Chapter 24

Massachusetts

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§ 24:1 Summary of postconviction remedies in Massachusetts

Principal postconviction remedy:

Rule 30, Mass. R. Crim. Proc., remedy. This remedy is applied for in the convicting court, whether it is a superior court or a district court. The remedy is a postsentencing phase of the original criminal case, not an independent civil action. The remedy is authorized by a judicially promulgated court rule. There is a custody requirement applicable to Rule 30(a) motions for release or correction of sentence, but not to Rule 30(b) motions for a new

trial. Newly discovered evidence of innocence is a ground for relief under the remedy.

Right to counsel:

There is a no right to counsel in Rule 30 proceedings in Massachusetts.

Statute of limitations:

None

Secondary postconviction remedies:

Motion to revoke or revise sentence

Motion to vacate judgment under Mass. Gen. Laws Ann., ch. 278, § 29D

Habeas corpus

Certiorari

Declaratory judgment action

Motion to correct clerical error

Other remedies:

Coram nobis has never been a recognized postconviction remedy in Massachusetts.

Massachusetts has a postconviction DNA testing statute, enacted in 2012.

Massachusetts has an erroneous convictions act, enacted in 2004.

Helpful readings:

(1) Bellefontaine, Postconviction Relief Under the Rules of Criminal Procedure, 66 Mass. L. Rev. 149 (1981)

(2) Eldridge, Federalism and Massachusetts Post-Conviction Remedies, 4 Suffolk U. L. Rev. 714 (1970)

(3) Lazazzero, Justice Undeterred: A Call for Massachusetts Legislation on Post-Conviction DNA Access, 44 Suffolk U. L. Rev. 231 (2011)

(4) Lee, The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief, 35 New Eng. L. Rev. 663 (2001)

(5) Wisneski, "That's Just Not Right": Monetary Compensation for the Wrongly Convicted in Massachusetts, 88 Mass. L. Rev. 138 (2004)

(6) Siegel and Massing, Preserving Evidence to Convict the Guilty and Protect the Innocent: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis Act, 56 Boston B.J. 28 (Fall 2012)

(7) Van Buskirk, Guilty Until Proven Innocent: Clearing Massachusetts's Uncertain Road to Post-Conviction DNA Testing, 85 St. John's L. Rev. 1595 (2011)

(8) Allen, Section 33E Survives the Death Penalty: Why Extraordinary Review of First Degree Murder in Massachusetts Serves No Compelling Purpose, 45 Suffolk L. Rev. 979 (2012)

(9) Case Comment, Criminal Law—Resentence Places Defendant in Double Jeopardy When Probation Violation Potentially Outweighs Original CPSL Violation—Commonwealth v. Cumming, 995 N.E.2d 1094 (Mass. 2013), 20 Suffolk J. Trial & App. Advoc. 361 (2015)

§ 24:2 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30

The principal postconviction remedy in Massachusetts is authorized by Rule 30, Mass. R. Crim. Proc., promulgated by the Massachusetts Supreme Judicial Court on Oct. 19, 1978, and effective on July 1, 1979. Since its adoption, Rule 30 has been amended twice—in 1995 and in 2001.

Arguably, Rule 30 authorizes not one but two postconviction remedies: (1) the motion to release movant or correct the sentence, which is authorized by Rule 30(a) and may be invoked only by persons in custody; and (2) the motion for a new trial, which is authorized by Rule 30(b) and has no custody requirement. However, for purposes of this discussion, Rule 30 will be treated as authorizing a single remedy which can be applied for in the convicting court by either of two different methods—by filing a Rule 30(a) motion attacking confinement, or else by filing a Rule 30(b) motion seeking a new trial.

§ 24:3 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Text

Rule 30, Mass. R. Crim. Proc., provides:

Rule 30 Post Conviction Relief

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may

grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days' notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal under G.L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

§ 24:4 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Extends to convictions in the superior and district court

Rule 30 extends to persons convicted in the superior court and to persons convicted in the district court. Rule 1(b), Mass. R. Crim. Proc. (these rules govern the procedure in all criminal proceedings in the district court and in all criminal proceedings in the superior court).

§ 24:5 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—History

Rule 30 "is derived from a number of sources. See Fed. R. Crim. Proc. 33, 35; ABA Standards Relating to Post-Conviction

Remedies (Approved Draft, 1968); Rules of Criminal Procedure (ULA) rule 632 (1974)." Reporter's Notes, Rule 30, Mass. R. Crim. Proc. See also *Com. v. Lupo*, 394 Mass. 644, 476 N.E.2d 963 (1985) (Rule 30 consolidates two formerly separate remedies, writ of error and habeas corpus, with the motion for a new trial). Rule 30(a) "consolidate[s] the previously distinct procedures of habeas corpus and writ of error." Reporter's Notes, Rule 30, Mass. R. Crim. Proc. Rule 30(b) is modeled after Rule 33, Fed. R. Crim. Proc., relating to motions for a new trial in federal criminal proceedings. See Reporter's Notes, Rule 30, Mass. R. Crim. Proc. (Rule 30(b) is taken primarily from Rule 33, Fed. R. Crim. Proc.).

Prior to 1979, and even more so prior to 1939, both direct and postconviction remedies were narrowly available in Massachusetts, and this contributed to several miscarriages of justice, most notably the infamous case of Sacco and Vanzetti, executed for murder in 1927 after a shockingly unfair trial which the Massachusetts courts were unable to overturn.

Rule 30, therefore, "marks a significant departure from prior Massachusetts practice." Reporter's Notes, Rule 30, Mass. R. Crim. Proc. "Rule 30 was adopted in 1979 as the exclusive vehicle for postconviction relief [in Massachusetts]."

§ 24:6 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—In nature of coram nobis

Rule 30 is in the nature of coram nobis, available in the convicting court. Rule 30(a), (b), Mass. R. Crim. Proc. (authorizing Rule 30 relief to be granted by "the trial judge").

§ 24:7 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Right to counsel

There is no right to counsel in Rule 30 proceedings. Rule 30(c)(5), Mass. R. Crim. Proc. (judge hearing the Rule 30 motion "in his discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule"). See, e.g., *Mains v. Com.*, 433 Mass. 30, 739 N.E.2d 1125 (2000) (under Rule 30(c), appointment of counsel in Rule 30 proceedings is discretionary).

§ 24:8 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Statute of limitations

There is no statute of limitations on Rule 30 motions. A Rule

30(a) motion may be filed "at any time," Rule 30(a), Mass. R. Crim. Proc., and under Rule 30(b) on written motion the trial judge may grant a new trial "at any time," Rule 30(b), Mass. R. Crim. Proc.

§ 24:9 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Procedural requirements

Rule 30(c), Mass. R. Crim. Proc., sets forth the procedural requirements applicable to Rule 30 proceedings.

The primary purpose of Rule 30(c)(3), relating to the use of affidavits in Rule 30 proceedings, is to encourage the disposition of postconviction motions upon affidavit. Reporter's Notes, Rule 30, Mass. R. Crim. Proc. See also *Com. v. Vaughn*, 471 Mass. 398, 30 N.E.3d 76 (2015) (primary purpose of Rule 30(c)(3) is to encourage the disposition of motions for postconviction relief on the basis of affidavits alone; decision to hold an evidentiary hearing on a motion for a new trial is left largely to the sound discretion of the judge; only when the motion and affidavits raise a "substantial issue" is an evidentiary hearing required; in determining whether a "substantial issue" meriting an evidentiary hearing . . . has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised; newly discovered evidence that is cumulative of evidence admitted at trial tends to carry less weight than new evidence that is different in kind; in determining the adequacy of the defendant's showing, the motion judge may consider whether the motion and affidavits contain credible information of sufficient quality to raise a serious question); *Com. v. Muniur M.*, 467 Mass. 1010, 5 N.E.3d 1210 (2014) (motion to vacate an admission to sufficient facts is treated as a motion for a new trial; in determining whether to conduct an evidentiary hearing on a motion to vacate an admission to sufficient facts, both the seriousness of the issue raised and the adequacy of the showing on that issue must be considered; when a substantial issue has been raised in relation to a motion to vacate an admission to sufficient facts, and supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing on the motion; trial court was required to hold evidentiary hearing on juvenile's motion to vacate admission to sufficient facts, 18 years after juvenile had been adjudicated delinquent by reason of rape of a child with force, since juvenile raised a substantial issue as to whether admission had been voluntary; juvenile's claim that his father had coerced him into the admission was supported by presentence investigation describing juvenile's behavioral and emotional changes in the presence of his

father and attributed those changes to depression caused by father's preoccupation with his own lawsuits against city); *Com. v. Marrero*, 459 Mass. 235, 945 N.E.2d 284 (2011) (judge may rule on the motion for a new trial from the face of the affidavits or other supporting material, without an evidentiary hearing, "if no substantial issue is raised by the motion or affidavits"; where a substantial issue is raised and is supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing; in determining whether a motion for a new trial warrants an evidentiary hearing, both the seriousness of the issue itself and the adequacy of the defendant's showing on that issue must be considered); *Tevlin v. Spencer*, 621 F.3d 59 (1st Cir. 2010) (Rule 30 provides that judges have discretion to authorize postconviction discovery where affidavits filed by the moving party establish a prima facie case for relief; in requesting such discovery, the defendant must make a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial; to meet the prima facie case standard for discovery under a motion for a new trial based on newly discovered evidence, a defendant must make specific, not speculative or conclusory, allegations that the newly discovered evidence would have materially aided the defense against the pending charges, and that this evidence, if explored further through discovery, could yield evidence that might have "played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a verdict of not guilty."); *Com. v. Pagels*, 69 Mass. App. Ct. 607, 870 N.E.2d 645 (2007) (evidentiary hearing may be required on a motion for new trial if substantial issues are raised that involve facts outside of the trial record and concern counsel's actions or omissions; decision whether to hold an evidentiary hearing on a motion for a new trial is committed to the discretion of the motion judge; factors governing the entitlement to a hearing on a motion for a new trial are the seriousness of the issue raised and the adequacy of the defendant's showing on that issue; claim of ineffective assistance of counsel raises an issue of constitutional importance that readily qualifies as a serious issue, for purposes of determining whether a motion for a new trial warrants an evidentiary hearing; materials in support of a motion for new trial need not prove the issue raised but they must at least contain sufficient credible information to cast doubt on the issue; defendant was not entitled to an evidentiary hearing on motion for new trial regarding ineffective assistance at the Appellate Division proceeding, where allegations in defendant's affidavit were conclusory, elliptical, and uncorroborated, and therefore, affidavit was inadequate); *Com. v. Rebello*, 450 Mass. 118, 876

N.E.2d 851 (2007) (defendant was not entitled to an evidentiary hearing on his second motion for new trial where affidavits supporting defendant's motion were self-serving and consisted of hearsay, witness's testimony as to admissions he claimed the defendant had made to him was largely cumulative of the testimony of other witnesses, and defendant's counsel discredited witness by thoroughly cross-examining him regarding his potential bias or motive to testify falsely and by presenting an alternate theory to account for his knowledge of the case).

§ 24:10 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Discovery

Discovery in Rule 30 proceedings may be authorized by the trial judge on a written motion. Rule 30(c)(4), Mass. R. Crim. Proc. See, e.g., *Com. v. Sealy*, 467 Mass. 617, 6 N.E.3d 1052 (2014) (in requesting post-trial discovery in support of new trial motion, the defendant must make a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial); *Com. v. Dubois*, 451 Mass. 20, 883 N.E.2d 276 (2008) (purpose of postconviction discovery is to allow a defendant to gather evidence to support a meritorious claim; trial court was not required to credit murder defendant's affidavit in support of his motion for postconviction discovery of particular allegedly exculpatory evidence, even if such affidavit were undisputed; commonwealth's answer to murder defendant's request for information about particular allegedly exculpatory evidence was inadequate, and defendant would be permitted to file motion to compel Commonwealth to answer specific questions raised in his postconviction motion to compel discovery, where motion specifically referenced particular tape recording of one of defendant's conversation with police, and prosecutor's affidavit in response to defendant's motion stated only that prosecutor was aware of no potentially exculpatory evidence not turned over to defendant's trial counsel); *Restucci v. Appeals Court*, 442 Mass. 1031, 815 N.E.2d 571 (2004) (Rule 30 contemplates that motions for discovery in connection with a new trial motion be filed in the first instance in the trial court—where that new trial motion is pending—and not in an appellate court).

§ 24:11 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Grounds for relief

Rule 30(c)(2) requires that all grounds for relief be raised in the original or amended Rule 30 motion, and any grounds for

relief not so asserted in the motion are waived, unless the judge in his discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion. See, e.g., *Com. v. Vaughn*, 471 Mass. 398, 30 N.E.3d 76 (2015) (affidavit in support of motion for new trial following defendant's conviction for first degree murder was insufficient to warrant an evidentiary hearing; affidavit did not contain affiant's identifying information such as address or birth date, affiant did not come forward with purportedly exonerating statement until 10 years after defendant's conviction, and affiant's statements, that he had witnessed the shooting from an unknown vantage point and had seen victim being shot by a person who was taller than defendant, was merely cumulative of the evidence offered by the defendant at trial); *Com. v. Furr*, 454 Mass. 101, 907 N.E.2d 664 (2009) (motion to withdraw a guilty plea is treated as a motion for a new trial under Mass. R.Crim. P. 30(b); judge may grant the defendant's motion only if it appears that justice may not have been done; judge may decide the motion based solely on the submitted affidavits, and the weight and credibility to be accorded those affidavits are within the judge's discretion; judge need not believe such affidavits even if they are undisputed; motion is addressed to the sound discretion of the trial judge, and will not be reversed unless it is manifestly unjust, or unless the proceeding was infected with prejudicial constitutional error).

However, a sentence that is in excess of the statutory maximum or is otherwise illegal may be corrected via Rule 30 notwithstanding the defendant's earlier failure to raise the issue of illegal sentence on his direct appeal.

§ 24:12 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Filing

A Rule 30(a) proceeding is commenced by filing in the convicting court a motion to release the convicted person or to correct the sentence, and a Rule 30(b) proceeding is commenced by filing a motion for a new trial in the convicting court. A Rule 30 proceeding is a postsentencing phase of the original criminal case, not an independent civil action.

§ 24:13 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Appeals

An appeal from the final order or judgment entered in a Rule 30 proceeding "may be taken to the Appeals Court, or to the

Supreme Judicial Court in an appropriate case, by either party." Rule 30(c)(8), Mass. R. Crim. Proc. The appeal is to the Appeals Court, except that in capital cases the appeal is to the Supreme Judicial Court. Mass. Gen. Laws. Ann., ch. 231, § 113 (final judgment of superior court may be appealed to the Appeals Court); Mass. Gen. Laws. Ann., ch. 211A, § 10 (only Supreme Judicial Court may review convictions for first degree murder).

When appellate review is sought by either the convicted person or the commonwealth from the final judgment or order in a Rule 30 proceeding, the notice of appeal must be filed with the clerk of the convicting court within 30 days after entry of the judgment or order appealed from. Rules 3(a), 4(b), Mass. R. App. Proc.

§ 24:14 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Appeals—Gatekeeper provisions under Massachusetts General Laws Chapter 278, § 33E

Under the so-called "gatekeeper" provisions of Mass. Gen. Laws Ann., ch. 278, § 33E, an appeal in a Rule 30 capital case may not, as a general rule, proceed without the leave of a single justice of the Massachusetts Supreme Judicial Court, irrespective of whether the convicted person is seeking review of a denial of Rule 30 relief, or the commonwealth is seeking review of a granting of Rule 30 relief. Mass. Gen. Laws Ann., ch. 278, § 33E (if any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court); Rule 30(c)(9), Mass. R. Crim. Proc. (if an appeal or application for leave to appeal is taken by the commonwealth under the provisions of Mass. Gen. Laws Ann., Ch. 278, § 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application).

In Massachusetts, a rescript is the order, direction, or mandate of an appellate court disposing of the appeal; see Rule 1(c), Mass. R. App. Proc. In Massachusetts, which has no death penalty, a capital case is, in the postconviction relief context, one in which the defendant has been convicted of first degree murder.

Under the gatekeeping requirement, the party seeking the appeal from the Rule 30 judgment must file a motion for leave to appeal with the Massachusetts Supreme Judicial Court. Where a

convicted person is seeking to appeal the denial of a Rule 30 motion, the motion for leave to appeal must be filed within 30 days of the denial of Rule 30 relief. Thereafter, a single justice of the Massachusetts Supreme Judicial Court makes a final and unreviewable determination whether the claim is new and substantial and hence warrants full appellate review by the Supreme Judicial Court.

§ 24:15 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Appeals—Gatekeeper provisions under Massachusetts General Laws Chapter 278, § 33E—Case law

For case law involving the gatekeeper requirement in Rule 30, Mass. R. Crim. Proc., capital proceedings, see, e.g., *Com. v. Chatman*, 473 Mass. 840, 46 N.E.3d 1010 (2016) (burden rests on the party moving for a new trial to prove the facts on which he or she relies in support of the motion; when this court reviews a defendant's appeal from the denial of a motion for a new trial in conjunction with his direct appeal from an underlying conviction of murder both are reviewed under G.L. c. 278, § 33E; court reviews the denial of that motion to determine if the judge committed an abuse of discretion or other error of law and, if so, whether such error created a substantial likelihood of a miscarriage of justice; an abuse of discretion exists when the motion judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives; review extends special deference to the action of a motion judge who was also the trial judge); *Monteiro v. Com.*, 473 Mass. 1007, 40 N.E.3d 1029 (2015) (defendant whose motion for the appointment of counsel to seek postconviction relief is denied or an indigent's motion for counsel in seeking postconviction access to forensic and scientific analysis is denied, in the case of a defendant convicted of first degree murder, seek leave to appeal pursuant to the gatekeeper provision of the statute governing review of capital cases by the Supreme Judicial Court); *Shipps v. District Attorney for Norfolk Dist.*, 472 Mass. 1001, 32 N.E.3d 1254 (2015) (it is well established that declaratory relief ordinarily is not available in the context of pending criminal cases; similarly, a complaint seeking declaratory relief may not be used postconviction to avoid the gatekeeper provision of G.L. c. 278, § 33E, or to challenge the legality of a sentence by contesting the constitutionality of the statute under which the plaintiff (the defendant in the underlying criminal case) was sentenced; proper way for the plaintiff to challenge the legality of his sentences was by way of a postconviction motion in

the trial court; no matter how a defendant chooses to label his claim, and regardless of the procedural route employed, he may not circumvent the gatekeeper provision by filing an action in the county court in the first instance; this appeal does not present an extraordinary circumstance "justifying declaratory relief to prevent disruption of the orderly administration of criminal justice); *Com. v. Vincent*, 469 Mass. 786, 17 N.E.3d 1045 (2014) ("We review the defendant's claim of ineffective assistance to determine whether there exists a substantial likelihood of a miscarriage of justice, as required under G.L. c. 278, § 33E, which is more favorable to a defendant than is the general constitutional standard for determining ineffective assistance of counsel"); *Com. v. Frank*, 433 Mass. 185, 187, 740 N.E.2d 629 (2001). ("We therefore consider '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"); *Com. v. Evans*, 469 Mass. 834, 17 N.E.3d 1084 (2014) (DNA evidence that a particular individual could not be excluded as a potential contributor of the DNA at issue should not be admitted without accompanying statistical evidence of the likelihood that the test could not exclude other individuals in a given population, the issues raised by the lack of such evidence to determine whether there is a substantial likelihood that a miscarriage of justice has occurred must be considered pursuant to court's duty under G.L. c. 278, § 33E, even if not raised by the defendant); *Com. v. Foster*, 471 Mass. 236, 28 N.E.3d 427 (2015) (defendant's conviction for murder in first degree would not be reduced to lesser degree of guilt, nor was he entitled to new trial, pursuant to statute providing that, in capital cases, if court is satisfied that the verdict is against the law or the weight of the evidence, the court may order a new trial or direct the entry of a verdict of a lesser degree of guilt; defendant was suffering from situational depression due to his personal circumstances while incarcerated pending trial, and this was rational response to defendant's circumstances, rather than psychotic thought processes and illogical thinking, defendant's mental state in response to his incarceration did not bear on his mental state at time of killing, and thrust of the evidence did not support determination that lesser degree of guilt would be more appropriate); *Lee v. Corsini*, 777 F.3d 46 (1st Cir. 2015) (discussing Mass. Gen. Laws ch. 278, § 33E); *Com. v. Hardy*, 464 Mass. 660, 984 N.E.2d 727 (2013), cert. denied, 134 S. Ct. 248, 187 L. Ed. 2d 184 (2013) ("[t]he substantial likelihood of a miscarriage of justice standard that is associated with plenary review under G.L. c. 278, § 33E, and which we have said is more forgiving to a defendant than the substantial risk standard applicable in other criminal cases . . .

is limited to the direct appeal"); *Com. v. Jules*, 464 Mass. 478, 984 N.E.2d 266 (2013) (absence of a recording of the defendant's responses to the translator does not give rise to a substantial likelihood of a miscarriage of justice; from the judge's findings, it is clear that he credited the translator's testimony concerning what the defendant said to her and properly concluded, based on his credibility determinations, that she was able to discern what the defendant said, and that what he said reflected his understanding of the Miranda warnings; in the circumstances, we discern no reason to disturb the judge's determinations that, on the record before him, are not clearly erroneous; no substantial likelihood of a miscarriage of justice arises from the absence of a recording of the interview in this case); *Herbert v. Dickhaut*, 695 F.3d 105 (1st Cir. 2012), cert. denied, 133 S. Ct. 2775, 186 L. Ed. 2d 225 (2013) (Mass. Gen. Laws ch. 278, § 33E, provides that, in the case of motions for a new trial filed with the Superior Court in capital cases, "no appeal [to the full Supreme Judicial Court] shall lie . . . unless the appeal is allowed by a single justice . . . on the ground that it presents a new and substantial question which ought to be determined by the full court"; in Massachusetts, a "gatekeeper" justice's decision pursuant to § 33E, "whether it is to permit or prohibit an appeal, is final and unreviewable"; thus, in Massachusetts, the denial of a § 33E motion marks the end of the pendency of an application for postconviction relief); *Mendes v. Brady*, 656 F.3d 126 (1st Cir. 2011) (after his conviction in a Massachusetts state court for murdering his wife was affirmed on the direct appeal, Mendes sought state postconviction relief on grounds including a federal claim of ineffective assistance of trial counsel in failing adequately to contest the admission into evidence at his trial of a note allegedly written by his dead wife, and, alternatively, failing to establish that Mendes himself wrote the note at some time well in advance of the killing; the state trial court denied relief on the merits; Mendes then appealed the denial to the Supreme Judicial Court in accordance with the special procedure for dealing with postconviction petitions in § 33E cases: a single judge acts as gatekeeper to bar access to the full court on any issue that could have been raised at the time of direct appeal, unless — as a general rule — the relief is sought on a basis that is both new, in the sense of having been unavailable at the time of direct appeal, and substantial; while the bar is not absolute, since the gatekeeper presumably has discretion to allow the appeal to go to the full court if the grounds are substantial even though not new, the defendant in such as case is not excused from the procedural consequences of waiver; that is, any such review of a non-new issue will be conducted under a standard comparatively less favorable

to a petitioner); *Com. v. Johnson*, 461 Mass. 1, 957 N.E.2d 1073 (2011) (issue is not "new" within the meaning of statute prohibiting appeal from denial of a postconviction motion in a capital case unless the appeal presents a new and substantial question, 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; determination of "new" does not contemplate revisiting the decision in a capital appeal merely to reconsider issues that were decided in the direct appeal, which the defendant claims were incorrectly decided); *Com. v. Smith*, 460 Mass. 318, 951 N.E.2d 322 (2011) (given the thoroughness of the unique form of direct plenary review conducted by the Supreme Judicial Court in a capital case, it should be a very rare situation where, following the direct appeal, relief is granted to a defendant based on a claim of error that either was or could have been raised at the trial or in the direct appeal); *Com. v. Cavitt*, 460 Mass. 617, 953 N.E.2d 216 (2011) (The standard of review under G.L. c. 278, § 33E, for claims of ineffective assistance of counsel is more favorable to a defendant than the Federal or State constitutional standards; under the § 33E standard, "we need not focus on the adequacy of trial counsel's performance . . . . [Rather,] we shall consider 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."); *Com. v. Marrero*, 459 Mass. 235, 945 N.E.2d 284 (2011) (for claims of ineffective assistance of counsel in capital cases, Supreme Judicial Court reviews case to determine whether there exists a substantial likelihood of a miscarriage of justice; this is a standard of review that is more favorable to a defendant than general test for ineffective assistance of counsel set forth in *Saferian*, which was a discerning examination and appraisal of specific circumstances to see whether there had been serious incompetency, inefficiency, or inattention of counsel falling measurably below that which might be expected from an ordinary fallible lawyer and, if such conduct was found, considered whether it likely deprived defendant of an otherwise available, substantial ground of defense); *Com. v. Garvin*, 456 Mass. 778, 926 N.E.2d 169 (2010) (where the denial of a motion for a new trial is considered in conjunction with a defendant's direct appeal from a conviction of murder in the first degree, an appellate court must determine whether there was a substantial likelihood of a miscarriage of justice); *Com. v. Cruz*, 456 Mass. 741, 926 N.E.2d 142 (2010) (defendant was not entitled to reversal of his murder conviction based on defense counsel's opening statement, in which counsel stated the evidence was going to establish beyond a reasonable doubt that the defendant did not shoot the victim, even if

the statement caused juror confusion as to the burden of proof; the trial court repeatedly informed the jury, from the time it was empaneled through the court's final instructions, that the burden of proof was on the Commonwealth); *Com. v. Linton*, 456 Mass. 534, 924 N.E.2d 722 (2010) (trial counsel's failure to develop and offer evidence of a third-party culprit could not have resulted in a substantial likelihood of a miscarriage of justice in first-degree murder prosecution arising from strangulation death of defendant's wife, and thus did not meet statutory standard for finding ineffective assistance on an appeal from first-degree murder conviction; defendant made bare assertion in affidavit on motion for new trial that adequate investigation of a group of five named people would have proved that the killer was "someone other than me," and nothing contained in affidavit or presented on appeal provided any substantive support for that claim; statutory review of ineffective assistance claim for substantial likelihood of a miscarriage of justice, as performed on appeal of first-degree murder conviction, is more favorable to a defendant than the constitutional standard for determining ineffectiveness of counsel, and, thus, the Supreme Judicial Court considers ineffective assistance claim as part of its broader inquiry into whether there was an error in course of trial, and, if there was, whether that error was likely to have influenced jury's conclusion; without more, defense counsel's choice not to call victim's former boyfriend or question police officers about their investigation of boyfriend after defendant, who was victim's husband, told them that boyfriend might have killed victim did not support ineffective assistance claim asserted on appeal of first-degree murder conviction); *Com. v. Seng*, 456 Mass. 490, 924 N.E.2d 285 (2010) (there was no substantial likelihood of a miscarriage of justice in murder prosecution as result of unobjected-to error in permitting medical examiner who did not perform autopsies to expressly convey the conclusion contained in original autopsy reports as to one victim's cause of death, in view of the overwhelming nature of the forensic and testimonial evidence against defendant); *Com. v. Gunter*, 456 Mass. 1017, 924 N.E.2d 687 (2010) (statute governing review by the Supreme Judicial Court of capital murder cases permits review of the defendant's claims if and only if the single justice, as gatekeeper, allows the claims to pass through; the special function of the single justice mandated by the statute would be futile and meaningless if his or her rulings were subject to appeal before the full court; where a single justice has denied a gatekeeper application under G.L. c. 278, § 33E, the only remedy for the defendant in the State courts is to file a timely motion for reconsideration with the single justice); *Com. v. Smith*, 456 Mass. 476, 924 N.E.2d 270 (2010) (impeachment of a witness is "fraught

with a host of strategic considerations, to which we will, even on § 33E review, still show deference"; absent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion); *Com. v. Stote*, 456 Mass. 213, 922 N.E.2d 768 (2010) (once a defendant's direct appeal from his conviction in a capital case has been reviewed, any claim of ineffectiveness of counsel presented in a subsequent appeal from the denial of a motion for a new trial, authorized by a single justice of the Supreme Judicial Court, would not be tested under the statutory standards for appeals in capital cases, but on the applicable state and federal constitutional standards, even where trial counsel and appellate counsel were the same and the claim of ineffective assistance is therefore raised for the first time in a subsequent motion for postconviction relief); *Com. v. Mosher*, 455 Mass. 811, 920 N.E.2d 285 (2010) (Supreme Judicial Court, in considering a claim of ineffective assistance of counsel under statute governing review of capital cases, reviews the record to determine whether there was a serious failure by trial counsel and, if so, whether the failure resulted in a substantial likelihood of a miscarriage of justice); *Com. v. Williams*, 453 Mass. 203, 900 N.E.2d 871 (2009) (because the defendant has been convicted of murder in the first degree, we consider her contention of ineffectiveness of counsel to determine whether there exists a substantial likelihood of a miscarriage of justice, pursuant to G.L. c. 278, § 33E, which is more favorable to a defendant than the constitutional standard for determining whether there has been ineffective assistance; we consider whether there was error during the course of the trial, and, if so, whether the error was likely to have influenced the jury's conclusion; under this more favorable standard of review, we consider a defendant's claim even if the action by trial counsel does not constitute conduct falling measurably below that of an ordinary fallible lawyer; a strategic decision by an attorney, however, amounts to ineffective assistance only if it was manifestly unreasonable when made); *Com. v. Garuti*, 454 Mass. 48, 907 N.E.2d 221 (2009) (where the denial of a motion for a new trial is considered in conjunction with a defendant's direct appeal from a conviction of murder in the first degree, we must determine whether, under G.L. c. 278, § 33E, there was a substantial likelihood of a miscarriage of justice); *Com. v. Nassar*, 454 Mass. 1008, 908 N.E.2d 371 (2009) (while untimeliness and the absence of a new and substantial question are "separate and independent grounds" for the denial of a gatekeeper petition, the single justice's decision to deny Nassar's request for leave to appeal in the circumstances of this case is final and unreviewable regard-

less of the ground); *Com. v. Molina*, 454 Mass. 232, 909 N.E.2d 19 (2009) (notwithstanding the fact that witness credibility was the province of the jury and that a single fingerprint in the victim's blood is sufficient evidence to convict the defendant, the defendant ignores the other evidence that ties him to the murder; we have reviewed the entire record and the defendant's claims of error pursuant to our obligation under G.L. c. 278, § 33E, and discern no reason to grant the defendant's request for relief); *Olszewski v. Spencer*, 466 F.3d 47 (1st Cir. 2006) (28 U.S.C.A. § 2254 habeas corpus proceeding filed by Massachusetts prisoner convicted of first degree murder in Massachusetts state court; under Massachusetts law, after a defendant's direct appeal is completed, the Massachusetts Supreme Judicial Court cannot review appeals from the denial of collateral attacks on a defendant's conviction unless a single justice finds the claims to be "new and substantial," Mass. Gen. Laws Ann., ch. 278, § 33E); *Cook v. Com.*, 451 Mass. 1008, 885 N.E.2d 824 (2008) (defendant could not circumvent final and unreviewable decision of a single justice of the Supreme Judicial Court by seeking relief pursuant to the Supreme Judicial Court's superintendence of inferior courts); *Com. v. Gilbert*, 447 Mass. 161, 849 N.E.2d 1246 (2006) (it is contended that the "gatekeeper" provision of Mass. Gen. Laws Ann., ch. 278, § 33E, does not apply when this court has affirmed a conviction of murder in the first degree on direct appeal, and a judge in the superior court thereafter sets aside the verdict of murder in the first degree and reduces the verdict under Rule 25(b)(2), Mass. R. Crim. Proc.; however, the plain language of the statute is to the contrary: in a capital case, § 33E directs all appeals from postconviction motions to a single justice of this court; until a superior court judge's postrescript order is reviewed on appeal (or the time for taking an appeal expires and there is no appeal), the superior court judge's order does not effect a final change in the defendant's conviction and the case remains a "capital case" for purposes of § 33E; that is, the defendant stands convicted of murder in the first degree until this court says otherwise, or until the appellate period has run without an appeal being filed; § 33E, expressly prohibits an appeal from any motion filed in the superior court after § 33E review without the leave of a single justice of this court; in contrast, the gatekeeper provision in § 33E does not apply after this court on a direct appeal has reduced a verdict from murder in the first degree pursuant to its authority under § 33E; in such cases, the defendant does not thereafter stand convicted of murder in the first degree).

§ 24:16 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Consolidation of habeas corpus and writ of error under Rule 30(a)

The Rule 30(a) remedy consolidates habeas corpus and the writ of error. Reporter's Notes, Rule 30, Mass. R. Crim. Proc.

§ 24:17 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—May be used to correct illegal sentence even though conviction may be valid

Rule 30(a) may be used to correct an illegal sentence, even though the underlying conviction may be perfectly valid. Reporter's Notes, Rule 30, Mass. R. Crim. Proc. (Rule 30(a) permits defendant to seek the correction of an illegal sentence; in addition to permitting convicted defendants to seek release from illegal confinement or other restraint on their liberty, Rule 30(a) permits them to seek the correction of an illegal sentence; a distinction is drawn between an illegal sentence and a sentence imposed in an illegal manner; an illegal sentence is one that is not permitted by law for the offense committed by the defendant, e.g., a sentence that exceeds the permissible maximum); see, e.g., *Com. v. Cruz*, 62 Mass. App. Ct. 610, 818 N.E.2d 616 (2004) (judges have discretion to decide postconviction motions without a hearing when, under Rule (30)(c)(3), Mass.R.Crim.Proc., no substantial issue is raised by the motion or affidavits).

§ 24:18 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Custody requirement under Rule 30(a)

There is a custody requirement in proceedings under Rule 30(a). Rule 30(a), Mass. R. Crim. Proc. (any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may file a Rule 30(a) motion).

§ 24:19 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Case law regarding Rule 30(a)

For case law involving Rule 30(a), Mass. R. Crim. Proc., see, e.g., *Com. v. Dykens*, 473 Mass. 635, 45 N.E.3d 580 (2016) (guilty plea is properly challenged under the rule providing that any

person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may file a motion requesting a release or a correction of sentence on the ground that the confinement or restraint is unconstitutional; defendant could bring double jeopardy challenge to his multiple convictions based on guilty pleas to attempted unarmed burglary, where indictments charged three attempts to burglarize the same residence on or about the same date and the record included at least a minimal description of the key evidence establishing each of those attempts); *Com. v. Cumming*, 466 Mass. 467, 995 N.E.2d 1094 (2013) (when ruling on defendant's motion to correct sentence, trial court did not violate defendant's right of protection against double jeopardy by vacating community parole supervision for life (CPSL) component of sentence and modifying remaining portions of the sentence; by filing a motion to correct his unlawful sentence, defendant knowingly exposed himself to possibility that his entire sentencing scheme might be restructured, and the sentences imposed constituted an integrated package, each piece dependent on the other, which could not be separated); *Com. v. Negron*, 462 Mass. 102, 967 N.E.2d 99 (2012) (rule governing postconviction relief permits a defendant to raise a double jeopardy challenge to his continued confinement or restraint arising from a criminal conviction, whether from a guilty plea or a jury verdict, at any time, as of right; where a defendant is charged with two criminal offenses based on the same conduct and where the legislature has not declared its intent that a defendant be punished separately for both offenses, convictions of a greater and lesser offense are duplicative and barred by the prohibition against double jeopardy); *Com. v. Scholwin*, 73 Mass. App. Ct. 1115, 899 N.E.2d 118 (2009) (a motion under rule 30(a) seeks release from the alleged unlawful restraint of a sentence of confinement; as the defendant was placed on probation, this rule has no application); *Goetzendanner v. Superintendent, Massachusetts Correctional Inst., Norfolk*, 71 Mass. App. Ct. 533, 883 N.E.2d 1250 (2008) (an illegal sentence is one that is in excess of the punishment prescribed by the relevant statutory provision or in some way contrary to the applicable statute or one that is premised on a major misunderstanding by the sentencing judge as to the legal bounds of his authority; an illegally imposed sentence is one in which the sentencing judge employs an erroneous or incorrect procedure when imposing the sentence); *Com. v. Mahar*, 442 Mass. 11, 809 N.E.2d 989 (2004) (ineffective counsel claim; postconviction motions for a new trial based on grounds available but not raised on direct appeal are waived); *Com. v. Melo*, 65 Mass. App. Ct. 674, 843 N.E.2d 659 (2006) (Rule 30(a) would permit the defendant to seek relief from an illegal sentence; an illegal sentence is one

that is in excess of the punishment prescribed by the relevant statutory provision or in some way contrary to the applicable statute; Rule 30(a) provides no relief to a defendant whose sentence was legally imposed but the term of which had been miscalculated by the Department of Correction).

§ 24:20 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial

Rule 30(b), Mass. R. Crim. Proc., provides, in part, that the convicting court "upon motion may grant a new trial at any time if it appears that justice may not have been done." Rule 30(b) is modeled after Rule 33, Fed. R. Crim. Proc., relating to motions for a new trial in federal criminal proceedings. See Reporter's Notes, Rule 30, Mass. R. Crim. Proc. (Rule 30(b) is taken primarily from Rule 33, Fed. R. Crim. Proc.).

§ 24:21 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial—Custody requirement

There is no custody requirement in Rule 30(b) proceedings, and there are no time limitations on applying for relief.

§ 24:22 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial—Filing

With respect to the timing of the filing of a particular motion, Rule 30(b) motions for a new trial fall into one of these three categories: (1) Rule 30(b) motions filed before the direct appeal, with any appeal from the denial of the motion usually consolidated with the direct appeal; (2) Rule 30(b) motions filed after the direct appeal; and (3) Rule 30(b) motions after the time for taking a direct appeal has expired.

§ 24:23 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial—Grounds for relief

Under Rule 30(b), relief is generally sought under either or both of two general sets of grounds for granting a motion for a new trial: (1) grounds involving the conduct of the trial resulting

in the conviction; and (2) grounds involving newly discovered evidence. Reporter's Notes, Rule 30, Mass. R. Crim. Proc.

Rule 30(b) requires the grant of a new trial if, among other reasons, "the original trial was infected with prejudicial constitutional error." *Com. v. Cowie*, 404 Mass. 119, 123, 533 N.E.2d 1329 (1989). Thus, Rule 30(b) authorizes relief where the conviction or the sentence was obtained in violation of a constitutional right.

§ 24:24 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial—Grounds for relief—Newly discovered evidence—Case law

Newly discovered evidence of innocence is also a ground for relief under Rule 30(b).

For case law on the availability of Rule 30(b) relief based on newly discovered evidence of innocence, see, e.g., *Com. v. Drayton*, 473 Mass. 23, 38 N.E.3d 247 (2015) (where the defendant moves for a new trial on the basis of newly discovered evidence, the defendant must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction, which entails a showing that it probably would have been a real factor in the jury's deliberations, and the defendant also bears the burden of demonstrating that any newly discovered evidence is admissible); *Com. v. Brescia*, 471 Mass. 381, 29 N.E.3d 837 (2015) (newly discovered evidence warrants a new trial if that evidence casts real doubt on the justice of the conviction, in the sense that the evidence would probably have been a real factor in the jury's deliberations; judge weighing whether a new trial is warranted must keep in mind that a defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials; new trial was warranted on charges of murder and conspiracy, where defendant suffered a stroke on the night between his first and second day of testifying on his own behalf, and where the stroke went undetected until after the jury had begun deliberations; defense, based on defendant's denial that he had hired a person to kill victim, turned on whether jury believed defendant's testimony, defendant had apparent difficulty understanding questions and communicating answers on the second day of his testimony, and prosecutor used defendant's apparent lack of memory to impeach his credibility); *Com. v. Murray*, 461 Mass. 10, 957 N.E.2d 1079 (2011) (to secure a new trial on the basis of exculpatory evidence, the defendant must establish three elements; first, the evidence must have been in the possession,

custody, or control of the prosecutor or a person subject to the prosecutor's control; second, the defendant must establish that the evidence is exculpatory; exculpatory in this context is not a narrow term connoting alibi or other complete proof of innocence, but rather comprehends all evidence which tends to negate the guilt of the accused or, stated affirmatively, supporting the innocence of the defendant; favorable evidence need not be dispositive evidence; third, after showing that the withheld evidence was potentially exculpatory, a defendant seeking a new trial must establish prejudice; where the evidence is not specifically requested by the defendant prior to trial, the standard of prejudice is the same standard used to assess the impact of newly discovered evidence, that is, "whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial"; judge does not decide whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations); *Com. v. Rosario*, 460 Mass. 181, 950 N.E.2d 407 (2011) (a judge may grant a new trial anytime it appears that justice may not have been done under Rule 30(b); a defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction; the evidence said to be new not only must be material and credible but also must carry a measure of strength in support of the defendant's position; thus newly discovered evidence that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind); *Com. v. Lykus*, 451 Mass. 310, 885 N.E.2d 769 (2008) (defendant seeking a new trial on the ground of newly discovered evidence must show that the evidence is newly discovered, that it is material and credible, and that it casts real doubt on the justice of the conviction; newly discovered evidence that is merely cumulative of evidence admitted at the trial will carry little weight; the task of the motion judge is to decide whether the new evidence probably would have been a real factor in the jury's deliberations, and in that regard the judge must consider the strength of the case against the defendant).

§ 24:25 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial—Attacking convictions resting on guilty plea—Case law

Rule 30(b) is an available remedy regardless of whether the applicant for relief was convicted after a trial or following a guilty plea.

For case law on the use of Rule 30(b) to attack convictions resting on a guilty plea, see, e.g., *Com. v. Scott*, 467 Mass. 336, 5 N.E.3d 530 (2014) (a motion for a new trial pursuant to Mass. R.Crim. P. 30(b) is the proper vehicle by which to seek to vacate a guilty plea); *Com. v. Negron*, 462 Mass. 102, 967 N.E.2d 99 (2012) (defendant's plea of guilty to allegedly duplicative indictments charging him with armed assault in a dwelling and aggravated burglary did not preclude defendant from filing motion for postconviction relief seeking to vacate the assault conviction on double jeopardy grounds); *Com. v. Grannum*, 457 Mass. 128, 928 N.E.2d 339 (2010) (ordinarily, the Commonwealth bears the burden of establishing that a challenged plea was intelligently and voluntarily made; however, when a defendant waits many years and then challenges a guilty plea after court records have been destroyed lawfully pursuant to court rules, the defendant bears the burden to rebut a presumption that the plea proceeding was conducted correctly; presumption of regularity that applies when a defendant challenges the voluntariness of a guilty plea after court records have been lawfully destroyed does not apply to motions to withdraw a guilty plea for failure to provide immigration warnings); *Com. v. Williams*, 71 Mass. App. Ct. 348, 881 N.E.2d 1148 (2008) (although the disposition of a postsentence motion to withdraw plea is within the discretion of the judge, a rigorous standard must be applied and a judge may only allow such a motion if it appears that justice may not have been done; an appellate court grants substantial deference to a decision denying a postsentence motion to withdraw plea when the judge passing on the motion is the same judge who heard the plea; *Com. v. Walker*, 443 Mass. 867, 825 N.E.2d 491 (2005) (judge may grant a motion for a new trial only if it appears that justice may not have been done; when, as here, the motion includes a postsentence request to withdraw a guilty plea and the motion is filed after plea records have been destroyed, a new trial motion should be granted only if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the commonwealth; a defendant whose plea counsel gives plainly incorrect advice, and who relies on that advice in tendering a guilty plea, has received ineffective assistance of counsel; in such a case, there could be no certainty that a defendant's decision to waive his right to a jury trial by entering pleas of guilty was made intelligently or voluntarily, with a full understanding of the consequences; that constitutional infirmity would create a substantial risk of a miscarriage of justice and justify our granting the defendant's request to withdraw his pleas; here, given the state of law in the commonwealth in 1991, when the plea occurred, the defendant's plea counsel's advice was not patently

wrong); *Com. v. Sherman*, 68 Mass. App. Ct. 797, 864 N.E.2d 1241 (2007), aff'd, 451 Mass. 332, 885 N.E.2d 122 (2008) (ordinarily, if the defendant wishes to present evidence in support of the grounds raised in his motion for new trial, he must submit an affidavit to support his contention; however, a defendant attacking a conviction based upon a guilty plea has a choice between two tactics; he may stand on the contemporaneous record, the record made in the case through the stage of the colloquy and conviction; if the defendant chooses this route, it is not open to the commonwealth to introduce extraneous evidence tending to show that the defendant in fact acted freely and intelligently in tendering the plea; alternatively, the defendant may offer extraneous evidence to supplement (or contradict) the record, but in that event the commonwealth has a like right to offer evidence; consequently, a defendant who challenges the intelligence or voluntariness of his plea and relies solely on the contemporaneous record of the proceeding for that challenge need do no more than file with his motion a copy of the record of the plea proceeding being challenged; the record will then establish the constitutional adequacy or inadequacy of the colloquy); *Com. v. Hoyle*, 67 Mass. App. Ct. 10, 851 N.E.2d 469 (2006) (under Rule 30(b), justice was done when trial court accepted defendant's guilty pleas).

§ 24:26 Motion to release movant or correct sentence and motion for new trial under Massachusetts Rule of Criminal Procedure 30—Rule 30(b) regarding motion for new trial—Case law regarding Rule 30(b)

For case law involving Rule 30(b), see, e.g., *Com. v. Sylvain*, 473 Mass. 832, 46 N.E.3d 551 (2016) (motion to withdraw a guilty plea is treated as a motion for a new trial; in reviewing the decision on a motion to withdraw a guilty plea, the Supreme Judicial Court reviews the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion; to the extent that a judge hearing a motion to withdraw a guilty plea was in a better position to evaluate the credibility of the affiants, the Supreme Judicial Court will defer to the judge's assessment of the credibility, weight, and impact of the affidavits submitted in support of the motion; reliance on affidavits rather than live testimony in granting defendant's motion for a new trial alleging ineffective assistance of counsel in failing to inform him of the clear immigration consequences of his guilty plea was not erroneous; defendant called one witness and submitted several affidavits at evidentiary hearing on motion, Commonwealth chose not to call any witnesses and submitted no

affidavits in support of its opposition to motion, and following the hearing, the trial court weighed all of the evidence before it and based its decision on affidavits of defendant and plea counsel, as well as the context in which defendant pled guilty); *Com. v. Cameron*, 473 Mass. 100, 39 N.E.3d 723 (2015) (to show that newly available evidence casts real doubt on the justice of the conviction, the defendant must show that there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial; newly discovered evidence cast real doubt on justice of his conviction, as required to establish entitlement to a new rape trial based on newly discovered evidence; prosecution's case primarily relied on victim's testimony, the only evidence that possibly corroborated victim's testimony was DNA evidence from victim's underwear, which expert indicated was from a secondary male source from which defendant could not be excluded, new DNA testing of victim's underwear revealed secondary source was in fact female DNA to which defendant was excluded as a possible contributor, and newly discovered evidence contradicted victim's testimony and negated a key piece of evidence relied upon at trial); *Com. v. DiCicco*, 470 Mass. 720, 25 N.E.3d 859 (2015) (where an indigent defendant seeks to obtain additional evidence in connection with a motion for postconviction relief that would likely raise a meritorious defense warranting a new trial, the judge has discretion to grant a motion for funds to hire an expert; trial court could not deny defendant's postconviction supplemental request for additional expert funds, after court had granted initial request for expert funds, since denial of supplemental request was based on court's ultimate finding that expert's opinion was insufficiently reliable to be admissible; initial request for expert funds had been based on expectation that expert would be required for one-day evidentiary hearing, evidentiary hearing lasted one day longer than anticipated, and expert adequately documented the services he performed and time spent assisting the defendant's case); *Bridgeman v. District Attorney for Suffolk Dist.*, 471 Mass. 465, 30 N.E.3d 806 (2015) (in cases in which a defendant seeks to withdraw a guilty plea as a result of the revelation of misconduct of the chemist at the state crime laboratory, and where the motion is allowed, the defendant cannot: (1) be charged with a more serious offense than that of which he or she initially was convicted under the terms of a plea agreement, and (2) if convicted again, cannot be given a more severe sentence than that which originally was imposed); *Lee v. Corsini*, 777 F.3d 46 (1st Cir. 2015) (discussing the litigation of ineffective counsel claims in Massachusetts postconviction proceedings); *Com. v. Brescia*, 471 Mass. 381, 29 N.E.3d 837 (2015) (if a motion for a

new trial rests on an unpreserved claim of nonconstitutional error, a new trial should be granted only if the defendant demonstrates a substantial risk of a miscarriage of justice, namely, a serious doubt whether the result of the trial might have been different had the error not been made); *Com. v. Rodriguez*, 467 Mass. 1002, 5 N.E.3d 519 (2014) (an admission to sufficient facts is treated as a plea of guilty; motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R.Crim. P. 30(b); judge may grant such a motion if it appears that justice may not have been done; motion for a new trial is committed to the sound discretion of the judge); *Com. v. Scott*, 467 Mass. 336, 5 N.E.3d 530 (2014) (judge may make a ruling on a motion for new trial based solely on the affidavits and must hold an evidentiary hearing only if the affidavits or the motion itself raises a substantial issue that is supported by a substantial evidentiary showing; defendant's guilty plea may be vacated as involuntary because of external circumstances or information that later comes to light; where a defendant's decision to tender a guilty plea was induced by government misconduct such as falsifying a key piece of evidence in the case against the defendant, it is most appropriate for the court to focus its analysis on the threshold question whether the decision to tender the plea was voluntary; in applying the Ferrara analysis to a defendant seeking to vacate a guilty plea on the ground that government misconduct rendered the plea involuntary, the defendant first must show that egregious government misconduct preceded the entry of his guilty plea and that it is the sort of conduct that implicates the defendant's due process rights; rather than merely showing that he misjudged the prosecution's case or was unaware of a possible defense, the defendant must show that the guilty plea was preceded by particularly pernicious government misconduct that was the source of the defendant's misapprehension of some aspect of his case; defendant must show that the egregious misconduct was undertaken by government agents prior to the entry of the defendant's guilty plea); *Com. v. Chatman*, 466 Mass. 327, 995 N.E.2d 32 (2013) (evidentiary hearing on a motion for a new trial is required only where a substantial issue has been raised; in determining whether a substantial issue meriting an evidentiary hearing on a motion for a new trial has been raised, the Supreme Judicial Court looks not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised; to establish, for purposes of motion for new trial, that defendant was not mentally competent at the time of trial due to condition that was no discoverable at the time of trial, burden of proof was on the defendant to establish by a preponderance of the evidence that the Commonwealth would not have

prevailed had the issue been raised at trial in murder prosecution, where, if the question of the defendant's competence had been raised at trial, the Commonwealth would have had the burden to establish by a preponderance of the evidence that the defendant was competent); *Com. v. Lane*, 462 Mass. 591, 970 N.E.2d 284 (2012) (on appeal of a trial court's decision on a motion for new trial, it is irrelevant how the appellate court would have decided the motion; the appellate court's task is only to ensure that there exists in the record evidence to support the trial court's decision to order a new trial; an appellate court gives special deference to both the findings of fact and the ultimate decision of the motion judge, where the motion judge also served as the trial judge); *Com. v. Patton*, 458 Mass. 119, 934 N.E.2d 236 (2010) (although the rules of criminal procedure do not apply to probation violation proceedings, questions of ineffective assistance of counsel involving those proceedings may most appropriately be raised in a motion for a new trial under rule 30(b); the failure of trial counsel to file a timely notice of appeal when specifically instructed by his client to do so deprived the probationer of an appeal to which he was entitled; this constitutes ineffective assistance of counsel; where a probationer has been deprived of his right to a direct appeal due to the ineffective assistance of counsel, he must either be retried or his appeal must be reinstated; the U.S. Supreme Court has said that a State may, in these circumstances, insist on adherence to its appellate rules of procedure in the interest of orderly presentation of appeals, provided it does not extinguish altogether a defendant's right of appeal; to the extent a defendant's right to appeal has been extinguished because of counsel's ineffectiveness, as here, the State may provide some alternative procedure; such an alternative has been provided in the context of a direct criminal appeal that has been lost because of counsel's ineffectiveness, through a motion under rule 30(b); the same reasoning and result should apply in the context of a lost right of appeal from a revocation of probation due to counsel's ineffectiveness in failing to file a timely notice of appeal; under rule 30(b) a probationer must first show that counsel's failure to file a timely notice of appeal deprived him of a right of appeal to which he would have been entitled and that he intended to pursue; second, he must show that he was prejudiced thereby); *Com. v. Gautreaux*, 458 Mass. 741, 941 N.E.2d 616 (2011) (it is incumbent on the foreign national to demonstrate that the failure to comply with art. 36 of the Vienna Convention gave rise to a substantial risk of a miscarriage of justice; " 'a substantial risk of a miscarriage of justice exists when we "have a serious doubt whether the result of the proceeding might have been different had the error not been

made'" "); *Com. v. Petetabella*, 459 Mass. 177, 944 N.E.2d 582 (2011) (on appeal to the Supreme Judicial Court from denial of first-degree murder defendant's motion for postconviction relief, defendant's failure to file direct appeal from the underlying conviction would be considered a waiver of plenary review of the conviction, where the failure to appeal was the product of a strategic decision made on the advice of trial counsel, and the advice was far from manifestly unreasonable; motions for new trial filed after conviction and sentencing are considered collateral attacks on final decisions); *Com. v. Grannum*, 457 Mass. 128, 928 N.E.2d 339 (2010) (ordinarily, the Commonwealth bears the burden of establishing that a challenged plea was intelligently and voluntarily made; however, when a defendant challenges a guilty plea after waiting many years, the tape recording, transcript, and other records of the plea are often unavailable through no fault of the Commonwealth; when a defendant challenges a guilty plea after Court records have been destroyed lawfully the defendant bears the burden of proof and must present evidence sufficient to rebut a presumption that the plea proceeding was conducted correctly; such presumption of regularity does not apply to motions to withdraw a guilty plea for failure to provide immigration warnings); *Com. v. Lykus*, 451 Mass. 310, 885 N.E.2d 769 (2008) (if the prosecution fails to turn over exculpatory evidence for which a specific request has been made, the reviewing judge must set aside the verdict and judgment unless judge is sure that the error did not influence the jury, or had but very slight effect; for nondisclosure of specifically requested exculpatory evidence to warrant a new trial, there must be a determination that there is a substantial basis for claiming prejudice from the nondisclosure); *Com. v. Dubois*, 451 Mass. 20, 883 N.E.2d 276 (2008) (denial of murder defendant's motion for funds to pay for handwriting expert upon whose opinion he relied as basis for motion for new trial did not deprive defendant of his rights to due process, equal protection, or to present a defense, where opinion at issue merely questioned credibility of Commonwealth's expert and failed to raise substantial issue); *Com. v. Perkins*, 450 Mass. 834, 883 N.E.2d 230 (2008) (motion judge, who did not preside at trial, could deny motion for new trial predicated on allegations that a prescribed medication interfered with defendant's ability to assist in his defense; trial transcript showed that defendant never complained to trial judge of such side effects, and motion judge made credibility determinations based on witnesses at motion hearing that defendant never complained to anyone, including trial counsel, about side effects of medication, and that no one, including defendant's expert witness, ever observed him experiencing any of the complained-of side effects; when judge deciding

motion for new trial did not preside at trial, appellate court defers to that judge's assessment of the credibility of witnesses at the hearing on the new trial motion, but appellate court regards itself in as good a position as the motion judge to assess the trial record); *Com. v. Gilbert*, 447 Mass. 161, 849 N.E.2d 1246 (2006) (under circumstances, the motion judge, having concluded that the jury instructions were both erroneous and prejudicial to the defendant on the murder in the first degree charge, had the authority to reduce, sua sponte, the verdict to murder in the second degree and was not required by Rule 30 to order a new trial); *Com. v. Phinney*, 446 Mass. 155, 843 N.E.2d 1024 (2006) (defense counsel's failure to review police reports with respect to third-party suspect in murder prosecution deprived defendant of two substantial grounds of defense and constituted ineffective assistance of counsel; relief granted); *Com. v. Daniels*, 445 Mass. 392, 837 N.E.2d 683 (2005) (due process claim that prosecution withheld evidence favorable to the defendant; to meet the prima facie case standard for discovery under a motion for a new trial based on newly discovered evidence, a defendant must make specific, not speculative or conclusory, allegations that the newly discovered evidence would have materially aided the defense against the pending charges, and that this evidence, if explored further through discovery, could yield evidence that might have played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a verdict of not guilty; here, the defendant established a prima facie case for postconviction discovery); *Com. v. Rodriguez*, 443 Mass. 707, 823 N.E.2d 1256 (2005) (commonwealth argues that Rule 30(b) is not the appropriate mechanism for seeking review of a pretrial motion previously decided in the trial court and affirmed on appeal, especially where the defendant had only requested a rehearing on her motion to suppress; we disagree; Rule 30 was adopted in 1979 as the exclusive vehicle for postconviction relief; a motion for a new trial under Rule 30(b) may include a request to reconsider a ruling on a motion to suppress evidence; a postconviction motion seeking a new hearing on a motion to suppress evidence will be treated as a motion for a new trial; the judge properly considered the defendant's motion as a motion for a new trial; the commonwealth argues that the defendant is estopped, under the doctrine of collateral estoppel, or issue preclusion, from relitigating her motion to suppress in her Rule 30(b) motion; where, as here, the issue actually litigated arises from the same indictment, the principle of issue preclusion is more appropriately referred to as direct estoppel; collateral estoppel usually involves the application of issue preclusion in a subsequent action of a different claim between the same parties;

for direct estoppel to apply, the commonwealth must show that the issues raised in the defendant's Rule 30(b) motion were actually litigated and determined on the defendant's original motion to suppress, that such determination was essential to the defendant's conviction, and that the defendant had an opportunity to obtain review of the determination of her motion to suppress; the requirements of direct estoppel have been met here; the defendant raises no new factual or legal issue in her Rule 30(b) motion; she simply seeks to relitigate her motion to suppress based on her assertion that her direct appeal was decided wrongly; we conclude that principles of direct estoppel operate as a bar to the defendant's attempt in her Rule 30(b) motion to relitigate issues in her motion to suppress); *Com. v. Goodreau*, 442 Mass. 341, 813 N.E.2d 465 (2004) (claim that defendant was not competent to plead guilty; convicting court properly denied the Rule 30(b) motion without conducting an evidentiary hearing); *Com. v. Trussell*, 68 Mass. App. Ct. 452, 862 N.E.2d 444 (2007) (Rule 30(b) provides an adequate remedy for the loss of a direct appeal, and, it would seem, for losses of direct appeals stemming from denial of a motion under Rule 4(c), Mass. R. App. Proc., or Rule 14(b), Mass. R. App. Proc.; Rule 30(b) is not, however, the exclusive remedy for such losses; this state's highest court has suggested that a Rule 30(b) motion for a new trial is a constitutional alternative to the lost right of direct appeal stemming from counsel's failure to comply with any procedural rule); *Com. v. Proulx*, 61 Mass. App. Ct. 454, 811 N.E.2d 993 (2004) (jury instruction claim; order granting relief is reversed); *Com. v. Gilmore*, 59 Mass. App. Ct. 231, 794 N.E.2d 1284 (2003) (claims relating to jury instructions and ineffective assistance of counsel).

§ 24:27 Motion to revoke or revise sentence under Massachusetts Rule of Criminal Procedure 29

Although Rule 30, Mass. R. Crim. Proc., has been described as the state's "exclusive" postconviction remedy, it is not. There are several available Massachusetts postconviction remedies in addition to Rule 30. The motion to revise or revoke sentence, authorized by Rule 29, Mass. R. Crim. Proc., is one of these remedies. This remedy is available in the convicting court and is a postsentencing phase of the original criminal case.

Under Rule 29(a), Mass. R. Crim. Proc., a trial judge, within 60 days after sentencing or of affirmance on direct appeal, may on his own motion or on motion of the defendant revise and revoke the sentence "if it appears that justice has not been done."

Although it seems to have been assumed in 1979 when Rule 29 was adopted that the rule would permit reduction but not an

increase of the sentence, the Massachusetts Supreme Judicial Court later held that under Rule 29 the judge has power to either reduce or increase the sentence.

§ 24:28 Motion to revoke or revise sentence under Massachusetts Rule of Criminal Procedure 29—Text

Rule 29, Mass. R. Crim. Proc., provides:

Rule 29. Revision or Revocation of Sentence

(a) Revision or Revocation. The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done.

(b) Affidavits. If a defendant files a motion pursuant to this rule, he shall file and serve and the prosecutor may file and serve affidavits in support of their respective positions. The judge may rule on a motion filed pursuant to this rule on the basis of facts alleged in the affidavits without further hearing.

(c) Notice. The defendant shall serve the prosecutor with a copy of any motion and affidavit filed pursuant to this rule. If the judge orders that a hearing be held on the motion, the court shall give the parties reasonable notice of the time set for the hearing.

(d) Place of Hearing. A motion filed pursuant to this rule may be heard by the trial judge wherever he is then sitting.

§ 24:29 Motion to revoke or revise sentence under Massachusetts Rule of Criminal Procedure 29—Case law

For case law involving Rule 29, Mass. R. Crim. Proc., see, e.g., *Com. v. Costa*, 472 Mass. 139, 33 N.E.3d 412 (2015) (Rule 29 allows a trial judge, within a limited period of time after the imposition of a sentence, to "revise or revoke such sentence if it appears that justice may not have been done;" it applies to lawful sentences; its purpose is to permit a judge to reconsider the sentence he or she has imposed and determine, in light of the facts as they existed at the time of sentencing, whether the sentence was just;

rule contains strict time limits because the passage of time from the date of sentencing makes it increasingly difficult for a trial judge to make the determination called for by the rule without improperly considering postsentencing events); *Com. v. Selavka*, 469 Mass. 502, 14 N.E.3d 933 (2014) (here, the failure of the trial court judge to impose GPS monitoring on the defendant as a condition of his probation violated the terms of Mass. Gen. Laws Ann., c. 265, § 47, and rendered the resulting sentence unlawful; we determine that Rule 29(a), with its sixty-day time frame, is the proper vehicle by which the Commonwealth may challenge illegal sentences, as here); *Com. v. McGuinness*, 421 Mass. 472, 475, 658 N.E.2d 150 (1995) (a Rule 29 motion to revise or revoke sentence must be filed within 60 days of imposition of sentence; however, under rule, once motion is filed, judge may act on motion at any time); *Com. v. Rodriguez*, 461 Mass. 256, 962 N.E.2d 711 (2012) (Rule 29 recognizes that occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account; in such cases, a judge under rule 29 may reconsider the sentence he has imposed and determine, in light of the facts as they existed at the time of sentencing, whether the sentence was just; a judge, therefore, is not barred from reducing a sentence the judge has imposed until the time limits established in rule 29 to revise or revoke a sentence have expired; the existence of a plea agreement, even a plea agreement with an agreed recommendation, does not bind a judge to a sentence the judge later determines to be unjustly harsh; trial judge, in reducing defendant's sentence for drug possession offenses, did not exercise executive powers, such as would violate State Constitution; judge did not deny prosecutor the opportunity to indict, or reduce the criminal charges brought by district attorney, but simply exercised a quintessential judicial power, i.e., the power to sentence, and ultimately concluded that the agreed sentencing recommendation in plea agreement was more severe than justice permitted); *Com. v. Goodwin*, 458 Mass. 11, 933 N.E.2d 925 (2010) (the power of a trial judge to revise or revoke a criminal disposition is severely limited; under rule 29(a), a trial judge may revise or revoke a sentence only on her own motion or the written motion of a defendant filed within 60 days after the imposition of sentence, and may not take into account conduct of the defendant that occurs subsequent to the original sentencing; however the addition of reasonable conditions to a defendant's probation does not constitute a revision or revocation of a sentence under rule 29(a); after a sentence is final, the time to revise and revoke under hav-

ing expired and any direct appeal having concluded, a defendant may not be sentenced again for that same conviction); *Com. v. Drewnowski*, 74 Mass. App. Ct. 1115, 907 N.E.2d 265 (2009) (motion to revise or revoke a sentence must be filed within sixty days after a sentence is imposed; sixty-day period established by the rule is absolute and may not be extended; if, however, there is a finding of ineffective assistance of counsel based on counsel's failure to file in a timely manner, as he promised, a motion to revise or revoke sentence, the judge should vacate the sentence and reimpose it, thereby affording the defendant an opportunity to file timely a motion pursuant to Mass.R.Crim.P. 29(a) to revise the new sentence); *Com. v. White*, 74 Mass. App. Ct. 1115, 907 N.E.2d 265 (2009) (the dispositions of collateral motions for a new trial do not qualify as triggering events or new starting points for rule 29(a) motions; the rule does not explicitly include or exclude them; however, a workable application of the rule could not include them); *Com. v. McCulloch*, 450 Mass. 483, 879 N.E.2d 685 (2008) (occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account; in such cases the interests of justice and sound judicial administration will be served by permitting the trial judge to reduce the sentence within a reasonable time; rule 29 governs reductions of sentences motivated by demands of fairness; when considering whether to allow a defendant's motion to revise or revoke, a judge may not take into account conduct of the defendant that occurs subsequent to the original sentencing; by the explicit terms of rule 29, if a judge determines that justice has not been done, the judge may revise or revoke a sentence, not a finding of guilt; when judge vacated the finding of guilt on the criminal complaint and entered a continuance without a finding subject to the payment of restitution, he effectively erased all vestiges of the criminal proceedings against the defendant; such action was not within the purview of the judge's authority under rule 29); *Com. v. Fenton F.*, 442 Mass. 31, 809 N.E.2d 1005 (2004) (it is well settled that Rule 29(a) establishes strict jurisdictional time limits for the filing of motions to revise or revoke a sentence; a motion to revise or revoke a sentence must be filed within 60 days after a sentence is imposed and a judge cannot consider a motion filed after this time frame).

§ 24:30 Motion to vacate judgment under Massachusetts General Laws Chapter 278, § 29D—Text

Another Massachusetts postconviction remedy is the motion to

vacate judgment, filed in the convicting court and authorized by Mass. Gen. Laws Ann., ch. 278, § 29D. This remedy was enacted into law in 1978 and amended in 1996 and 2004.

Mass. Gen. Laws Ann., ch. 278, § 29D provides:

§ 29D. Conviction upon plea of guilty, nolo contendere or an admission to sufficient facts; motion to vacate

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

§ 24:31 Motion to vacate judgment under Massachusetts General Laws Chapter 278, § 29D—Case law

For case law involving Mass. Gen. Laws Ann., ch. 278, § 29D,

see e.g., *Com. v. Grannum*, 457 Mass. 128, 928 N.E.2d 339 (2010) (to be entitled to withdraw his admission due to the absence of immigration warnings, the defendant must show that "his plea and conviction may have or has had one of the enumerated consequences" set forth in the immigration warnings: deportation, exclusion from admission to the United States, or denial of naturalization; defendant bears the burden of demonstrating that he may face or is facing one of the enumerated consequences; to meet this burden, the defendant must show more than a hypothetical risk of such a consequence, but that he actually faces the prospect of its occurring; defendant must demonstrate also that the immigration consequences he may face or is facing were caused by the admission he seeks to nullify); *Com. v. Grannum*, 74 Mass. App. Ct. 1110, 905 N.E.2d 604 (2009), aff'd, 457 Mass. 128, 928 N.E.2d 339 (2010) (the second, or remedial, paragraph of G.L. c. 278, § 29D, in effect at the time of the defendant's plea, provided that, in the absence of a record of the required warning, the defendant will receive the benefit of the presumption of its omission; consequently, the absence of any notation on the face of the docket sheet entitles the defendant to the presumption; however, it remains for the defendant to demonstrate that the omission may have one of the enumerated consequences; the remedial withdrawal of a plea or admission, and resulting conviction, materializes only when a defendant can additionally demonstrate that he 'may' become subject to one of the immigration consequences enumerated in the statute; we construe this requirement to mean that a defendant must demonstrate more than a hypothetical risk of such a consequence, but that he actually faces the prospect of its occurring); *Com. v. Gonzalez*, 73 Mass. App. Ct. 1117, 899 N.E.2d 918 (2009) (the defendant has not satisfied his burden under G.L. c. 278, § 29D that, based on his guilty plea, he currently faces immigration consequences, i.e., deportation, exclusion from admission to the United States, or denial of naturalization; merely being 'subject' to removal or that he 'may' be denied citizenship is insufficient).

§ 24:32 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40

The writ of habeas corpus is another postconviction remedy in Massachusetts. Statutory habeas corpus is authorized by Mass. Gen. Laws Ann., ch. 248, §§ 1 to 40.

A writ of habeas corpus may be issued, irrespective of the county in which the person is imprisoned or restrained, by the Massachusetts Supreme Judicial Court, or the superior court, or by a probate or a district court, or by a judge of any of said courts. Mass. Gen. Laws. Ann., ch. 248, § 2.

The notice of appeal must be filed with the clerk of the superior court within 60 days of the date of the entry of the judgment appealed from. Rules 3(a), 4(a), Mass. R. App. Proc. The appeal is to the Appeals Court. Mass. Gen. Laws. Ann., ch. 231, § 113 (final judgment of superior court may be appealed to the Appeals Court); see also Mass. Gen. Laws. Ann., ch. 211A, § 10 (only Supreme Judicial Court may review convictions for first degree murder).

§ 24:33 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40—Case law

For case law, see, e.g., *Garden v. Com.*, 2009 WL 1081942 (Mass. Super. Ct. 2009) (General Laws Chapter 248, Section 1 provides that "Whoever is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of habeas corpus, according to this chapter, to obtain release from such imprisonment or restraint, if it proves to be unlawful . . . " the law provides however that such a petition may only be brought where an individual contends that he is being held unlawfully and the term of a lawfully imposed sentence has expired and who bases arguments on grounds distinct from issues at indictment, trial, conviction, or sentencing stage; indictment, trial or sentencing issues are more properly brought forward by appeals therefrom; the issue raised by Garden in this petition concerns the validity of the indictment; this issue is not properly the subject of a petition for a writ of habeas corpus, but, more properly is the subject of a motion to dismiss in the pending criminal action).

§ 24:34 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40—Postconviction habeas corpus relief since adoption of Rule 30

Since the adoption of Rule 30 it has been a requirement in Massachusetts that Rule 30, rather than habeas corpus, be used when the convicted person seeks to collaterally attack the validity of a conviction or sentence obtained in a Massachusetts court. Mass. Gen. Laws Ann., ch. 248, § 1 (person who has been convicted or is in execution upon legal process, civil or criminal may not prosecute writ of habeas corpus to obtain release); Mass. Gen. Laws Ann., ch. 248, § 25 (court shall have no power to issue a writ of habeas corpus at its discretion for a person who is imprisoned or restrained of his liberty pursuant to a criminal conviction).

§ 24:35 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40—Postconviction habeas corpus relief since adoption of Rule 30—Case law

For case law on the requirement that Rule 30, not habeas corpus, be used for postconviction attacks on Massachusetts convictions or sentences, see, e.g., *In re Aldrich*, 459 Mass. 1001, 942 N.E.2d 170 (2011) (motion for postconviction relief, rather than habeas petition, was proper vehicle for prisoner to raise claim that threatening phone call which he allegedly received from police officer had violated his rights by causing him to decide not to testify on his own behalf; mere fact that prisoner had not to date received the relief he sought through ordinary postconviction motion process, while his appeal from denial of such relief was pending, did not entitle him to habeas corpus relief); *Ledbetter v. Com.*, 456 Mass. 1007, 923 N.E.2d 86 (2010) (habeas petitioner who alleged that he had been improperly denied credit for time spent in custody while awaiting trial on criminal charges failed to establish that he would be entitled to immediate release, as required to warrant habeas corpus relief where even if petitioner would have been entitled to all claimed jail credits, time would still have remained on his sentence); *Glawson v. Com.*, 445 Mass. 1019, 839 N.E.2d 822 (2005) (Glawson seeks release from custody via a writ of habeas corpus, arguing that his Norfolk County convictions were invalid due to the pendency of related indictments in other counties; a petition for a writ of habeas corpus may be brought by an individual who contends that the term of a lawfully imposed sentence has expired and who bases his arguments on grounds distinct from the issues at the indictment, trial, conviction, or sentencing stage; a challenge, such as Glawson raises, to a conviction is properly raised in the trial court by filing a motion under Rule 30).

§ 24:36 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40—Postconviction habeas corpus relief since adoption of Rule 30—Claims unrelated to validity of conviction or sentence

The last sentence of the first paragraph of Mass. Gen. Laws Ann., ch. 248, § 25, which was enacted by the Act of June 30, 1979, ch. 344, § 12, 1979 Mass. Acts 219, 221 to 22, purports to abolish habeas corpus relief for "a person imprisoned or restrained of his liberty pursuant to a criminal conviction," but the Massachusetts courts have held that notwithstanding the 1979 statute Massachusetts prisoners may continue to use habeas corpus

as a postconviction remedy to raise claims unrelated to the validity of the conviction or the sentence.

§ 24:37 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40—Postconviction habeas corpus relief since adoption of Rule 30—Claims unrelated to validity of conviction or sentence—Case law

For case law on the continued availability of postconviction habeas corpus relief in Massachusetts on grounds unrelated to the conviction or sentence, see, e.g., *Glawson v. Com.*, 445 Mass. 1019, 839 N.E.2d 822 (2005) (petition for a writ of habeas corpus may be brought by an individual who contends that the term of a lawfully imposed sentence has expired and who bases his arguments on grounds distinct from the issues at the indictment, trial, conviction, or sentencing stage); *In re Babcock*, 71 Mass. App. Ct. 687, 885 N.E.2d 853 (2008) (to be entitled to issuance of writ of habeas corpus, a petitioner must establish that further incarceration of him is unlawful); *Pridgett v. Commissioner of Correction*, 443 Mass. 1016, 823 N.E.2d 1247 (2005) (petitioner, an inmate in the state prison system, filed a petition alleging that he is being held improperly in the institution's departmental disciplinary unit; even if we were to construe the petition before us as seeking a writ of habeas corpus, the single justice properly could have denied relief because the petitioner failed to establish that he is eligible for immediate release from the respondents' custody; while the petition challenged the conditions of the petitioner's confinement—i.e., in the institution's departmental disciplinary unit rather than the general population—even if the petitioner could show that the conditions of his confinement are unlawful, he would be entitled only to modification of the conditions rather than immediate release); *Rampino v. Superintendent, Old Correctional Center*, 442 Mass. 1028, 814 N.E.2d 1094 (2004) (claim that the inmate's two sentences should be considered together (aggregated), and that the Department of Correction failed to apply statutory good time credits to reduce his total incarcerated time; if the credits were thus applied, the inmate argues, he would be entitled to immediate release); *Reynolds v. Superintendent, Old Colony Correctional Center*, 442 Mass. 1007, 809 N.E.2d 1051 (2004) (claim that the Department of Correction failed to credit inmate with time served on a lawfully imposed sentence; the inmate claims that the superintendent of the Old Colony Correctional Center is now improperly detaining him beyond the expiration date of his sentence); *Com. v. Melo*, 65 Mass. App. Ct. 674, 843 N.E.2d 659 (2006) (prison inmate may use either habeas corpus or declaratory judgment procedures to chal-

lenge the Department of Correction's calculation of a sentence; a prisoner who could show an entitlement to immediate release could invoke a judge's discretionary power to issue a writ of habeas corpus; when a prisoner was not entitled to immediate release and thus could not state a claim for a writ of habeas corpus, he could still avail himself of the declaratory judgment procedures set out in Mass. Gen. Laws Ann., ch. 231A to resolve a controversy which had arisen concerning the execution of his sentence).

§ 24:38 Writ of habeas corpus under Massachusetts General Laws Chapter 248, §§ 1 to 40—Petitioner entitled to immediate release

Habeas corpus may not be used as a postconviction remedy in Massachusetts unless the petitioner is entitled to immediate release.

For case law holding that habeas corpus relief in Massachusetts is limited to situations where the petitioner is entitled to immediate release from custody, see, e.g., *Pridgett v. Commissioner of Correction*, 443 Mass. 1016, 823 N.E.2d 1247 (2005) (petitioner, an inmate in the state prison system, filed a petition alleging that he is being held improperly in the institution's departmental disciplinary unit; even if we were to construe the petition before us as seeking a writ of habeas corpus, the single justice properly could have denied relief because the petitioner failed to establish that he is eligible for immediate release from the respondents' custody; while the petition challenged the conditions of the petitioner's confinement—i.e., in the institution's departmental disciplinary unit rather than the general population—even if the petitioner could show that the conditions of his confinement are unlawful, he would be entitled only to modification of the conditions rather than immediate release); *Com. v. Melo*, 65 Mass. App. Ct. 674, 843 N.E.2d 659 (2006) (prison inmate may use either habeas corpus or declaratory judgment procedures to challenge the Department of Correction's calculation of a sentence; a prisoner who could show an entitlement to immediate release could invoke a judge's discretionary power to issue a writ of habeas corpus).

§ 24:39 Writ of certiorari under Massachusetts General Laws Chapter 249, § 4

In addition to the remedies already discussed in this chapter, there are two Massachusetts postconviction remedies for imprisoned convicts who meet three requirements: (1) they have valid claims against prison or parole officials relating to the duration

or conditions of the confinement; (2) they are ineligible for Rule 30 relief because they do not seek to attack the validity of their conviction or sentence; and (3) they are ineligible for habeas corpus relief because they are not entitled to immediate release.

The first of these two remedies is the writ of certiorari. The convicted inmate may apply for judicial relief by bringing a civil action in the nature of certiorari in the superior court, pursuant to Mass. Gen. Laws Ann., ch. 249, § 4, in order to challenge prison disciplinary proceedings. Such an action must be commenced within 60 days next after the proceeding complained of.

§ 24:40 Writ of certiorari under Massachusetts General Laws Chapter 249, § 4—Case law

For case law on the use of certiorari proceedings by Massachusetts inmates to obtain state judicial review of prison disciplinary proceedings, see, e.g., *Diatchenko v. District Attorney for Suffolk Dist.*, 471 Mass. 12, 27 N.E.3d 349 (2015) (judicial review of decision by parole board on application by inmate serving mandatory life sentence for murder committed as a juvenile takes nature of certiorari, rather than action for declaratory relief, as the review focuses on the parole determinations relating to a particular inmate; most original actions for certiorari, including action by inmate serving mandatory life sentence for murder committed as a juvenile seeking review of parole board decision, are most appropriately brought in the Superior Court); *Chardin v. Police Com'r of Boston*, 465 Mass. 314, 989 N.E.2d 392 (2013), cert. denied, 134 S. Ct. 525, 187 L. Ed. 2d 368 (2013) (General Laws c. 249, § 4, provides for limited judicial review in the nature of certiorari to correct errors of law in administrative proceedings where judicial review is otherwise unavailable; certiorari allows a court to "correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff . . . . In its review, the court may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public"); *Picciotto v. Appeals Court (No. 2)*, 457 Mass. 1002, 927 N.E.2d 998 (2010) (defendant not entitled to relief pursuant to G.L. c. 249, § 4 where they could adequately obtain review of their claims through other available paths: petitions for rehearing and applications for further appellate review; fact that they pursued those paths, albeit unsuccessfully did not entitle them to relief in the nature of certiorari); *Gemme v. Ricciardi*, 25 Mass. L. Rptr. 65, 2008 WL 5505485 (Mass. Super. Ct. 2008) (a party aggrieved by a District Court decision does not have the right to appeal for a trial de novo, but is limited to a civil action in the nature of a writ of certiorari pursuant to G.L.c. 249, § 4; the standard of

review in such an action is to correct substantial errors of law evident from the record; thus, a reviewing Superior Court does not weigh evidence, find facts, exercise discretion or substitute its own judgment; the function of a writ of certiorari is to correct errors of law apparent on the record and not reverse or review findings of fact; the review is confined to the record and whether the decision is legally tenable and supported by substantial evidence).

§ 24:41 Declaratory judgment action under Massachusetts General Laws Chapter 231A, §§ 1 et seq.

The second of these two remedies is the action for declaratory judgment. The imprisoned convict may institute a declaratory judgment action in the superior court, pursuant to Mass. Gen. Laws Ann., ch. 231A, §§ 1 et seq., for the purpose of obtaining judicial review of various forms of alleged misconduct by prison or parole authorities. A final judgment entered in a declaratory judgment action is appealable. Mass. Gen. Laws. Ann., ch. 231A, § 4.

§ 24:42 Declaratory judgment action under Massachusetts General Laws Chapter 231A, §§ 1 et seq.—Case law

A habeas corpus petition seeking relief from the conduct of prison or parole officials, but not immediate release, may be treated as an action for declaratory relief.

For case law on the use of declaratory judgment proceedings by Massachusetts inmates, see, e.g., *Goe v. Commissioner of Probation*, 473 Mass. 815, 46 N.E.3d 997 (2016) (probationer whose supervision is transferred to Massachusetts pursuant to the Interstate Compact for Adult Offender Supervision should file a complaint for declaratory judgment to obtain a determination that a special condition of probation that was added by Massachusetts is not mandated by Massachusetts law or is unconstitutional); *DuPont v. Commissioner of Correction*, 448 Mass. 389, 861 N.E.2d 744 (2007) (inmate filed complaint for declaratory relief, raising procedural challenges to the disciplinary hearing process and alleging that sentencing him to prison disciplinary unit denied him equal protection of the law because there was no such unit in use for female prisoners); *Goetzendanner v. Superintendent, Massachusetts Correctional Inst., Norfolk*, 71 Mass. App. Ct. 533, 883 N.E.2d 1250 (2008) (petition for writ of habeas corpus, claiming Department of Correction improperly executed the intervening sentences petitioner received for offenses he committed while on parole from concurrent reformatory sentences,

would be treated as a claim for declaratory relief; the allegedly improper execution would not entitle petitioner to immediate release, but there was a controversy between petitioner and prison authorities regarding the proper execution of his sentences); *Com. v. Melo*, 65 Mass. App. Ct. 674, 843 N.E.2d 659 (2006) (prison inmate may use either habeas corpus or declaratory judgment procedures to challenge the Department of Correction's calculation of a sentence; a prisoner who could show an entitlement to immediate release could invoke a judge's discretionary power to issue a writ of habeas corpus; when a prisoner was not entitled to immediate release and thus could not state a claim for a writ of habeas corpus, he could still avail himself of the declaratory judgment procedures set out in Mass. Gen. Laws Ann., ch. 231A to resolve a controversy which had arisen concerning the execution of his sentence). See also *Diatchenko v. District Attorney for Suffolk Dist.*, 466 Mass. 655, 1 N.E.3d 270 (2013) (relief from unconstitutional sentence granted).

§ 24:43 Motion to correct clerical error under Massachusetts Rule of Criminal Procedure 42

Another Massachusetts postconviction remedy is the motion to correct clerical error, filed in the convicting court as part of the original criminal case, pursuant to Rule 42, Mass. R. Crim. Proc. Rule 42 is modeled after Rule 36, Fed. R. Crim. Proc. Rule 42 embodies the "well established" principle that a Massachusetts court "has plenary power at any time to correct errors in its records." *Com. v. Melo*, 65 Mass. App. Ct. 674, 843 N.E.2d 659 (2006) (Rule 42 provides a procedure to correct clerical errors in court judgments or records of an otherwise legal sentence imposed by a judge); *Doyle v. Com.*, 472 Mass. 1002, 32 N.E.3d 1256 (2015) (defendant's double jeopardy and ineffective assistance of counsel claims could have been raised either on direct appeal or in postconviction relief petition, and therefore claims could not be raised for the first time in habeas corpus petition or purported appeal from denial of habeas petition; habeas corpus relief is only available for claims involving grounds distinct from the issues at the indictment, trial, conviction, or sentencing stage).

§ 24:44 Motion to correct clerical error under Massachusetts Rule of Criminal Procedure 42—Text of Rule 42

Rule 42, Mass. R. Crim. Proc., provides:

Rule 42. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the

record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be corrected with leave of the appellate court.

"Rule 42 is limited to the correction of 'clerical mistakes' or errors 'arising from oversight or omission' and does not apply to the correction of errors of substance, such as an illegal sentence or improperly obtained conviction. The federal criminal analogue is said to be typically invoked when the court has authority to impose consecutive as well as concurrent sentences, but the record is ambiguous as to which was in fact given." Reporter's Notes, Rule 42, Mass. R. Crim. Proc.

§ 24:45 Writ of error coram nobis

There are no reported instances of the writ of error coram nobis being used as a postconviction remedy in Massachusetts; thus, coram nobis has never been a recognized postconviction remedy in Massachusetts.

§ 24:46 Postconviction DNA testing statute

Massachusetts has a postconviction DNA testing statute enacted in 2012 and codified at Mass. Gen. Laws Ann., ch. 278A and is entitled 'Post Conviction Access to Forensic and Scientific Analysis'. As codified, the statute provides:

Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases

Title II. Proceedings in Criminal Cases

Chapter 278A. Post Conviction Access to Forensic and Scientific Analysis

§ 1. Definitions

Section 1. As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:—

"Analysis", the process by which a forensic or scientific technique is applied to evidence or biological material to identify the perpetrator of a crime.

"Biological material", a sexual assault forensic examination kit, semen, blood, saliva, hair, skin tissue or other identified biological substance.

"Conviction", a verdict or finding of guilty, a plea of guilty, a plea of nolo contendere or an adjudication of delinquency as a juvenile entered by the trial court.

"Exhaustive testing", analysis of a particular item of evidence or biological material that precludes replicate analysis of the evidence or biological material.

"Factually innocent", a person convicted of a criminal offense who did not commit that offense.

"Governmental entity", an official body of the commonwealth, or of a county, city or town within the commonwealth.

"Identity", the moving party's identity as the perpetrator of the offense for which the moving party was convicted in the underlying case.

"Moving party", a person who files a motion under this chapter.

"Post conviction", indicates any time after which a conviction has been entered.

"Prosecuting attorney", the district attorney for the district in which the moving party was convicted or the attorney general of the commonwealth.

"Replicate analysis", the duplication of an analysis performed on a particular item of evidence or biological material.

"Underlying case", the trial court proceedings that resulted in the conviction of the moving party.

"Victim", any natural person who suffered direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of the crime or delinquency case that is the subject of the underlying case; "victim" shall also include the parent, guardian, legal representative or administrator or executor of the estate of such person if that person is a minor, incompetent or deceased.

§ 2. Conditions for filing motion for forensic or scientific analysis; effect of chapter upon analysis under other circumstances

Section 2. A person may file a motion for forensic or scientific analysis under this chapter if that person: (1) has been convicted of a criminal offense in a court of the commonwealth; (2) is incarcerated in a state prison, house of correction, is on

parole or probation or whose liberty has been otherwise restrained as the result of a conviction; and (3) asserts factual innocence of the crime for which the person has been convicted.

This chapter shall not be construed to prohibit the performance of forensic or scientific analysis under any other circumstances, including by agreement between the person convicted of a criminal offense and the prosecuting attorney.

§ 3. Filing of motion; contents; motion for discovery; affidavit of factual innocence; expeditious review of motion

Section 3. (a) A person seeking relief under this chapter shall file a motion in the court in which the conviction was entered, using the same caption and docket number as identified the underlying case.

(b) The motion shall include the following information, and when relevant, shall include specific references to the record in the underlying case or to affidavits that are filed in support of the motion that are signed by a person with personal knowledge of the factual basis of the motion:

(1) the name and a description of the requested forensic or scientific analysis;

(2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;

(3) a description of the evidence or biological material that the moving party seeks to have analyzed or tested, including its location and chain of custody if known;

(4) information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case; and

(5) information demonstrating that the evidence or biological material has not been subjected to the requested analysis because:

(i) the requested analysis had not yet been developed at the time of the conviction;

(ii) the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction;

(iii) the moving party and the moving party's attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction;

(iv) the moving party's attorney in the underlying case

was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or

(v) the evidence or biological material was otherwise unavailable at the time of the conviction.

(c) If the moving party is unable to include for filing with the motion any of the items or information described in subsection (b), or if the moving party lacks items or information necessary to establish any of the factors listed in subsection (b) of section 7, the moving party shall include a description of efforts made to obtain such items and information and may move for discovery of such items or information from the prosecuting attorney or any third party.

(d) The moving party shall file with the motion an affidavit stating that the moving party is factually innocent of the offense of conviction and that the requested forensic or scientific analysis will support the claim of innocence. A person who pleaded guilty or nolo contendere in the underlying case may file a motion. The court shall not find that identity was not or could not have been a material issue in the underlying case because of the plea. A person who is alleged to have, or admits to having, made a statement that is or could be incriminating may file a motion under this chapter. The court shall not find that identity was not or should not have been a material issue in the underlying case because the moving party made, or is alleged to have made, an incriminating statement. If the moving party entered a plea of guilty or nolo contendere to the offense of conviction or made an incriminating statement, the moving party shall state in the affidavit that the claim of factual innocence is made notwithstanding the plea or incriminating statement.

(e) The court shall expediously review all motions filed and shall dismiss, without prejudice, any such motion without a hearing if the court determines, based on the information contained in the motion, that the motion does not meet the requirements set forth in this section. The prosecuting attorney may provide a response to the motion, to assist the court in considering whether the motion meets the requirement under this section. The court shall notify the moving party and the prosecuting attorney as to whether the motion is sufficient to proceed under this chapter or is dismissed.

§ 4. Jurisdiction over motion; service of motion; response by prosecuting attorney

Section 4. (a) The moving party shall file a motion under section 3 with the court that adjudicated the underlying case and shall serve a copy of the motion on the prosecuting attorney.

(b) If the motion is not dismissed by the court under subsection (e) of section 3, the prosecuting attorney shall file a response with the court within 60 days after the date upon which the court issues notice under said subsection (e) of said section 3, and shall simultaneously serve the response on the moving party. The prosecuting attorney may request additional time in which to file the response, which the court may grant for good cause shown.

(c) The prosecuting attorney's response shall include any specific legal or factual objections that the prosecuting attorney has to the requested analysis.

§ 5. Appointed Counsel

Section 5. The court may assign or appoint counsel to represent a moving party who meets the definition of indigency under section 2 of chapter 211D in the preparation and presentation of motions filed under this chapter.

§ 6. Hearing

Section 6. (a) The court shall order a hearing on the motion if the motion meets the requirements of section 3. The moving party shall be present for the hearing unless the moving party waives the party's presence at the hearing.

(b) The judge who conducted the trial or accepted the moving party's plea of guilty or nolo contendere in the underlying case shall conduct the hearing if possible.

§ 7. Findings of fact and conclusions of law; criteria for allowing requested analysis; orders for discovery

Section 7. (a) After reviewing the motion, the prosecuting attorney's response and after holding a hearing, the court shall state findings of fact and conclusions of law on the record, or shall make written findings of fact and conclusions of law that support the decision to allow or deny a motion brought under section 3.

(b) The court shall allow the requested forensic or scientific analysis if each of the following has been demonstrated by a preponderance of the evidence:

(1) that the evidence or biological material exists;

(2) that the evidence or biological material has been

subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value;

(3) that the evidence or biological material has not been subjected to the requested analysis for any of the reasons in clauses (i) to (v), inclusive, of paragraph (5) of subsection (b) of section 3;

(4) that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case;

(5) that the purpose of the motion is not the obstruction of justice or delay; and

(6) that the results of the particular type of analysis being requested have been found to be admissible in courts of the commonwealth.

(c) The court on motion of any party, after notice to the opposing party and any third party from whom discovery is sought, and an opportunity to be heard, may authorize such discovery as provided for under Rule 30(c)(4) of the Massachusetts Rules of Criminal Procedure, from either party or any third party as is deemed appropriate, subject to appropriate protective orders or an order to the party seeking discovery to produce reciprocal discovery.

Such discovery may include items and biological materials from third parties, provided the party seeking discovery demonstrates that analysis of these items or biological material will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator of the crime.

If, in response to a motion made under subsection (c) of section 3, the court finds good cause for the moving party's inability to obtain items or information required under subsection (b) of said section 3 and subsection (b) of section 7, the court may order discovery to assist the moving party in identifying the location and condition of evidence or biological material that was obtained in relation to the underlying case, regardless of whether it was introduced at trial or would be admissible. The court, when considering such discovery requests, shall not require the establishment of a prima facie case for relief under Rule 30 of the Massachusetts Rules of Criminal Procedure.

§ 8. Conditions of analysis; selection of forensic service provider; equal access to personnel and information; retention of material evidence to allow for replicate analysis; cooperation with laboratory by moving party

Section 8. (a) In allowing a motion under section 3, the court shall specify conditions on the analysis, including, but not limited to, the transportation, handling and return of evidence or biological materials, to protect the integrity of the evidence or biological material and the analysis.

(b) The prosecuting attorney and the moving party shall agree on a forensic services provider accredited by an accreditation body that is a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Agreement and offers forensic laboratory accreditation services to conduct the analysis, which, except in the case of exhaustive testing, may include the forensic and technology center of the state police crime laboratory or the Boston police department crime laboratory units.

(c) If the prosecuting attorney and the moving party are unable to agree on a forensic services provider, the prosecuting attorney and the moving party shall submit to the court a list of not more than 3 forensic services providers who are accredited by an accreditation body that is a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Agreement and offers forensic laboratory accreditation services and have the capability to perform the requested analysis. The court shall select a forensic services provider from either list. For purposes of this section, "laboratory" shall refer to the forensic services provider selected under this subsection or subsection (b).

(d) The laboratory shall give equal access to its personnel, opinions, conclusions, reports and other documentation to the prosecuting attorney and the moving party.

(e) The laboratory shall retain and maintain the integrity of a sufficient portion of the evidence or biological material for replicate analysis. If, after initial examination of the evidence or biological material, but before the actual analysis, the laboratory determines that there is insufficient material for replicate analysis, it shall simultaneously notify in writing the prosecuting attorney, the moving party and the court. Exhaustive testing shall not occur except by specific order of the court. In the event that exhaustive testing is so authorized, upon request of either party, the court shall make such orders to ensure that representatives of the moving party

and the prosecuting attorney have the opportunity to observe the analysis, unless such observation is inconsistent with the practices or protocols of the laboratory conducting the analysis.

(f) The moving party shall cooperate with the laboratory. At the laboratory's or the prosecuting attorney's request and upon court order, the moving party shall provide biological samples to the laboratory or to law enforcement personnel. If the moving party unreasonably fails to cooperate with such orders, the court may deny the motion with prejudice.

§ 9. Time for Performing Analysis

Section 9. Upon allowance of a motion under section 3, analysis shall take place as soon as practicable.

§ 10. Cost of Analysis

Section 10. The costs of the analysis shall be paid:

(1) by the moving party if the moving party does not meet the definition of indigency under section 2 of chapter 211D and has sufficient means to make such payment;

(2) if the moving party meets the definition of indigency under said section 2 of said chapter 211D, as an extra fee or cost under sections 27A through 27G, inclusive, of chapter 261; or

(3) if a person is indigent, but has the ability to pay a reduced fee as defined under said section 2 of said chapter 211D, by the moving party to the maximum feasible amount possible given the financial resources of the moving party as the court deems equitable.

§ 11. Effect of proceedings on terms of sentence imposed

Section 11. Proceedings under this chapter shall not stay or otherwise interfere with a term of incarceration, parole, probation or other sentence imposed.

§ 12. Disclosure of analysis results; orders to produce data, documents and notes

Section 12. (a) The results of the analysis shall be simultaneously disclosed to the moving party, the prosecuting attorney and the court.

(b) The court shall, at the request of a party or on its own initiative, order production of the underlying laboratory data, documents and notes.

§ 13. Additional analysis ordered upon inconclusive findings

Section 13. If the analysis is inconclusive, the court may order any additional analysis requested if the court concludes that the requirements of subsection (b) of section 7 are met.

§ 14. Victim Notification

Section 14. (a) If a motion is filed under section 3, the prosecuting attorney shall notify the victim of the crime in the underlying case.

(b) The prosecuting attorney shall notify the victim if the court allows a motion for forensic or scientific analysis and, if the victim is notified of the allowance of the motion, shall promptly notify the victim of the result of the analysis.

§ 15. Waiver of Right to File Motion

Section 15. The right to file a motion under this chapter shall not be waived. This prohibition of any waiver includes, but is not limited to, any stated or unstated waiver that is or is alleged to be part of any agreement or understanding related to any plea of guilty or of nolo contendere or to any sentencing or appellate proceeding or to any correctional placement or conditions.

§ 16. Retention and preservation of evidence or biological material by governmental entities; regulations

Section 16. (a) Any governmental entity that is in possession of evidence or biological material that is collected for its potential evidentiary value during the investigation of a crime, the prosecution of which results in a conviction, shall retain such evidence or biological material for the period of time that a person remains in the custody of the commonwealth or under parole or probation supervision in connection with that crime, without regard to whether the evidence or biological material was introduced at trial. Each governmental entity shall retain all such evidence or biological material in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration. The evidence or biological material need not be preserved if it is to be returned to a third party or if it is of such a size, bulk or physical character as to render retention impracticable.

(b) The director of the crime laboratory within the department of state police, in consultation with the forensic sciences advisory board established by section 184A of chapter 6, shall promulgate regulations governing the retention and preservation of evidence or biological material by any governmental entity. The regulations shall include standards

for maintaining the integrity of the materials over time, the designation of officials at each governmental entity with custodial responsibility and requirements for contemporaneously recorded documentation of individuals having and obtaining custody of any evidence or biological material.

§ 17. Civil or criminal liability of governmental officials; willful or wanton misconduct or gross negligence by governmental entities resulting in deterioration or destruction of evidence; damages

Section 17. (a) Governmental officials and employees acting in good faith shall not be liable in a civil or criminal proceeding for any act under this chapter.

(b) If a governmental entity responsible for the preservation of evidence or biological material engages in willful or wanton misconduct or gross negligence, which results in the deterioration or destruction of evidence or biological material so that a laboratory is unable to perform adequate or proper analysis, that entity shall be subject to proceedings for contempt.

(c) Nothing in this chapter shall create any cause of action for damages against the commonwealth or any of its subdivisions or officers, employees, agents or subdivisions, except as provided in this section.

§ 18. Appeals

Section 18. An order allowing or denying a motion for forensic or scientific analysis filed under this chapter shall be a final and appealable order. If the moving party appeals an order denying a motion for forensic or scientific analysis the moving party shall file a notice of appeal with the court within 30 days after the entry of the judgment.

Added by St.2012, c. 38, eff. May 17, 2012.

§ 24:47 Postconviction DNA testing statute—Case law

For case law on Massachusetts postconviction DNA testing statute, see, e.g., *Com. v. Clark*, 472 Mass. 120, 34 N.E.3d 1 (2015) (in 2012, the Legislature enacted this state's postconviction DNA testing statute, Mass. Gen. Laws, ch. 278A, "An Act providing access to forensic and scientific analysis;" the enactment, which occurred in the wake of national recognition that DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty, permits access to forensic and scientific evidence on the filing of a motion by an individual who has been convicted of a criminal offense, who consequently has been

incarcerated, and who asserts factual innocence; the purpose of the act was to remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques that provide a more reliable basis for establishing a factually correct verdict than the evidence available at the time of the original conviction; the act created a process, separate from the trial and any subsequent proceedings challenging an underlying conviction, that permits forensic and scientific analysis of evidence or biological material, the results of which could support a motion for a new trial; Clark filed a motion under the statute, which was denied by the trial court; Clark contends on appeal that the judge misinterpreted the requirements for postconviction DNA analysis as set forth in the plain language of ch. 278A, and, consequently, erred in denying his motion for such testing and for related discovery; for the reasons that follow, we conclude that Clark met the requirements of the statute, that the judge erred in determining that Clark was required to establish the existence of biological material on the handle of the knife, that the judge properly denied Clark's request for discovery, and that the judge must make findings of fact and conclusions of law regarding whether Clark satisfied ch. 278A, § 7(b)(2), (3), (5), and (6); accordingly, we reverse the judge's order denying Clark's motion, and remand for further proceedings consistent with this opinion; with respect to the threshold inquiry, a person seeking relief under ch. 278A shall file a motion that includes all of the information set forth in § 3(b), and, § 7 when relevant, and shall include specific references to the record in the underlying case, or to supporting affidavits signed by a person with personal knowledge of the factual basis of the motion; accompanying the motion shall be an affidavit stating that the moving party is factually innocent of the offense of conviction and that the requested forensic or scientific analysis will support the claim of innocence; the Commonwealth may provide a response to the motion, to assist the court in considering whether the motion meets the requirements of § 3; then, a judge shall review the motion expeditiously and shall dismiss, without prejudice, any such motion without a hearing if the court determines, based on the information contained in the motion, that the motion does not meet the requirements set forth in § 3; the court shall notify the parties as to whether the motion is dismissed, or whether it is sufficient to proceed to the next level of review under § 7; the threshold inquiry made pursuant to § 3 is limited, based primarily on the moving party's filings, and essentially nonadversarial; a motion meets the requirements of § 3, then a judge shall order a hearing on the motion; the Commonwealth shall file a response with the

court within sixty days after the court issues notice of further proceedings, and shall include any specific legal or factual objections it may have to the requested analysis; after reviewing the motion, together with the Commonwealth's response, and holding the requisite hearing, the judge shall determine whether the moving party has demonstrated, by a preponderance of the evidence, all of the criteria set forth in § 7(b); if the moving party has done so, then the judge shall allow the requested forensic or scientific analysis; the judge is required to state findings of fact and conclusions of law on the record, or issue written findings and conclusions that support the decision to allow or deny the motion brought under § 3; in addition, the judge may authorize discovery, as appropriate; we have said that the threshold requirement of § 3(b)(4) is a modest one; we conclude that the judge erred in determining that Clark failed to satisfy his burden of demonstrating the requirements of § 7(b)(1) and (4); the judge properly denied Clark's request for discovery regarding a pair of men's socks because Clark failed to satisfy his burden of demonstrating that searching for and analyzing the socks would provide evidence material to the identification of the perpetrator of the underlying crimes); *Com. v. Coutu*, 88 Mass. App. Ct. 686, 42 N.E.3d 622 (2015), review denied, 474 Mass. 1103, 48 N.E.3d 467 (2016) (the judge allowed the defendant's motion, pursuant to Mass. Gen. Laws, ch. 278A, § 7, for postconviction DNA testing; on appeal, the Commonwealth claims the motion should have been denied; we affirm; the Commonwealth claims the judge erred in concluding that the defendant was entitled to postconviction DNA testing where there was no reasonable potential that testing would result in evidence material to the identification of the perpetrator of the crime; we disagree; here, the defendant established that DNA testing of the victim's finger swabs has to result in material identification evidence; the Commonwealth also asserts that the defendant fails to satisfy ch. 278A, § 3(b)(5), which is required under § 7(b)(3), because a reasonably effective attorney would not have sought DNA analysis of the victim's finger swabs; we disagree; for the purposes of ch. 278A, the defendant must demonstrate that a reasonably effective attorney would have sought the requested analysis, not that every reasonably effective attorney would have done so; the fact that trial counsel followed one trial strategy where another reasonably effective attorney might have sought DNA testing is enough to satisfy § 3(b)(5)(iv); because the Legislature enacted ch. 278A with the intent to remedy the wrongful convictions of factually innocent persons, we construe the statute and its language in a manner that is generous to the moving party; we therefore afford the defendant the opportunity for testing despite the strength of

the Commonwealth's case, and our affirmance of his convictions); *Com. v. Wade*, 467 Mass. 496, 5 N.E.3d 816 (2014) (on September 8, 1997, a Superior Court jury convicted Robert D. Wade of murder in the first degree on a theory of felony-murder and aggravated rape; on direct appeal, the conviction of murder was affirmed and the conviction of aggravated rape was vacated as duplicative; since at least December, 2002, Wade has sought unsuccessfully to obtain DNA testing of the physical evidence that was used to support the expert opinion evidence introduced at trial; in 2012, the Legislature enacted G.L. c. 278A, "An Act providing access to forensic and scientific analysis" (act); the enactment, which occurred in the wake of national recognition that DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty, permits access to forensic and scientific evidence on the filing of a motion by an individual who has been convicted of a criminal offense, who consequently has been incarcerated, and who asserts factual innocence; on March 26, 2012, Wade filed a motion and affidavit pursuant to the Act; the motion asserts that he is factually innocent of the crimes of murder and rape; the motion states further that the evidence he seeks to have analyzed has not been subjected to DNA testing because his trial counsel failed to request it, that serological evidence presented at trial established that a third party contributed to seminal fluid found in the victim's vagina and on her clothes, and that DNA testing could establish the identity of that third party and "may wholly exonerate" the defendant; the motion was denied without prejudice by a judge of the Superior Court who concluded that the DNA testing sought by Wade did not appear to have the potential to produce material evidence; a second Superior Court judge denied Wade's renewed motion, with a reference to the first denial, and also denied Wade's motion for reconsideration of that denial; Wade's appeal from the denial of his motion for DNA testing raises issues of first impression regarding the interpretation of the Act; we are called upon to consider whether the motion meets the threshold requirements of the Act, such that Wade would be entitled to a hearing on his request for DNA testing; we conclude that the motion judge applied an incorrect standard in denying Wade's motion for DNA testing, and that the motion meets the requirements of the Act; accordingly, the order denying the motion must be reversed, and the matter remanded for an evidentiary hearing pursuant to the Act; the Act creates a two-step procedure for requesting DNA testing or analysis; first, a threshold determination is made by the court in which the conviction was entered as to whether the motion meets the preliminary criteria set forth in the Act; if those criteria are met, a hearing "shall" be

conducted pursuant to the Act, to determine whether a petitioner has established by a preponderance of the evidence sufficient facts for a judge to order DNA testing or further discovery; here we are concerned only with the threshold review at the first step, that is, whether Wade's motion meets the preliminary requirements of the Act; based on the plain language of the statute and the purpose for which it was enacted, it is clear that the Legislature intended the determination of whether a motion meets the requirements such that the moving party is entitled to proceed to a hearing, to be a limited, threshold inquiry; a judge conducting this inquiry is not called upon to make credibility determinations, or to consider the relative weight of the evidence or the strength of the case presented against the moving party at trial; review at this stage is limited to the motion, its supporting documents and affidavits, and any response that the Commonwealth may file to assist the court a motion for scientific testing under the Act is conceived as separate from the trial process and any postconviction proceedings challenging the underlying conviction; the Act was intended to create the process that allows the DNA testing, the results of which subsequently might support a motion for a new trial; if a moving party were to prevail on a motion seeking DNA testing and subsequently received test results favorable to his claim, the moving party would then be required to file a motion for a new trial pursuant to Mass. R.Crim. P. 30(b) before a court could consider whether the moving party is entitled to a new trial; the language of the Act sets a far lower bar for access to scientific testing than that required by similar statutes in other States; in particular, the Legislature elected to include a provision requiring that scientific testing be material to identity, but did not condition access to such testing on some degree of proof that the test results will raise doubt about the conviction; the order denying the motion is reversed).

§ 24:48 Erroneous Convictions Act

Massachusetts has an erroneous convictions act, enacted in 2004 by the Act of Dec. 30, 2004, ch. 444, 2004 Mass. Sess. Laws 1318 (West), and codified at Mass. Gen. Laws Ann., ch. 258D.

As codified, the statute provides:

Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases

Title IV. Certain Writs and Proceedings in Special Cases

Chapter 258D. Compensation for Certain Erroneous Felony Convictions

§ 1. Erroneous felony conviction claims; class of eligible persons; burden of proof; definitions; right to jury trial

(A) A claim may be brought against the commonwealth for an erroneous felony conviction resulting in incarceration as provided in this chapter.

(B) The class of persons eligible to obtain relief under this chapter shall be limited to the following:—

(i) those that have been granted a full pardon pursuant to section 152 of chapter 127, if the governor expressly states in writing his belief in the individual's innocence, or

(ii) those who have been granted judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual as set forth in clause (vi) of subsection (C), and if (a) the judicial relief vacates or reverses the judgment of a felony conviction, and the felony indictment or complaint used to charge the individual with such felony has been dismissed, or if a new trial was ordered, the individual was not retried and the felony indictment or complaint was dismissed or a nolle prosequi was entered, or if a new trial was ordered the individual was found not guilty at the new trial; and (b) at the time of the filing of an action under this chapter no criminal proceeding is pending or can be brought against the individual by a district attorney or the attorney general for any act associated with such felony conviction.

(C) In order for an individual to prevail and recover damages against the commonwealth in a cause of action brought under this chapter, the individual must establish, by clear and convincing evidence, that:—

(i) he is a member of the class of persons defined in subsection (B);

(ii) he was convicted of an offense classified as a felony;

(iii) he did not plead guilty to the offense charged, or to any lesser included offense, unless such guilty plea was

withdrawn, vacated or nullified by operation of law on a basis other than a claimed deficiency in the plea warnings required by section 29D of chapter 278;

(iv) he was sentenced to incarceration for not less than one year in state prison or a house of correction as a result of the conviction and has served all or any part of such sentence;

(v) he was incarcerated solely on the basis of the conviction for the offense that is the subject of the claim;

(vi) he did not commit the crimes or crime charged in the indictment or complaint or any other felony arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser included felony; and

(vii) to the extent that he is guilty of conduct that would have justified a conviction of any lesser included misdemeanor arising out of or reasonably connected to facts supporting the indictment or complaint, that he has served the maximum sentence he would have received for such lesser included misdemeanor and not less than one additional year in a prison.

(D) The claimant shall attach to his claim certified copies of: the mittimus that shows the claimant's sentence to incarceration and; the warrants necessary to grant a pardon pursuant to section 152 of chapter 127 or; criminal case docket entries or documents related thereto in the case of judicial relief.

(E) For the purposes of this chapter "conviction" or "convicted" shall include an adjudication as a youthful offender, if such adjudication resulted in the youthful offender's incarceration in a house of correction or state prison.

(F) The commonwealth and any individual filing an action for compensation under this chapter shall have the right to a jury trial on any action so filed. In the interest of doing substantial justice, with regard to weight and admissibility of evidence submitted by the claimant or the commonwealth, the court presiding at a jury-waived trial shall exercise its discretion by giving due consideration to any difficulties of proof caused by the passage of time, the death or unavailability or witnesses, or other factors not caused by the claimant, or those acting on the claimant's or the commonwealth's behalf. At a jury trial, the court shall consider these same factors as part of the exercise of its discretion when determining the admissibility and weight of evidence, and the court shall instruct the jury that it may consider the same factors when it weighs the evidence presented at trial. No evidence proffered by any party shall be excluded on grounds that it was seized or obtained in violation of the Fourth, Fifth or Sixth amendments to the Con-

stitution of the United States, or in violation of Articles 12 or 14 of Part the First of the Constitution of Massachusetts.

§ 2. Compensation for claimants

A claimant shall not be entitled to compensation from the commonwealth for any incarceration or portion thereof, which was or will be credited toward a sentence for, or during which the claimant was also serving a concurrent sentence for the conviction of another crime. In those cases in which only a pardon from the governor is used to support a pending action against the commonwealth brought under this chapter, the subsequent exercise of the governor's authority to revoke such pardon pursuant to section 152 of chapter 127 shall immediately negate the validity of any such pending action and the superior court shall immediately issue a summary judgment in favor of the commonwealth on such grounds.

§ 3. Jurisdiction

A civil action brought against the commonwealth under this chapter shall be brought in the county where the claimant was convicted or in Suffolk county. The superior court shall have exclusive jurisdiction of all such actions. All civil actions brought pursuant to this chapter shall in all manner proceed by and be governed by the rules of civil procedure except as otherwise expressly provided in this chapter.

§ 4. Service of process; notification; victim's right to testify; evidence; arbitration and settlements.

Service of process for a civil action brought pursuant to this chapter shall be made upon the attorney general for the commonwealth who shall defend the commonwealth against all such claims. The attorney general shall immediately notify the district attorney for the county that prosecuted the felony that forms the basis for the claim. Any district attorney so notified by the attorney general shall immediately notify any individual meeting the definition of "victim", as set forth in section 1 or chapter 258B, of the felony conviction that forms the basis of the claim. Any such victim shall be allowed, but may not be compelled, to testify or furnish other evidence. If such victim is unavailable to testify or decides not to testify, his prior recorded testimony, given under oath at a relevant proceeding, shall only be admissible after judicial review and determination that such testimony, or portion thereof, may be helpful to the factfinder. The attorney general shall consult with the appropriate district attorney relative to the merits of such action and, following consultation, shall have discretion to determine whether to proffer as evidence any documents, records, testimony or other information brought forward to the attorney general by such district attorney in defense of the com-

monwealth at a time deemed appropriate by the attorney general. The attorney general may arbitrate or settle any claim for damages filed under this chapter, but any award or settlement in excess of $80,000 shall be made only with the prior approval of the secretary of administration and finance. The acceptance by the claimant of any such award or settlement shall be in writing and shall, except when procured by fraud, be final and conclusive on the claimant, and shall constitute a complete release of any claim by the claimant against the commonwealth and a complete bar to any action by the claimant against the commonwealth by reason of the same subject matter.

§ 5. Damages

(A) Upon a finding or verdict that the claimant has met the requirements of section 1 by the requisite standard of proof and is not barred from compensation by section 2, the court or the jury shall determine the damages that shall be payable to the claimant. In making such determination, the court or jury shall consider, but not be limited to, the consideration of: the income the claimant would have earned, but for his incarceration; the particular circumstances of the claimant's trial and other proceedings; the length and conditions under which the claimant was incarcerated and; any other factors deemed appropriate under the circumstances in order to fairly and reasonably compensate the claimant. The court, in its discretion, may admit expert testimony on these or any factors. The court may include, as part of its judgment against the commonwealth, an order requiring the commonwealth to provide the claimant with services that are reasonable and necessary to address any deficiencies in the individual's physical and emotional condition that are shown to be directly related to the individual's erroneous felony conviction and resulting incarceration through documentary or oral evidence presented to the court or jury by the claimant as part of the claim if the claimant provided in his original claim for compensation under this chapter:

(i) the nature of the services that he seeks; and

(ii) the agencies, departments or commissions of the commonwealth from which he seeks to receive such services. Any such agency, department or commission so named in the claim shall be entitled to reasonable notice of the court proceedings pertaining to the possible ordering of such services and shall be given an opportunity to be heard on whether such agency is the appropriate entity to provide such services if so ordered. The court may also include in its judgment an order that entitles any claimant who wishes to apply for and receive educational services from any state or

community college of the commonwealth including, but not limited to, the University of Massachusetts at Amherst and its satellite campuses, a 50% reduction of the tuition and fees applicable to such services at said institutions. Once the damages have been determined, the court shall enter a judgment against the commonwealth for the claimant in an amount certain, payable in either a lump sum or in annuity installment payments set by the court; provided, however, that any such annuity installment payments shall have fixed limits on their annual amount and on the time period which they shall be paid to the claimant. A judgment against the commonwealth may not include punitive or exemplary damages. The total liability of the commonwealth for any judgment entered under this chapter shall not exceed $500,000. Notwithstanding any general or special law to the contrary, the clerk of court shall not add to the judgment and the commonwealth shall not be liable for paying, any prejudgment or post judgment interest on damages. Subject to section 4, relative to award or settlements, the rights and remedies afforded to certain individuals by this chapter are not intended to limit in any way any rights or remedies that such individuals or other individuals may be entitled to exercise and pursue under chapter 258.

(B) In awarding damages under this section, the court or jury shall not offset the award by any expenses incurred by the commonwealth or any political subdivision of the commonwealth including, but not limited to, expenses incurred to secure the claimant's custody, or to feed, clothe or provide medical services for the claimant nor shall the court offset against the award the value of any reduction in tuition or fees for educational services or the value of services to be provided to the claimant that may be awarded to the claimant pursuant to this section.

(C) The commonwealth shall not be liable to levy of execution on any real or personal property to satisfy a judgment ordered pursuant to this chapter. Any judgments ordered by the court pursuant to this chapter shall be paid from funds appropriated by the general court for such purpose. Payments by the commonwealth under this chapter are made to remedy the claimant's injury of unjust incarceration. Only those portions of a judgment that are paid or retained as compensation for services in bringing a claim under this chapter by an attorney representing the claimant pursuant to a signed agreement with the claimant or otherwise shall be subject to taxation by the commonwealth.

(D) The court shall give due consideration to the possible bifurcation of court proceedings to separate the consideration

of issues to be resolved by the court, as required by sections 1 and 2, from the determination of reasonable damages and other relief as required by this section.

§ 6. Motion for costs; appeals

Any party to an action filed under this chapter is entitled to make a motion seeking costs, expenses and interest for wholly insubstantial, frivolous or bad faith claims or defenses advanced by the opposing party during proceedings under this chapter as set forth in section 6F of chapter 231 and is also entitled to the rights of appeal afforded parties in a civil action following a decision on such motions as set forth in section 6G of said chapter 231.

§ 7. Expungement or sealing of records; hearings

(A) Upon the entry of a judgment in favor of a claimant under this chapter and following a separate hearing on the matter, the court shall enter an order either directing the expungement or sealing of those records of the claimant maintained by the department of criminal justice information services, the probation department, and the sex offender registry that directly pertain to the claimant's erroneous felony conviction case, including documents and other materials and any samples obtained from the claimant. The commonwealth, as well as any other law enforcement agency that may be directly affected by such expungement or sealing of such records including, but not limited to, the district attorney that prosecuted the felony case against the claimant, shall be given reasonable notice and an opportunity to be heard on the issue of whether such records, documents and materials shall be so expunged or sealed. In making its determination as to whether such records, documents and materials shall be so expunged or sealed, the court shall consider the interests of privacy and justice pertaining to the claimant's erroneous felony conviction as well as the probable effect of such expungement or sealing on relevant law enforcement entities and their ability to appropriately investigate and prosecute other persons for the felony which forms the basis of the claim or other crimes that may relate to the information contained in such records, documents and materials.

(B) Following a separate hearing conducted by the court, the court may also order the expungement or sealing of those records that directly pertain to the claimant's erroneous felony conviction case that are currently in the care, custody and control of other state, municipal or local departments, agencies, commissions or committees, including law enforcement entities. Any such agency, commission, committee or entity shall be given reasonable notice and an opportunity to be heard on the

issue of whether such records, documents and materials shall be expunged or sealed pursuant to this section. In making its determination as to whether such records, documents and materials shall be expunged or sealed, the court shall consider those factors required for consideration by the court in paragraph (A).

(C) Any order to expunge or seal entered by the court shall provide that, in any employment application, the claimant may answer "no record" as to any charges expunged or sealed pursuant to this section in response to an inquiry regarding prior felony arrests, court appearances or criminal convictions.

(D) The charges and convictions expunged or sealed shall not operate to disqualify the claimant in any examination, appointment or application for public employment in the service of the commonwealth or any other political subdivision thereof, nor shall such charges and convictions be used against the claimant in any way in any court proceedings or hearings before any court, board or commission to which the claimant is a party to the proceedings.

§ 8. Limitation on action

A claim for compensation brought under this chapter shall be commenced within two years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in subsection (B) of section 1. Any action by the commonwealth challenging or appealing the grant of such judicial relief shall toll the two year period. Every action brought pursuant to this chapter that is not commenced within the time required by this section is forever barred from consideration by the courts of the commonwealth.

§ 9. Receipt of chapter

(A) A court granting judicial relief consistent with the criteria set forth in subclause (a) of clause (ii) of subsection (B) of section 1 shall provide a copy of this chapter to an individual seeking such relief at the time the criteria of said subclause (a) of said clause (ii) of said subsection (B) of said section 1 are satisfied. Such individual shall be required to acknowledge receipt of a copy of this chapter in writing on a form established by the chief justice of the trial court. This acknowledgement shall be entered on the docket by the court and shall be admissible in any proceeding filed by a claimant under this chapter.

(B) The parole board, upon the issuance of a full pardon under section 152 of chapter 127, shall provide a copy of this chapter to an individual granted clemency at the time warrants necessary to grant the pardon are issued. Such individual shall be required to acknowledge receipt of a copy of this chapter in writing on a form established by the parole board,

which shall be retained on file by the parole board as part of its official records and shall be admissible in any proceeding filed by a claimant under this chapter.

(C) If a claimant granted judicial relief or a full pardon shows he did not properly receive a copy of the information required by this section, he shall receive a one year extension on the two year time limit provided in section 8.

§ 24:49 Erroneous Convictions Act—Case law

For case law on the Erroneous Convictions Act, see e.g., *Renaud v. Com.*, 471 Mass. 315, 28 N.E.3d 478 (2015) (erroneous convictions statute was enacted to ensure that those erroneously convicted but factually innocent be afforded equal opportunities to obtain compensation; the statute "waives sovereign immunity for an erroneous felony conviction, then establishes the class of claimants eligible to obtain relief"; to be entitled to compensation under the statute, the threshold matter of eligibility as a member of the class of claimants eligible to pursue relief must be decided, then, a claimant must establish at trial, by clear and convincing evidence, that he or she did not commit the offense charged; the requirement that judicial relief must have been granted on 'grounds which tend to establish the innocence' of a claimant does not limit the threshold question of eligibility for relief to individuals whose convictions were vacated or reversed strictly on the basis of compelling or overwhelming exculpatory evidence, that is, on the grounds that they were actually innocent; rather, grounds which tend to establish a plaintiff's innocence require that a conviction be overturned on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime; however, that such grounds must tend to do more than merely assist the defendant's chances of acquittal); *Irwin v. Com.*, 465 Mass. 834, 992 N.E.2d 275 (2013) (commonwealth was entitled, under doctrine of present execution, to file interlocutory appeal from trial court's denial of its motion to dismiss action seeking compensation for allegedly erroneous felony conviction; erroneous convictions statute provided only a limited waiver of Commonwealth's sovereign immunity, and the threshold matter of eligibility as a member of the class of claimants eligible to pursue relief was a "collateral" issue, separate and distinct from the merits of the claim for relief that a claimant must establish at trial; requirement of the erroneous convictions statute that judicial relief form an allegedly wrongful conviction must have been granted on "grounds which tend to establish the innocence" of a claimant does not limit the threshold question of eligibility for relief to individuals whose convictions were

vacated or reversed strictly on the basis of compelling or overwhelming exculpatory evidence, that is, on the grounds that they were actually innocent; rather, "grounds which tend to establish" a plaintiff's innocence require that a conviction be overturned on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime); *Drumgold v. Com.*, 458 Mass. 367, 937 N.E.2d 450 (2010) (defendant whose murder conviction was vacated was eligible to bring suit under Massachusetts Erroneous Convictions Law if the grounds on which his motion for new trial was granted rested upon facts and circumstances probative of the proposition that he did not commit the crime; grant of motion for new trial on grounds implicating fair trial rights did not preclude inquiry into whether those grounds rest on facts and circumstances probative of the proposition that the defendant did not commit the crime for purposes of determining defendant's eligibility to bring suit under Massachusetts Erroneous Convictions Law; it is not necessary that the judge granting postconviction relief to a defendant make any specific finding as to the likely innocence of the defendant in order for him to be eligible to bring an action under Massachusetts Erroneous Convictions Law; eligibility does not require that the grounds on which new trial was allowed be examined in relation to the strength of the evidence of guilt adduced at the claimant's criminal trial; this is a task best suited for the trial stage of a claimant's case, where the claimant must prove his actual innocence); *Guzman v. Com.*, 458 Mass. 354, 937 N.E.2d 441 (2010) (eligibility requirement under Erroneous Convictions Law, that claimant's conviction must have been reversed or vacated "on grounds which tend to establish the innocence" of the claimant, does not limit the threshold question of eligibility for relief to individuals whose convictions were vacated or reversed strictly on the basis of compelling or overwhelming exculpatory evidence, that is, on the grounds that they were actually innocent); *Guzman v. Com.*, 74 Mass. App. Ct. 466, 907 N.E.2d 1140 (2009), aff'd, 458 Mass. 354, 937 N.E.2d 441 (2010) (claimant has been granted relief from a criminal conviction on "grounds which tend to establish innocence," as a requirement in determining whether he is eligible for relief under the Erroneous Convictions Law, when he has been granted relief on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime; the statute places reasonable limits on eligibility that are in keeping with the Legislature's goal of providing a remedy for innocent persons erroneously convicted of crimes).

vacated or reversed strictly on the basis of compelling or overwhelming exculpatory evidence, that is, on the grounds that they were actually innocent; rather "grounds which tend to establish a plain." Its innocence requires that a conviction be overturned on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime; *Ferrara v. Com.*, 458 Mass. 397, 937 N.E.2d 450 (2010) (defendant whose murder conviction was vacated was eligible to bring suit under Massachusetts Erroneous Convictions Law if the grounds on which his motion for new trial was granted rested upon facts and circumstances probative of the proposition that he did not commit the crime; grant of motion for new trial on grounds implicating fair trial rights did not preclude inquiry into whether those grounds rest on facts and circumstances probative of the proposition that the defendant did not commit the crime for purposes of determining defendant's eligibility to bring suit under Massachusetts Erroneous Convictions Law; it is not necessary that the judge granting postconviction relief to a defendant make any specific finding as to the likely innocence of the defendant in order for him to be eligible to bring an action under Massachusetts Erroneous Convictions Law; eligibility does not require that the grounds on which new trial was allowed be examined in relation to the strength of the evidence of guilt adduced at the claimant's criminal trial; this is a task best suited for the trial stage of a claimant's case, where the claimant must prove his actual innocence); *Guzman v. Com.*, 458 Mass. 354, 937 N.E.2d 441 (2010) (eligibility requirement under Erroneous Convictions Law, that claimant's conviction must have been reversed or vacated "on grounds which tend to establish the innocence" of the claimant, does not limit the threshold question of eligibility for relief to individuals whose convictions were vacated or reversed strictly on the basis of compelling or overwhelming exculpatory evidence, that is, on the grounds that they were actually innocent); *Guzman v. Com.*, 74 Mass. App. Ct. 480, 937 N.E.2d 1140 (2009), aff'd, 458 Mass. 354, 937 N.E.2d 441 (2010) (claimant has been granted relief from a criminal conviction on "grounds which tend to establish innocence," as a requirement in determining whether he is eligible for relief under the Erroneous Convictions Law, when he has been granted relief on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime; the statute places reasonable limits on eligibility that are in keeping with the Legislature's goal of providing a remedy for innocent persons erroneously convicted of crimes).

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