

CHAPTER 45

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Appeals

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Cross-References:

- Bail appeal, § 9.7
- Costs and fees appeal, § 8.4B
- Postconviction remedies, ch. 44
- Preserving appellate issues, §§ 29.2, 32.13
- Speedy trial rights during appeal, § 23.2F
- Stay of sentence pending appeal, § 39.2

§ 45.1 OVERVIEW

This chapter describes the various appellate processes available to the criminal defendant. The primary focus is on the direct appeal of a conviction or other trial court judgment to the Appeals Court or to the Supreme Judicial Court, including the essential steps of a typical appeal, direct appellate review by the Supreme Judicial Court,² further appellate review by the Supreme Judicial Court of Appeals Court decisions,³ and the special process for review of convictions of first-degree murder.⁴

The chapter also explores two types of interlocutory appellate mechanisms: interlocutory appeals under Mass. R. Crim. P. 15⁵ and invocation of the superintendence power of the Supreme Judicial Court under G.L. c. 211, § 3.⁶

Moreover, the chapter includes discussion of the procedures for review of sentences by the Appellate Division of the Superior Court.⁷

Finally, the chapter discusses the reporting of questions of law by the trial court to the appellate courts, pursuant to Mass. R. Crim. P. 34.⁸

¹ [Reserved]

² See *infra*, § 45.2F.

³ See *infra*, § 45.2G.

⁴ See *infra*, § 45.2H.

⁵ See *infra*, § 45.3.

⁶ See *infra*, § 45.4.

⁷ See *infra*, § 45.5.

⁸ See *infra* § 45.6. Postconviction motions seeking relief from the trial court and state habeas corpus proceedings are discussed *supra* in ch. 44.

§ 45.2 DIRECT APPEAL FROM CONVICTION OR OTHER JUDGMENT⁹

A “defendant ha[s] a clear statutory right to an appeal.”¹⁰ All criminal appeals are governed by the Massachusetts Rules of Appellate Procedure.¹¹ Appeals from convictions of first-degree murder are entered directly in the Supreme Judicial Court. All other appeals are initially entered in the Appeals Court.¹²

The typical, but not invariable, sequence of steps in a criminal appeal is as follows. Each step will be discussed in detail below.¹³

1. *Notice of appeal*: to be filed within thirty days of trial court judgment.
2. *Motion for stay of execution of sentence and for bail pending appeal*: to be filed in trial court at time of sentence or any time thereafter.
3. *Preparation of transcript of trial court proceedings*: by the court stenographer per order of the trial court clerk.
4. *Assembly of record*: by the trial court clerk upon receipt of the transcript.
5. *Notice of assembly of record*: sent to the parties and appellate court by the trial court clerk.
6. *Entry of appeal in appellate court*: upon receipt of the notice of assembly of record.
7. *Application for direct appellate review by the Supreme Judicial Court*: within twenty days of entry of appeal; the application does not suspend the briefing schedule.
8. *Appellant's brief and record appendix*: to be filed within forty days of entry of appeal in the appellate court.
9. *Appellee's brief and record appendix*: to be filed within thirty days of filing of appellant's brief.
10. *Appellant's reply brief*: to be filed within fourteen days of filing of appellee's brief.
11. *Oral argument before the appellate court*.
12. *Postargument letter to the appellate court*: may be filed by a party in response to new matter raised in oral argument.
13. *Issuance of decision by the appellate court*.
14. *Petition for rehearing by the appellate court*: to be filed within fourteen days of the issuance of the court's decision.
15. *Application for further appellate review by the Supreme Judicial Court*: to be filed within twenty days of a decision by the Appeals Court.

⁹ The procedures described *infra* apply to appeals by the Commonwealth, as well as by the defendant. Therefore, references to “the appellant” or “the appellee” may signify either party.

¹⁰ Commonwealth v. Geowey, 452 Mass. 399, 402-03 (2008); Commonwealth v. Frank, 425 Mass. 182, 184 (1997); Commonwealth v. Beauchamp, 424 Mass. 682, 685–86 (1997).; G.L. c. 278, § 28.

¹¹ Mass. R.A.P. 1(a). The Massachusetts Rules of Appellate Procedure are to be construed like the Federal rules. Doe v. Sex Offender Registry Board, 429 Mass. 654, 655–56 (1999).

¹² G.L. c. 211A, § 10.

¹³ The issue of the timeliness of disposition of an appeal is addressed *supra* in § 23.2F.

16. *Issuance of rescript by appellate court to trial court:* twenty-eight days after the decision unless it is stayed by the filing of a petition for rehearing by the appellate court or by an application for further appellate review by the Supreme Judicial Court.

The appellate court may extend the various deadlines indicated above for good cause shown in a motion filed pursuant to Mass. R. Mass. R.A.P. 2 and 14(b).

§ 45.2A. ADVISABILITY OF APPEAL; RELATION TO NEW TRIAL MOTIONS

Before preparing the defendant's brief, counsel should meet with the client to explain the appellate procedures and the specific appellate issues that have been revealed by counsel's reading of the transcript. It is important to ascertain from the client whether, subsequent to the conviction being appealed, he was served with a new warrant, or was indicted or convicted of other crimes unrelated to the matter on appeal. This information will help counsel to assess whether, ironically, success in the present appeal might actually result in harm to the defendant. Such harm could occur, for example, if the present appeal were to result in a new trial, the client were convicted again at the new trial, and criminal liabilities which arose only after the first conviction were to come to the attention of the sentencing judge at the second trial. In such circumstances, that judge would have the discretion to increase the original sentence imposed by the judge at the first trial. Ordinarily, of course, in the absence of any intervening criminal liabilities, the second judge would be precluded from increasing the sentence imposed by the first judge.¹⁴

Counsel should also explore with the defendant any aspects of the case that might warrant filing of a Rule 30 motion for a new trial prior to the direct appeal. For example, the defendant might wish to pursue a claim of ineffective assistance of trial counsel or a claim that exculpatory information has come to light after the trial. Such matters generally cannot be addressed in the direct appeal, which is limited to review of matters that have already been addressed in the trial record.¹⁵ However, where a claim of ineffective assistance of counsel is based on trial counsel's failure to file a motion to suppress, the issue may be resolved on direct appeal based on the trial transcript alone.¹⁶ To construct a record for appeal as to any new claims, such claims must first be addressed and acted on by the trial court.

¹⁴ See *Commonwealth v. Hyatt*, 419 Mass. 815, 819–24 (1995); *Commonwealth v. White*, 436 Mass. 340, 345 (2002) (in resentencing defendant, court may consider defendant's unfavorable conduct occurring subsequent to original imposition of sentence); *North Carolina v. Pearce*, 395 U.S. 711, 725–26 (1969).

¹⁵ *Commonwealth v. Fletcher*, 52 Mass. App. Ct. 166, 171–72 (2001). See, however, *Commonwealth v. Adamides*, 37 Mass. App. Ct. 339, 344 (1994) (“claim of ineffective assistance may be resolved on direct appeal of the defendant's conviction when the factual basis of the claim appears indisputably on the trial record”); *Commonwealth v. North*, 52 Mass. App. Ct. 603, 614 & n.11 (2001) (same). Thus a tactical decision by counsel which is manifestly unreasonable may be assessed on the defendant's direct appeal without any necessity of a motion for new trial. *Commonwealth v. McCrae*, 54 Mass. App. Ct. 27, 29 & n.2 (2002).

¹⁶ See *Commonwealth v. Hanson*, 79 Mass. App. Ct. 233, 237 (2011) (noting that exception to general rule exists where ineffective assistance of counsel claim is based on failure to file suppression motion and motion would have been likely to succeed).

Motions for new trial during the pendency of the appeal are governed by practice, not rule,¹⁷ and are comprehensively discussed in the important Appeals Court case of *Commonwealth v. Montgomery*.¹⁸ Because the entry of the defendant’s case in the appellate court automatically divests the trial court of jurisdiction to act on any motion for new trial or a related motion, the defendant must move for a stay of appeal as the necessary prerequisite to the filing of a motion for new trial in the trial court.¹⁹ The motion is decided by a single justice of the Appeals Court according to criteria established by usage and practice.²⁰ If the stay of appeal is granted, and the motion for new trial is thereafter brought and denied, the defendant’s appeal from the denial is consolidated with the direct appeal for briefing and argument in the appellate court, either on motion of the defendant or by the appellate court *sua sponte*.²¹

(Until 2005, there was a potentially important advantage to filing a new-trial motion before, not after, the direct appeal.²² If the defendant had not objected to an error at trial, but raised that error in a new-trial motion prior to the direct appeal, the appellate court would consider the issue as if it had been properly preserved for appellate review so long as the motion judge had considered the issue on its merits.²³ This would entitle the defendant to a more advantageous standard of review than the “substantial risk of a miscarriage of justice” standard that would otherwise apply to that issue.²⁴ However, in 2005, the Supreme Judicial Court determined that this power of

¹⁷ *Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 353 n.7 (2001).

¹⁸ 53 Mass. App. Ct. 350 (2001).

¹⁹ *Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 353 (2001).

²⁰ *See Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 354 (2001). Factors favoring the grant of stay are “the possibility that the motion for a new trial will be allowed; the economy of consolidating an appeal from the denial of a motion for a new trial with the direct appeal...; the advantages to the defendant of such consolidated review of a motion for a new trial over postappeal review; and the general systemic benefits of earlier retrials in cases in which a motion for a new trial is allowed.” *Ibid.* Among the reasons for which an Appeals Court single justice may deny the defendant’s request for a stay of appeal to permit the filing of a motion for new trial are “the similarities of issues raised in the motion for a new trial and in the direct appeal, and a reluctance to delay appellate review when briefing has been completed and the case has been, or is ready to be, scheduled for oral argument.” *Ibid.* The single justice’s ruling is itself subject to appellate review. *Id.* at 354 n.8.

²¹ *Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 354 n.9 (2001).

²² *See Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 354 n.10 (2001).

²³ *Commonwealth v. Hallet*, 427 Mass. 552, 553–55 (1998). *See Commonwealth v. Dyous*, 436 Mass. 719, 730 (2002); *Commonwealth v. Acevedo*, 427 Mass. 714, 714–15 (1998); *Commonwealth v. Ortiz*, 53 Mass. App. Ct. 168, 172–173 (2001); *Commonwealth v. Moore*, 52 Mass. App. Ct. 120, 122 n.3 (2001); *Commonwealth v. Munafo*, 45 Mass. App. Ct. 597, 600 (1998). *See also Commonwealth v. Sleeper*, 435 Mass. 581, 583 n.2, 588, 594, 599, 602 (2002) (rule applies even though motion judge was not trial judge). Such issues are sometimes denominated as “resurrected” claims. *See, e.g., Hallet, supra; Acevedo*, 427 Mass. at 714; *Vinnie, supra*. However, the issue will not be resurrected and the defendant will be relegated to the standard for non-preserved error if the judge expressly refuses to address the issue on its merits, *Commonwealth v. Oliveira*, 431 Mass. 609, 612 (2000); *Commonwealth v. Graham*, 431 Mass. 282, 286–287 & 287 n.11 (2000), or discusses it so briefly that the issue cannot be found to have been considered fully on its substantive merits, *Commonwealth v. Lewis*, 48 Mass. App. Ct. 343, 349 & n.12 (1999), or declines to pass on it at all, *Commonwealth v. Thompson*, 45 Mass. App. Ct. 523, 524 (1998).

“resurrection” originally set out in *Commonwealth v. Hallet*,²⁵ is no longer viable in criminal cases.²⁶

§ 45.2B. INITIAL STEPS

1. Notice of Appeal

An appeal from a judgment of the trial court is initiated by the filing of a notice of appeal in the office of the trial court clerk.²⁸ Generally, the following statement in the notice of appeal is sufficient: “Notice is hereby given that the defendant in the above case, being aggrieved by certain opinions, rulings, and judgments of the court, hereby appeals pursuant to Massachusetts Rules of Appellate Procedure, Rule 3.” However, where there might be some doubt as to precisely what judgment is being appealed, more specificity can be included: “Notice is hereby given that the defendant in the above case appeals from his conviction of [offense specified] on [date specified], pursuant to Massachusetts Rules of Appellate Procedure, Rule 3.”²⁹

Defendants convicted together may file a joint notice of appeal.³⁰ If joint defendants file separate notices of appeal, they may later move to consolidate their appeals, or the Commonwealth may so move, or the appellate court may consolidate the appeals *sua sponte*.³¹

The notice of appeal must be filed³² within thirty days after the verdict, the imposition of the sentence, or other judgment.³³ This period may be extended in several

²⁴ *Commonwealth v. Curtis*, 417 Mass. 619, 623–26 (1994); *Commonwealth v. Freeman*, 352 Mass. 556, 561–64 (1967). However, a motion for new trial filed prior to the direct appeal remains available as a vehicle for “resurrection” of issues on remand after affirmance of the defendant’s conviction by the appellate court. *Commonwealth v. Croken*, 432 Mass. 266, 277 (2000). Motions for a new trial are discussed *supra* in §44.4.

²⁵ *Commonwealth v. Hallet*, 427 Mass. 552, 553–55 (1998).

²⁶ *Commonwealth v. Bly*, 444 Mass. 640, 651 (2005) (in finding power of resurrection inapplicable to criminal cases, court noted that “trial judges often decline to express their views on the merits of unpreserved error because of the effect their consideration of the merits will have on the appeal”).

²⁸ Mass. R.A.P. 3(a). An immaterial miscitation in the notice of appeal is not sufficient to undermine its validity. *Commonwealth v. Vaidulas*, 433 Mass. 247, 252 (2001).

²⁹ Mass. R.A.P. 3(c).

³⁰ Mass. R.A.P. 3(b).

³¹ Mass. R.A.P. 3(b).

³² An incarcerated pro se defendant is deemed to have filed his notice of appeal at the time that he deposits it in the prison’s institutional mailbox or otherwise relinquishes control of the notice to prison authorities. *See Commonwealth v. Hartsgrove*, 407 Mass. 441, 444 (1990); *Commonwealth v. Andrade*, 71 Mass. App. Ct. 1110 (2008).

³³ Mass. R.A.P. 4(b). In the absence of a contrary judicial order, the trial court clerk is obligated to docket and process the notice of appeal. *Callahan v. Commonwealth*, 416 Mass. 1010, 1010 (1994). If the appeal is not docketed by the clerk, the defendant must file a motion in the trial court for an order to correct the docket and, if the motion is denied, must appeal the denial to the Appeals Court. *Sibinich v. Commonwealth*, 436 Mass. 1008, 1009–10 (2002). If the lower court issues an order dismissing the appeal, that order itself is appealable by the defendant to the Appeals Court. *Burnham v. Clerk, Peabody Div. of the Dist. Ct. Dept.*, 432 Mass. 1014, 1014 (2000).

ways. *First*, if the defendant files a motion for a new trial pursuant to Mass. R. Crim. P. 30 within thirty days of the conviction or sentencing, there is no need to file a notice of appeal until the motion is denied, at which point a new thirty-day period begins to run.³⁴ *Second*, the trial court may, upon a showing of excusable neglect, extend for an additional thirty days the initial thirty-day deadline.³⁵ *Finally*, the appellate court (not the trial court) may, for good cause shown,³⁶ extend the deadline up to the one-year point.³⁷ In no event, however, do the Rules of Appellate Procedure permit an extension beyond one year from the date of the verdict or sentence (or other final judgment).³⁸ Where the failure to file a notice of appeal within the designated time period is attributable to ineffective assistance of counsel, the defendant may raise all his appellate issues in a new-trial motion based on a claim of ineffectiveness of counsel.³⁹ As a result of the landmark decision in *Commonwealth v. White*⁴⁰, if a notice of appeal has actually been filed within one year of the judgment or appealable order,⁴¹ but belatedly, its late filing may be allowed by a single appellate justice under Mass. R. A. P. 14(b) even after the year has passed.⁴²

³⁴ Mass. R.A.P. 4(b).

³⁵ Mass. R.A.P. 4(c). The trial court has no power to extend the time for filing a notice of appeal beyond this point. *Commonwealth v. Pappas*, 432 Mass. 1025, 1025-1026 (2000).

³⁶ “Good cause” has been interpreted as a less exacting standard than “excusable neglect,” given that to interpret the rules otherwise would result in making it more difficult for a litigant to obtain a 30-day extension than to obtain a 365-day extension. *Commonwealth v. Trussell*, 68 Mass. App. Ct. 452, 454-55 (2007).

³⁷ Mass. R.A.P. 14(b); See *Commonwealth v. Barboza*, 68 Mass. App. Ct. 180, 182-83 (2007) (extension may be allowed for “good cause shown”).

³⁸ See *Commonwealth v. Burns*, 43 Mass. App. Ct. 263, 265–66 (1997). As a last resort, a defendant can request that the single justice of the S.J.C. exercise that court's general supervisory power under G.L. c. 211, § 3, to override the deadline prescribed by the Rules of Appellate Procedure. See *infra*, § 45.4. Such a petition was successful in the case of *Commonwealth v. Rivera*, S.J.C. for Suffolk County No. 94-0207 (1994).

³⁹ *Commonwealth v. Cowie*, 404 Mass. 119, 122–23 (1989). See *Commonwealth v. Frank*, 425 Mass. 182, 184–85 (1997) (where trial attorney filed notice of appeal, but then failed to pursue appeal, so that appeal was dismissed, counsel's neglect constituted ineffective assistance of counsel; Court remanded case for appointment of counsel, so that defendant could pursue direct appeal or motion for new trial, or both); *Rasheed v. Appeals Court*, 434 Mass. 1012, 1013 (2001) (defendant has burden to show that claims he intended to raise on appeal dismissed for lack of prosecution were meritorious). See also *Evitts v. Lucey*, 469 U.S. 387, 391-392 (1985); *Commonwealth v. White*, 429 Mass. 258, 265 (1999).

⁴⁰ 429 Mass. 258 (1999).

⁴¹ See *Commonwealth v. Hernandez*, 441 Mass. 1014 (2004) (rescript) (finding time limit on filing of notice of appeal commences when original sentence is imposed, not when probation is revoked).

⁴² *Commonwealth v. White*, 429 Mass. 258, 262–64 (1999). A Superior Court justice has no jurisdiction to allow the defendant to file a late notice of appeal after 60 days, even if the motion to file late is assented to by the Commonwealth, but a notice of appeal untimely filed in reliance on an invalid Superior Court order may be validated *nunc pro tunc* by a single appellate justice under the rule of *White*. *Commonwealth v. Pappas*, 432 Mass. 1025, 1026 n.1 (2000); *Commonwealth v. Painten*, 429 Mass. 536, 537 n.1 (1999). Cf. *Commonwealth v. Pixley*, 48 Mass. App. Ct. 917, 917 n.3 (2000) (though trial court judge lacked authority to grant defendant's motion to file late notice of appeal after 60 days had passed, Appeals Court chose to review merits of appeal). See also *Commonwealth v. Abreau*, 66 Mass. App. Ct. 795, 798

2. Trial Counsel's Withdrawal from Representation

Generally, it is preferable that trial counsel withdraw upon the conclusion of trial court proceedings and not represent the defendant on appeal. The defendant should be free to pursue all possible avenues on appeal and representation by trial counsel would preclude any claim of ineffectiveness of counsel.

However, trial counsel for an indigent criminal defendant must continue to represent the client after trial, until permission to withdraw is granted by the appellate court and new counsel files a notice of appearance.⁴³ Withdrawal is accomplished by means of a motion to withdraw and a motion for appointment of substitute counsel (the Committee for Public Counsel Services), which should be filed at the time of the filing of the defendant's notice of appeal.⁴⁴ An indigent defendant is guaranteed appointed counsel at the appellate level.⁴⁵ Despite his filing of a motion to withdraw, trial counsel should represent the defendant at the latter's sentence appeal hearing before the Appellate Division of the Superior Court, as counsel is obviously the person most conversant with the facts of the case.⁴⁶

3. Motion for Stay of Execution of Sentence

Upon the imposition of a sentence, counsel should assess whether the circumstances of the defendant's case warrant the filing of a motion for a stay of execution of the sentence.⁴⁷ Such a motion should first be filed in the trial court. If it is denied, it can be filed again in either or both appellate courts.⁴⁸

§ 45.2C. PRODUCTION OF TRANSCRIPT AND ASSEMBLY OF APPELLATE RECORD

Once the notice of appeal has been filed, the clerk of the trial court orders from the court stenographer a transcript of the proceedings⁴⁹ and assembles the appellate record.⁵⁰ In addition to the transcript, the appellate record consists of the documents

(2006) (finding no abuse of discretion where single justice allowed motion to deem notice of appeal timely).

⁴³ Mass. R.A.P. 3(e).

⁴⁴ Mass. R.A.P. 3(e).

⁴⁵ G.L. c.211D, § 14. *See* Commonwealth v. Sparks, 431 Mass. 299, 302 n.5 (2000).

⁴⁶ The Appellate Division construes Mass. R. Crim. P. 7(c) as obligating trial counsel to continue her representation of the defendant through the sentence appeal proceedings. Guidelines for Appellate Division Proceedings §§ 2(d)(1), 4 (1985), appearing in Massachusetts Rules of Court (West 1998).

⁴⁷ The substance of a motion for a stay of execution of sentence is discussed *supra* at § 39.2.

⁴⁸ *Duong v. Commonwealth*, 434 Mass. 1006, 1007-08 (2001); *Commonwealth v. Senior*, 429 Mass. 1021, 1021-1022 (1999); *Lewis v. Commonwealth*, 429 Mass. 1007 (1999).

⁴⁹ Mass. R.A.P. 8(b).

⁵⁰ Mass. R.A.P. 8(a), 9(a). Alternatively, the parties may stipulate to a statement of the record on appeal. Mass. R.A.P. 8(d). Upon approval by the trial court, the agreed statement becomes the official record of the proceedings. *Commonwealth v. Fisher*, 54 Mass. App. Ct. 41, 48 n.8 (2002). If the clerk of the trial court fails to assemble the record, the defendant must file

filed in the trial court, the trial exhibits, and a certified copy of the docket entries.⁵¹ The defendant bears the burden of producing a record which is adequate for appellate review.⁵²

Upon notice from the trial court clerk that the record has been assembled, the clerk of the Appeals Court formally enters the appeal in that court,⁵³ whereupon the briefing schedule commences.⁵⁴

Where the trial court proceedings were recorded by a stenographer, he is obligated to prepare a certified transcript, copies of which are distributed to the appellate court, the Commonwealth, and the defendant. The defendant must pay for her copy of the transcript unless she is indigent.⁵⁵

If the proceedings were electronically recorded, it is the appellant's responsibility to order from the trial court clerk a copy of the tape cassette.⁵⁶ The appellant must review and designate for transcription those portions that he believes are relevant to the appeal.⁵⁷ The appellant and appellee must agree on a transcriber; if they cannot agree, or if the Commonwealth is paying for the transcript, the clerk selects the transcriber.⁵⁸

In general, counsel should seek to procure the entire transcript of the trial and any important pretrial motion hearings, even where trial counsel has represented in good faith that there were no apparent errors at trial. It goes without saying that, in the stressful atmosphere of the lower-court proceedings, trial counsel may have overlooked some errors, including her own. Any part of the transcript, including the jury impanelment and the rendering of the verdict (portions often thought to be

in the trial court a motion for an order directing her to do so and appeal the denial of such a motion to the Appeals Court. *Sibinich v. Commonwealth*, 436 Mass. 1008, 1009-10 (2002).

⁵¹ Mass. R.A.P. 8(a). The record on appeal may include a document filed subsequent to the filing of the notice of appeal. *Commonwealth v. Morse*, 50 Mass. App. Ct. 582, 584-85 n.3 (2000).

⁵² *Commonwealth v. Lampron*, 65 Mass. App. Ct. 340, 349 (2005) (noting that defendant must correct the record if information is omitted which is critical to defendant's claims).

⁵³ Mass. R.A.P. 10(a)(2). Entry of the appeal occurs automatically on receipt by the appellate court clerk of notice of assembly of the record, *Commonwealth v. Montgomery*, 52 Mass. App. Ct. 350, 353 n.6 (2001), and ousts the trial court of jurisdiction to rule on any motion for a new trial, or any motion related thereto, whether then pending or filed during the pendency of the appeal. *Id.* at 351-53.

⁵⁴ Mass. R.A.P. 19(a).

⁵⁵ Mass. R.A.P. 8(b)(2), (4).

⁵⁶ *See Burnham v. Clerk, Peabody Div. of the Dist. Ct. Dept.*, 432 Mass. 1014, 1014 (2000) (non-indigent defendant must pay required trial court fee to obtain cassette of trial); *Commonwealth v. Pudder*, 41 Mass. App. Ct. 930, 930-32 (1997) (trial counsel neglected to order tape cassette after trial and by time appellate counsel attempted to obtain cassette, it had been destroyed).

⁵⁷ Mass. R.A.P. 8(b)(3)(ii). Where a criminal defendant is indigent, such that the Commonwealth is paying for the transcript, the defendant must also file a certificate stating that the designated portions "are necessary to permit full consideration of the issues on appeal." Mass. R.A.P. 8(b)(3)(vi). *See Charpentier v. Commonwealth*, 376 Mass. 80, 88 (1978) (indigent defendant is entitled to complete trial transcript under statutory predecessor to Mass. R.A.P. 8(b)).

⁵⁸ Mass. R.A.P. 8(b)(3)(ii).

dispensable), may turn out to contain errors rectifiable on appeal. Many reversals by the appellate courts have occurred in cases where no participant in the trial — not defense counsel, not the prosecutor, not even the judge — noticed the error.

It cannot be stressed too strongly that “it is the responsibility of the defendant as the appealing party to provide an adequate record for review.”⁵⁹ If the record is incomplete, the defendant should move to vacate the notice of assembly of the record and the entry of the appeal until the deficiencies are remedied. Any disputes about the accuracy of the record must first be addressed and resolved, if possible, in the trial court.⁶⁰ If necessary, the defendant also has recourse to the appellate courts.⁶¹

Frequently encountered problems include gaps in transcripts and inaudible portions of cassette tapes. Whatever the problem, counsel should file in the trial court a motion to correct the appellate record, pursuant to Mass. R. Mass. R.A.P. 8(e).⁶² The motion should set forth the problem and the defendant's proposed reconstruction or amendment of the record. Affidavits attesting to the recollection of participants in the proceedings may be attached to the motion.⁶³ Where the trial judge is retired, an affidavit regarding the judge's customary practice in taking guilty pleas may be used to reconstruct the record.⁶⁴ If the trial court denies such a motion by the defendant or grants such a motion by the Commonwealth, that ruling becomes another ground for appeal, to be included in the defendant's appellate brief.⁶⁵

⁵⁹ *Commonwealth v. Robicheau*, 421 Mass. 176, 184 n.7 (1995). *See Commonwealth v. Woods*, 419 Mass. 366, 369–72 (1995) (appellate issue was not properly preserved where counsel did not attempt to reconstruct the record of the sidebar discussion of the issue); *See also Commonwealth v. Lampron*, 65 Mass. App. Ct. 340, 349 (2005) (noting that defendant must correct the record if information is omitted which is critical to defendant's claims)..

⁶⁰ Mass. R.A.P. 8(b)(v), (e). *See Commonwealth v. Harris*, 376 Mass. 74, 76–80 (1978); *Drayton v. Commonwealth*, 450 Mass 1028, 1029-30 (2008).

⁶¹ Mass. R.A.P. 8(e).

⁶² *Commonwealth v. Best*, 50 Mass. App. Ct. 722, 729 (2001). Appellate counsel is responsible for ensuring that the record, including the transcript, is adequate for appellate review of the issues raised by the defendant. *Commonwealth v. Woody*, 429 Mass. 95, 96–97 & n.2 (1999); *See also Commonwealth v. Lampron*, 65 Mass. App. Ct. 340, 349 (2005).

⁶³ Mass. R.A.P. 8(c). *See Commonwealth v. Boyer*, 400 Mass. 52, 53–54 (1987); *Commonwealth v. Rosenfield*, 20 Mass. App. Ct. 125, 127 (1985); *Commonwealth v. Quinones*, 414 Mass. 423, 434 (1993) (in addition to judge's actual recollections of plea colloquy, his “recitation of facts based on his usual practice may properly support . . . reconstruction of . . . record” of colloquy). *Commonwealth v. Ciampa*, 51 Mass. App. Ct. 459, 463-464 (2001) (four-part test for adequacy of reconstructed plea record); *Commonwealth v. Glenden*, 49 Mass. App. Ct. 250, 252–253 (2000) (judge's statement as to his customary practice sufficient to settle record pursuant to Mass. R. A. P. 8(e), despite absence of specific recollection by judge of defendant's case). Affidavits as to facts long in the past should set forth the foundation for the affiant's recollection, such as a contemporaneous writing or an unusual event. *Ciampa, supra* at 461 n.3.

⁶⁴ *Commonwealth v. Simmons*, 448 Mass. 687, 689-90 (2007); *cf. Commonwealth v. Haskell*, 76 Mass. App. Ct. 284, 291 (2010) (holding that affidavit from retired plea judge sufficient to reconstruct record).

⁶⁵ Mass. R.A.P. 8(e). *See Commonwealth v. Rzepphiewski*, 431 Mass. 48, 56 (2000) (Commonwealth not granted expansion of record to include matter irrelevant to issue presented by defendant's appeal); *Commonwealth v. Boyer*, 400 Mass. 52, 53–54 (1987) (where no transcript existed, Court rejected defendant's version of events); *Commonwealth v. Robles*, 423 Mass. 62, 72–74 (1996) (denying defendant's appeal from trial court's granting of Commonwealth's motion to correct record).

Where the defendant's best efforts to correct the record are unsuccessful, a new trial will be granted by an appellate court only if the transcript is unavailable through no fault of the defendant and cannot be reconstructed sufficiently to permit proper presentation of the defendant's claims of error on appeal.⁶⁶

§ 45.2D. PREPARATION AND FILING OF THE APPELLATE BRIEF

The entry of the appeal in the Appeals Court or the Supreme Judicial Court triggers the briefing schedule. The *initial deadline for the filing of the appellant's brief* is forty days from the date of entry of the case in the appellate court. That deadline may be extended by motion. Counsel should be aware of an important distinction between practice in the Appeals Court and in the Supreme Judicial Court. Under a policy which took effect in 1998,⁶⁷ the Appeals Court grants only one motion to extend the forty-day filing deadline. The maximum extension is 120 days. Counsel seeking an extension must set forth in an affidavit “good cause to warrant the requested enlargement” and “an explanation why the particular time period requested is reasonable.”⁶⁸ In the context of a criminal appeal, the good cause determination will take into account the importance of the potential loss of rights to the defendant.⁶⁹ Any further extension will be justified only where there is a “genuine emergency,” defined by the Court as “death, illness or serious injury.” In the Supreme Judicial Court, there is no absolute filing deadline and counsel may seek serial extensions, so long as he or she is able to set forth reasonable grounds in an affidavit.

Failure to file a brief may result in dismissal of the defendant's appeal.⁷⁰ In lieu of briefing an appellate issue, a defendant may also join in a codefendant's briefing of the issue.⁷¹

⁶⁶ Commonwealth v. McWhinney, 20 Mass. App. Ct. 444, 445–47 (1985) (defendant granted new trial where crucial portions of transcript were unavailable and could not be adequately reconstructed, such that record was insufficient for proper presentation of defendant's appellate claim); Commonwealth v. Pudder, 41 Mass. App. Ct. 930, 930–32 (1997) (although tape cassette was destroyed, denial of defendant's new-trial motion was affirmed because defendant shared fault for not pursuing appeal more aggressively and for not seeking to reconstruct transcript from other sources); Commonwealth v. Harris, 376 Mass. 74, 76–80 (1978).

⁶⁷ Policy on Enlargements on Brief Filings, effective October 1, 1998.

⁶⁸ Policy on Enlargements of Brief Filings. See Lawrence Savings Bank v. Garabedian, 49 Mass. App. Ct. 157, 159–60, 164 (2000) (counsel's surgery to correct severe obstructive sleep apnea shortly before extended due date for brief was not “good cause” for second enlargement of time for brief; first enlargement granted had been 90 days on request for 120 days).

⁶⁹ Commonwealth v. White, 429 Mass. 258, 264 (1999); See also Commonwealth v. Barboza, 68 Mass. App. Ct. 180, 184 (2007) (taking into account the loss of rights to the defendant, the court found no abuse of discretion in allowing motion to deem notice of appeal timely).

⁷⁰ Mass. R.A.P. 19(c). See John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 4 Mass. App. Ct. 847, 847 (1976). The appeal can be dismissed only by a three-judge panel, not by a single justice acting alone. Kordis v. Appeals Court, 434 Mass. 662, 665 n.7 (2001). The order of dismissal need be served only on the defendant's counsel, not the defendant personally, Rasheed v. Appeals Court, 434 Mass. 1012, 1013 n.1 (2001), a somewhat anomalous rule since it is counsel's failure to file a brief that triggers the steps leading to the dismissal in the first place.

⁷¹ Mass. R.A.P. 16(j); Commonwealth v. Ruiz, 51 Mass.App. Ct. 346, 351 n.10 (2001).

Having ascertained that there is no unacceptable risk involved in proceeding with the appeal, and that it is not necessary to stay the appeal in order to pursue a new-trial motion, counsel may prepare the defendant's brief. The brief must contain the following sections:⁷²

1. A table of contents;
2. A table of authorities;
3. A statement of the issues presented on appeal;
4. A statement of the case, that is, a history of the proceedings to date;
5. A statement of the facts relevant to the appeal; generally, a summary of the testimony at trial and at pretrial motion hearings;⁷³
6. The argument;
7. A conclusion stating the precise relief sought;⁷⁴
8. An addendum containing the text of relevant constitutional provisions, statutes, court rules, and other authorities cited in the brief;
9. A table of contents listing the documents in the record appendix;
10. The record appendix, consisting of the docket entries, the complaint or indictment, and any other documents relevant to the issues raised on appeal, including exhibits;⁷⁵
11. The signature of the preparer of the brief (in S.J.C. briefs only; the printed name suffices in Appeals Court briefs).⁷⁶
12. A certification of compliance with all court rules governing briefs.⁷⁷

⁷² Mass. R.A.P. 16(a).

⁷³ The statement of facts should include appropriate references to the record. Mass. R.A.P. 16(e).

⁷⁴ Although the appellate courts generally decline to review a conviction on an indictment filed with the defendant's consent (*see* *Commonwealth v. Nowells*, 390 Mass. 621, 629–30 (1983); *Commonwealth v. Boone*, 356 Mass. 85, 88 (1969)), exceptions have been made. Therefore, counsel should not hesitate to include in the prayer for relief a request that filed convictions be reversed. *See* *Commonwealth v. Freeman*, 29 Mass. App. Ct. 635, 636 n.1 (1990) (court reviewed conviction on filed complaint, as well as conviction on which defendant was sentenced, because constitutional error affected fairness of trial of both matters); *Commonwealth v. Thompson*, 382 Mass. 379, 381–82 (1981) (court reviewed conviction on filed indictment in non-constitutional case). *See also* *Commonwealth v. Paniaqua*, 413 Mass. 796, 797 n.1 (1992) (“[b]ecause the record does not reflect the defendant's consent to two convictions' being placed on file we shall consider them”; “[t]he better practice is not to place a case on file without the defendant's consent”).

⁷⁵ Mass. R.A.P. 18. *See* *Commonwealth v. Grenier*, 45 Mass. App. Ct. 58, 59 (1998). The appellate court may rely on parts of the record not included in the record appendix, *Commonwealth v. Morse*, 50 Mass. App. Ct. 565, 570-71 (2000), but a defendant challenging on appeal the admission in evidence of a particular document must include a copy of it, *Commonwealth v. Best*, 50 Mass. App. Ct. 722, 728 (2001), and a defendant challenging on appeal the sufficiency of a search warrant affidavit must include a copy of it, *Commonwealth v. Hill*, 51 Mass. App. Ct. 598, 611 n.11 (2001), in their record appendices. A relevant document not admitted in evidence but marked for identification should be included in the record appendix. *Commonwealth v. Yeshulas*, 51 Mass. App. Ct. 486, 490 (2001).

⁷⁶ Counsel's Board of Bar Overseers number should be inserted under his or her name in any document filed in an appellate court. Mass. R.A.P. 16(a)(7), 20(a).

⁷⁷ Mass. R.A.P. 16(k) was amended in 2005 to require a certification that the brief complies with all of the rules of court governing briefs. According to the 2005 Reporter's Notes, a brief which does not contain this certification may be struck by the court for non-compliance.

Ordinarily, a brief may not exceed fifty pages of word-processed text, excluding the table of contents, the table of authorities, the addendum, and the record appendix.⁷⁸ If the argument section exceeds twenty-four pages of word-processed text, then an additional section summarizing the argument must be inserted immediately preceding the argument section.

Where counsel believes that it would be helpful to the presentation of the defendant's appeal to include in the record appendix of the brief a document that is not part of the official record of the case, counsel may file in the appellate court a motion to expand the appellate record.

The argument section of the brief must contain substantive discussion of the issues. Any issue that is not argued in the brief is deemed waived.⁷⁹ The mere mention of an issue, without substantive treatment, may result in a ruling that the presentation did not rise to the level of appellate argument and, therefore, that the appellate claim has been deemed waived.⁸⁰ For example, where an issue raised in an appellate brief is not supported by citation to legal authority, the courts have deemed the issue to be waived.⁸¹

To the extent possible, appellate arguments in the defendant's brief should be “federalized,” that is, couched in terms cognizable under federal constitutional law.⁸² If

⁷⁸ Mass. R.A.P. 16(h).

⁷⁹ *Commonwealth v. LeFave*, 430 Mass. 169, 172–73 (1999); *Commonwealth v. Amirault*, 424 Mass. 618, 642–44 (1997) (issue was deemed waived where counsel could have, but did not, raise it at trial or in direct appeal). There is a suggestion in *Commonwealth v. DeCicco*, 51 Mass. App. Ct. 159, 161 (2001), that any issue known to the defendant, though dependent on matters outside the trial record, is waived for purposes of a motion for new trial if it is not incorporated into the direct appeal. By contrast, an *ineffective assistance* claim is not waived when the defendant’s trial counsel is also representing her on appeal, *Commonwealth v. Azar*, 435 Mass. 675, 686 (2002), and for this purpose members of the same law firm or staff attorneys of the Public Defender Division of the Committee for Public Counsel Services constitute the “same attorney.” *Commonwealth v. Egardo*, 426 Mass. 48, 49-50 (1997). However, an ineffective assistance claim against trial counsel available on the record (see note 59) is waived if not raised on direct appeal by appellate counsel not affiliated with trial counsel. *Commonwealth v. Chase*, 433 Mass. 293, 294-295, 297 & n.3 (2001).

⁸⁰ *See* Mass. R.A.P. 16(a)(4); *In re McBride*, 449 Mass. 154, 164-65 (2007) (in attorney misconduct prosecution, court found insufficient briefing to amount to appellate argument where counsel’s bare assertions regarding stress and negative publicity appeared in last sentences of brief, and were unsupported by factual or legal arguments); *Commonwealth v. Broomhead*, 67 Mass. App. Ct. 547, 547-48, n. 1 (2006) (claim not properly before appellate court where defendant raised conclusory allegation that Commonwealth’s prosecution of him for three separate crimes within six months was overzealous); *Commonwealth v. Grace*, 370 Mass. 746, 758 (1976); *Commonwealth v. Flynn*, 362 Mass. 455, 468 (1972); *Commonwealth v. Shaheen*, 15 Mass. App. Ct. 302, 307–08 n.5 (1983). *But see* *Commonwealth v. Janvrin*, 44 Mass. App. Ct. 917, 917–18 (1998) (Court addressed and decided, in defendant's favor, “an issue not raised by either party on appeal”); *Commonwealth v. Angiulo*, 415 Mass. 502, 523–24 (1993) (concisely stated claim, supported by some reasoning and citations to authorities and parts of record relied on, will suffice to avoid finding of constructive waiver of appeal); *Commonwealth v. Hinckley*, 422 Mass. 261, 267 n.7 (1996) (argument presented entirely in footnote was sufficient where “defendant outlined the standard, provided citations, and applied the standard to his case”)

⁸¹ *See, e.g., Commonwealth v. Oliveira*, 74 Mass. App. Ct. 49, 57 (2009); *Commonwealth v. Garner*, 59 Mass. App. Ct. 350 (2003).

⁸² The bare assertion of a federal constitutional claim in the brief, without supporting authority, does not suffice to raise a federal issue, *Commonwealth v. DiRenzo*, 52 Mass. App.

the state appellate courts affirm the defendant's conviction, the defendant will then have the option of continuing to seek vindication by filing in federal district court a petition for a writ of habeas corpus. Such a petition will be granted, however, only on a showing that the petitioner's federal constitutional rights were violated in the state trial and appellate proceedings. Unless the federal petitioner can demonstrate that he has presented his grievances to the state appellate courts in federal constitutional terms, the federal court will dismiss the petition for a writ of habeas corpus on the ground that the petitioner did not exhaust his state remedies.⁸³

There is a significant difference between the filing requirements for briefs addressed to the Appeals Court and those addressed to the Supreme Judicial Court. The Appeals Court requires only seven copies of the appellant's brief, while the Supreme Judicial Court requires eighteen copies, one of which must bear the preparer's original signature.⁸⁴

The appellant must serve two copies of the brief on the appellee, who has thirty days to respond. No later than fourteen days after the appellee's brief is filed, the appellant may file a reply brief not exceeding twenty pages of word-processed text.⁸⁵

The potential significance of a reply brief has changed substantially in light of the implementation of a 1998 Appeals Court policy⁸⁶ which specifies that oral argument in cases on the Court's "summary list" is not guaranteed.⁸⁷ Prior to this policy, it was not crucial for a defendant to file a reply brief, as there was generally opportunity at oral argument to address issues raised in the Commonwealth's brief. Under this policy, however, in any case where the defendant is notified by the Appeals Court that there will be no oral argument, counsel should carefully consider filing a reply brief, in order to ensure that, at least on paper, all significant aspects of the defendant's position have been presented to the Court.

§ 45.2E. ORAL ARGUMENT AND DECISION

In every case before the Supreme Judicial Court and in every case on the Appeals Court's regular list, the justices hear oral argument⁸⁸ (unless argument is waived by the parties). As noted above, the Appeals Court retains discretion to decide certain cases on its summary list without having heard argument.

Ct. 907, 909 (2001), nor does the assertion of the claim in a footnote, *Commonwealth v. Soares*, 51 Mass. App. Ct. 273, 278 (2001).

⁸³ For a complete discussion of the exhaustion doctrine, see § 44.5C(3) *supra*.

⁸⁴ Mass. R.A.P. 19(b).

⁸⁵ Mass. R.A.P. 16(c), 16(h), 19.

⁸⁶ Effective September 1, 1998.

⁸⁷ See Appeals Court Rule 1:28.; *Hunt v. Commonwealth*, 434 Mass. 1012, 1012 n.1 (2001).

⁸⁸ Generally, each Appeals Court case is decided by a panel of three of the Court's justices. *But see* Mass. R.A.P. 24(a); *Commonwealth v. James*, 30 Mass. App. Ct. 490 (1991) (decision by all 15 justices); *Commonwealth v. Abrams*, 44 Mass. App. Ct. 584 (1998) (decision by four justices). If the defendant dies following oral argument before the decision is released, the conviction is vacated and the indictment dismissed. *Commonwealth v. Barrows*, 435 Mass. 1011, 1011 (2002).

In the Supreme Judicial Court, each side typically argues for fifteen minutes; however, in first-degree murder cases, each side argues for twenty minutes.⁸⁹ In the Appeals Court, each side argues for fifteen minutes in cases on the regular list. However, in cases on the summary list, assuming that the Court permits oral argument, each side has only ten minutes. Where two or more defendants appeal jointly, they must split the available time between them. The oral argument is limited to discussion of issues that were raised in the parties' briefs.⁹⁰

Incarcerated defendants are not permitted to attend the oral argument in either appellate court.⁹¹

After the argument, counsel may file an additional submission in the form of a letter, addressing a significant occurrence at the argument — for example, a misrepresentation in the other party's argument or a novel question posed by a justice — or alerting the court to new and relevant case law or other authority issued subsequent to the argument.⁹²

Once the Appeals Court issues its decision, the losing party has fourteen days to file a petition for rehearing,⁹³ and twenty days to apply for further appellate review by the Supreme Judicial Court.⁹⁴ If neither of those documents is filed, the rescript (i.e., formal notification) of the Appeals Court's decision is sent to the trial court on the twenty-eighth day after the decision.

The losing party in the Supreme Judicial Court may submit to that court a petition for rehearing. Absent further consideration by the Supreme Judicial Court, its decision, like a decision of the Appeals Court, is formally transmitted to the trial court on the twenty-eighth day after the decision.

A defendant who prevails in either appellate court and believes that the Commonwealth will not be filing a petition for rehearing or an application for further appellate review may, prior to the twenty-eighth day after the court's decision, move for immediate issuance of the rescript.⁹⁵ Immediate issuance would expedite the process of

⁸⁹ Mass. R.A.P. 22(b), as amended effective September 3, 2002. The amendment reduced the time allotted from thirty to twenty minutes, though counsel are invited to request more than twenty minutes “for good cause shown” if additional time is necessary for adequate presentation of the argument.

⁹⁰ See *Commonwealth v. Hynes*, 40 Mass. App. Ct. 927, 928 n.1 (1996) (court declined to address issue raised by defendant for first time at oral argument); *Commonwealth v. Bacigalupo*, 49 Mass. App. Ct. 629, 63 (2000) (court need not pass on issue raised by defendant for first time in reply brief, but may choose to do so if issue is important). The defendant does not waive any matter raised in her brief by failing to argue it orally. *Hunt v. Commonwealth*, 434 Mass. 1012, 1012 n.1 (2001). Even if the Commonwealth confesses error with respect to a particular issue presented by the defendant, the court must still examine it. *Commonwealth v. Moore*, 50 Mass. App. Ct. 730, 735 (2001).

⁹¹ *Hunt v. Commonwealth*, 434 Mass. 1012, 1012 n.1(2001).

⁹² Mass. R.A.P. 16(l). A letter alerting the appellate court to new case law may also be filed during the period between the filing of the defendant's brief and the oral argument. Mass. R.A.P. 16(l). However, the rule permits only the citation of new authority, not argument. *Commonwealth v. Christian*, 430 Mass. 552, 567–68 n.15 (2000); *Commonwealth v. Springer*, 49 Mass. App. Ct. 469, 483 (2000).

⁹³ Mass. R.A.P. 27(a). The petition for rehearing consists of a letter addressed to the chair of the panel that heard the oral argument.

⁹⁴ Mass. R.A.P. 27.1(a). See *infra*, § 45.2G.

⁹⁵ See Mass. R.A.P. 23.

release of the defendant from incarceration and the process of application for bail in the trial court.⁹⁶

A stay of proceedings pending the resolution of the appeal automatically expires when the decision of the appeal is docketed.⁹⁷

§ 45.2F. DIRECT APPELLATE REVIEW BY THE SUPREME JUDICIAL COURT

As noted above, all appeals, other than those in first-degree murder cases, originate in the Appeals Court. However, once the case has been entered in that court, a party may ask the Supreme Judicial Court to take the case for direct appellate review.⁹⁸ The application for direct review should attempt to demonstrate that the appeal involves “(1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the Supreme Judicial Court.”⁹⁹

Aside from the fact that one or more of the requisite grounds is present in his case, a defendant may wish to seek direct appellate review for various other reasons. A new and compelling reason is that, as noted above, a defendant is no longer guaranteed an oral argument before the Appeals Court. Review by the Supreme Judicial Court ensures, at least, that counsel will have an opportunity to argue. Other reasons for seeking direct review include: (1) that the defendant's appellate issue relates to an area of the law in which the Supreme Judicial Court, rather than the Appeals Court, has been the primary maker of law; (2) that the defendant is requesting that the appellate court depart from established precedent, a task that the state's highest court, rather than the intermediate Appeals Court, is more likely to undertake; and (3) the obvious fact that cutting one step out of the appellate process is likely to save the defendant time and money.

An application for direct appellate review must contain the following:¹⁰⁰

1. A cover page containing the request for direct appellate review;
2. A statement summarizing the history of prior proceedings in the case;
3. A short statement of the facts relevant to the appeal;
4. A statement of the issues of law raised by the appeal;
5. The argument, including authorities, which should not exceed ten pages of word-processed text;
6. A statement of reasons why direct appellate review is appropriate;
7. A certified copy of the docket entries in the case; and

⁹⁶ The one-year period for retrial (if such is ordered) runs either from the date of issuance of the rescript or the date of its receipt by the trial court. The question of which date controls has not yet been decided. *See* *Commonwealth v. Bodden*, 391 Mass. 356, 357–58 (1984); *Commonwealth v. Levin*, 390 Mass. 857, 860–61 (1984); *Mass. R. Crim. P. 36(b)(1)(D)*.

⁹⁷ *Commonwealth v. Kennedy*, 435 Mass. 527, 528 & n.2 (2001).

⁹⁸ *Mass. R.A.P. 11*. The S.J.C. may also take a case for direct review on its own initiative.

⁹⁹ *Mass. R.A.P. 11(a)*.

¹⁰⁰ *Mass. R.A.P. 11(b)*.

8. A statement indicating whether the issues were raised and preserved in the lower court.¹⁰¹

The filing in the Supreme Judicial Court consists of a signed original and seventeen copies. One copy of the application must be filed in the Appeals Court.¹⁰²

Mass. R.A.P. 11(a) includes the impracticable requirement that an application for direct appellate review be filed no later than twenty days after an appeal has been entered in the Appeals Court. It is extremely unlikely that, within twenty days of entry of a case in the Appeals Court, counsel could read and thoroughly analyze the transcript of the trial court proceedings and produce a well-crafted appellate argument suitable for submission in an application to the Supreme Judicial Court. In virtually every case, therefore, it is necessary to file the application late, even several months late. For that reason, the typical application for direct appellate review will be accompanied by a separate motion for leave to file the application late (submitted contemporaneously with the application itself). Such motions to file late are routinely allowed by the Supreme Judicial Court.

Any opposition to the application must be filed within ten days of the filing of the application.¹⁰³

If the application is allowed and the Supreme Judicial Court ultimately affirms the defendant's conviction, the affirmance constitutes the conclusion of the direct appeal. Put another way, the defendant's state remedies have been "exhausted." At that point, counsel should advise the defendant about the possibility of pursuing vindication in the federal courts, by the filing of a petition for a writ of certiorari in the U.S. Supreme Court or a petition for a writ of habeas corpus in the federal district court.¹⁰⁴ A defendant may pursue both of those avenues sequentially. As noted above, a petition for a writ of habeas corpus must be based on a claim that the state court proceedings violated the petitioner's federal constitutional rights. A petition for a writ of certiorari may, but need not, contain such a claim.

§ 45.2G. FURTHER APPELLATE REVIEW BY THE SUPREME JUDICIAL COURT

Upon the issuance of a decision by the Appeals Court, the losing party must decide quickly whether to seek further appellate review by the Supreme Judicial Court.¹⁰⁵ The filing deadline is twenty days from the date of the Appeals Court's decision.¹⁰⁶

¹⁰¹ Mass. R.A.P. 11(b) was amended in 2002 to require a statement regarding whether the issues were "properly preserved in the lower court." *See* Reporter's Notes 2002. A copy of any lower court decision must be appended to the application.

¹⁰² Mass. R.A.P. 11(d).

¹⁰³ Mass. R.A.P. 11(c).

¹⁰⁴ For a complete discussion of the rules governing federal habeas relief, see § 44.5 *supra*.

¹⁰⁵ G.L. c. 211A, § 11; Mass. R.A.P. 27.1. The defendant may also seek to obtain further appellate review of an appeal dismissed by the Appeals Court for lack of prosecution, by meeting a burden to show that the claims he intended to raise on appeal to the Appeals Court were meritorious. *Rasheed v. Appeals Court*, 434 Mass. 1012, 1013 (2001).

¹⁰⁶ Mass. R.A.P. 27.1(a).

The gist of the argument presented in such an application is that the Appeals Court erred in rejecting the defendant's appellate claim.¹⁰⁷ Successful applications tend to be those that raise questions of some novelty, or provide the Supreme Judicial Court with the occasion to update the law, or provide an opportunity to reconcile apparently inconsistent lines of prior appellate decisions. Where an Appeals Court decision has included a dissenting opinion, a signal that the issue involved is a close one, a defendant should strongly consider applying for further appellate review.

An application for further appellate review may not raise issues that were not addressed at all in the proceedings below.

An application for further appellate review must contain the following:¹⁰⁸

1. A cover page containing the formal request for further appellate review;
2. A statement summarizing the history of prior proceedings in the case, including notification as to whether either party is seeking a rehearing by the Appeals Court;¹⁰⁹

3. A short statement of the facts relevant to the appeal, but not repetitive of facts correctly stated in the Appeals Court's decision;

4. The argument, including authorities, which should not exceed ten pages of word-processed text;

5. A copy of the Appeals Court's decision; and

6. If the decision was in the form of an unpublished memorandum and order under Appeals Court Rule 1:28, the pertinent pages of any documents referred to in the decision (such as a brief or a judge's findings and rulings).

The filing in the Supreme Judicial Court consists of a signed original and seventeen copies. One copy of the application must be filed in the Appeals Court.¹¹⁰ Any opposition must be filed within ten days of the filing of the application.¹¹¹

If the application for further appellate review is allowed, the Supreme Judicial Court may review any or all of the issues that were before the Appeals Court,¹¹² regardless of the issues focused on in the application. It follows that where the Appeals Court's decision provided the defendant with partial vindication — for example, reversal of one conviction, but affirmance of another — counsel should advise his or her client that there is some risk involved in seeking further appellate review of the adverse portion of the Appeals Court's decision. The risk is that the Supreme Judicial Court will both vacate the portion of the Appeals Court's decision favorable to the defendant and leave intact the portion of the decision unfavorable to the defendant,

¹⁰⁷ A defendant cannot forego applying for further appellate review and subsequently seek relief under G.L. c.211, § 3 (*see infra* § 45.4), from the Appeals Court's decision. *Forte v. Commonwealth*, 429 Mass. 1019, 1021 (1999). The bar applies to the Commonwealth also. *Commonwealth v. O'Neil*, 436 Mass. 1007, 1007-1008 (2002).

¹⁰⁸ Mass. R.A.P. 27.1(b).

¹⁰⁹ It is, of course, the responsibility of the party that has filed a petition for rehearing by the Appeals Court to inform the S.J.C. immediately upon issuance of the Appeals Court's decision on the petition.

¹¹⁰ Mass. R.A.P. 27.1(d).

¹¹¹ Mass. R.A.P. 27.1(c).

¹¹² *Commonwealth v. Lombard*, 419 Mass. 585, 593 (1995); *Commonwealth v. Trowbridge*, 419 Mass. 750, 751 (1995); *Commonwealth v. Burno*, 396 Mass. 622, 623–24 (1986). An unlimited order for further appellate review brings up all issues raised by the defendant in his brief to the Appeals Court. *Commonwealth v. Gorassi*, 432 Mass. 244, 244-245 n.1 (2000).

thereby leaving the defendant with no vindication at all. A 2004 amendment to Mass. R.A.P. 27.1(f) further provides that where the Supreme Judicial Court has granted further appellate review, each party has the option of either submitting a new brief or relying on the original Appeals Court brief.¹¹³

A defendant who prevailed in the Appeals Court does not waive a challenge to dicta in the Appeals Court's opinion by failing to seek further appellate review by the Supreme Judicial Court.¹¹⁴

Upon allowance of an application for further appellate review, the Supreme Judicial Court directs the parties to submit to the Court eleven additional copies of each appellate brief filed in the Appeals Court, including a signed original.

Any party may, within ten days of the allowance of the application, request permission to file a supplemental brief in the Supreme Judicial Court.¹¹⁵

The denial of an application for further appellate review ordinarily constitutes the conclusion of the direct appeal. At that point, as noted above, counsel should advise the defendant about the possibility of pursuing vindication in the federal courts.

§ 45.2H. APPELLATE REVIEW OF CONVICTIONS OF FIRST-DEGREE MURDER

1. Special Scrutiny of the Record Under G.L. c. 278, § 33E¹¹⁶

On direct appeal to the Supreme Judicial Court,¹¹⁷ a conviction of first-degree murder receives special scrutiny. By statute,¹¹⁸ the Court not only addresses the particular appellate issues presented by the defendant; it also reviews the entire record of the case¹¹⁹ to ensure that the outcome is consonant with justice.¹²⁰ The Court has

¹¹³ Mass. R.A.P. Rule 27.1(f) and its Reporter's Notes 2004 (neither party may rely on both the Appeals Court brief and a new brief to the S.J.C., as was previously allowed).

¹¹⁴ *Bynum v. Commonwealth*, 429 Mass. 705, 707 (1999).

¹¹⁵ Mass. R.A.P. 27.1(f).

¹¹⁶ For a complete discussion of the history of § 33E and its provisions, see Justice John M. Greaney & James E. Comerford, *THE LAW OF HOMICIDE IN MASSACHUSETTS*, § 21.1 (Flaschner Judicial Institute 2009).

¹¹⁷ Appeals from first-degree murder convictions are entered directly in the S.J.C., not the Appeals Court. G.L. c. 211A, § 10.

¹¹⁸ G.L. c. 278, § 33E. Although the death penalty no longer exists in the Commonwealth, murder in the first degree is still deemed a "capital" crime for purposes of § 33E. In cases where the crime occurred prior to July 1, 1979, § 33E also applies to indictments for murder in the first degree that result in convictions of murder in the second degree. *Commonwealth v. Beauchamp*, 424 Mass. 682, 683 n.1 (1997). *Cf. Commonwealth v. Lawrence*, 404 Mass. 378, 379–80 n.1 (1989) (in interest of judicial efficiency, manslaughter conviction reviewed under § 33E standard along with first-degree murder conviction, where most of appellate issues related to both convictions).

¹¹⁹ Under § 33E the court may consider an issue not briefed but raised by defense counsel at oral argument. *Commonwealth v. Duran*, 435 Mass. 97, 109 & n.13 (2001); *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 expansive provisions of § 33E).

¹²⁰ A defendant convicted of being an accessory before the fact to first-degree murder is also entitled to review under § 33E. *See Commonwealth v. Angiulo*, 415 Mass. 502, 507–10 (1993). "[A] finding of delinquency by reason of [first-degree] murder does not" entitle a

declared that it will exercise its powers under § 33E only “with restraint”¹²¹ and that it will “not sit as a second jury to pass anew on the question of the defendant’s guilt.”¹²² Nonetheless, where it has concluded that justice was not done in the trial court, the Supreme Judicial Court has invoked its “ ‘power and . . . duty’ ” to “ ‘order a new trial or . . . direct the entry of a verdict of a lesser degree of guilt.’ ”¹²³

In addition to conferring on the Court the power to reduce a verdict of first-degree murder,¹²⁴ § 33E permits the Court to assess trial errors to which no objection was raised below, under a standard of review less stringent than that which applies in all other appeals. The ordinary standard of review where there was no objection below is the substantial risk of a miscarriage of justice standard. In first-degree murder cases, however, the standard is “substantial *likelihood* of a miscarriage of justice.”¹²⁵ In spite of this more favorable standard of review, along with the expansive provisions of § 33E, a recent study of first-degree murder appeals in Massachusetts demonstrates that the Supreme Judicial Court only rarely invokes its powers under this statute.¹²⁶

2. Effect of § 33E on New Trial Motions

Under G.L. c. 278, § 33E, from the time a first-degree murder case is entered in the Supreme Judicial Court to the time of the issuance of the rescript following the

juvenile defendant to review under § 33E. *Commonwealth v. Bart B.*, 424 Mass. 911, 914 (1997). *Commonwealth v. Doane*, 428 Mass. 631, 631 (1999). Appeal from denial of a motion to withdraw a plea of guilty to a charge of first degree murder does not receive § 33E review. *Commonwealth v. Robbins*, 431 Mass. 442, 443 n.1 (2000).

¹²¹ *Commonwealth v. Schnopps*, 390 Mass. 722, 726–28 (1984).

¹²² *Commonwealth v. Lo*, 428 Mass. 45, 54 (1998); *Commonwealth v. Reddick*, 372 Mass. 460, 464 (1977).

¹²³ *Commonwealth v. Jefferson*, 416 Mass. 258, 259, 265–66 (1993) (quoting *Commonwealth v. Gricus*, 317 Mass. 403, 406 (1944)). *See also Commonwealth v. Carlino*, 449 Mass. 71, 80-81 (2007) (court declines to grant new trial under § 33E). *See G.L. c. 278, § 33E.*

¹²⁴ *See Commonwealth v. Lennon*, 399 Mass. 443, 448 (1987) (first-degree murder conviction reduced to conviction of murder in the second degree); *Commonwealth v. Lattimore*, 396 Mass. 446, 454 (1985) (same).

¹²⁵ *See Commonwealth v. Smith*, 459 Mass. 538, 549 (2011) (§ 33E standard applied to ineffective assistance of counsel claim based on failure to request jury instruction); *Commonwealth v. Smith*, 47 Mass. App. Ct. 551, 556 n.8 (1999) (“substantial likelihood” standard of G.L. c.278, § 33E, more favorable to defendant than “substantial risk” standard); *Commonwealth v. Wright*, 411 Mass. 678, 681–82 (1992) (“a defendant in a so-called ‘capital case’ under § 33E has a lower barrier to clear with respect to an error at trial not objected to than does a similarly situated defendant in an appeal of a noncapital case”; Court “consider[s] whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury’s conclusion”); *Commonwealth v. Carmona*, 428 Mass. 268, 274 (1998) (§ 33E standard applies to defendant’s ineffectiveness of counsel claim whether or not it was raised in motion for new trial); *Commonwealth v. Lennon*, 399 Mass. 443, 448–449 n.6 (1987).

¹²⁶ *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) (finding that 7.5% of first-degree murder convictions were reversed on appeal under § 33E during the ten-year time frame of the article’s study).

Court's decision, the Court has exclusive jurisdiction over motions for a new trial.¹²⁷ The Court may hear and decide such motions or may send them back to the trial judge for resolution.¹²⁸ Subsequent to the issuance of the rescript, jurisdiction over motions for a new trial shifts back to the trial court. The Supreme Judicial Court has recently noted that while review under § 33E on direct appeal is extremely broad, the Court's review of postconviction motions following direct appeal is decidedly narrow.¹²⁹ The Court adopts this approach because defendants seeking postconviction relief following a first-degree murder conviction have already had the benefit of a plenary review.¹³⁰

The statute provides for a special "gatekeeper" procedure to be utilized in the event that the trial court denies a post-rescript motion for a new trial. The "gatekeeper" procedure limits the defendant's access to the full Court in these circumstances, on the ground that the defendant has already had the benefit of special scrutiny of his case during his direct appeal.¹³¹ Therefore, the defendant may not present to the full Court an appeal from the denial of his post-rescript new-trial motion unless the single justice of the Court, the "gatekeeper," first determines that the motion presents a "new and substantial" question appropriate for determination by the full Court.¹³² Where the Supreme Judicial Court, pursuant to its powers under § 33E, has reduced a conviction from murder in the first degree to murder in the second degree, the defendant may appeal from the denial of any subsequent new-trial motions without the restriction of the gatekeeper provision of the statute.¹³³ However, this provision does not apply to a

¹²⁷ G.L. c. 278, § 33E. *See supra*, § 44.4G(1).

¹²⁸ G.L. c. 278, § 33E. If the trial judge grants the motion, and the S.J.C. reverses that order on the Commonwealth's appeal, it must subsequently decide the defendant's appeal from conviction on the G.L. c. 278, § 33E, standard. *Commonwealth v. Martin*, 427 Mass. 816, 817–818 n.2 (1998). *See also* *Commonwealth v. Gunter*, 459 Mass. 480, 489 (2011) (issue not "new" where it could have been raised on direct appeal). The §33E standard applies to review of the denial of a motion for new trial conducted in conjunction with the direct appeal. *Commonwealth v. Nerette*, 432 Mass. 534, 537(2000). However, if the motion was granted, the standard of review is the same as for any other motion for new trial. *Commonwealth v. Alvarez*, 433 Mass. 93, 101 n.8 (2000); *Commonwealth v. Hill*, 432 Mass. 704, 710 n.14 (2000).

¹²⁹ *Commonwealth v. Gunter*, 459 Mass. 480, 485-86 (2011).

¹³⁰ *Commonwealth v. Gunter*, 459 Mass. 480, 486-87 (2011).

¹³¹ The defendant's petition to the gatekeeper for leave to appeal must be filed within thirty days of the denial of a post-appeal motion for new trial. *Mains v. Commonwealth*, 433 Mass. 30, 37 n.10 (2000).

¹³² G.L. c. 278, § 33E. *See* *Commonwealth v. Ambers*, 397 Mass. 705, 707–08 (1986), quoting *Commonwealth v. Pisa*, 384 Mass. 362, 365–66 (1981) (for purposes of § 33E, "[a]n issue is not 'new' . . . 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. 'The statute requires that the defendant present all his claims of error at the earliest possible time, and failure to do so precludes relief on all grounds generally known and available at the time of trial or appeal' "); *Commonwealth v. Smith*, 427 Mass. 245, 248–49 (1998). *See also* *Trigones v. Attorney General*, 420 Mass. 859, 862–64 (1995) (upholding constitutionality of "gatekeeper" provision against due process challenge); *Dickerson v. Attorney General*, 396 Mass. 740, 743–45 (1986) (upholding constitutionality of "gatekeeper" provision against equal protection challenge).

¹³³ *Lanoue v. Commonwealth*, 427 Mass. 1014, 1015 (1998); *Commonwealth v. Perry*, 424 Mass. 1019, 1019–20 (1997).

defendant who appeals from the denial of a motion for a new trial following a guilty plea.¹³⁴

§ 45.2I. THE FRIVOLOUS APPEAL: THE PREPARATION OF A MOFFETT BRIEF

A special problem is presented where an indigent defendant, represented by appointed counsel, wishes to pursue an appellate claim for which there is no legal authority. Counsel for such a defendant faces a dilemma. On the one hand, indigent defendants are entitled to the assistance of counsel on appeal.¹³⁵ On the other hand, counsel is bound by oath not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.”¹³⁶ The U.S. Supreme Court has sought to resolve this problem by permitting counsel to move to withdraw from the case, while at the same time compelling her to present to the appellate court a brief summarizing the arguable appellate claims.¹³⁷

The Massachusetts Supreme Judicial Court has recognized that the Supreme Court's approach is “meant to resolve the tension between an indigent defendant's right to a counseled appeal and counsel's desire to withdraw because he finds the appeal frivolous.”¹³⁸ However, the Supreme Judicial Court has nevertheless rejected that approach on the ground that the requirement that an attorney assume contradictory roles vis-à-vis his client is potentially prejudicial to the client, is likely to alienate the client, and is procedurally impracticable.¹³⁹

Therefore, the Supreme Judicial Court has “conclude[d] that appointed counsel should not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.”¹⁴⁰ In resolving the ethical dilemma posed by such situations, the Court has enunciated the following guidelines:

If there is nothing to support a contention which the defendant, despite counsel's attempts to dissuade him, insists on pursuing, we think it preferable that counsel present the contention succinctly in the brief in a way that will do the least harm to the defendant's cause[, for example,] “sketchily and without developing [the contention] in detail or pressing it on the court' []. If appointed counsel, on grounds of professional ethics deems it absolutely necessary to dissociate himself or herself from purportedly frivolous points, counsel may so state in a preface to the brief. . . . If such a preface is included, counsel must send a copy of the brief to the defendant, direct his attention to the preface, and inform him that he may present additional arguments to the appellate court within thirty days. Counsel should certify to the court that the defendant has

¹³⁴ See Justice John M. Greaney & James E. Comerford, *THE LAW OF HOMICIDE IN MASSACHUSETTS*, § 22.3 (Flaschner Judicial Institute (2009)).

¹³⁵ *Douglas v. California*, 372 U.S. 353, 356–58 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

¹³⁶ S.J.C. Rule 3:07, Mass. R. of Prof. C. 3.1. See also *Polk County v. Dodson*, 454 U.S. 312, 323–24 (1981).

¹³⁷ *Anders v. California*, 386 U.S. 738, 743–45 (1967).

¹³⁸ *Commonwealth v. Moffett*, 383 Mass. 201, 205–06 (1981).

¹³⁹ *Commonwealth v. Moffett*, 383 Mass. 201, 205–06 (1981).

¹⁴⁰ *Commonwealth v. Moffett*, 383 Mass. 201, 207 (1981).

been so notified. Counsel must refrain thereafter from arguing against his client, both in the brief and at oral argument.¹⁴¹

§ 45.3 INTERLOCUTORY APPEAL

§ 45.3A. SCOPE OF INTERLOCUTORY APPEAL

By statute and rule, the parties are permitted, in limited circumstances, to appeal from interlocutory rulings of the trial court. Both the defendant and the Commonwealth “have the right and the opportunity to apply to a single justice of the Supreme Judicial Court for leave to appeal an order determining a motion to suppress evidence prior to trial.”¹⁴² Although it is common practice in the District Court to consolidate bench trials with motions to suppress evidence, in recent years the Supreme Judicial Court has expressly disfavored this practice.¹⁴³

The Commonwealth also has the right to appeal from the allowance of “a motion to dismiss a complaint or indictment or a motion for appropriate relief” filed pursuant to Mass. R. Crim. P. 13(c),¹⁴⁴ or of a defendant’s motion for a continuance without a finding.¹⁴⁵ The Commonwealth’s right to an interlocutory appeal from the allowance of a motion to dismiss “is based on the fact that [such a ruling] preclude[s] a public trial and entirely terminate[s] the proceedings.”¹⁴⁷

¹⁴¹ Commonwealth v. Moffett, 383 Mass. 201, 208–09 (1981). The appellate court may summarily reject *Moffett* arguments. See, e.g., Commonwealth v. Rodriguez, 50 Mass. App. Ct. 405, 418 (2000). See also Commonwealth v. Almeida, 452 Mass. 601, 603 (2008) (appellate brief raising “pro se arguments” at defendant’s request was treated as “Moffett brief”).

¹⁴² Mass. R. Crim. P. 15(a)(2). See G.L. c. 278, § 28E. The Commonwealth’s failure to apply to a single justice of the S.J.C. under R. Crim. P. 15(a)(2) for interlocutory appeal from a judge’s order allowing the defendant’s motion to suppress evidence renders the order *res judicata*. Commonwealth v. Williams, 431 Mass. 71, 75–76 (2000). See also Commonwealth v. Love, 452 Mass. 498, 506–07 (2008) (court emphasizes right of both defendant and Commonwealth to interlocutory appeal in determining that criminal trial and suppression motion should not be consolidated).

¹⁴³ See Commonwealth v. Healy, 452 Mass. 510, 511–12 (2008) (noting that practice of consolidating bench trials and motions to suppress evidence can lead to confusion regarding procedure, applicable burden of proof, and proper use of evidence).

¹⁴⁴ Mass. R. Crim. P. 15(a)(1). See G.L. c. 278, § 28E. The defendant has no corresponding right of interlocutory appeal from the judge’s denial of her motion to dismiss, and may not use G.L. c. 211, § 3, to circumvent that bar. Commonwealth v. Jenkins, 431 Mass. 501, 504 n.7 (2000). See also Commonwealth v. Tam, 49 Mass. App. Ct. 31, 36 n.11 (2000). However, the Commonwealth may bring an interlocutory appeal from the dismissal of an indictment either with or without prejudice. See Commonwealth v. Wermers, 61 Mass. App. Ct. 182, 185–86 (2004).

¹⁴⁵ Commonwealth v. Taylor, 428 Mass. 623, 625 (1999).

¹⁴⁷ Commonwealth v. Yelle, 390 Mass. 678, 685 (1984). In a jury-waived trial, a threshold issue may be whether the judge’s ruling was a non-appealable finding of “not guilty” or an appealable order dismissing the complaint with prejudice. See Commonwealth v. Hosmer, 49 Mass. App. Ct. 188, 189–190 (2000). On the Commonwealth’s appeal, the defendant may seek to uphold the order of dismissal on a ground rejected by the judge. Commonwealth v. Levesque, 436 Mass. 443, 455 (2002).

The Commonwealth's right to an interlocutory appeal from the allowance of a pretrial “motion for appropriate relief” pursuant to Mass. R. Crim. P. 13 is rather limited.¹⁴⁸ For example, the Commonwealth has no right to appeal from the allowance of a motion to admit certain kinds of evidence.¹⁴⁹

§ 45.3B. PROCEDURE FOR INTERLOCUTORY APPEALS

1. Timing

An appeal by the Commonwealth from the dismissal of a complaint or indictment, or from the allowance of a motion for appropriate relief under Mass. R. Crim. P. 13(c), must be filed in the trial court within thirty days of the order being appealed.¹⁵⁰

Under Mass. R. Crim. P. 15, where the appeal is from a decision on a motion to suppress, the appellant must, within ten days of the order (“or such additional time as either the trial judge or the [S.J.C.] single justice . . . shall order”), (1) file a notice of appeal in the trial court; and (2) apply to the single justice of the Supreme Judicial Court for leave to appeal.¹⁵¹ However, it is important to note that the Supreme Judicial Court has issued a Standing Order¹⁵² that shortens the filing deadline from ten days to seven days from the issuance of the decision on the defendant's suppression motion.¹⁵³

¹⁴⁸ See the Reporter's Notes to Mass. R. Crim. P. 13, which discuss the relationship between that rule and the 1978 amendment to G.L. c. 277, § 47A, which “abolished at least in name all the other pleas, demurrers, challenges, and motions to quash and effectively consolidated all of them under the general heading of a motion to dismiss or grant appropriate relief, in effect retaining the statutory and common law of the Commonwealth governing such pleas.” Pursuant to that amendment, the S.J.C. has ruled that the Commonwealth's right to an interlocutory appeal from the granting of a defense “motion for appropriate relief” under Rule 13 is limited to situations where that motion raised “defenses and objections which could have been raised by the abolished pleas, demurrers, challenges, and motions to quash.” *Commonwealth v. Yelle*, 390 Mass. 678, 682 (1984).

¹⁴⁹ *Commonwealth v. Yelle*, 390 Mass. 678, 680–85 (1984). For a discussion of the relationship between the language of Mass. R. Crim. P. 15 and the similar language of G.L. c. 278, § 28E, see *Commonwealth v. Therrien*, 383 Mass. 529, 532–35 (1981). The Court in *Therrien* explains how the statute enables the Commonwealth to appeal from the allowance of a new-trial motion or a postconviction motion for a required finding of not guilty. See also *Commonwealth v. Amirault*, 415 Mass. 112, 113–15 (1993) (G.L. c. 278, § 28E, allows Commonwealth to appeal from order to revise or revoke defendant's sentence).

¹⁵⁰ Mass. R. Crim. P. 15(b)(1). See *Commonwealth v. Rosberg*, 25 Mass. App. Ct. 949, 949–50 (1988) (Commonwealth's appeal dismissed because notice was untimely). See also *Commonwealth v. Wermers*, 61 Mass. App. Ct. 182, 185–86 (2004).

¹⁵¹ Mass. R. Crim. P. 15(b)(1). Failure to file the notice of appeal may result in dismissal of the interlocutory appeal unless the single justice suspends this requirement pursuant to Mass. R.A.P. 2. *Commonwealth v. Santana*, 403 Mass. 167, 169–70 (1988).

¹⁵² Standing Order Concerning Applications to the Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), effective February 1, 1997.

¹⁵³ The Standing Order states that the contents of an application for leave to appeal from a suppression decision must contain the following items: the trial court docket number; the trial court's findings and rulings on the suppression issue; a brief memorandum of law, including an explanation of how the granting of leave to appeal would facilitate the administration of justice; a prediction as to the likely duration of the trial; the date set for the

The Standing Order further states that, within seven days of the appellant's filing, "or such shorter time as the single justice may direct," the opposing party may, but need not, file a brief memorandum in opposition.

2. Procurement of Record

Under Mass. R. Crim. P. 15, "[t]he record for an interlocutory appeal shall be defined and assembled pursuant to" Mass. R.A.P. 8.¹⁵⁴

3. Stay of Trial Proceedings

Any motion subject to interlocutory appeal must be decided by the trial judge before the defendant is placed in jeopardy.¹⁵⁵ After the trial judge decides the motion, the trial "shall be stayed and the defendant shall not be placed in jeopardy until interlocutory review has been waived or the period specified in Mass. R. Crim. P. 15](b)(1) for instituting interlocutory procedures has expired."¹⁵⁶ If an interlocutory appeal does go forward, the trial must be stayed pending the decision by the appellate court.¹⁵⁷

4. Decision by Single Justice

In evaluating the appellant's application for leave to file an interlocutory appeal from a decision on a suppression motion, the single justice assesses whether "the administration of justice would be facilitated" by resolution of the matter prior to trial. Under the Supreme Judicial Court's Standing Order, "[t]he single justice will consider the application on the papers . . . unless he or she otherwise orders."¹⁵⁸ If the single justice believes there is merit to the application and grants leave to pursue the interlocutory appeal, he or she may hear the appeal or report it to the full Supreme Judicial Court or to the Appeals Court.¹⁵⁹ "[T]here is no right to appeal from a determination by a single justice denying an application for leave to appeal."¹⁶⁰ If the single justice grants leave to file an interlocutory appeal and proceeds to decide the suppression issue, that decision is appealable to the full Supreme Judicial Court.

next trial court proceedings in the case; and, where the Commonwealth is the applicant, a statement regarding the viability of the prosecution without the suppressed evidence.

¹⁵⁴ Mass. R. Crim. P. 15(b)(2). When the losing party on a motion to suppress accepts the motion judge's findings of fact, a transcript is unnecessary, although a stipulation to that effect should be entered under R. A. P. 8(b)(2). *Commonwealth v. Hill*, 49 Mass. App. Ct. 58, 64–65 (2000).

¹⁵⁵ Mass. R. Crim. P. 15(c).

¹⁵⁶ Mass. R. Crim. P. 15(e). *See also* *Commonwealth v. Turner*, 71 Mass. App. Ct. 665, 666 (2008) (dismissal of drug charges following suppression of evidence improper where ordered during period when Commonwealth entitled to seek leave for interlocutory appeal).

¹⁵⁷ Mass. R. Crim. P. 15(e).

¹⁵⁸ Decision by Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), effective Feb. 1, 1997.

¹⁵⁹ Mass. R. Crim. P. 15(a)(2).

¹⁶⁰ *Commonwealth v. Boncore*, 412 Mass. 1013, 1014 (1992). *See also* *Cowell v. Commonwealth*, 432 Mass. 1028, 1028 (2000).

5. Decision by Full Appellate Court

An interlocutory appeal that makes its way to the full bench of the Supreme Judicial Court or the Appeals Court is briefed and argued in the same manner as is any appeal.

6. Costs

Where the Commonwealth is the appellant, the appellate court, upon a motion filed by the defendant at the conclusion of the interlocutory procedures, “shall determine and approve the payment to the defendant of his or her costs of appeal together with reasonable attorney’s fees.”¹⁶¹ Appellate review of a single justice’s order on the defendant’s motion is not available unless the defendant was denied any costs and fees.¹⁶² An award of costs and fees is payable by the Administrative Office of the Trial Court, but if no appropriated funds are available for that purpose, then the award is payable by the district attorney’s office which pursued the interlocutory appeal.¹⁶³ The purpose behind requiring payment of attorney’s fees is to protect the rights of defendants who may have funds which are sufficient to retain counsel, but insufficient to oppose an interlocutory appeal.¹⁶⁴

§ 45.4 SUPERINTENDENCE POWER OF THE SUPREME JUDICIAL COURT

§ 45.4A. SCOPE OF POWER

In addition to its appellate powers, ordinary and extraordinary, the Supreme Judicial Court, by statute, has “general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided.”¹⁶⁵ Discretionary relief under this provision is not meant to act as a substitute for standard appellate review.¹⁶⁶

The Court has repeatedly stated that it will grant relief under G.L. c. 211, § 3, “[o]nly in the most exceptional circumstances.”¹⁶⁷ Therefore, a party seeking relief

¹⁶¹ Mass. R. Crim. P. 15(d). *See* *Commonwealth v. Lopez*, 430 Mass. 244, 246 (1999); *Commonwealth v. Sparks*, 431 Mass. 299, 302 (2000) (payment by Commonwealth of fees and costs of defense counsel, whether appointed or retained, on Commonwealth’s interlocutory appeal is mandatory, but counsel to whom defendant’s representation on Commonwealth’s interlocutory appeal is unilaterally “subcontract[ed]” by appointed counsel cannot receive fees and costs from Commonwealth).

¹⁶² *Commonwealth v. Gonsalves*, 432 Mass. 613, 615 (2000).

¹⁶³ *Commonwealth v. Gonsalves*, 432 Mass. 613, 617, 622 n.14 (2000).

¹⁶⁴ *See* *Commonwealth v. Rosario*, 458 Mass. 1003, 1003-04 (2010); *Commonwealth v. Phinney*, 448 Mass. 621, 622 (2007).

¹⁶⁵ G.L. c. 211, § 3.

¹⁶⁶ *See* *Commonwealth v. Goodwin*, 458 Mass. 11, 14 (2010).

¹⁶⁷ *Gilday v. Commonwealth*, 360 Mass. 170, 171 (1971). *See* *Costarelli v. Commonwealth*, 374 Mass. 677, 679 (1978); *Corey v. Commonwealth*, 364 Mass. 137, 138 (1973). *See also* *Commonwealth v. DiBennadetto*, 436 Mass. 310, 311 (2002) (review under S.J.C.’s power of “general superintendence” deemed appropriate where trial court erred in

must demonstrate not only that a substantive right is at stake, but also that the normal process of appellate review will be inadequate to vindicate that right, such that there is no other recourse but to invoke the Court's special powers.¹⁶⁸ For example, invocation of the statute is quintessentially appropriate where the defendant's right not to be placed twice in jeopardy is at stake. In granting relief in one such case, the Court stated, "The right to be free from being placed twice in jeopardy is significant, and the defendant's petition presents a claim that has substantial merit. More important is the fact that a refusal by us to review before trial the claim of rights under the double jeopardy clause would, because of the nature of the guaranty, result in the irremediable denial of such rights."¹⁶⁹ In another case where G.L. c. 211, § 3, was the appropriate vehicle for relief, the single justice permitted the defendant to file a notice of appeal, even though the one-year deadline imposed by the Rules of Appellate Procedure had expired,¹⁷⁰ a circumstance that, absent relief under the statute, would have foreclosed any possibility of an appeal.¹⁷¹

The Commonwealth, too, may seek relief under G.L. c. 211, § 3.¹⁷²

conducting de novo evidentiary hearing to review clerk-magistrates finding of probable cause to arrest).

¹⁶⁸ *Morrisette v. Commonwealth*, 380 Mass. 197, 198 (1980) ("[t]o obtain review, a defendant must demonstrate both a substantial claim of violation of his substantive rights and irremediable error, such that he cannot be placed in status quo in the regular course of appeal"). *See also* *Drayton v. Commonwealth*, 450 Mass. 1028, 1029 (2008) (rescript) (relief under G.L. c. 211, § 3 generally interpreted as authority to supervise lower courts to correct and prevent errors).

¹⁶⁹ *Costarelli v. Commonwealth*, 374 Mass. 677, 680 (1978). Other cases where defendants have sought relief under G.L. c. 211, § 3, in the double-jeopardy context include *Powers v. Commonwealth*, 426 Mass. 534, 534–35 (1998); *Luk v. Commonwealth*, 421 Mass. 415, 416–17 (1995); *Koonce v. Commonwealth*, 412 Mass. 71, 72–74 (1992); *Aucella v. Commonwealth*, 406 Mass. 415, 416 (1990); *Neverson v. Commonwealth*, 406 Mass. 174, 175–76 (1989).

¹⁷⁰ *Commonwealth v. Rivera*, S.J.C. for Suffolk County No. 94-0207 (1994) ("[i]t appears from the record that the delay in filing was due to clerical error rather than the neglect of counsel").

¹⁷¹ *See* *Delaney v. Commonwealth*, 415 Mass. 490, 492 (1993) (holding that mootness was not bar to ruling, pursuant to c. 211, § 3, on matter concerning bail, where issues were important, recurrent, and " 'unlikely to be capable of appellate review in the normal course before they bec[a]me moot' " [internal citation omitted]).

¹⁷² *Commonwealth v. Super*, 431 Mass. 492, 495 & n.5 (2000) (Commonwealth invoked G.L. c. 211, § 3, to test defendant's claim of double jeopardy); *Villalta v. Commonwealth*, 428 Mass. 429, 430–434 (1998) (Commonwealth sought relief from judge's ruling excluding evidence against defendant); *Commonwealth v. Cowan*, 422 Mass. 546, 547–50 (1996) (Commonwealth sought relief from district court decision to revise or revoke defendant's sentence); *Commonwealth v. Gordon*, 410 Mass. 498, 499–504 (1991) (Commonwealth sought relief from judge's acceptance, over prosecutor's objection, of defendant's plea to second-degree murder, where defendant was indicted for first-degree murder); *Commonwealth v. Nettis*, 418 Mass. 715, 717–20 (1994) (Commonwealth sought relief from trial judge's declaration of mistrial on ground that verdict had been improperly recorded). *Compare* *Commonwealth v. Jenkins*, 431 Mass. 501, 503–504 (2000) (Commonwealth could not obtain relief under G.L. c. 211, § 3, from judge's dismissal of indictment, because it had other recourse available).

§ 45.4B. PROCEDURES UNDER G.L. C. 211, § 3

A petition for relief under G.L. c. 211, § 3, is filed in the office of the clerk of the Supreme Judicial Court for Suffolk County (across the hall from the office of the clerk of the Supreme Judicial Court for the Commonwealth).

The petition should be in a format similar to that of a typical motion filing. In the upper right-hand corner of the cover page, the petitioner should inscribe both “Supreme Judicial Court for Suffolk County No. ___” and, under that inscription, the name and docket number of the court in which the issue has arisen, for example, “Superior Court No. 1234.” The title of the petition should indicate the issue being raised. For example, “Defendant's Petition, Pursuant to G.L. c. 211, § 3, to File Late His Notice of Appeal.” The petition should then proceed as would any motion, setting forth the procedural history of the case, a description of the issue being raised, an explanation of how the case meets the requirements of the statute (that is, involvement of substantive rights and unavailability of any other relief); and a specific request for relief.¹⁷³

The single justice has discretion to grant or deny relief or to reserve and report the issue to the full Supreme Judicial Court.¹⁷⁴

The special procedures for appealing from the denial of a petition pursuant to G.L. c. 211, § 3, are described in Supreme Judicial Court Rule 2:21.¹⁷⁵ Under the Rule, if the single justice denies relief and does not report the matter to the full Court, the denial is appealable to the full Court.¹⁷⁶ The petitioner should file a notice of appeal in the office of the clerk of the Supreme Judicial Court for Suffolk County within seven days of the issuance of the single justice's decision.¹⁷⁷ No later than fourteen days after the filing of the notice of appeal, the petitioner should file a memorandum, not to exceed ten double-spaced pages, “in which the appellant must set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means.”¹⁷⁸ The prevailing party may not respond to the petitioner's appellate memorandum unless the Court expressly requests a response.¹⁷⁹ Furthermore, the Court decides the matter on the papers, unless it otherwise orders.¹⁸⁰ Pursuant to Rule 2:21, the Court, where appropriate, may order that the defendant pursue his appeal through the regular appellate process, rather than through the truncated process delineated in the Rule.

When the judge orders trial to proceed, and the Commonwealth is not ready to present evidence, it should move for a stay of proceedings from the judge and seek relief from an S.J.C. single justice under G.L. c. 211, § 3. *Super, supra*, 431 Mass. at 499.

¹⁷³ The petition must create a record by having attached copies of relevant pleadings in the lower court. *Sabree v. Commonwealth*, 432 Mass. 1003, 1004 (2000).

¹⁷⁴ *See Commonwealth v. Narea*, 454 Mass. 1003, 1003-04 (2009).

¹⁷⁵ 421 Mass. 1303-04 (1995). S.J.C. Rule 2:21 is not applicable to the defendant's appeal from a single justice's order where the underlying ruling of the trial court judge is not “interlocutory.” *Commonwealth v. Super*, 431 Mass. 492, 495 (2000).

¹⁷⁶ *Murray v. Commonwealth*, 432 Mass. 1026, 1026 (2000).

¹⁷⁷ S.J.C. Rule 2:21(1). *Farley v. Commonwealth*, 433 Mass. 1004, 1004 (2000).

¹⁷⁸ S.J.C. Rule 2:21(2). *Murray v. Commonwealth*, 432 Mass. 1026, 1026 (2000).

¹⁷⁹ S.J.C. Rule 2:21(2).

¹⁸⁰ S.J.C. Rule 2:21(4).

Where a petition clearly involves double jeopardy principles, the Court ordinarily permits appeal through the regular appellate process.¹⁸¹

The full Court's review of the single justice's decision is limited to a determination of whether there was an abuse of discretion or a clear error of law by the single justice.¹⁸²

The trial proceedings are not stayed pending the Court's decision on the appeal, unless the single justice or the full Court orders otherwise.¹⁸³

§ 45.5 SENTENCE REVIEW BY APPELLATE DIVISION OF SUPERIOR COURT¹⁸⁴

§ 45.5A. JURISDICTION AND STRUCTURE OF APPELLATE DIVISION

On direct appeal to the appellate courts, a defendant may challenge his sentence only on the ground that it was unlawfully imposed, for example, because it exceeded the statutory maximum term,¹⁸⁵ or because the judge considered improper factors in imposing the sentence. The appellate courts will not amend a sentence that is consonant with the relevant statute and was imposed according to the proper procedures.¹⁸⁶ However, a criminal defendant may appeal to the Appellate Division of the Superior Court in order to present an argument that his lawfully imposed sentence was simply too severe under the circumstances.¹⁸⁷

The Appellate Division has jurisdiction to review: (1) state prison sentences, “except in any case in which a different sentence could not have been imposed” (that is, where a mandatory minimum sentence was imposed); and (2) “sentences to the reformatory for women [that is, M.C.I.-Framingham] for terms of more than five

¹⁸¹ See *Commonwealth v. McGuiness*, 423 Mass. 1003, 1004 (1996) (“defendant may pursue his appeal [from single justice's denial of relief under c. 211, § 3] according to the regular appellate process,” because his petition “was based on a double jeopardy claim, [such that] appellate review of its denial after trial and conviction would not provide adequate relief if the defendant were to prevail on the double jeopardy issue after trial”); *Powers v. Commonwealth*, 426 Mass. 534, 534–35 (1998).

¹⁸² *Pare v. Commonwealth*, 420 Mass. 216, 218 (1995).

¹⁸³ S.J.C. Rule 2:21(1).

¹⁸⁴ In the first edition of this book, this section was coauthored by J.W. Carney, Jr. and Evan Slavitt.

¹⁸⁵ If, after his direct appeal, a defendant wishes to challenge his sentence on the ground that it exceeds the statutory maximum term, the proper procedure is the filing of a motion for release from unlawful restraint, pursuant to Mass. R. Crim. P. 30(a). See *supra* Ch. 44.

¹⁸⁶ *Commonwealth v. Franks*, 365 Mass. 74, 81 (1974); *Commonwealth v. Grimshaw*, 412 Mass. 505, 512–13 (1992). *But see* *Commonwealth v. Morrow*, 363 Mass. 601, 611–12 (1973) (appearing to leave open possibility that appellate court could amend lawfully imposed sentence as violative of constitutional prohibition against cruel and unusual punishment).

¹⁸⁷ See G.L. c. 278, §§ 28A–28D; Superior Court Rule 64. *Commonwealth v. McCravy*, 430 Mass. 758, 767 (2000); *Commonwealth v. Woodward*, 427 Mass. 659, 683 (1998). Reduction of the defendant's sentence by the Appellate Division does not cure error of law in the trial judge's original sentence. *Commonwealth v. White*, 48 Mass. App. Ct. 658, 664 (2000).

years.”¹⁸⁸ However, the Supreme Judicial Court has recently interpreted G. L. c. 278 § 28A to allow appeals by female inmates sentenced to state prison, regardless of the length of sentence, given that to require a minimum five-year sentence for women, but not for men, would violate equal protection.¹⁸⁹ The direct appeal and the appeal to the Appellate Division are entirely independent of one another; the defendant may pursue either or both.¹⁹⁰

Before deciding whether to seek a sentence review, the defendant should be aware that the Appellate Division has the power to increase a sentence, as well as to reduce it.¹⁹¹ Although such increases are rare, they are a real possibility. Thus, it is imperative that, before filing a sentence appeal, the defendant thoroughly and pragmatically assess the merits of her argument and the likelihood of an increase. The importance of such a hard-headed assessment is magnified by the fact that a “decision [of the Appellate Division] shall be final.”¹⁹²

The Appellate Division consists of three Superior Court justices designated by the Chief Justice of that Court.¹⁹³ A quorum consists of two of the three justices on the panel. The statute specifically bars a justice from participating in the review of a sentence that he imposed.¹⁹⁴

The clerks of the criminal division of the Superior Court in Suffolk County serve ex officio as the clerks of the Appellate Division.¹⁹⁵

§ 45.5B. PROCEDURE FOR FILING APPEAL

At the time of sentencing, the defendant must be informed of her right to seek review of the sentence by the Appellate Division.¹⁹⁶ The defendant has ten days within which to file the appeal, even if the sentence is stayed pending appeal or is suspended with a term of probation. The filing does not stay the execution of the sentence.¹⁹⁷

The notice of appeal, consisting of a form provided by the trial court clerk, must be signed by the defendant and filed in the office of the trial court clerk.¹⁹⁸ Forms should be available at the courthouse and at the prison (or reformatory) to which the defendant is transported from the courthouse. To avoid confusion or delay attendant on

¹⁸⁸ G.L. c. 278, § 28A. A probationary condition may also be reviewed by the Appellate Division. *Commonwealth v. Lapointe*, 435 Mass. 455, 458 (2001). *See also* *Commonwealth v. Alfonso*, 449 Mass. 738, 743-44 (2007) (appeal to Appellate Division deemed appropriate under G.L. c. 278 § 28A where female defendant sentenced to MCI-Framingham for term of three to five years and facts made clear that judge intended a state prison sentence).

¹⁸⁹ *Commonwealth v. Alfonso*, 449 Mass. 738, 743-44 (2007)

¹⁹⁰ *Walsh v. Commonwealth*, 358 Mass. 193, 195 (1970).

¹⁹¹ G.L. c. 278, § 28B. The Appellate Division's power to increase a sentence has repeatedly been challenged and upheld. *See* *Gavin v. Commonwealth*, 367 Mass. 331, 332-34 (1975); *Commonwealth v. Callahan*, 419 Mass. 306, 309 (1995).

¹⁹² G.L. c. 278, § 28B; *Commonwealth v. Callahan*, 419 Mass. 306, 308-09 (1995).

¹⁹³ G.L. c. 278, § 28A. Under the statute, the appellate division may sit in Boston, at a state prison, or at such other location as the chief justice of the superior court designates.

¹⁹⁴ G.L. c. 278, § 28A.

¹⁹⁵ G.L. c. 278, § 28A.

¹⁹⁶ G.L. c. 278, § 28B; Superior Court Rule 64.

¹⁹⁷ G.L. c. 278, § 28B; Superior Court Rule 64.

¹⁹⁸ Superior Court Rule 64.

the defendant's transition from the courthouse to prison, counsel should obtain the defendant's signature at the time of sentencing.

As a general rule, defendants should always file a sentence appeal in order to preserve their rights. The appeal may be withdrawn without penalty at any time prior to the hearing on the appeal.¹⁹⁹

If a sentence appeal is not filed within ten days of sentencing, then the defendant must file a motion to file a late appeal, in which good cause for the lateness must be demonstrated. Such a motion should be directed to the clerk of the Appellate Division of the superior court.²⁰⁰

If a defendant wishes to seek a continuance, a motion to that effect should be filed in the office of the clerk of the Appellate Division.²⁰¹ The panel itself might wish to continue the proceedings in a case where the defendant's motion to revise or revoke his sentence is still pending before the trial judge. The fact that the defendant's direct appeal has not yet been resolved does not deter the Appellate Division from hearing the sentence appeal.

§ 45.5C. THE HEARING

Under the statute, the Appellate Division may rule on a defendant's sentence appeal "with or without a hearing."²⁰² Typically, a hearing is held.

1. Procedures at an Appellate Division Hearing

Hearings of the Appellate Division are conducted during one sitting each year, in May, at the Norfolk Superior Court in Dedham. They are open to the public.²⁰³ Generally, the appeals heard during each day of the sitting are grouped by county.

The Appellate Division prefers that trial counsel, not successor counsel, appear on behalf of the defendant, for the obvious reason that trial counsel is thoroughly conversant with the facts of the case.²⁰⁴ If, unavoidably, trial counsel cannot appear at the hearing, she should file a motion to withdraw in the office of the clerk of the Appellate Division, not in the office of the trial court clerk.²⁰⁵

¹⁹⁹ Once the Appellate Division has rendered a decision increasing a sentence, the trial judge is divested of jurisdiction to act on a motion to revise or revoke the sentence. *Commonwealth v. Callahan*, 419 Mass. 306, 308–09 (1995).

²⁰⁰ The mailing address of the clerk's office is 712 New Court House, Pemberton Square, Boston, Massachusetts 02108.

²⁰¹ Guidelines for Appellate Division Proceedings § 2(d)(4) (1985), appearing in *Massachusetts Rules of Court* (West 1998). A defendant might wish to continue the proceedings if the transcript of his trial has not yet been produced, thereby hampering his ability to present specific factual matters to the justices.

²⁰² G.L. c. 278, § 28B.

²⁰³ Guidelines for Appellate Division Proceedings § 1. The Division no longer sits in November; the Guidelines do not reflect the current policy of the Division to sit only once a year, in May.

²⁰⁴ As noted above, the Appellate Division construes Mass. R. Crim. P. 7(c) as obligating trial counsel to continue her representation of the defendant through the sentence appeal proceedings. Guidelines for Appellate Division Proceedings §§ 2(d)(1), 4.

²⁰⁵ Guidelines for Appellate Division Proceedings § 2(d)(3).

Prior to the hearing, counsel has an opportunity to meet with the defendant in the lockup next to the courtroom. When the case is reached, the defendant is brought into the courtroom and seated next to counsel. The prosecutor presents to the justices an information sheet that includes a description of the factual background of the case, any victim impact statements, and the Commonwealth's argument regarding the appropriateness of the sentence.²⁰⁶ This material must be made available to defense counsel "seasonably before the hearing,"²⁰⁷ but realistically, unless counsel contacts the prosecutor prior to the hearing date, the information may not be provided until the morning of the hearing. The probation officer submits a separate information sheet containing personal data on the defendant, a presentencing report, and a computation of the sentence range under the Superior Court Sentencing Guidelines.²⁰⁸ Defense counsel is "encouraged," but not required, to submit his own sentencing memorandum to the justices.²⁰⁹

At the commencement of the hearing, the presiding justice first describes to the defendant the nature of the proceedings, emphasizing the limited nature of the Appellate Division's jurisdiction. The clerk then recites the convictions and sentences, after which the presiding justice invites oral argument from defense counsel and the prosecutor. There is no specified time limit for oral argument. Ordinarily, the defendant does not address the justices.

Following oral argument, the justices take the appeal under advisement. Frequently, the panel's decision is announced later on the day of the hearing; therefore, counsel should not depart from the courthouse after her oral argument. In the vast majority of sentence appeals, the panel dismisses the appeal without any revision of the sentence. In the rare instances where the sentence is reduced or increased, the defendant is brought back to the courtroom for resentencing.²¹⁰ If the sentence is to be increased, the panel must give the defendant an opportunity to be heard.²¹¹ Whatever the Appellate Division's decision, the panel need not provide any reasons for the ruling.²¹²

2. The Defendant's Argument

The focus at an Appellate Division hearing is not simply on the sentence vis-à-vis the defendant in the present case; rather, the panel is implicitly comparing that sentence to the penalties imposed on other defendants in similar circumstances. The panel reduces a sentence only when a recognizable disparity exists, such that it can be said that the present defendant's sentence is unfair.

Therefore, counsel should attempt to demonstrate that his client's criminal act was significantly less reprehensible than were the acts of other defendants who received sentences of similar magnitude. In the absence of hard data regarding sentence patterns in other cases, it is permissible for counsel to speak anecdotally from his own

²⁰⁶ Guidelines for Appellate Division Proceedings § 2(c). Appended to the Guidelines is a sample of the prosecution's information sheet.

²⁰⁷ Guidelines for Appellate Division Proceedings § 2(c).

²⁰⁸ *See supra*, § 39.1D. Appended to the Guidelines for Appellate Division Proceedings is a sample of the probation department's information sheet.

²⁰⁹ Guidelines for Appellate Division Proceedings § 3.

²¹⁰ If the appeal is not resolved on the day of the argument, the defendant will again be transported to Norfolk Superior Court on the date of decision and resentencing.

²¹¹ G.L. c. 278, § 28B.

²¹² *Gavin v. Commonwealth*, 367 Mass. 331, 335–36 (1975).

experience. If feasible, it is helpful to contrast the client's background and criminal history (or lack thereof) to those of defendants in other cases. Similarly helpful is information that a codefendant who was tried separately (or pleaded guilty) received a lesser sentence or that the sentencing judge in the present case far exceeded the Superior Court Sentencing Guidelines.

Appellate division proceedings are not a proper occasion to dispute the jury's decision to convict. Indeed, it may be a reasonable tactic at the hearing to acknowledge affirmatively the gravity of the defendant's wrongdoing, in order to show that she does not wish to avoid responsibility, while at the same time suggesting that the sentence was too harsh.

§ 45.6 REPORT OF QUESTIONS BY TRIAL COURT TO APPEALS COURT

Although not, strictly speaking, an “appeal,” the reporting of legal questions by the trial court is another process that utilizes the decisional procedures of the appellate courts. Under Mass. R. Crim. P. 34, trial court judges may seek guidance on legal issues by “reporting” questions of law to the appellate courts. A party may request that a judge report a question or the judge may do so sua sponte. The decision whether to report a question is within the judge's discretion.²¹³ Rule 34 was amended in 2004 and now applies to all superior, juvenile, district and municipal courts.²¹⁴

The criteria for reporting a question are: (1) that the matter must be purely a question of law;²¹⁵ and (2) that the question must be “so important or doubtful as to require the decision of the Appeals Court.”²¹⁶ Although reported questions are initially addressed to the Appeals Court,²¹⁷ the Supreme Judicial Court may take jurisdiction of the case, either by motion of a party or sua sponte.

A question may be reported either prior to trial²¹⁸ or after conviction.²¹⁹ If the report is made prior to trial, the parties should attempt to agree on a statement of the essential factual background, which will enable the appellate court to place the legal

²¹³ Commonwealth v. Eagleton, 402 Mass. 199, 208 (1988).

²¹⁴ Mass. R. Crim. P. 34, Reporter's Notes 2004.

²¹⁵ Mass. R. Crim. P. 34; Commonwealth v. Bankert, 67 Mass. App. Ct. 118, 121 (2006); Commonwealth v. Petralia, 372 Mass. 452, 459 (1977).

²¹⁶ Mass. R. Crim. P. 34; Commonwealth v. A Juvenile, 381 Mass. 727, 728 n.2 (1980). The reporting judge should state why the issue is appropriate for interlocutory, rather than post-trial, review. Commonwealth v. Wallace, 431 Mass. 705, 705 n.1 (2000). *See also* Commonwealth v. Bankert, 67 Mass. App. Ct. 118, 121 (2006) (noting that Appeals Court's practice is not to answer constitutional questions in the abstract, but to wait until “the circumstances of the case are established”).

²¹⁷ Mass. R. Crim. P. 34.

²¹⁸ The reporting of a question prior to trial is predicated on the idea that resolution of the question at that juncture might be more efficient than trying the case. For example, in Commonwealth v. Shields, 402 Mass. 162, 163 (1988), the S.J.C. opined that the trial judge had properly reported questions regarding the constitutionality of sobriety roadblocks, where the answers to the questions were likely to be dispositive of the case at bar, where the questions were likely to arise again in similar proceedings, and where an improper determination of the matter by the trial court “would result in unnecessary expenditure of judicial resources at trial.”

²¹⁹ Mass. R. Crim. P. 34.

question in context.²²⁰ Questions that develop during the trial may not be reported until after conviction²²¹ and, then, only with the consent of the defendant.²²² If a question is reported prior to the trial, the case is continued, pending the decision of the Appeals Court.²²³

Because the appellate courts are generally reluctant to decide constitutional questions unless they must do so in order to resolve a matter, reported questions raising constitutional issues must demonstrate a compelling need for a response.²²⁴ Of course, the Appeals Court may decline to answer a reported question or postpone its response to a pretrial report until after the trial.²²⁵ It may also reframe the question,²²⁶ or decide issues not directly responsive to a stated question.²²⁷ An appellate court is more likely to deem a reported question to be of “substantial significance” where it has not previously been addressed by the United States Supreme Court or by the appellate courts in Massachusetts.²²⁸

Procedurally, “[a] report of a case . . . shall for all purposes under [the Rules of Appellate Procedure] be taken as the equivalent of a notice of appeal.”²²⁹ If the report is made prior to conviction, the defendant is deemed the “appellant.”²³⁰ If the report occurs after the defendant’s conviction, the trial court must designate an “aggrieved party” who is deemed to be the appellant.²³¹ Briefing of the issues and the other components of the appellate process then proceed as in an appeal from a trial court judgment.

45.7 APPEAL FROM SINGLE JUSTICE OF APPEALS COURT

Procedural motions in a pending criminal appeal are ruled on by a single justice of the Appeals Court.²³² Appeals Court Rule 2:02 and Mass. R.A.P. 15(c), as construed by the Supreme Judicial Court in *Kordis v. Appeals Court*,²³³ entitle a defendant aggrieved by the single justice’s ruling on a motion to appeal the ruling to a panel of

²²⁰ *Commonwealth v. Yacobian*, 393 Mass. 1005, 1005–06 (1984).

²²¹ Mass. R. Crim. P. 34.

²²² Mass. R. Crim. P. 34.

²²³ Mass. R. Crim. P. 34.

²²⁴ *Compare* *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 154–57 (1984) (Court answers reported question of constitutional law) *with* *Commonwealth v. Paasche*, 391 Mass. 18, 21 (1984) (Court declines to answer reported question of constitutional law).

²²⁵ *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 154 (1984); *Commonwealth v. Benjamin*, 358 Mass. 672, 673 n.1 (1971).

²²⁶ *Commonwealth v. Marrone*, 387 Mass. 702, 704 n.4 (1982).

²²⁷ *Commonwealth v. Collett*, 387 Mass. 424, 436 (1982).

²²⁸ *Commonwealth v. Leboeuf*, 78 Mass. App. Ct. 45, 48 (2010).

²²⁹ Mass. R.A.P. 5.

²³⁰ Mass. R.A.P. 5.

²³¹ Mass. R.A.P. 5.

²³² *See Kordis v. Appeals Court*, 434 Mass. 662, 664 & n.5 (2001).

²³³ 434 Mass. 662 (2001).

the Appeals Court.²³⁴ The defendant may request an expedited appeal.²³⁵ “[I]n a case where time is truly of the essence, the Appeals Court could decide the appeal on the papers that were before its single justice, without further briefing or oral argument.”²³⁶

²³⁴ *Kordis v. Appeals Court*, 434 Mass. 662, 664-665 (2001). *See* *Jaynes v. Commonwealth*, 436 Mass. 1010, 1011 (2002) (defendant may appeal impoundment order of Appeals Court single justice to panel); *Sibinich v. Commonwealth*, 436 Mass. 1008, 1010 (2002) (defendant may appeal to panel from Appeals Court single justice’s ruling refusing to compel trial court clerk to assemble record); *Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 354 & n.8 (2001)(defendant may obtain appellate review of Appeals Court single justice’s denial of motion for stay of appellate proceedings).

²³⁵ *Kordis v. Appeals Court*, 434 Mass. 662, 669 n.13 (2001).

²³⁶ *Kordis v. Appeals Court*, 434 Mass. 662, 669 n.13 (2001).