § 33E generally).

[110] The Reporter's Notes following the revisions to this Rule which became effective on October 1, 2001, now recognize that it is "not unusual" to file motions pursuant to Rule 30 after a notice of appeal has been filed, but before an appellate decision has been issued. *See* Commonwealth v. Montgomery 53 Mass. App. Ct. 350, 352 & n. 4 (commenting upon the modifications to the Reporter's Notes following the October 1, 2001, amendments to the Rule).

practice, however, it is common for both the Appeals Court and the Supreme Judicial Court[111]to allow a motion to stay the direct appeal until the defendant has obtained a ruling in the trial court. Any appeal from the ruling can then be consolidated with the direct appeal, thereby avoiding "piecemeal appellate review."[112]

At times a motion for new trial must be pursued in conjunction with the direct appeal to provide support for the appellate issues with facts outside the original trial record. For example, claims that trial counsel was ineffective must often be supported by facts outside the trial record.[113] In the absence of a compelling reason for consolidating the motion for new trial with the direct appeal, the rule's waiver provisions, as discussed in the following section, make it advantageous in many situations for the defendant to save the Rule 30 remedies until after the direct appeal is decided.[114]

§ 44.4B. OMITTED GROUNDS MAY BE WAIVED

1. Waiver of State Claims

The provisions of Mass. R. Crim. P. 30(c)(2) effectively restrict a defendant's request for relief under Rule 30 to one motion as of right. The Rule requires defendants to assert in their original or amended motion all grounds under both 30(a) and 30(b)

[111] If an appeal is filed from a conviction, the trial court has no jurisdiction to act on a motion filed pursuant to Rule 30(b), from the date that the appeal is entered in the appellate court, until the date that appellate court has entered its decision, unless the appellate court stays the appeal, thereby permitting the trial court to act upon such a motion. Commonwealth v. Montgomery, 53 Mass. App. Ct. 350, 351-355 (2001), *citing* Commonwealth v. Cronk, 396 Mass. 194, 197 & n. 3 (1985).

[112] *See* Commonwealth v. Smith, 384 Mass. 519, 524 (1981). *But see*, Commonwealth v. Preston, 393 Mass. 318, 323 & n.5 (1984) (acknowledging intention of drafters that Rule 30 be utilized after conviction becomes final). *Cf.* Commonwealth v. Curtis, 417 Mass 619, 623–24 (1994) (discussing standards of review of Rule 30 motions and noting that, after a decision on direct appeal, "any further challenge to the conviction must be made on a motion for a new trial"). *See also* Commonwealth v. Amirault, 424 Mass. 618, 637 (1997) (noting conflict between finality of adjudications and availability of relief through motion for new trial which may be filed years after trial); Commonwealth v. Hallet, 427 Mass. 552 (1998) (noting that a different standard of review may apply if the motion is filed in advance of the direct appeal); Commonwealth v. Montgomery, 53 Mass. App. Ct. 350, 354 (2001)(when an appeal from the denial of a new trial motion is entered in the appellate court prior to or in conjunction with the direct appeal from a criminal conviction, those appeals are generally consolidated on the court's own motion or at the request of any party).

[113] Commonwealth v. Medeiros, 73 Mass. App. Ct. 571, 577-79 (2009) (noting that ineffective assistance of counsel claim not brought as part of Rule 30 motion for new trial, will amount to successful basis for direct appeal only where factual support for claim appears indisputably within trial record). *But see* Commonwealth v. Frisino, 21 Mass. App. Ct. 551 (1986) (recognizing that motion for new trial is not always required to establish trial counsel's ineffectiveness). *See also*, Commonwealth v. Whyte, 43 Mass. App. Ct. 920, 921 & n.3 (1997) (noting that claim for ineffective assistance of counsel is typically "best left for resolution in the first instance by the trial judge on a motion for new trial" but grave and fundamental errors by trial counsel can sometimes be apparent from record of trial itself).

[114] A defendant may have a more favorable standard of review in certain situations if a Rule 30 motion is filed in advance of the direct appeal. Commonwealth v. Hallet, 427 Mass. 552 (1998). In such situations it may be appropriate to give consideration to filing the Rule 30 motion in advance of the resolution of the direct appeal.

that can reasonably be raised at that time. Any omitted grounds for relief are waived[115] unless the motion judge exercises the discretion to consider such claims in a subsequent motion.[116] In the absence of certain narrow exceptions, the Supreme Judicial Court has repeatedly upheld motion judges' refusals to consider the merits of claims that were not raised on direct appeal or in previous postconviction motions.[117] For this reason, counsel preparing a Rule 30 motion must thoroughly investigate all possible grounds for relief. The inevitable time pressures to pursue a claim that has been recognized at an early stage must be balanced against the dangers of forever waiving other meritorious but perhaps more subtle or as yet unidentified claims.

2. Waiver of Federal Claims

The ramifications of a waiver imposed pursuant to Rule 30(c)(2) are not limited to a defendant's state remedies. Any waiver imposed pursuant to state procedural rules will typically bar the defendant from asserting the same claim as a ground for federal habeas corpus relief under 28 U.S.C. §§ 2241–2254.[118] In drafting a motion for

[115] Mass. R. Crim. P. 30(c)(2); Commonwealth v. Mahar, 442 Mass. 11 (2004); Commonwealth v. Stewart, 414 Mass. 1006, 1007 (1993) (reversing trial judge's grant of new sentencing hearing because Rule 30 issues could have been raised previously); Commonwealth v. Giddy, 409 Mass. 45, 46–47 n.3 (1991). The waiver rule applies equally to constitutional claims that could have been raised but were not raised on direct appeal or in a prior motion for a new trial. Commonwealth v. Watson, 409 Mass. 110, 112 (1991). *But see* Commonwealth v. Harris, 23 Mass. App. Ct. 687, 691–92 (1987) (interpreting language of Rule 30(a) that permits motions to be filed "at any time" as permitting defendant serving illegal sentence to obtain relief under Rule 30(a) despite fact that he could have raised claim on his earlier appeal). This interpretation may be questioned in light of Rodwell v. Commonwealth, 432 Mass. 1016, 1018 (2000), which holds that a motion may be untimely if the grounds raised in the motion could have been raised in a previously filed motion.

[116] Exceptions to the waiver rule are discussed *infra* in § 44.4B(3).

[117] *See, e.g.,* Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 230 (1993); Commonwealth v. Szczuka, 413 Mass. 1004 (1992) (rescript); Commonwealth v. Pisa, 384 Mass. 362 (1981)(G.L. c. 278, § 33E motion); Commonwealth v. Deeran, 397 Mass. 136 (1987); Commonwealth v. Lowe, 405 Mass. 1104 (1989). *But see* Commonwealth v. Doherty, 411 Mass. 95, 97–99 (1991) (in § 33E appeal from denial of motion for new trial, S.J.C. rejected motion judge's ruling that defendant had already received appellate review of issue in several previous motions for postconviction relief); Commonwealth v. Mahar, 442 Mass. 11 (2004) (grounds for Rule 30 motions are waived if available, but not raised, on direct appeal); Commonwealth v. Randoph, 438 Mass. 290, 297-98 (2002) (challenges raised to jury instructions in Rule 30 petition were waived where defendant did not object to instructions at trial and did not challenge them on direct appeal).

[118] The waiver provisions imposed by statute and case law have increasingly reduced the availability of federal habeas corpus relief. The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) codified many of the strictures that were placed on such relief by earlier federal court decisions. 28 U.S.C. § 2254. AEDPA and the current state of the law relating to habeas corpus relief is discussed *infra* at § 44.5. *See also* Wainwright v. Sykes, 433 U.S. 72 (1977) (federal issues that are not preserved in state court are waived in absence of showing of "cause and prejudice" for not raising such issues); Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984) (discussing applicability of *Wainwright* to state appellate procedural defaults); McCown v. Callahan, 726 F.2d 1 (1st Cir. 1984) (involving appeal under G.L. c. 278, § 33E); Gibson v. Butterworth, 693 F.2d 16 (1st Cir. 1982) (where unpreserved claim was raised for first time in state motion for new trial, S.J.C.' s consideration of issue under

postconviction relief, consideration must be given to the federal habeas corpus statute's exhaustion requirements, which are contained in 28 U.S.C. § 2254(b) and (c).

An application for a writ of habeas corpus shall not be granted unless it appears that "the applicant has exhausted the remedies available in the courts of the State,"[119] there is "an absence of State corrective process,"[120] or "circumstances exist that render such process ineffective to protect the rights of the applicant."[121]

Under the current state of the law, a defendant should raise all federal issues at the trial stage, or as soon as possible thereafter, and pursue those claims through all available state appellate levels. To the greatest degree possible all claims asserted in the motion for new trial should be described in terms of both state and federal law, and state and federal constitutional and case law authority should be cited. In determining whether a federal habeas petitioner has exhausted state remedies, the court will look at the "trappings" of the federal claim allegedly raised in state court, which must be likely to put a reasonable jurist on notice of the nature of the claim. In particular, the federal courts will look to whether the petitioner cited to the United States Constitution or presented the constitutional claim substantively in such a way so as to alert the court to its federal nature, or whether the petitioner relied on federal precedent or an explicit federal constitutional right.[122]

3. Exceptions to the Waiver Rule

The principal exceptions to the waiver provisions of Rule 30(c)(2) are: (1) the discretion accorded the motion judge to entertain on their merits issues that could have been raised earlier;[123] and (2) the defendant's right to raise issues that "could not reasonably have been raised" in the original or amended motion. The motion judge's discretion also extends to consideration of issues that were not adequately preserved at trial, and consideration of such issues on a Rule 30 motion effectively resurrects them for appellate review.[124]

"substantial risk of miscarriage of justice" standard does not constitute waiver of state procedural default and does not permit review of claim on federal habeas corpus petition).

[119] 28 U.S.C. § 2254(b)(1)(A).

[120] 28 U.S.C. § 2254(b)(1)(B)(I).

[121] 28 U.S.C. § 2254(b)(1)(B)(ii).

[122] Lemay v. Murphy, 537 F. Supp. 2d 239, 250-51 (D. Mass. 2008) (merits of federal habeas claims not reached based on procedural default).

[123] The S.J.C. has recommended restricting the exercise of this discretion to "extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." Fogarty v. Commonwealth, 406 Mass. 103, 107–08 (1989) (quoting Commonwealth v. Harrington, 379 Mass. 446, 449 (1980)). *See* Commonwealth v. Amirault, 424 Mass. 618, 639–53 (1997) (reversing ruling by trial court that new trial should be allowed). *See also* Commonwealth v. Azar, 435 Mass. 675 (2002)(new trial ordered by the S.J.C. in a second degree murder case where "third prong malice" instruction was in error, even though the issue had neither been preserved at trial nor argued on original appeal).

[124] Commonwealth v. Martinez, 420 Mass. 622, 624 (1995) ("Where . . . the judge [on a motion for a new trial] considers the merits of an argument that defendant could have raised earlier . . . the motion judge's action breathes some life into the issue and on appeal we consider it to determine if there has been a substantial risk of miscarriage of justice"). *Cf.* Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994) (motion for new trial may not be used as vehicle to compel review and consideration of questions of law that have been considered or waived on appeal); Commonwealth v Curtis, 417 Mass. 619, 625–26 (1994) (trial judge's

With respect to the second category of exceptions to the waiver rule, a defendant is not deemed to have waived a claim if its constitutional significance was not established until after the trial, appeal, or previous postconviction motions.[125] Similarly, a defendant will not be deemed to have waived issues presented by newly discovered evidence that was unknown to the defendant earlier, that "reasonable pretrial diligence" would not have uncovered, which is material and credible, and that might have affected the jury's verdict.[126]

4. Motions to Amend

Given the potentially serious consequences of failing to include all possible claims in the initial postconviction motion, careful consideration should always be given to amending the original motion before the court rules on it. If counsel does not become involved until after the initial motion is filed and denied, it is advisable to file a motion for reconsideration and for leave to amend accompanied by the amended motion.[127]

§ 44.4C. THE WRITTEN RECORD

Subparagraph (c)(3) requires the moving party, and permits the opposing party, to file affidavits in support of their positions. All factual assertions material to the defendant's claims should be supported by affidavit or other exhibits. Because this subparagraph also permits the judge to rule on the motion on the basis of the affidavits

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discretionary power under Rule 30 to grant relief on waived nonconstitutional issues "should be exercised only in those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result"). This standard of review does not, however, apply to a Rule 30 motion that is brought before a direct appeal is briefed and argued. Commonwealth v. Hallet, 427 Mass. 552 (1998); Commonwealth v. Amirault, 424 Mass. 618, 639–53 (1997) (where trial court exercises its power to consider constitutional issue that was not raised at trial or on direct appeal, appellate courts may still review issue to determine whether there was substantial risk of miscarriage of justice).

[125] *See* Commonwealth v. Bonds, 424 Mass. 598, 700 (1997) (new trial allowed 24 years after initial trial where jury instruction on "reasonable doubt" was constitutionally defective); Commonwealth v. Burkett, 396 Mass. 509, 511–12 (1986); Commonwealth v. Rembiszewski, 391 Mass. 123 (1984). Demonstrating that a waiver does not apply, however, is only part of the defendant's burden. The S.J.C. has adopted special restrictions for the retroactive application of new rules on collateral review (as opposed to direct review). *See* Commonwealth v. Bray, 407 Mass. 296, 300, 303 (1990) (S.J.C. indicated that on collateral review, new rule must be "central to an accurate determination of innocence or guilt") (quoting and following the federal rule announced in Teague v. Lane, 489 U.S. 228 (1989)). *See* Commonwealth v. Sullivan, 425 Mass. 449, 554 (1997); Commonwealth v. Amirault, 424 Mass. 618, 639–53 (1997) (defendant failed to raise known constitutional claims on direct appeal; ruling of trial court allowing motion for new trial was vacated on appeal).

[126] *See* Commonwealth v. Grace, 397 Mass. 303, 305–07 (1986); Commonwealth v. Salvati, 420 Mass. 499 (1995); *See also* Commonwealth v. Lapointe, 55 Mass. App. Ct. 799, 803-05 (2002) (relief from waiver warranted where new evidence leaves serious doubt whether result of trial might have been different had error not been made).

[127] If the appeal has been entered in the Appeals Court, a question may arise as to the lower court's jurisdiction to entertain a motion for reconsideration. *Cf.* Commonwealth v. Aguiar, 400 Mass. 508, 510–11 (1987) (in capital case superior court loses jurisdiction when case is transferred to S.J.C. pursuant to G.L. c. 278, § 33E).

without an evidentiary hearing if "no substantial issue is raised by the motion or affidavits,"[128] the papers filed may become the record for appellate purposes. For this reason, the motion and supporting materials should be researched and investigated at an early stage so the record created by these filings will provide the best opportunity for relief at the trial court level as well as supporting the arguments to be made on appeal.[129]

The motion judge is entitled to disregard affidavits that contain hearsay or are not based on firsthand knowledge.[130] Additionally, while vague or overly general affidavits may limit the opposing party's ability to prepare to cross-examine the defendant's witnesses at a later evidentiary hearing, any strategic advantage is realized at the risk of failing to persuade the motion judge of the need for an evidentiary hearing, and of leaving the defendant without the factual record necessary to pursue the appeal effectively. [131] Thus, erring on the side of a thorough affidavit is typically the recommended approach.

§ 44.4D. EVIDENTIARY HEARINGS

Unless the motion raises issues based exclusively on the trial record or other documentary materials of undisputed authenticity and accuracy, there is usually a need to expand the trial record. Although the Rule appears to require an evidentiary hearing

[128] *See* Commonwealth v. Stewart, 383 Mass. 253 (1981). *See also* Commonwealth v. DeVincent, 421 Mass. 64, 67 (1995).

[129] Where the defendant relies on the transcript of the trial or other hearings or on trial exhibits, those should also be made a part of the record when the motion is initially filed. Where the defendant relies on newly discovered evidence, affidavits should demonstrate that the evidence would be material and, where it is in the form of testimony from a previously unavailable witness, that the witness is willing to testify. *See* Commonwealth v. Colantonio, 31 Mass. App. Ct. 299, 302 (1991) (motion was not accompanied by affidavit indicating what witness with allegedly newly discovered evidence would state or whether he would be willing to testify).

[130] *See* Commonwealth v. Grace, 397 Mass. 303, 312 (1986).

[131] Commonwealth v. Rebello, 450 Mass. 118, 124 (2007) (hearing properly denied where defendant's affidavits were self-serving and largely cumulative of other witness testimony, and contained hearsay); Commonwealth v. Goodreau, 442 Mass. 341, 353-54 (2004) (motion properly decided without hearing where defendant's claimed suicide attempt was insufficient to create doubt concerning his competency at time of guilty plea).

if a "substantial issue" is raised by the motion or affidavits,[132] the motion judge has some discretion to hear evidence as to some issues and rely on affidavits as to others.[133]

Hearings may be held in any court where the trial judge, or the judge assigned to the postconviction motion, is sitting. Unless the court determines that there is "good cause" for an expedited hearing, the court shall provide the parties with at least thirty days notice of any hearing.[134]

§ 44.4E. DISCOVERY

Rule 30(c)(4) permits the motion judge to authorize appropriate discovery if the moving party's affidavits establish a prima facie case for relief.[135] After notice to the opposing party and an opportunity to be heard, a court "may authorize such discovery as is deemed appropriate, subject to appropriate protective order."[136] Such discovery may include access to physical evidence, including DNA evidence, witness statements, scientific reports, police reports, and other records of investigation. While such discovery may typically take the form of the production of documents and things, a court could permit interrogatory responses, depositions, or other forms of discovery, provided that such discovery was "appropriate" in the context of the case. An indigent defendant may move the court for reasonable costs and expenses incurred in post conviction discovery.[137]In addition to obtaining discovery from the opposing party, the

[132] Commonwealth v. Meggs, 30 Mass. App. Ct. 111, 114 (1991) (motion should not have been decided on affidavits alone as there was "substantial issue" meriting an evidentiary hearing) (quoting Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 407 (1983), and Commonwealth v. Stewart, 383 Mass. 253, 257 (1981)); Commonwealth v. Licata, 412 Mass. 654, 660–61 (1992) (defendant's affidavit raised serious constitutional issue; evidentiary hearing should have been allowed).

Both the "seriousness of the issue and the adequacy of the defendant's showing on it" are to be considered by the motion judge in determining whether a "substantial issue is raised" under Rule 30(c)(3). Commonwealth v. Colon-Cruz, 408 Mass. 533, 559 (1990). *See also* Commonwealth v. Jones, 432 Mass. 623, 633 (2000) (evidentiary hearing not automatically warranted based on affidavit of recanting witness alone)Commonwealth v. Goodreau, 442 Mass. 118 (2007); Commonwealth v. Osorno, 30 Mass. App. Ct. 327, 330 (1991);.Commonwealth v. Rosado, 408 Mass. 561, 568 (1990).

[133] *See* Commonwealth v. Osorno, 30 Mass. App. Ct. 327, 330 (1991) (trial judge did not abuse discretion in deciding postconviction motion on affidavits alone); Commonwealth v. Toney, 385 Mass. 575 (1982). *See also* Commonwealth v. Burke, 414 Mass. 252, 264 (1993); Commonwealth v. Huenefeld, 34 Mass. App. Ct. 315, 323 (1993); Commonwealth v. Fogarty, 406 Mass. 103, 110 (1989); Commonwealth v. Grace, 397 Mass. 303, 313 (1986) (suggesting that any affidavits on which party relies and wishes to make part of record for appeal should be offered into evidence at hearing).

[134] Mass. R. Crim. P. 30(c)(7).

[135] *See* Commonwealth v. Stewart, 383 Mass. 253, 261 (1981) (motion judge has discretion as to scope of discovery); Commonwealth v. Nicholson, 20 Mass. App. Ct. 9, 11 n.1 (1985) (abuse of discretion is standard of review for failure to allow discovery).

[136] Mass. R. Crim. P. 30(c)(4). This Rule formerly provided that a court may authorize appropriate discovery "as would be available in civil cases." This change in the language, which became effective on October 1, 2001, does not reduce the scope of available discovery. The Reporter's Notes to Rule 30 indicate that the change was made to "eliminate confusion" arising from the reference to civil discovery.

[137] Mass. R. Crim. P. 30(c)(5).

moving party may, in some circumstances, be permitted to take and submit her own deposition.[138]

While discovery is available upon a showing of a prima facie case for relief, many motions for postconviction relief are decided without a hearing, and before any formal discovery has been approved by the court. It is therefore important to investigate facts and perform informal discovery even before the motion is filed.[139] If the motion is denied without a hearing the only record on appeal will be the documents that are filed with the Rule 30 motion. The initial documents filed with the trial court should be as complete as possible, and should be supported by affidavits and other documents supporting the factual basis of the motion.

§ 44.4F. APPOINTMENT OF COUNSEL

Although the Rule authorizes the motion judge to appoint counsel for indigent defendants, the Supreme Judicial Court has held that there is no right to appointed counsel on a motion for postconviction relief.[140] Under current rules of practice in the Commonwealth, the appropriateness of appointing counsel is investigated by the Committee for Public Counsel Services. If such an investigation concludes that the postconviction motion may be meritorious, counsel will generally be appointed. Attorney fees may also be awarded for appellate counsel appointed to a capital defendant opposing the Commonwealth's appeal from the trial court's grant of a new trial.[141]

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[138] *See* Commonwealth v. Duest, 26 Mass. App. Ct. 137, 149 (1988) (Appeals Court suggests that defendant incarcerated out of state would be able to present his testimony on motion for new trial through deposition taken pursuant to Mass. R. Crim. P. 35).

[139] Informal discovery can take several forms, and should begin with a thorough review of the trial record and interviews with the defendant and witnesses. In Commonwealth v. Gallarelli, 399 Mass. 17, 19 (1987), counsel discovered exculpatory evidence ultimately resulting in the reversal of the conviction, by calling the police laboratory on the telephone after trial and asking questions about the forensic evidence. In Commonwealth v. Ramirez, 416 Mass. 41, 42 & n.1 (1993), counsel carried out an investigation, through an examination of numerous prior cases, which suggested that the informant who had been named in a warrant application was fictitious. It may also be productive to conduct a search of public records in the hands of Commonwealth agencies through a public records request. *See* G.L. c. 66, § 10; 950 C.M.R. § 32.

[140] *See* Commonwealth v. Conceicao, 388 Mass. 255 (1983). *See also* Pennsylvania v. Finley, 481 U.S. 551 (1987) (there is no federal constitutional right to appointed counsel in state postconviction proceedings); Murray v. Giarratano, 492 U.S. 1 (1989) (accord) (applying *Finley* holding to capital cases); Commonwealth v. Gagnon, 37 Mass. App. Ct. 626, 634–35 (1994), *further appellate review granted on other grounds*, 419 Mass. 1009 (1995) (no error in refusal to appoint counsel on Rule 30 motion where "no factual issues" and arguments "were not legally complex"). A defendant may request copies of transcripts that may be needed in support of a Rule 30 motion, but the refusal of the trial court to grant such a request is not an appealable order. Commonwealth v. Swist, 38 Mass. App. Ct. 907 (1995). Indigent defendants have, however, asserted their right to copies of such transcript through petitions under G.L. c. 211, § 3. Commonwealth v. Swist, 38 Mass. App. Ct. 907 (1995). *See* Charpentier v. Commonwealth, 376 Mass. 80, 81, 82 n.1 (1978). *See also* Commonwealth v. Genninger, 56 Mass. App. Ct. 1106 (2002) (unpublished disposition) (CPCS determination that no appointment of counsel necessary was deemed proper in spite of "remote possibility of a meritorious basis for post-conviction relief").

[141] See Commonwealth v. Phinney, 448 Mass. 621, 623 (2007) (award of attorney fees calculated by reasonable private counsel rate).

A defendant is not entitled as a matter of constitutional law to funds to pay for costs and expenses in connection with a motion for postconviction relief.[142] The statutory provisions for obtaining reasonable costs and expenses at the trial level are not applicable at the Rule 30 stage.[143] However, Rule 30(c)(5) now provides that the court "after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule."[144] Since costs may be authorized for "preparation and presentation" of a motion, the Rule anticipates that information and materials obtained after such expenditures may be used to support and supplement both postconviction motions and presentations to the court. If investigation or scientific testing yields favorable results, such information should be presented to the court in supplemental or amended filings as an offer of proof, so the record will reflect the nature of the case even if the court declines to permit a hearing. If the court will not authorize expenditure of funds, certain functions, such as investigation, and obtaining witness statements, may still be done by counsel.[145]

§ 44.4G. APPEAL

1. Procedure

Subparagraph (c)(8) permits either party to appeal from the motion judge's ruling, gives the motion judge authority to admit the defendant to bail pending appeal,[146] and allows the Appeals Court to compensate a defendant for his costs and reasonable attorney fees.[147]

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[142] *See* Commonwealth v. Dubois, 451 Mass. 20, 27-28 (2008) (court did not abuse its discretion in denying defendant funds for handwriting expert where court found no likelihood that trial result was unjust); Commonwealth v. Davis 410 Mass. 680, 684 (1991) (S.J.C. affirmed trial court's denial of defendant's request for expenses for DNA testing).

[143] G.L. c. 261, § 27C.

[144] These provisions permitting costs were added by amendment which became effective October 1, 2001. The Reporter's Notes following the amended Rule state that "costs" may include expenses for "preparation of a transcript, obtaining the services of an investigator, retaining the services of an expert, or paying for scientific testing."

[145] In such cases the Committee for Public Counsel Services will still approve payment to appointed counsel, and associated counsel, for counsel fees incurred in necessary investigation and preparation by counsel.

[146] However, bail may not be admitted pending appeal when the defendant attacks the sentence rather than conviction and, at the most, earlier parole eligibility would result. Stewart v. Commonwealth, 413 Mass. 664, 669 (1992). *See* Forte v. Commonwealth, 424 Mass. 1012 (1987).

[147] The compensation provision is patterned after Cal. Penal Code § 1506 (Deering Supp. 1976) and former G.L. c. 278, § 28E (St. 1967, c. 898, § 1). Reporter's Notes to Mass. R. Crim. P. 30. The latter provision applied to any appeal by the Commonwealth and provided that the defendant "shall be reimbursed" for the costs of appeal. The statute, like Rule 30(c)(8)(B), contained no requirement that the defendant succeed on appeal in order to receive reimbursement from the Commonwealth. Bail pending appeal on a Rule 30 motion may be granted by the appellate judge and is proper *if* the appeal will result in a reversed conviction, a new trial order, or a sentence less than time served, including the time of the appeal proceedings. Stewart v. Commonwealth, 413 Mass. 664 (1992) (admission of bail improper during Commonwealth's appeal of a resentencing, which was granted based on a Rule 30 motion). *See also* Forte v. Commonwealth, 418 Mass. 98, 99–100 (1994).

After rescript issues in a capital case, the appellate route for subsequent motions for new trial is marked by an additional procedural hurdle. To appeal the denial of a subsequent motion,[148] the defendant must obtain a ruling from the single justice of the Supreme Judicial Court that the motion "presents a new and substantial question which ought to be determined by the full court."[149] The constitutionality of this more limited access to appellate review has been upheld in both the state and federal courts.[150]

The application of these provisions is limited by G.L. c. 278, § 33E.[151] This statute applies only to "capital cases," which the statute defines as "case[s] in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree."[152] Once the appeal is entered and until the rescript issues, all motions for new trial in capital cases must be filed in the Supreme Judicial Court. Once the motion is filed with the Supreme Judicial Court, the court will typically remand the motion for consideration in the trial court, but the Supreme Judicial Court does have the authority to decide the motion itself. When a motion for new trial is filed in the trial court before entry of the appeal, the Supreme Judicial Court has implicitly approved of the superior court clerk's delaying transfer of the case until the trial court rules on the motion.[153]

2. Standard of Review

[148] After the S.J.C. has reviewed a case on direct appeal pursuant to its "special powers" under G.L. c. 278, § 33E, those powers are "no longer applicable." Commonwealth v. Smith, 427 Mass. 245, 256 (1998). As a result, an appeal from the denial of a subsequent motion for new trial will be tested on the "applicable constitutional standards." *Smith, supra,* 427 Mass. at 256.

[149] G.L. c. 278, § 33E. An issue fails this test "where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." Commonwealth v. Ambers, 397 Mass. 705, 707 (1986). The S.J.C. has likened this requirement to the waiver provisions of Rule 30(c)(2). Commonwealth v. Pisa, 384 Mass. 362, 366, n.5 (1981). This "gatekeeper" provision also applies to the Commonwealth's appeal from the allowance of a § 33E new trial motion. Commonwealth v. Francis, 411 Mass. 579, 582–85 (1992). Although *Francis* and other cases suggest that no appeal will lie from the single justice's ruling on whether the appeal "presents a new and substantial question," whether the defendant has waived the claim is a distinct, appealable issue. *Francis, supra,* 411 Mass. at 582, n.4, 585–86; Commonwealth v. Doherty, 411 Mass. 95, 96, n.1. The single justice acting as "gate keeper" may specify the particular issues upon which appellate relief will be allowed. *See, e.g.,* Commonwealth v. Salvati, 420 Mass. 499, 500 (1995); Commonwealth v. Smith, 427 Mass. 245, 247 (1998).

[150] *See* Dickerson v. Attorney General, 396 Mass. 740 (1986); Dickerson v. Latessa, 688 F. Supp. 797 (D. Mass. 1988); Latimore v. Commonwealth, 417 Mass. 805, 808 (1994); Trigones v. Attorney General, 420 Mass. 859 (1995).

[151] *See* Stephanie Roberts Hartung, *The Limits of "Extraordinary Power": A Survey of First-Degree Murder Appeals Under Massachusetts General Laws Chapter 278, § 33E*, 16 SUFFOLK J. OF TRIAL & APP. ADV., no. 1 (Spring 2011) (discussing provisions of § 33E generally).

[152] Where the defendant's conviction of first-degree murder was reduced to second degree on appeal, he was no longer convicted of first-degree murder and, consequently, his motion for new trial was not subject to the restrictions of G.L. c. 278, § 33E. Commonwealth v. Lattimore, 400 Mass. 1001 (1987). *But see* Commonwealth v. Lanoue, 409 Mass. 1, 9 (1990) (O'Connor, J., concurring).

[153] *See* Commonwealth v. Aguiar, 400 Mass. 508, 511 (1987).

The motion judge has broad but not unlimited discretion in ruling on a motion for postconviction relief. The Supreme Judicial Court has repeatedly noted that "if the original trial was infected with prejudicial constitutional error the judge has no discretion to deny a new trial."[154] The limits of the motion judge's discretion are marked by reversals on appeal of both allowances and denials of Rule 30 motions.[155]

The motion judge's discretion is broadest where she was also the trial judge, and her ruling will be upheld as long as evidence exists in the record to support it.[156]

Where the motion judge did not preside at trial, the appellate court is in as good a position to assess the trial record and will defer only to the motion judge's findings regarding testimony and evidence admitted at the hearing on the motion.[157] However,

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[154] *See, e.g.,* Commonwealth v. Cowie, 404 Mass. 119, 123 & n.9 (1989) (citing Commonwealth v. Doherty, 394 Mass. 341, 346 (1985), and quoting Earl v. Commonwealth, 356 Mass. 181, 184 (1969)). The S.J.C. has also made it clear that it will not disturb the motion judge's denial of a Rule 30 motion unless reversal is required to prevent a "manifest injustice." Commonwealth v. Watson, 409 Mass. 110, 114 (1991). *See also* Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994). The appellate court will review the decision of the trial court judge, if a motion for new trial was previously filed, on a "substantial risk of a miscarriage of justice" standard. If it appears that there was error, even if that error was not preserved at trial, or argued on an initial appeal, relief may be granted. Commonwealth v. Azar, 435 Mass. 675 (2002).

[155] *See* Commonwealth v. Johnson, 409 Mass. 405, 406–07 (1991) (vacating allowance of motion for new trial where trial judge erred in applying standard for retroactive application of new rule to case on collateral review); Commonwealth v. Genius, 402 Mass. 711, 714 (1988) (reversing allowance of motion where judge failed to make explicit his basis for granting new trial and where necessary subsidiary findings were unwarranted by record); Commonwealth v. Grace, 397 Mass. 303 (1986) (vacating allowance of motion and remanding for further findings where judge failed to make subsidiary findings necessary to support ruling that claimed "newly discovered evidence" warranted a new trial); Commonwealth v. Donovan, 15 Mass. App. Ct. 269 (1983) (reversing denial of motion for new trial where trial judge failed to appreciate both magnitude of error and that no showing of prejudice was required); Commonwealth v. Donahue, 396 Mass. 590 (1986) (reversing denial of motion for new trial where material and exculpatory evidence in possession of FBI was not disclosed). It is worth noting that pre-1966 new trial motions were judged by a stricter standard which required the judge to find that "justice has not been done," not that "justice may not have been done." Older precedents are thus applied "with somewhat more generous predisposition." Commonwealth v. Markham, 10 Mass. App. Ct. 651, 654 (1980).

[156] Commonwealth v. Morgan, 453 Mass. 54, 64 (2009); Commonwealth v. Calantonio, 31 Mass. App. Ct. 299, 302 (1991) (quoting Commonwealth v. Moore, 408 Mass. 117, 125 (1990)); Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439, 449 (1986); Commonwealth v. Markham, 10 Mass. App. Ct. 651, 652 (1980). *But see* Commonwealth v. Gallarelli, 399 Mass. 17 (1987) (reversing trial judge's ruling that failure to disclose exculpatory evidence was not prejudicial based on the S.J.C.' s own review of record; holding that trial judge's analysis was at odds with logic, facts, and judge's own statements at trial and motion hearing). *See also* Commonwealth v. Amirault, 424 Mass. 618 (1997) (where motion for new trial was denied with regard to one codefendant who had his motion decided by trial judge, and motion for postconviction relief of other two defendants was allowed by judge who was not trial judge, the S.J.C. held that all motions should be denied). *See also* Commonwealth v. Tucceri, 412 Mass. 401, 403 (1992) (affirming order granting new trial where Commonwealth failed to disclose potentially exculpatory evidence).

[157] *See* Commonwealth v. Haley, 413 Mass. 770, 773 (1992); Commonwealth v. Grace, 397 Mass. 303, 307 (1986); Commonwealth v. Johnson, 13 Mass. App. 439, 449 (1986); Commonwealth v. Donahue, 396 Mass. 590 (1986); Commonwealth v. Richardson, 1 Mass. App. Ct. 348 (1973). Where the motion for new trial is constitutionally based, the appellate

regardless of whether the motion judge was also the trial judge, the appellate court will examine the motion judge's ruling for errors of law.[158]

In situations where the trial judge is no longer sitting, the broader review by the appellate courts can have both advantages and disadvantages. The heightened scrutiny on appeal applies to allowances of motions as well as to denials. Assuming, however, that more postconviction motions are denied than are allowed, most defendants will benefit from the more thorough appellate review available when the motion judge is not the trial judge. This consideration, balanced against an assessment of the trial judge's likely sympathies, may be a factor in deciding when to bring a motion for postconviction relief. Any significant passage of time in pursuing such a motion once the grounds are recognized, however, may lead to an argument that the defendant engaged in "deliberate delay" and that such delay should constitute a waiver.[159]

§ 44.4H. SUBSTANTIVE GROUNDS

This section provides an overview of several of the more common grounds for postconviction relief. It is by no means a complete survey of all possible grounds for postconviction relief.

1. Rule 30(a) Motions

A motion will lie under Rule 30(a) where the jury did not explicitly find facts to support each and every element of the offense charged. For example, where the court sentenced the defendant for armed assault with intent to murder, but the verdict slips returned by the jury indicated it found him guilty only of simple assault with intent to murder, a Rule 30(a) motion would lie.[160] The court also ruled that the defendant's failure to raise this issue on an earlier appeal did not constitute a waiver, interpreting Rule 30(a) as permitting a defendant to file a motion of this nature at any time.[161]

Rule 30(a) is also an appropriate vehicle for claiming a violation of the Interstate Agreement on Detainers,[162] for presenting a claim of duplicative sentencing,[163] for obtaining relief where a postconviction appellate decision in another

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court may "exercise its own judgment on the ultimate factual as well as legal conclusions." Commonwealth v. Salvati, 420 Mass. 499, 500–01 (1995) (citing Commonwealth v. Tucceri, 412 Mass. 401, 409 (1992)).

[158]See Commonwealth v. Morgan, 453 Mass. 54, 64 (2009) (noting that when deciding judge acted as trial judge, knowledge and evaluation of evidence at trial may be used without evidentiary hearing). *See* Commonwealth v. Donovan, 15 Mass. App. 269 (1983); Commonwealth v. Minkin, 14 Mass. App. 911, *further appellate review denied*, 386 Mass. 1104 (1982). *See also* Commonwealth v. Hallet, 427 Mass. 552 (1998) (standard of review may be more favorable if the motion is filed with the trial court in advance of the direct appeal).

[159] *See* Commonwealth v. Francis, 411 Mass. 579, 585 (1992) (where Commonwealth argued, unsuccessfully, that "deliberate delay" should constitute waiver).

[160] *See* Commonwealth v. Harris, 23 Mass. App. 687, 691–92 (1987). *See also* Commonwealth v. Andino, 34 Mass. App. Ct. 423 (1993) (defendant's conviction was not rendered invalid by clerk's erroneous reference to crime of receiving stolen "property" in course of taking jury verdict).

[161] Commonwealth v. Harris, 23 Mass. App. Ct. 687, 691–92 (1987).

[162] *See* Commonwealth v. Wilson, 399 Mass. 455 (1987) (motion denied).

[163] *See* Commonwealth v. Ambers, 397 Mass. 705 (1986).

case interprets the relevant statute as not applying to the defendant's conduct,[164] and for challenging the propriety of consecutive sentences for a single series of acts.[165] The Supreme Judicial Court has granted relief under Rule 30(a) where a defendant, in addition to being convicted of a criminal offense, was determined to be a sexually dangerous person, without first having a hearing as required by G.L. c. 123A, § 5.[166]

Massachusetts courts have also applied limits on the grounds for relief under Rule 30(a). In separate opinions involving the same defendant, the Appeals Court ruled that Rule 30(a) cannot be used to reduce a sentence where the sentencing judge imposed a sentence based on a misapprehension of the applicable parole eligibility dates,[167] nor can Rule 30(a) be used by the sentencing judge to correct ambiguous language employed in imposing a "from and after" sentence.[168] Both *Layne* opinions make the point that Rule 30(a) does not provide relief which, if the motion were timely, might be available under a Rule 29(a) motion to revise or revoke the sentence.[169]

2. Rule 30(b) Motions

a. Withdrawal of Guilty Pleas

A motion for new trial under Rule 30(b) is the proper vehicle for challenging the lawfulness[170] of a guilty plea or an admission to sufficient facts.[171] Essentially, a motion to withdraw a guilty plea is treated as a motion for a new trial.[172]

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[164] *See* Commonwealth v. Fenton, 395 Mass. 92 (1985) (defendant was convicted under G.L. c. 269, § 10(a), for carrying a CO_2 powered revolver).

[165] *See* Commonwealth v. Dello Iacono, 20 Mass. App. Ct. 83 (1985) (holding that consecutive sentences are permissible where single series of assaultive acts simultaneously placed two persons in fear).

[166] Commonwealth v. Godfroy, 420 Mass. 561, 564 (1995). *See also* Commonwealth v. Tate, 424 Mass. 236 (1997) (discussing repeal of G.L. c. 123A, §§ 3–6).

[167] *See* Commonwealth v. Layne, 21 Mass. App. 17, 18–19, *further appellate review denied*, 396 Mass. 1104 (1985).

[168] *See* Commonwealth v. Layne, 25 Mass. App. 1 (1987) (despite judge's testimony as to his intention that sentence be served after group of consecutive sentences then being served, ambiguity was resolved in defendant's favor).

[169] Rule 30(a) was not available for review of an illegal sentence imposed in the bench trial session of the district court where the defendant failed to exercise his right of appeal to the jury-of-six session under the former trial de novo system. Commonwealth v. Lupo, 394 Mass. 644 (1985).

[170] The power of the trial court to permit the withdrawal of a guilty plea is limited, and a finding that the defendant had already served sufficient time did not supply an adequate basis to vacate the plea. Commonwealth v. Nessolini, 19 Mass. App. Ct. 1016 (1985) (reversing orders allowing withdrawal of guilty plea and entry of finding on a lesser offense).

[171] *See* Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984); Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982). Where a defendant seeks to challenge a conviction based on an inadequate colloquy, the court may decline to give retroactive effect to the court-imposed colloquy requirements of Commonwealth v. Duquette, 386 Mass. 834, 837 (1982), and Commonwealth v. Mele, 20 Mass. App. Ct. 958 (1985). *See* Commonwealth v. Russell, 37 Mass. App. Ct. 152, 156 n.4 (1994).

[172] *See* Commonwealth v. Furr, 454 Mass. 101, 106 (2009); Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353 (post-sentence motion to withdraw guilty plea treated as a motion for a new trial)

The use of Rule 30(b) to challenge convictions based on guilty pleas has become a common practice where a defendant is facing the serious sentencing consequences of being a "repeat offender" or facing other sentencing enhancements under the U.S. Sentencing Guidelines.[173] In some cases a comparatively minor state court conviction can result in many additional years of incarceration on a new offense or have drastic immigration consequences.[174] With this in mind, previous convictions must be reviewed with care to determine whether they may be subject to collateral attack.

An admission to sufficient facts[175] or a guilty plea is constitutionally defective unless the record shows that the defendant has knowingly and voluntarily[176] waived several constitutional rights including: (1) the privilege against compulsory self-incrimination; (2) the right to trial by jury; and (3) the right to confront one's accusers.[177] Because a guilty plea involves a waiver of these constitutional rights, the plea is valid only when the defendant offers it voluntarily, with sufficient awareness of the relevant circumstances, and with the advice of competent counsel.[178] The plea record must show that the defendant was advised of the elements of the offense or that he admitted to facts constituting the unexplained elements.[179] (*Pleas and admissions* are addressed in detail in Chapter 37.)

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[173] *See, e.g.,* Commonwealth v. Russell, 37 Mass. App. Ct. 152 (1994) (defendant challenged a 12-year-old state court conviction after being sentenced in the U.S. District Court under the Armed Career Criminal Act, 18 U.S.C. § 924(e)); Commonwealth v. Pingaro, 44 Mass. App. Ct. 41 (1997) (defendant challenged a 15-year-old state court conviction after receiving an enhanced federal sentence); Commonwealth v. Lopez, 426 Mass. 657 (1998) (defendant challenged a series of state court convictions after receiving sentencing enhancements in federal criminal proceedings).

[174] As immigration consequences of criminal convictions have become more severe, attempts to vacate convictions to improve a defendant's chances in immigration proceedings have become more common. *See* Commonwealth v. Pryce, 429 Mass. 556 (1999). Failure of a trial court to give adequate "immigration warnings" as required by M.G.L. c. 278 Sec. 29D, provides grounds for vacating a plea or admission to sufficient facts. Commonwealth v. Soto, 431 Mass. 340 (2000). There is doubt as to whether the immigration warnings required by Massachusetts statute are adequate to advise defendants of the potential immigration consequences of a guilty plea or an admission to sufficient facts. Commonwealth v. Villalobos, 52 Mass. App. Ct. 903, further appellate review allowed, 435 Mass. 1104 (2001).

[175] An admission to sufficient facts accompanied by a failure to appeal implicates the same constitutional rights as a guilty plea. Commonwealth v. Mahadeo, 397 Mass. 314, 316 (1986); Commonwealth v. De La Zerda, 416 Mass. 247, 248 (1993).

[176] Commonwealth v. Foster, 368 Mass. 100, 106 (1975) (record must show that defendant entered plea voluntarily and not in response to threats or undue pressure).

[177] Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)). Though *Boykin* required the record to affirmatively show that these rights were waived, the Supreme Court has subsequently cut back on this requirement, allowing the burden to be placed on the defendant to establish that the plea was invalid and the absence of waiver resulted in prejudice. Parke v. Raley, 506 U.S. 20 (1992); United States v. Ferguson, 60 F.3d 1, 2 (1st Cir. 1995).

[178] Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984) (citing Brady v. United States, 397 U.S. 742, 748–49 (1970)).

[179] Commonwealth v. Lopez, 426 Mass. 657, 660 (1998) (citing Henderson v. Morgan, 426 U.S. 637, 646 (1976)); Commonwealth v. Colantoni, 396 Mass. 672, 678–79 (1986). *See* Commonwealth v. Correa, 43 Mass. App. Ct. 714 (1997) (where a defendant agreed to "plead to the faces of the complaints" but record did not show that defendant was advised of elements of

Once a defendant challenges the voluntariness of a plea or the completeness of the constitutional waivers, the burden is ordinarily on the Commonwealth to show that the plea was entered in compliance with constitutional requirements.[180] If a contemporaneous record of the plea proceedings is unavailable, it may be reconstructed through testimony or other proof of what happened in court when the plea was taken.[181] In many instances the records of plea colloquies are taped and transcribed. If the contemporaneous record of the proceedings in the form of tapes or transcripts is destroyed, it becomes difficult for the Commonwealth to establish that the plea was entered into in compliance with these constitutional requirements.

The Supreme Judicial Court, recognizing the proliferation of postconviction challenges to guilty pleas, announced "standards that should govern a judge's consideration of a defendant's motion to withdraw a guilty plea under Mass R. Crim. P. 30(b) . . . when the motion is filed in a sentencing enhancement context and no record of the plea exists because the means of creating that record have been destroyed pursuant to court rule."[182] Pursuant to the *Lopez* standards, if the contemporaneous record of the plea proceedings is unavailable, the trial court need not "accept the defendant's self serving affidavit, alleging constitutional defects in conclusory terms, as sufficient to satisfy the defendant's burden, under rule 30(b) to produce" a credible basis for withdrawing the plea, which outweighs the risk of prejudice to the Commonwealth.[183] The Supreme Judicial Court states that there is a "presumption of regularity" in the plea proceedings, that remains in place unless the defendant overcomes the presumption with credible and reliable factual evidence.[184] If a defendant meets this burden, then an evidentiary hearing may be warranted at which "the burden would be on the Commonwealth to show that the defendant's plea proceedings were conducted in a way that protected his constitutional rights."[185]

The *Lopez* and *Grant* decisions make it clear that a defendant may not file a conclusory affidavit that states that he does not remember being advised of his rights, but must present affirmative evidence that he was not advised of his rights. The best evidence of a defect in the plea proceedings would be a tape or transcript of the actual

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offense, motion for new trial should be allowed); *See also* Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353 (2008) (court found sufficient colloquy at defendant's entry of guilty plea where defendant's claim of coercion was unsupported by the record).

[180] Commonwealth v. Lopez, 426 Mass. 657, 660 (1998); Commonwealth v. Duquette, 386 Mass. 834, 841 (1982).

[181] Commonwealth v. Lopez, 426 Mass. 657, 660 (1998); Commonwealth v. Quinones, 414 Mass. 423, 432 (1993).

[182] Commonwealth v. Lopez, 426 Mass. 657, 658 (1998); Commonwealth v. Grant, 426 Mass. 667, 668 (1998).

[183] Commonwealth v. Lopez, 426 Mass. 657, 661–62.

[184] Commonwealth v. Lopez, 426 Mass. 657, 661–63, 665 (1998); Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 49–50 (1997); Commonwealth v. Gonzales, 43 Mass. App. Ct. 926 (1997).

[185] Commonwealth v. Lopez, 426 Mass. 657, 665 (1998). Where no record of the plea agreement exists, the defendant's motion must be accompanied by sufficient credible and reliable evidence to rebut a presumption that the prior conviction was valid. If this burden is met, an evidentiary hearing may be warranted, where the burden shifts to the Commonwealth to show that the plea proceedings were conducted in a constitutional manner. Commonwealth v. Colon, 439 Mass. 519 (2003)

plea colloquy.[186] An affidavit of counsel stating that the plea proceedings failed to comply with constitutional requirements may also provide support for the defendant's motion.[187] Further, withdrawal of a guilty plea has been deemed an appropriate remedy where the record indicates that the defendant was not advised regarding potential mitigating issues such as provocation in a murder case.[188]

b. Newly Discovered Evidence

A defendant may obtain a new trial under Rule 30(b) on a showing that there is newly discovered evidence that "casts real doubt on the justice of the conviction."[189] The evidence must give material and credible support to the defendant's position.[190] The motion judge must find that there is a "substantial risk" that the evidence, if admitted, would have produced a different verdict.[191]

The defendant must also demonstrate that the evidence was unknown[192] to, and not reasonably discoverable by, either the defendant or counsel at the time of trial.[193] To support the granting of a new trial on this basis, the trial judge must find that a diligent search would not have produced the evidence at the time of trial.[194] Evidence

[186] In general, obsolete court papers and records may be destroyed after six years. G.L. c. 221, § 27A; S.J.C. Rules 1:11 and 1:12. Recordings of district court proceedings should be maintained for at least two and one-half years. Rule 211(A)(4) of the Special Rules of the District Courts (1997). One way to assure the availability of such tapes or transcripts would be to order copies, as a matter of course, at the time that the plea is entered.

[187] Commonwealth v. Lopez, 426 Mass. 657, 665–66 (1998); Commonwealth v. Grant, 426 Mass. 667, 671 & n.3 (1998).

[188] *See* Commonwealth v. Yates, 62 Mass. App. Ct. 494, 498-99 (2004).

[189] *See* Commonwealth v. Lykus, 451 Mass. 310, 325-26 (2008) (defendant seeking new trial must show that evidence is newly discovered, material and credible, and "casts real doubt" on the propriety of the conviction); Commonwealth v. Grace, 397 Mass. 303, 305 (1986); Commonwealth v. Epsom, 422 Mass. 1002, 1003 (1996) (defendant's motion and affidavits held to raise new and substantial issue of self-defense warranting evidentiary hearing).

[190] *See* Commonwealth v. Colantonio, 31 Mass. App. Ct. 299, 302–03 (1991) (motion correctly denied where defendant failed to demonstrate that claimed newly discovered evidence was material); Commonwealth v. DiBenedetto, 414 Mass. 37 (1992) (same).

[191] Commonwealth v. Moore, 408 Mass. 117, 126–27 (1990) (upholding denial of new trial where "supposedly newly discovered evidence would not have been a real factor in the jury's deliberations"); Commonwealth v. Grace, 397 Mass. 303, 306 (1986). *See also* Commonwealth v. DiBenedetto, 458 Mass. 657, 670 (2011) (case remanded for further findings where DNA evidence was presumed to be "newly discovered" but it was not clear from trial court's findings whether evidence undermined otherwise strong prosecution case).

[192] Commonwealth v. Kobrin, 72 Mass. App. Ct. 589, 612-13 (2008); Commonwealth v. Grace, 397 Mass. 303, 308–11 (1986).

[193] Commonwealth v. Osorno, 30 Mass. App. Ct. 327, 333–34 (1991); Commonwealth v. Cormier, 75 Mass. App. Ct. 1101 (2009) (unpublished disposition); *See* Commonwealth v. Bowie, 25 Mass. App. 70, 85 (1987) (expressions of doubt about accuracy of identification were not newly discovered because diligent cross-examination could have produced same evidence at trial); Commonwealth v. Brown, 378 Mass. 165, 171–72 (1979); Commonwealth v. Markham, 10 Mass. App. 651, 653–54 & n.1 (1980).

[194] *See* Commonwealth v. Grace, 397 Mass. at 308 (remanding to motion judge for further findings as to whether diligence would have produced witness).

that was not lawfully available to a defendant at the time of trial, if it later becomes available, may be "newly discovered evidence." For example, if a defendant is denied access, by the trial court, to potentially valuable impeachment evidence, and subsequent developments in the law show that such evidence should have been available to the defendant, such evidence is "newly discovered."[195] If a defendant was deprived access to a police report in advance of trial that report may be "newly discovered" evidence.[196] Further, information that the victim failed to testify to incriminating facts at trial has been deemed sufficient to warrant a new trial.[197] While it is possible to characterize new scientific information as "newly discovered evidence," and this tactic is particularly advantageous in light of the recent publication of the National Academy of Sciences Report which discredits many traditional forms of forensic evidence, the courts have so far been reluctant to accept these claims.[198]

c. Ineffective Assistance of Counsel

A motion for new trial is usually necessary to present the evidentiary basis for a claim that trial counsel was ineffective.[199] When the claim can be substantiated on the trial record alone, however, there is no requirement that the record be expanded.[200]

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[195] In Commonwealth v. Figueroa, 422 Mass. 72 (1996), a defendant was denied access to a Department of Mental Retardation records of complaining witness. The S.J.C. applied Commonwealth v. Stockhammer, 409 Mass. 867 (1991), retroactively and held that the case should be remanded to the superior court for a hearing to determine whether such records warranted a new trial.

[196] *See* Commonwealth v. Daye, 411 Mass. 719, 734 (1992).

[197] Commonwealth v. Chiappini, 72 Mass. App. Ct. 188, 198-99 (2008) (new trial warranted based on newly discovered evidence where bar fight victim admitted in later plea colloguy to act of violence against defendant, and such admission would have supported defendant's self-defense claim at trial).

[198] A dispute among experts regarding scientific evidence is not necessarily sufficient to warrant an evidentiary hearing in a motion for a new trial. *See* Commonwealth v. Shuman, 445 Mass. 268, 272-73 (2005) (finding evidence linking Zoloft to violent urges among users did not constitute "newly discovered" evidence, as such information was already known in scientific and medical communities at time of trial).

[199] *See, e.g.,* Commonwealth v. Zinser, 446 Mass. 807 (2006) (claim of ineffective assistance of counsel properly raised in post-appeal motion for new trial where defendant claimed counsel failed to investigate defendant's impairment at time of crime, given that claim required consideration of new facts, including affidavit submitted by psychologist); Commonwealth v. Habarek, 421 Mass. 1005 (1995) (evidentiary hearing granted on motion for new trial where ineffective assistance of counsel claim could not have been raised earlier, because same attorney had represented defendant at trial and on appeal); Commonwealth v. Martin, 427 Mass. 816 (1998) (new trial allowed where Commonwealth failed to disclose laboratory test results, and where trial counsel failed to challenge evidence regarding cause of death); Commonwealth v. Haggerty, 400 Mass. 436 (1987) (motion for new trial granted where evidence at hearing showed that expert testimony — if trial counsel had sought it — could have provided only realistic defense available to charge). *Compare* Commonwealth v. Bennett, 414 Mass. 269 (1993) (defendant may not rely on posttrial revelation of police wrongdoing to support new trial/ineffective assistance claim based on failure to move to suppress).

[200] *See, e.g.,* Commonwealth v. Whyte, 43 Mass. App. Ct. 920, 921 & n.3 (1997) (rescript) (motion for required finding would have been entered but for counsel's error in judgment); Commonwealth v. Frisino, 21 Mass. App. Ct. 551 (1986) (failure of counsel to object to inadmissible evidence deprived defendant of required finding of not guilty). *Cf.*

Where ineffective assistance has resulted in the failure to file a timely appeal, the Supreme Judicial Court has ruled that Rule 30(b) provides the appropriate and adequate remedy for the loss of the direct appeal.[201] In this situation the Rule 30(b) motion should raise the loss of appellate rights caused by the deprivation of the constitutional right to effective assistance of counsel, as well as all errors at trial that could have been raised on the direct appeal. All claimed trial errors, whether or not of constitutional dimension, should be given the same review by both the motion judge and the appellate court that the issues would have received on direct appeal.[202]

d. Other Grounds

A new trial motion under Rule 30(b) may be an appropriate remedy for the loss of the stenographer's trial notes when the parties are unable to reconstruct the trial record;[203] for errors arising from the jurors' deliberations;[204] for errors in jury instructions, particularly where intervening developments in constitutional law have

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Commonwealth v. Companonio, 420 Mass. 1003 (1995) (motion for new trial, which had been allowed, reversed by S.J.C. and remanded for evidentiary hearing); Commonwealth v. Collins, 36 Mass. App. Ct. 25, 30 (1994) (defendant's failure to file affidavits from two witnesses whom his trial attorney failed to call justified denial of his motion for new trial alleging ineffective assistance of counsel).

[201] *See* Commonwealth v. Cowie, 404 Mass. 119, 122–23 (1989); Commonwealth v. Godfroy, 420 Mass. 561 (1995) (defendant permitted to file second Rule 30 motion, with grounds identical to first, due to allegation of ineffective assistance of counsel who had failed to appeal denial of first motion). *See also* Commonwealth v. Cardenuto, 406 Mass. 450 (1990) (failure of counsel to appeal from denial of motion for required finding of not guilty was, under circumstances, ineffective assistance of counsel).

[202] No issue of waiver should arise from failure to preserve trial errors because the defendant's failure to present the claims earlier on direct appeal was caused by the ineffective assistance. A defendant represented by the same attorney at trial and on direct appeal may seek review of counsel's performance on direct appeal. Commonwealth v. Lanoue, 409 Mass. 1, 2–4 (1990). It would be "unrealistic to expect" trial counsel to call his own competence into question on direct appeal. *Lanoue, supra.* Similarly, where trial counsel and appellate counsel were members of the same firm, it could not be expected that appellate counsel would call into question the competence of trial counsel. Breese v. Commonwealth, 415 Mass. 249, 250 & n.1 (1993). Where trial counsel and appellate counsel were both employed by the Committee for Public Counsel Services, the same principle applies. Commonwealth v. Egardo, 426 Mass. 48, 49–50 (1997).

[203] *See* Commonwealth v. Watts, 22 Mass. App. Ct. 952, *further appellate review denied*, 398 Mass. 1104 (1986); Commonwealth v. Pelp, 41 Mass. App. Ct. 435, 441 & n.8 (1996) (Appeals Court suggested that filing amended motion for new trial may be most efficient way to proceed where it is difficult to establish what records were available to counsel at time of trial).

[204] *See* Commonwealth v. Buckley, 17 Mass. App. Ct. 373, *further appellate review denied*, 391 Mass. 1104 (1984) (jury tainted by judge's comments on parole eligibility and other extraneous proceedings which judge conducted in jurors' presence); Commonwealth v. Donovan, 15 Mass. App. Ct. 269 (1983) (new trial based on trial judge's failure to respond to question related by foreman to court officer during deliberations); Commonwealth v. Fidler, 377 Mass. 192, 203–04 (1979) (new trial motion allowed where affidavits established that jury considered improper extraneous information). *But See* Commonwealth v. Pytou Heang, 458 Mass. 827, 858-59 (2011) (motion for new trial properly denied where trial court handled juror letter appropriately and no unfair prejudice to defendant resulted).

recognized the claim;[205] for the Commonwealth's withholding of or failure to provide properly requested material or exculpatory evidence;[206] for a judge's vindictiveness in sentencing;[207] and for numerous less common errors as well. The range of possible grounds is limited only by counsel's imagination, the law, and judicially imposed waivers for failure to raise the claim at an earlier opportunity.

§ 44.5 COLLATERAL ATTACKS IN THE FEDERAL COURTS: HABEAS CORPUS

In addition to direct and collateral attacks in state court, state prisoners may attack their convictions in federal courts through a petition for issuance of a writ of habeas corpus. The habeas corpus statute is codified in 28 U.S.C. §§ 2241–2255. Habeas corpus litigation is complex and it is beyond the scope of this treatise to deal in depth with the issues that arise in such litigation. The law relating to habeas corpus relief has undergone dramatic changes since the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), making it necessary for petitioners and their counsel to keep current on developments on an ongoing basis. Several comprehensive treatises are available and should be consulted in preparing to file a

[205] *See, e.g.*, Commonwealth v. Fortini, 68 Mass. App. Ct. 701, 707-09 (2007) (new trial warranted where trial court erred in failing to give jury instruction on reasonable provocation in prosecution for first-degree murder); Commonwealth v. Francis, 411 Mass. 579, 585–86 (1992) (new trial ordered, based on constitutional adequacy of instructions to jury on reasonable doubt). Claims based on improper jury instructions will generally require a showing of prejudice to the defendant. *See* Commonwealth v. Van Liew, 38 Mass. App. Ct. 934–35 (1995); Commonwealth v. Burkett, 396 Mass. 509, 511–12 (1986) (ordering new trial where jury instruction created unconstitutional presumption that relieved Commonwealth of its burden of proving intent). *But see* Commonwealth v. Bray, 407 Mass. 296, 300, 303 (1990) (following Teague v. Lane, 489 U.S. 288 (1989), in holding that new rule should be applied retroactively to cases on collateral review only where rule bears directly on accurate determination of innocence or guilt); Commonwealth v. Robinson, 408 Mass. 245, 247–48 (1990) (same).

[206] *See* Commonwealth v. Buck, 64 Mass. App. Ct. 760, 764-65 (2005) (new trial warranted where prosecutor failed to disclose complete surveillance videotape which would have supported defendant's alibi); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435 (1992); Commonwealth v. Donohue, 396 Mass. 590, 600–02 (1986) (new trial ordered where state prosecutor failed to relay to federal authorities defense counsel's request for FBI Form 302 investigative reports that were later revealed to contain evidence supporting an alibi defense); Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439, 447 (1986) (prosecutor's withholding until trial was underway of exculpatory evidence was one of several appropriate grounds for allowance of new trial). *But see* Commonwealth v. Schand, 420 Mass. 783, 787–88 (1995) (defendant would be entitled to new trial based on prosecutor's failure to turn over exculpatory information regarding identification procedures if defendant could prove that evidence existed, that it tended to exculpate him, that it was material, that prosecutor failed to deliver it, and that there was "prejudice"). *Cf.* Kyles v. Whitley, 514 U.S. 419 (1995) (reversing conviction and granting new trial due to prosecutor's failure to disclose exculpatory evidence where net effect of state- suppressed evidence favoring defendant raised reasonable possibility that its disclosure would have produced different result at trial). Remedies for the withholding or destruction of exculpatory evidence are addressed in detail *supra* at §§ 16.6A and 16.6B.

[207] Commonwealth v. Ravenell, 415 Mass. 191 (1993).

petition.[208] This section does attempt, however, to provide an overview of the basic law and procedure that governs the preservation of federal issues in the state court, and the filing of a petition for a writ of habeas corpus.

§ 44.5A. HISTORICAL OVERVIEW

Prior to 1867 the access of state prisoners to federal habeas corpus was quite limited because the federal statute conferred jurisdiction on the federal courts in only a few types of cases. The Habeas Corpus Act of 1867 was broadly worded and appeared to confer jurisdiction over any violation of federal law alleged by a state prisoner. This act did not have broad ranging impact until 1953, when the Supreme Court held, in *Brown v. Allen*,[209] that all federal constitutional issues raised by state prisoners were within federal habeas jurisdiction; that the federal courts were not bound by state court judgments on federal questions even if the issues had been fully and fairly litigated in state court; and that the federal habeas court could inquire into issues of fact as well as law. The Warren court took a liberal view of the reach of the Bill of Rights to the U.S. Constitution as applied to state prisoners through the writ of habeas corpus.[210]

In more recent decades the availability of habeas corpus relief has been curtailed and in some situations abolished altogether. In 1976 the Supreme Court began a sustained trend toward restricting the ability of state prisoners to obtain relief through the writ of habeas corpus.[211] On April 24, 1996, AEDPA was signed into law.[212] The Supreme Court has stated that the purpose of the law is "to further the principles of comity, finality and federalism."[213] However, the practical effect of this law is to substantially diminish the powers of federal courts to grant the writ of habeas corpus, and to codify certain restrictions on access to the federal courts that were developed

[208] Good resources on habeas corpus law include: Yackle, POSTCONVICTION REMEDIES(2010 ed.);Liebman & Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. (2011);Robbins, HABEAS CORPUS CHECKLIST (2010);LaFave & Israel, CRIMINAL PROCEDURE , 5th ed. (2010);Antineau, EXTRAORDINARY REMEDIES , 1–78, 231–42 (1987).

[209] 344 U.S. 443 (1953).

[210] The expansion of the availability of habeas corpus relief was illustrated by several cases decided by the Supreme Court in 1963. Sanders v. United States, 373 U.S. 1 (1963) (petitioner was entitled to hearing in habeas corpus proceedings even though previous petition had been filed and denied); Fay v. Noia, 372 U.S. 391 (1963) (state prisoner who did not fully pursue state remedies was entitled to habeas corpus relief when he was convicted on basis of coerced confession); Townsend v. Sain, 372 U.S. 293 (1963) (state prisoner was entitled to plenary hearing in federal court even though issue of voluntariness of confession was adjudicated in state court). To a large extent, the holding of each of these cases has been modified, or overruled altogether in subsequent Supreme Court cases.

[211] Although there were some earlier indications of constrictions on access to habeas corpus relief, major milestones in this trend included Stone v. Powell, 428 U.S. 465 (1976) (where petitioner unsuccessfully argued in state court that illegally obtained evidence should be suppressed, he would not be allowed to present same argument in federal court in support of application for writ of habeas corpus), and Wainwright v. Sykes, 433 U.S. 72 (1977) (where petitioner failed to argue in state court that statements were admitted in violation of *Miranda* rights, he would not be permitted to raise that argument in habeas corpus proceedings).

[212] Pub. L. No. 104-132, 110 Stat. 1217.

[213] Miller-El v. Cockrell, 537 U.S. 322, 337-40 (2003) (case remanded for further proceedings to determine facts regarding purposeful discrimination by prosecution in jury selection).

through decisional law. Since its passage in 1996, the provisions of AEDPA have been continually interpreted and challenged on constitutional grounds.[214]

The law governing the availability of relief pursuant to the federal writ of habeas corpus continues to evolve rapidly. The following sections present some of the fundamental principles that should be observed by practitioners in the Commonwealth to preserve the rights of a state court defendant.

§ 44.5B. TIMING ISSUES

AEDPA established a statutory time deadline for the filing of an application for a writ of habeas corpus for the first time. Prior to the enactment of AEDPA, state prisoners had almost unfettered discretion in deciding when to file a federal habeas corpus petition. Delays of more than a decade did not necessarily bar a prisoner from seeking relief.[215] The imposition of a firm limitations period is therefore a significant change from prior law. As a result of this time deadline, habeas corpus proceedings can no longer be viewed as a remedy to be pursued at some indefinite point in the future. In general, an application for a writ of habeas corpus must be filed by a state prisoner[216] within one year of the date that the judgment of conviction becomes final following direct review by the the state appellate court.[217]

If the State prevents a defendant from seeking habeas corpus relief, then the one-year period runs from the date on which the impediment to filing an application is removed.[218] In the event that the Supreme Court recognizes a new constitutional right, and then makes that right retroactively applicable to cases on collateral review, then the one-year period would run from the date that such a right was established by the

[214] The provisions of AEDPA have been challenged and discussed in numerous cases since the law was enacted. *See e.g.,* Felker v. Turpin, 518 U.S. 651 (1996) (finding AEDPA "does not work as an unconstitutional restriction of the jurisdiction of this Court"); Lindh v. Murphy, 521 U.S. 320 (1997) (Supreme Court noted that AEDPA was not model of legislative clarity). The review of those cases herein is primarily limited to cases decided by the U.S. Supreme Court, the Court of Appeals for the First Circuit, and the U.S. District Court for the District of Massachusetts.

[215] *See* Lonchar v. Thomas, 517 U.S. 314, 316 (1996); Calderon v. United States District Court, 112 F.3d 386 (9th Cir. 1997).

[216] AEDPA also set similar restriction on the filing of applications for a writ of habeas corpus by federal prisoners under 28 U.S.C. § 2255.

[217] 28 U.S.C. § 2244(d)(1)(A). If the petitioner did not seek appellate review of the conviction, then the one-year time period runs from the expiration of the "time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). If the petitioner did not seek appellate review, however, it is likely that the petitioner will encounter an additional hurdle for failure to exhaust remedies available "in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).

[218] 28 U.S.C. § 2244(d)(1)(B). It can be anticipated that this subsection will be the subject of litigation, and that petitioners will assert that the State prevented the filing of their writs of habeas corpus. Such arguments may take the form of assertions that solitary confinement, deprivation of access to library facilities, or deprivation of other facilities or services, constituted an "impediment to filing an application created by State action in violation of the Constitution or laws of the United States." 28 U.S.C. § 2244(d)(1)(B). Case law will determine whether similar arguments may be accepted as a means to bring a habeas corpus petition after the one-year period has run.

Supreme Court.[219] In the case of newly discovered evidence, "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence" will start the one-year limitation period.[220]

The one-year time period is tolled during the time in which a "properly filed application for State post-conviction or other collateral review" is pending.[221] Such state postconviction proceedings continue to be "pending" while relief is sought in the trial court, and in subsequent appellate proceedings. As a result, if a defendant files a Rule 30 motion in the trial court of the Commonwealth, and if that motion is pending for six months, followed by six months of appellate review, that time should not count against the one-year limitation period.[222] This one-year filing period is likely to lead to the dismissal of many applications for writs of habeas corpus on procedural grounds, and to ultimately reduce the number of petitions that are even filed. However, the Supreme Court has recently held that the doctrine of equitable tolling applies to federal habeas petitions under AEDPA,[223] and thus a defendant's mental incompetence may be deemed to equitably toll the limitations period.[224] In *Florida v. Holland*, the Supreme Court advised lower

[219] 28 U.S.C. § 2244(d)(1)(C). While the Supreme Court in recent years has been more likely to restrict than to expand access to habeas corpus review, this provision does allow for the possibility that newly recognized constitutional rights may form the basis for relief.

[220] 28 U.S.C. § 2244(d)(1)(D). It should be emphasized that this provision does not strictly contain a "discovery rule" but is driven by when the evidence "could have been discovered through the exercise of reasonable diligence." It can be anticipated that the government will challenge assertions that evidence is newly discovered by claiming that the petitioner should have discovered it earlier through the exercise of "reasonable diligence."

[221] 28 U.S.C. § 2244(d)(2). Healy v. DiPaolo, 981 F. Supp. 705, 706–08 (D. Mass. 1997). In *Healy* the court held that it was neither "necessary nor appropriate" to file a habeas corpus petition while a timely filed Rule 30 motion was pending in the state court system because the one-year limitation period would be tolled while the state court proceedings were pending. This statutory provision may be subject to differing interpretations as the law develops, so petitioners should be careful to research the law before relying on the interpretation of the provision as contained in *Healy*. *See also* Drew v. MacEachern, 620 F. 3d 16, 23-24 (1st Cir. 2010) (dismissal of federal habeas petition upheld; court interprets "pending" to exclude applications for state post-conviction relief that state's highest court dismissed on procedural grounds).

[222] *See* Healy v. DiPaolo, 981 F. Supp. 705, 706–08 (D. Mass. 1997). A defendant is under no obligation to a file motion for postconviction relief under Mass. R. Civ. P. 30, based on "newly discovered evidence" within one year. If a defendant files such a motion more than a year after the evidence is discovered, a federal court is likely to conclude that habeas corpus review is unavailable pursuant to 28 U.S.C. § 2244(d)(1)(D). These provisions require defendants to consider pursuing state court remedies in a prompt fashion in order to preserve the possibility of subsequent federal habeas corpus review.

[223] Holland v. Florida, 130 S. Ct. 2549, 2562-64 (2010) (finding doctrine of equitable tolling applicable to AEDPA, noting that statute of limitations defense is not jurisdictional, and not an "inflexible rule" automatically requiring dismissal).

[224] Riva v. Ficco, 615 F.3d 35, 39-40 (1st Cir. 2010) (dismissal of federal habeas petition vacated and case remanded for further development of record regarding petitioner's mental illness as a potential impairment to his ability to seek legal relief); *See* Lawless v Evans, 545 F. Supp. 2d 1044, 1047-48 (C.D. Ca. 2008) (finding defendant did not establish incompetence to equitably toll limitations period, but suggesting that sufficient showing of mental illness could achieve this result).

courts to "exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case."[225]

Practitioners should note the expiration of the habeas corpus deadline with the same care that they note the thirty-day date for filing a notice of appeal or the sixty-day date for filing a motion to revise and revoke.

§ 44.5C. JURISDICTION

1. The Constitutional Nature of the Claim

The statute giving federal courts the power to hear claims by state prisoners is 28 U.S.C. § 2254. It requires that the petitioner allege that the custody is in "violation of the constitution or laws or treaties of the United States."[226] As a practical matter, it is the first of these three possible bases of illegality — custody in violation of the constitution — that is the basis for virtually every habeas corpus claim because there are few other federal laws or treaties that can be alleged to have been violated in a state proceeding.[227]

Some claims, like Fifth Amendment self-incrimination and Sixth Amendment right to counsel, have traditionally been recognized as constitutional claims. There are several categories of constitutional claims, however, as to which the Supreme Court has restricted federal habeas review. *First,* Fourth Amendment search and seizure claims were effectively withdrawn from habeas corpus jurisdiction by the Supreme Court in *Stone v. Powell.*[228] Pursuant to that decision, Fourth Amendment habeas review would only be afforded if: (a) there was not a full and fair opportunity to litigate the claim in the state courts;[229] or (b) the Fourth Amendment issue forms the basis for a different, cognizable claim, such as a Sixth Amendment ineffective assistance claim.[230] *Second*, a

[225] Holland v. Florida, 130 S. Ct. 2549, 2562-64 (2010).

[226] 28 U.S.C. § 2254(a).

[227] Other federal law violations that have been asserted as the basis for habeas corpus relief include the Agreement on Detainers (*see* Tinghitella v. California, 718 F.2d 308 (9th Cir. 1983)), and the Uniform Extradition Act (*see* Hudson v. Moran, 760 F.2d 1027 (9th Cir. 1985)).

[228] Stone v. Powell, 428 U.S. 465 (1976). In *Stone v. Powell*, the Court's rationale was that the exclusionary rule was only quasi-constitutional, and as such was subject to an analysis whereby an interest in the finality of the state court judgment would outweigh the benefits of enforcing the exclusionary rule in postconviction proceedings.

[229] Stone v. Powell, 428 U.S. 465 (1976). AEDPA codified similar requirements with regard to all habeas petitions. Under 28 U.S.C. § 2254(b) a petitioner must establish that the State court remedies were exhausted, that there was an absence of available State "corrective process," or that circumstances rendered State corrective process ineffective. In addition, relief will not be granted with regard to any claim adjudicated on the merits in the State court unless that decision involved an unreasonable application of Supreme Court law or resulted from an unreasonable application of the facts in light of the evidence. 28 U.S.C. § 2254(d)(1), (2).

[230] *See* Kimmelman v. Morrison, 477 U.S. 365 (1986) (*Stone* does not bar Sixth Amendment claim alleging petitioner was prejudiced by trial counsel's failure to file timely motion to suppress evidence obtained in violation of Fourth Amendment). *See also* Reed v. Farley, 512 U.S. 339 (1994). It should be noted, however, that under the AEDPA, the "ineffectiveness or incompetence of counsel during federal or state collateral post-conviction proceedings shall not be grounds for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

guilty plea waives the right to bring a federal habeas action as to constitutional violations alleged to have occurred prior to entry of the guilty plea, although constitutional violations in the taking of the plea itself are still cognizable.[231] *Third,* a claim of actual innocence based on newly discovered evidence unaccompanied by separate "constitutional claim" does not constitute a basis for federal habeas jurisdiction.[232]

The requirement that there be a federal claim, in conjunction with the exhaustion requirements, makes it necessary to anticipate a federal habeas corpus claim at the earliest point in the state court proceedings. Every pretrial and trial motion should cite federal grounds for relief as well as applicable state law grounds. Even the most routine motions, such as motions for discovery, for funds for an investigator, and for a required finding of not guilty, should cite federal grounds for relief, including the right to due process of law, to a fair trial, and to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments.[233] This objective can be accomplished at

[231] *See* McMann v. Richardson, 397 U.S. 759 (1970) (petitioners who entered guilty pleas with the advice of counsel were not entitled to challenge voluntariness of their confessions by way of habeas corpus hearings). A "voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." Mabry v. Person, 467 U.S. 504, 508 (1984). The voluntariness and intelligence of a guilty plea normally cannot be attacked on collateral review unless such grounds were raised on direct review. Reed v. Farley, 512 U.S. 339, 354 (1994). Subsequent to the enactment of the AEDPA, the Supreme Court recognized, in Bousley v. United States, 523 U.S. 614 (1998), that an involuntary plea may still form the basis for habeas corpus review. In that case, a petitioner who asserted that his plea was not knowingly given was entitled to a remand where he could "attempt to make a showing of actual innocence." *Bousley, supra,* 118 S. Ct. at 1611. *Bousley* arose from a federal, rather than a state conviction, so it was initiated pursuant to 28 U.S.C. § 2255. In many cases it is necessary to supplement the record in postconviction proceedings in the State court in order to establish that a plea was not knowingly given. If the factual basis is not sufficiently established in the State court, there are further procedural hurdles to obtaining such a hearing in the federal court. *See* 28 U.S.C. § 2254(e)(2).

[232] Herrera v. Collins, 506 U.S. 390 (1993). As the Court stated in *Herrera v. Collins*, "our body of habeas jurisprudence makes it clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins, supra*, 506 U.S. at 404. To prevail a petitioner must demonstrate separate constitutional violations, in addition to "actual innocence." In Schlup v. Delo, 513 U.S. 298 (1995), the petitioner claimed, in addition to actual innocence, that he received ineffective assistance of counsel, and that the prosecution withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). In that context the Supreme Court determined that the petitioner was entitled to an evidentiary hearing to develop a record in support of the writ of habeas. AEDPA has adopted a new standard describing the petitioner's burden in establishing "actual innocence." The petitioner must "establish by clear and convincing evidence that but for unconstitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(c)(2)(B). *See also* Goldman v. Winn, 565 F. Supp. 2d 200, 244 (D. Mass. 2008) (habeas relief warranted where defendant presented clear and convincing evidence of actual innocence including credible witness statements denying defendant's involvement in crime). A similar standard applies to petitioners in federal custody pursuing a second or successive petition. 28 U.S.C. § 2255. *See* Bousley v. United States, 523 U.S. 614 (1998).

[233] Most claims can be stated in terms of federally protected rights. A denial to a petitioner of a purely state law right may arguably deprive the petitioner of equal protection. *See* Henderson v. Morris, 670 F.2d 699 (7th Cir. 1982). Denial of a series of rights may collectively constitute a due process violation. *See* Kyles v. Whitley, 514 U.S. 419 (1995) (due process violated due to government suppression of evidence favorable to defendant). *But see* Gilday v.

trial by filing an in limine motion requesting that all objections also be "federalized," i.e., that every hearsay objection be deemed a claimed Sixth Amendment confrontation issue.

2. The Custody Requirement

Title 28 U.S.C. § 2254(b)(1) requires that a habeas petitioner be "in custody." This requirement is jurisdictional, and if the petitioner is not *in custody* the petition will be dismissed. The term *in custody* has been broadly construed, but there will be no basis for review if, at the time of filing, some form of custody has not yet begun. A petitioner who has not yet been apprehended is not in custody.[234] The "collateral consequences" of a conviction, such as inability to vote or hold office, do not fulfill the "in custody" requirement. But if the petitioner is in custody at the time of filing, release during pendency of the proceeding will not moot the petition.[235]

Obviously if the petitioner is jailed or imprisoned the requirement is met. A person on parole meets the requirement as well.[236] So does a person who is released on a stay of execution while pursuing postconviction relief.[237] A person in custody pursuant to consecutive sentences is "in custody" as to the later sentence so as to be able to attack it in a habeas proceeding before he begins serving it, whether the second sentence is imposed by the same sovereign as the first sentence[238] or a different sovereign.[239] Federal habeas relief is has been deemed appropriate in the context of a civil detention, where the petitioner is the subject of a deportation order.[240] But a person cannot challenge a conviction as to which the sentence has already expired on the basis that the old conviction will be used to enhance the sentence on a later offense.[241]

Callahan, 59 F.3d 257, 267–71 (1st Cir. 1995) (no substantial and injurious effect when prosecutor concealed agreement with witness who testified against petitioner).

[234] Fernos-Lopez v. Lopez, 929 F.2d 20, 23–24 (1st Cir. 1991) (petitioner was not taken into custody until after petition was filed and denied).

[235] Carafas v. LaVallee, 391 U.S. 234 (1968); Spencer v. Kemna, 523 U.S. 1, 4-7 (1998) (petitioner may satisfy "in custody" requirement yet still have petition dismissed for failure to show ongoing case or controversy).

[236] Jones v. Cunningham, 371 U.S. 236 (1963). Probationers also are considered to be in custody. *See* Tinder v. Paula, 725 F.2d 801 (1st Cir. 1984) (stating rule, however, in this particular case court denied motion for habeas corpus because movant's probation was over).

[237] Hensley v. Municipal Court, 411 U.S. 345 (1973). Custody also includes release pending trial de novo. Justices of B.M.C. v. Lydon, 466 U.S. 294 (1984). The custody requirement may be met when a petitioner is released on his own recognizance following a conviction. Hutson v. Justices of Wareham Dist. Court, 552 F. Supp. 974 (D. Mass. 1982).

[238] Peyton v. Rowe, 391 U.S. 54 (1968). *See* Macdougal v. Dubois, 1994 WL 568776 (D. Mass 1994) (where prisoner's habeas corpus motion was signed prior to his release for "good time," prisoner was considered "in custody" regardless if release was prior to hearing). *See also* Gilday v. Garvey, 919 F. Supp. 506 (D. Mass. 1996) (petitioner may meet custody requirement where he was in state facility at time of filing but was transferred to federal facility thereafter).

[239] Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).

[240] Luna-Aponte v. Holder, WL 3547707 (W.D.N.Y. 2010).

[241] Maleng v. Cook, 490 U.S. 488 (1989). *But see* Garlotte v. Fordice, 515 U.S. 39 (1995) (holding that petitioner serving consecutive sentences can attack first completed sentence even after it expired).

3. The Exhaustion Requirement

An application for a writ of habeas corpus on behalf of a person in custody due to the judgment of a state court "shall not be granted unless it appears that" "the applicant has exhausted the remedies in the courts of the State,"[242] that there is an "absence of available State corrective process,"[243] or "circumstances exist that render such process ineffective to protect the rights of the applicant."[244]

Modifications to the habeas corpus statute have further tightened the exhaustion requirement by providing: (1) that an application for a writ of habeas corpus may be denied on the merits notwithstanding the failure to exhaust state remedies;[245] and (2) a state shall not be deemed to have waived the exhaustion requirement except where that requirement is expressly waived through counsel.[246]

In recognition of the role of state courts in protecting federally guaranteed rights, the exhaustion principle holds, in general, that a federal court will not entertain an application for habeas corpus relief "unless the petitioner has fully exhausted his state remedies with respect to each and every claim contained within an application."[247] In the context of the Massachusetts court system, exhaustion would include raising the issue at the trial court level, and fully pursuing the claim on appeal.[248] The defendant must seek discretionary review in the Massachusetts Supreme Judicial Court through an application for leave to obtain further appellate review under Mass. R. App. P. 27.1(b).[249]

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[242] 28 U.S.C. § 2254(b)(1)(A).

[243] 28 U.S.C. § 2254(b)(1)(B)(i). In the Commonwealth, "State corrective process" is generally available. As described above, a defendant has the ability to seek postconviction relief from any conviction pursuant to Mass. R. Crim. P. 30, and appellate relief is also available. The federal courts have also required federal habeas petitioners to exhaust state administrative remedies as well. *See, e.g.*, Mathena v. United States, 577 F.3d 943, 946-47 (8th Cir. 2009) (denying habeas relief where petitioner failed to exhaust remedies with Bureau of Prisons regarding erroneous sentence calclulation).

[244] 28 U.S.C. § 2254(b)(1)(B)(ii).

[245] 28 U.S.C. § 2254(b)(2).

[246] 28 U.S.C. § 2254(b)(3).

[247] Adelson v. DiPaolo, 131 F.3d 259, 261 (1st Cir. 1997) (citing Rose v. Lundy, 455 U.S. 509, 518–19 (1982)). *See also* Heck v. Humphrey, 512 U.S. 477 (1994); Grace v. Butterworth, 635 F.2d 1 (1st Cir.), *cert. denied*, 452 U.S. 917 (1980). Under recent modifications to the habeas corpus laws, the importance of the exhaustion requirement has become even more pronounced. The federal court, in general, will not grant a writ of habeas corpus on behalf of a state prisoner unless the state court adjudication was "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d). *See* O'Brien v. DuBois, 145 F.3d 16 (1st Cir. 1998). *See also* Dougan v. Ponte, 727 F.2d 199 (1st Cir. 1984); Nadworny v. Fair, 872 F.2d 1093 (1st Cir. 1989).

[248] A petitioner shall not be deemed to have exhausted state remedies if "he has a right under the laws of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). If issues are to be raised in postconviction proceedings pursuant to Mass. R. Crim. P. 30, the defendant should also pursue those issues through the appellate levels.

[249] Mele v. Fitchburg Dist. Court, 850 F.2d 817 (1st Cir. 1988). In *Mele* the federal habeas petitioner had presented his constitutional claim to the Massachusetts Appeals Court, but had neglected to include the federal claim in his application for leave to obtain further appellate

The petitioner must have made it clear to the state courts that the claim was being presented as a federal constitutional claim before the federal habeas court later will conclude that the purpose of the exhaustion requirement — to give the state court system a fair opportunity to correct its own mistakes — has been satisfied.[250]

The U.S. Supreme Court has held that all claims in a petition must be exhausted.[251] Historically, mixed petitions containing exhausted and unexhausted claims would be dismissed, and only rarely would the federal appellate courts deal substantively with a petition determined on appeal to contain unexhausted claims.[252] Under the AEDPA an application for a writ of habeas corpus may be denied "on the merits, notwithstanding the failure of the applicant to exhaust" state remedies.[253]

§ 44.5D. DEFERENCE TO STATE COURT RULINGS

One of the most significant changes to the law relating to habeas corpus is the new statutory requirement that the federal court must show deference to the rulings of the state court. AEDPA instructs federal courts not to grant a writ of habeas corpus unless the underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the State court proceeding.

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review which was filed with the S.J.C. The S.J.C. denied the application. The First Circuit held that the petitioner had not exhausted his state remedies because the S.J.C. did not have a fair opportunity to decide federal constitutional issue. The petitioner retained the ability to seek postconviction relief under Mass. R. Crim P. 30, and to potentially work his way back to the S.J.C. through that route before his state remedies would be deemed to be exhausted. *Mele, supra*, 850 F.2d at 824.

[250] Lemay v. Murphy, 537 F. Supp. 2d 239, 250-51 (D. Mass. 2008) (federal courts look to whether petitioner cited to United States Constitution or presented constitutional claim substantively so as to alert court to its federal nature, or whether petitioner relied on federal precedent or explicit federal constitutional right)[250]; Tart v. Massachusetts, 949 F.2d 490 (1st Cir. 1990); Nadworny v. Fair, 872 F.2d 1093 (1st Cir. 1989); Lanigan v. Maloney, 853 F.2d 40 (1st Cir. 1988); Gagne v. Fair, 835 F.2d 6 (1st Cir. 1987); Dougan v. Ponte, 727 F.2d 199 (1st Cir. 1984).

[251] Rose v. Lundy, 455 U.S. 509 (1982).

[252] *See* Granberry v. Greer, 481 U.S. 129 (1987) (noting that exhaustion requirement is not jurisdictional and that there are some situations in which appellate courts should address nonexhausted habeas claims on their merits); Gagne v. Fair, 835 F.2d 6 (1st Cir. 1987).

[253] 28 U.S.C. Sec. 2254(b)(2). The practice of some courts within the District of Massachusetts was to dismiss a petition "without prejudice" if there were claims that were not exhausted in the state court system. *See* Healy v. DiPaolo, 981 F. Supp. 705, 708 (D. Mass. 1997); Gaskins v. Duval, 89 F.Supp. 2d 139 (D. Mass. 2000); Neverson v. Bissonette, 261 F.3d 120 (1st Cir. 2001). The "without prejudice" language in a district court decision, however, will not permit defendants an opportunity to re-file a petition at a later date if the one year date for filing has expired. Duncan v. Walker, 533 U.S. 167 (2001). If there are unexhausted claims, the petitioner should request that the United States District Court proceedings be stayed, while efforts are made to exhaust claims in the state court system. Neverson v. Bissonette, 261 F.3d 120, 126 & n. 3 (1st Cir. 2001), *citing* Duncan v. Walker, 533 U.S. 167, 182 (2001)(Stevens, J., concurring).

28 U.S.C. § 2254 (d). This provision requires the federal habeas court to undertake a two-step analysis in weighing the state court decision.[254] First, the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, "the habeas court gauges whether the state court decision is 'contrary to' the governing rule."[255]

If there is no such governing rule, the second step of the analysis begins. The habeas court must determine whether the state court's use of existing law in deciding the petitioner's claim was an "unreasonable application" of Supreme Court precedent.[256] The "unreasonable application" clause "does not empower a habeas court to grant the writ merely because it disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result."[257] For the writ to issue, the state court decision must be "so offensive to existing precedent, so devoid of record support, or so arbitrary as to indicate that it is outside the universe of plausible, credible outcomes."[258]

In addition to this statutory requirement of deference to state court determinations of law, AEDPA also requires that any state court determination of a factual matter "be presumed to be correct."[259] The petitioner has the burden of "rebutting the presumption of correctness by clear and convincing evidence."[260]

On a related point, AEDPA restricts the petitioner's ability to obtain an evidentiary hearing in the federal court. If the factual basis of the claim was not established in the state court, the habeas court shall not hold an evidentiary hearing unless the claim relied on: (1) a new rule of constitutional law made retroactive to cases on collateral review;[261] or (2) a factual predicate that could not have been discovered through the exercise of due diligence and that such facts establish actual innocence by clear and convincing evidence.[262] By effectively restricting access to an evidentiary hearing in the federal court, this rule will have the effect of reducing the availability of a method by which to challenge state court determinations.

The concept of deference to state court adjudications had already been established by case law, but the current statutory requirements constitute an even more

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[254] Tevlin v. Spencer, 621 F.3d 59, 66 (1st Cr. 2010) ("the level of deference owed to a state court decision [on federal habeas review] hinges on whether the state court ever adjudicated the relevant claim on the merits or not."; O'Brien v. DuBois, 145 F.3d 16, 24 (1st Cir. 1998). *See* Williams v. Taylor, 529 U.S. 362, 377–379 (2000).

[255] Junta v. Thompson, 615 f.3d 67 (1st Cir. 2010); Young v. Murphy, 615 F.3d 59 (1st Cir. 2010); O'Brien v. DuBois, 145 F.3d 16, 24–25 (1st Cir. 1998). *See* Williams v. Taylor, 529 U.S. 362, 383 (2000).

[256] O'Brien v. DuBois, 145 F.3d 16, 24–25 (1st Cir. 1998) (citingLiebman & Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 30.2c at 310 (Supp. 1997)).

[257] O'Brien v. DuBois, 145 F.3d 16, 24 (1st Cir. 1998).

[258] The court in *O'Brien* recognized that other Courts of Appeal have interpreted these provisions of 28 U.S.C. § 2254(d) differently. O'Brien v. DuBois, 145 F.3d at 16, 24–26 & n. 7 (1st Cir. 1998). The court also noted that the AEDPA is not a "model of clarity." *O'Brien, supra* (citing Lindh v. Murphy, 521 U.S. 320, 336-37 (1997)). It can be anticipated that this provision will be the subject of judicial interpretation until its provisions are further clarified by the Supreme Court or further legislation.

[259] 28 U.S.C. § 2254(e)(1).

[260] 28 U.S.C. § 2254(e)(1).

[261] 28 U.S.C. § 2254(e)(2)(A)(i).

[262] 28 U.S.C. § 2254(e)(2)(A)(ii).

significant barrier to obtaining habeas relief in the federal courts from state court decisions.

§ 44.5E. THE RIGHT TO COUNSEL IN HABEAS PROCEEDINGS

A petitioner may request appointment of counsel by the federal court in any habeas proceeding.[263] Appointment of counsel is generally governed by the term of the Criminal Justice Act[264] that permits appointment of counsel "whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation."[265] There is no constitutional right to counsel in state[266] or federal[267] postconviction proceedings. However, where the petitioner seeks counsel in a death penalty case, counsel should be made available.[268]

AEDPA provides that the "effectiveness or incompetence of counsel during Federal or State collateral proceedings shall not be a ground for relief in a proceeding arising under Section 2254."[269] This provision, like other provisions of AEDPA, appears to be aimed at securing closure of state court determinations. Even if counsel on postconviction proceedings were ineffective, and thereby waived or failed to raise important constitutional issues, this provision indicates that the petitioner could not rely on such ineffective assistance of counsel to argue that a subsequent petition should be considered.

In summary, though habeas corpus law is a complex and ever-changing field, for the most part, petitioners have no right to counsel. As a practical matter, most petitions for writs of habeas corpus are filed by prisoners on a pro se basis. The new provisions of the habeas corpus law, in conjunction with recent decisions of the Supreme Court will make it increasingly difficult for petitioners to obtain relief. Even if counsel is available, the chances of success will largely be governed by how successfully trial counsel on the state level was able to articulate and preserve federal issues for subsequent review.

§ 44.5F. FILING THE PETITION

[263] The statute provides that "the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel." 28 U.S.C. § 2254(h). The statute states that counsel may be provided "[e]xcept as provided in section 408 of the Controlled Substances Act." This is a reference to the counsel provisions of 21 U.S.C. § 848(q)(4)(B), which require appointment of counsel in habeas corpus cases involving the death penalty.

[264] *See* 28 U.S.C. § 2254(h) (citing 18 U.S.C. § 3006A).

[265] 18 U.S.C. § 3006A(g).

[266] There is no right to counsel in a discretionary appeal in the state court system, as long as counsel was available for an initial appeal. Ross v. Moffit, 417 U.S. 600, 610 (1974). There is no right to counsel in state postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989).

[267] Lawrence v. Florida, 549 U.S. 327 (2007) (prisoners have no automatic right to counsel in federal postconviction proceedings).

[268] McFarland v. Scott, 512 U.S. 850 (1994). In *McFarland* the Court held that in a death penalty case counsel should be provided pursuant to 21 U.S.C. § 848(q)(4)(B).

[269] 28 U.S.C. § 2254(i).

The method for filing and proceeding with an application for a writ of habeas corpus is described in the Rules Governing Section 2254 Cases in the District Courts.[270] Those Rules appear in the United States Code Annotated, following the provisions of 28 U.S.C. § 2254. The Rules answer most of the basic questions about filing a petition, such as the identity of the respondent,[271] and the form that the petition should take.[272]

The application is typically filed in the federal district court for the district in which the petitioner is in custody.[273] As a result, an application for a writ of habeas corpus for a prisoner held in a Massachusetts corrections facility will typically be filed in the United States District Court for the District of Massachusetts.

A habeas proceeding is a civil action,[274] and the petitioner must either pay the appropriate filing fee or file an affidavit of indigency and motion to proceed in forma pauperis.[275] An original and two copies of the petition should be filed in court, and a copy should be served on the respondent and the attorney general for the state involved, by certified mail.[276]

A petitioner should obtain a copy of the Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254, and should follow the directions that accompany the form, as well as following the governing Rules when filing the application.

§ 44.5G. SUCCESSIVE PETITIONS

A claim that is presented in a "second or successive habeas corpus application under section 2254 that was presented in a previous application shall be dismissed."[277]

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[270] With regard to cases where the petitioner is in federal custody, the Rules Governing Section 2255 Cases in the District Courts should be consulted.

[271] Rule 2(a) states that the respondent should be "the state officer having custody of the applicant."

[272] The petition should be in substantially the form that is annexed to the Rules. Rule 2(c). The form annexed to the Rules is in a fill-in-the-blanks format, providing the petitioner with directions as to the information that must be in the petition.

[273] 28 U.S.C. § 2241(a). A writ of habeas corpus may be granted by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a). If there are two or more "Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application." 28 U.S.C. § 2241(d).

[274] Because a Federal habeas corpus proceeding is civil, the Federal Rules of Civil Procedure govern unless they are in conflict with the Rules Governing 2254 Cases in the District Courts. It would be appropriate to pursue discovery in the habeas corpus proceeding, and in certain cases it would be an abuse of discretion for the Court to foreclose discovery. *See* East v. Scott, 55 F. 3d 996 (5th Cir. 1995); East v. Johnson, 123 F. 3d 235 (5th Cir. 1997). The provisions of Rules 59 and 60 F.R.Civ. P., may also be utilized to seek relief from an adverse judgment in the habeas proceedings.

[275] *See* Rule 3(a), Rules Governing Section 2254 Cases.

[276] *See* Rules 3(a) and 4, Rules Governing Section 2254 Cases.

[277] 28 U.S.C. § 2244(b); *See* Gautier v. Wall, 620 F.3d 58 (1st Cir. 2010) (petition properly dismissed for lack of jurisdiction where petitioner brought two successive claims raising same issue without court's permission).

This restriction is intended to prevent what has been deemed an "abuse of the writ." [278] A claim that is presented in a successive petition that was not presented in a prior application shall be dismissed unless the applicant shows: (1) that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (2) that the factual predicate for the claim could not have been discovered previously and the facts establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[279] The Supreme Court has also been flexible in allowing successive petitions where there is a practical reason for failing to raise a claim in the first petiton, i.e., where a Ford-based incompetency claim is raised. [280]

Before filing a successive petition, the applicant must "move in the appropriate court of appeals for an order authorizing the district court to consider the application."[281] The court of appeals must grant or deny the authorization within thirty days after the filing of the motion.[282] The decision of the court of appeals shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.[283] The district court must dismiss the application unless the court of appeals has authorized the filing.[284]

The Supreme Court has recognized that in certain limited circumstances a petition for habeas corpus that was previously denied may be "renewed" without running afoul of the "successor petition" provisions.[285]

A petitioner's motion to recall the mandate issued by a court of appeals can be regarded as a second or successive application.[286] However, if a court of appeals recalls its own mandate sua sponte that would not contravene "the letter of AEDPA."[287]

§ 44.5H. APPEAL

The denial of a writ of habeas corpus in a proceeding arising from a state court conviction[288] is subject to appeal only if the "circuit justice or judge issues a certificate

[278] Felker v. Turpin, 518 U.S. 651 (1996).

[279] 28 U.S.C. § 2244(b)(2).

[280] Ford v. Wainwright, 477 U.S. 399 (1986) (establishing that government must establish prisoner's competency to be executed). *See also* Panetti v. Quarterman, 551 U.S. 930 (2007) (Court found no "abuse of the writ" where petitioner raised Ford-based claim in successive habeas petition).

[281] 28 U.S.C. § 2244(b)(3); Gautier v. Wall, 620 F.3d 58 (1st Cir. 2010) (petition properly dismissed for lack of jurisdiction where petitioner brought two successive claims raising same issue without court's permission)..

[282] 28 U.S.C. § 2244(b)(3)(D).

[283] 28 U.S.C. § 2244(b)(3)(E).

[284] 28 U.S.C. § 2244(b)(4).

[285] Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

[286] Calderon v. Thompson, 523 U.S. 538 (1998).

[287] In *Calderon*, the Court of Appeals for the Ninth Circuit had reversed the district court's grant of habeas relief. Just before the petitioner was to be executed, the court of appeals recalled its mandate and granted relief as to the death sentence. The Supreme Court found that the Ninth Circuit had abused its discretion and remanded the case for entry of a mandate denying habeas corpus relief. Calderon v. Thompson, 523 U.S. 538 (1998).

of appealability."[289] A petitioner should therefore file both a request for a certificate of appealability and a notice of appeal.[290] Such a certificate of appealability may issue only if the applicant "has made a substantial showing of the denial of a constitutional right."[291] The certificate of appealability must state which specific issues qualify for appellate review.[292] Typically, an appeal from a denial of a federal habeas petition under AEDPA is reviewed de novo.[293]

Appeals from orders in habeas corpus cases are governed by Fed. R. App. P. 22. Cases arising in the Commonwealth would typically be brought in the U.S. District Court for the District of Massachusetts, and would therefore be appealable to the U.S. Court of Appeals for the First Circuit. The Local Rules for the First Circuit, including Local Rule 22 and Interim Local Rule 22.1, govern such proceedings. As a first step, the petitioner should request a certificate of appealability from the district court judge who denied the petition for a writ of habeas corpus. At that point, "the district judge who rendered the judgment shall either issue a certificate of appealability or state reasons why such a certificate should not issue."[294] The Local Rules in the First Circuit provide that neither the Court of Appeals nor any judge thereof will "initially receive or act on a request for a certificate of probable cause if the judge who refused the writ is available." The Local Rules further provide that a request to the district judge should be made as promptly as possible.[295]

Pursuant to the Federal Rules of Appellate Procedure, if the district court judge denies the certificate of appealability then the applicant may request issuance of such a certificate from the Court of Appeals. If no express request for a certificate is filed, then the notice of appeal shall be deemed to be a request to the Court of Appeals for a certificate.[296] Under the Local Rules of the First Circuit, however, a petitioner should

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[288] Appeals from habeas corpus proceeding under § 2255 are also governed by 28 U.S.C. § 2253.

[289] 28 U.S.C. § 2253(c)(1).

[290] The general terms applicable to filing notices of appeal are set forth in Fed. R. App. P. 3 and 4. The Appendix of Forms to the Federal Rules of Appellate Procedure provide a form notice of appeal. The notice of appeal must be filed in a timely manner with the clerk of the district court. Fed. R. App. P. 3(a). If such a notice is erroneously filed with the clerk of the court of appeals, the date of receipt shall be noted thereon by the clerk, and it will be forwarded to the clerk of the district court. Fed. R. App. P. 4(a). In a civil case, the notice of appeal should be filed within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(1). If the United States or an officer or agent thereof is a party, the notice of appeal may be filed within 60 days of the entry of judgment. Fed. R. App. P. 4(a)(1). For good cause shown, the appeal period may be extended provided that the request is filed within 30 days of the expiration of the initial appeal period. *See* Fed. R. App. P. 4(a)(5), (6). In the case of inmates confined to an institution, a notice of appeal may be timely filed if it is "deposited in the institution's internal mail system on or before the last day for filing." Fed. R. App. P. 4(c). In such a case, timely filing may be shown by a notarized declaration setting forth the date of deposit and stating that first-class mail has been prepaid. Fed. R. App. P. 4(c).

[291] 28 U.S.C. § 2253(c)(2).

[292] 28 U.S.C. § 2253(c)(3).

[293] *See, e.g.,* Tevlin v. Spencer, 621 F.2d 59 (1st Cir. 2010); Aspen v. Bissonnette, 480 F.3d 571 (1st Cir. 2007).

[294] Fed. R. App. P. 22(b).

[295] Local Rule 22; Interim Local Rule 22.1(b), (c).

[296] Fed. R. App. P. 22(b).

promptly request a certificate from the district court judge, and should not rely on the notice of appeal as a substitute for a request for a certificate of appealability. Under the Rules of the First Circuit, the petitioner should promptly file a memorandum "giving specific and substantial reasons and not mere generalizations why such relief should be granted."[297] If such a memorandum is not filed the court may decline to make a review of the decision of the district court. Ten days after the district court file has been received by the court of appeals, the record shall be presented to the Court, "with or without a separate request for a certificate of probable cause."[298] If, by that time, the petitioner has not filed a memorandum in support of the request for a certificate, the Court of Appeals may deny the certificate without further consideration.[299]

As indicated above, the procedure for seeking an appeal is not a simple one, and requires the petitioner to be alert to the substantive and procedural requirements imposed by the habeas corpus statute, as well as the Federal Rules of Appellate Procedure and the Local Rules for the U.S. Court of Appeals.

In summary, there are many substantive and procedural barriers to obtaining relief pursuant to a writ of habeas corpus. Those barriers appear commencing with the filing of an application for such a writ, and continue to appear throughout the litigation, up to the filing of an appeal. As stated at the outset of this chapter, the petitioner and counsel should recognize that the likelihood of success in a habeas corpus case will be enhanced by setting the stage in the course of the state court proceedings, and preserving all federal issues for potential habeas corpus review. Such preparation must be followed up with the timely filing of an application for a writ of habeas corpus, paying attention to all of the substantive and procedural requirements contained in the statute and the rules as modified and supplemented by the decisional law.

[297] Rule 22 Local Rules of the First Circuit.

[298] Local Rule 22, Interim Local Rule 22.1(c).

[299] Local Rule 22, Interim Local Rule 22.1(c).