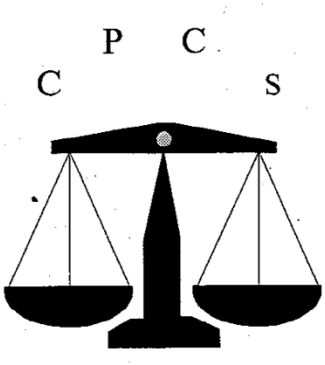

COMMITTEE FOR PUBLIC COUNSEL SERVICES

CRIMINAL APPEALS AND POST-CONVICTION ADVOCACY TRAINING MANUAL

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CHAPTER 1: OVERVIEW OF THE APPELLATE PROCESS

THE RIGHT TO APPEAL.[1]

A defendant who is convicted after trial has the right to take a direct appeal of his conviction.[2] The right of direct appeal also applies to revocations of probation.[3] Under certain *limited* circumstances a direct appeal can be taken from a ruling entered prior to a guilty plea or an admission to sufficient facts.[4] Where there is no right to a direct appeal, the client's conviction can only be attacked collaterally by a motion for new trial, any denial of which would then be appealable.[5] (*Note*: panelists must get the approval of the Director of Criminal Appeals for the Private Counsel Division before they can file a new trial motion).

THE NOTICE OF APPEAL.

The appeal is initiated by filing *a* ***Notice of Appeal*** with the clerk of the trial court.[6] A Notice of Appeal must be filed within 30 days of the verdict or within 30 days of sentencing if the sentence is imposed later.[7] So, for practical purposes, the sentencing date controls. If a motion for a new trial is filed during this 30 day period, the filing period for the notice of appeal is

[1] In this manual, the Massachusetts Rules of Appellate Procedure will be cited "M.R.A.P." The Massachusetts Rules of Criminal Procedure will be cited "M.R.Crim.P."

[2] G.L. c. 278, § 28. *Commonwealth v. Goewey*, 452 Mass. 399, 402-03 (2008).

[3] *Commonwealth v. Christian,* 429 Mass. 1022 (1999).

[4] The Massachusetts Rule of Criminal Procedure 12(b)(6) (Effective Sept. 1, 2019). Under this rule, a defendant may, "with the written agreement of the prosecutor … tender a guilty plea or admission to sufficient facts while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges."

[5] M.R.Crim.P.30; *Commonwealth v. Huot*, 380 Mass. 403 (1980).

[6] M.R.App.P. 3(a).

[7] M.R.App.P. 4(b).

tolled until the motion is decided.[8] If the motion is denied, the 30-day filing period for the notice of appeal begins again. Under these circumstances, the notice should indicate that the defendant is appealing both his conviction *and* the denial of the new trial motion.

In cases where the defendant is represented at trial by a public defender or private court-appointed counsel, trial counsel is responsible for filing the notice of appeal. Trial counsel should complete the Criminal Appeal Referral Form, and email it to appealform@publiccounsel.net . CPCS is notified of the need to assign appellate counsel by receipt of the Criminal Appeal Referral Form.[9]

APPELLATE COUNSEL'S INITIAL RESPONSIBILITIES UPON RECEIVING AN ASSIGNMENT.

Once assigned a case, appellate counsel should take the following steps immediately:

(1) Enter your Appearance in the trial court and in the Appeals Court as well if the case has already been entered there.

(2) Write to your client informing him or her that you have been assigned their case. If the client is incarcerated, encourage your client to write to you or call. Otherwise, encourage the client to call your office to make an appointment. *If you have a home office, and your client is not incarcerated, it is strongly recommended that you make arrangements to meet with the client in a location outside of your home, such as at the local courthouse or bar association. The meeting should take place in a location appropriate for a discussion of confidential and personal information.*

(3) Check the docket sheet and verify that a Notice of Appeal was filed. If a notice was not filed, you should file one *immediately*. (See the section below concerning curing a late filing).

(4) Verify that all necessary transcripts have been ordered, including hearings on substantive pretrial motions, jury empanelment, the entire trial, verdict, and sentencing. In a Superior Court case, the transcript orders should be indicated on the docket sheet just beneath the entry for the docketing of the notice of appeal. In the District Court, you will need to check the docket sheet against the audio recording order form. You

[8] M.R.A.P. 4.

[9] The Criminal Appeal Referral Form may also be found on the CPCS website www.publiccounsel.net under the "Attorney and Vendor Resources" tab.

should order any necessary transcript that has not been ordered. (Transcript production and ordering are discussed in Chapter 2).

(5) After taking these initial steps, the attorney should promptly do the following while waiting to receive the transcripts:[10]

-- Go to the clerk's office, review the entire file, and obtain a photocopy of each document on file.

-- Review and photocopy all of the exhibits. You should contact the court ahead of time, because you may need to make an appointment to review the exhibits.[11] (Note: Some courts require counsel to file a motion in order to photocopy exhibits.)

-- Contact trial counsel in order to discuss the case and request the attorney's file. The attorney may request a Release signed by your client. If the trial attorney was court appointed, tell the attorney that he or she can bill for the attorney's time and expenses in providing the file. Your client is entitled to the complete original file, *including all work product*. If court-appointed trial counsel is uncooperative, contact an attorney in the Criminal Appeals Unit, who will advise you as to which staff attorney in the Criminal Trial Support Unit to contact, depending on which county the trial was held in, who will then take steps to get the trial attorney to cooperate. *Note: It is advisable to keep the attorney's file separate from the court documents so as not to confuse what is and what is not part of the trial court record.*

LATE FILING OF THE NOTICE OF APPEAL.

If the notice of appeal is not timely filed, the appellate court is without jurisdiction to decide the appeal, and the appeal will be dismissed. It is malpractice for an appellate attorney to fail to immediately verify that a timely notice of appeal was filed and to fail to attempt to cure any default.

[10] These steps are discussed in more detail in Chapter 2.

[11] If you need a color copy of a photographic exhibit, file a motion to be allowed to take the exhibit out of the court to a printer who can make a color copy.

If you find out that a notice of appeal has not been filed, you should file one immediately in the trial court.[12] If a notice of appeal is not filed within 30 days of sentencing, the defendant must file ***a Motion to Enlarge Time for Filing Notice of Appeal*.** (The defendant does not need to re-file the notice of appeal with the motion.) The trial judge has the authority to extend the deadline another thirty days. So, if the notice is filed more than 30 days but less than 60 days after sentencing, the motion to file late should be filed in the trial court, along with the notice of appeal, if necessary. The standard for allowing the motion is "excusable neglect."[13] Usually an affidavit stating that the defendant wanted to appeal but his trial attorney failed to file a notice of appeal will satisfy this standard. If the motion is denied, the ruling can be appealed, and the Appeals Court will normally allow the motion.

Sixty days after the date of sentencing the trial judge loses jurisdiction to rule on the motion. Under these circumstances, the Appeals Court (or a single justice) can extend the period for filing the notice of appeal up to one year from the sentencing date.[14] If upon receiving your assignment you find that no notice of appeal was filed within 60 days of sentencing, you should file the motion to extend in the *Appeals Court*. You can simultaneously file the notice of appeal in the trial court. The Court can allow the late filing even after the year has passed, *as long as a notice of appeal was filed within one year*, and even if the motion for leave was filed after one year.[15] If a motion for leave to file late is allowed and no notice of appeal has been filed, a notice of appeal should be filed immediately in the trial court.

After one year, the appellate courts lose jurisdiction to grant the extension. Under these circumstances, the defendant's only realistic path is to resurrect any viable claims by way of a Motion for New Trial.[16]
Also, remember that if a motion for new trial is filed after the notice of appeal was filed, and if the new trial motion is then denied, you will need to file a *new* notice of appeal from any denial

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[12] M.R.A.P. 4(c). A clerk is required to docket the petitioner's notice of appeal, regardless of whether the clerk believes that no appeal is available to the petitioner or that the notice is untimely or otherwise defective. *Callahan* v. *Commonwealth,* 416 Mass. 1010, 1010-1011 (1994).

[13] M.R.A.P. 4(c).

[14] M.R.A.P. 4(b).

[15] *Commonwealth v. White*, 429 Mass. 258 (1999).

[16] See Chapter 5 for motions for new trial.

of new trial motion. Under these circumstances the appellate court will consolidate the appeal from the denial of the new trial motion with the direct appeal.

PRODUCTION OF THE TRANSCRIPTS AND ASSEMBLY OF THE RECORD

Under M.R.A.P. 8(b)(1), within 14 days after the notice of appeal is filed, trial counsel should order from the clerk an audio recording of the transcript of the proceedings[17]. Or order a transcript from the court reporter. In court-appointed cases, it is the responsibility of trial counsel to order the recordings. If trial counsel fails to do this, then you as appellate counsel must do so. (The 14-day period is not strictly enforced). The process for ordering audio recordings to be transcribed is explained in Chapter Two.

The audio recording goes to a transcriptionist to be transcribed.[18] After the transcriptionist transcribes the recording, he or she will transmit a PDF of the transcript to the trial court clerk and to the attorneys of record. Therefore, it is crucial that you file your ***Notice of Appearance*** in the trial court immediately upon receiving the assignment, or the transcript will go to trial counsel, who may ignore it.

Once the trial court clerk has received all of the transcripts, the clerk assembles the record and sends the case up to the Appeals Court, except that first-degree murder appeals come under the exclusive jurisdiction of the SJC. [19] Also, certain habitual offender convictions under G.L. c. 279, sec. 25(b), are sent directly to the Supreme Judicial Court, because they carry a potential life sentence. The trial court clerk has 21 days from receipt of the last transcript to assemble the record and send it up to the Appeals Court**.** M.R.A.P. 9(e) identifies in a checklist format the items and information that the lower court clerk must include in the assembly package.

Once a case is assembled and sent up to the Appeals Court, the Appeals Court clerk enters the case on the docket and gives it a docket number. Appellate court dockets may be viewed online at www.ma-appellatecourts.org. The Appeals Court then *sends notice to counsel of record* whose appearances are entered in the *trial court* that the case has been entered on the

[17] M.R.A.P. 8(b)(1).

[18] Traditionally, trial court proceedings have been taken down and transcribed by court reporters. The trial court has mostly phased out court reporters in favor of a statewide audio recording system. Court reporters are still used occasionally in the Superior Court, primarily in homicide cases or cases involving major felonies.

[19] The SJC's exclusive jurisdiction of first-degree murder appeals is provided for under G.L. c.278, §33E.

Appeals Court's docket. Again, it is imperative that appellate counsel enter an appearance in the trial court, or notice will be sent to the trial attorney.
After receiving copies of the transcripts, provisional members of the panel should contact Liz Dembitzer, the Director of Criminal Appeals, to be assigned a mentor.

Additional information on transcript production can be found in Chapters 2 and 4.

THE DOCKETING STATEMENT

Within 14 days after the Appeals Court issues the notice of entry of the appeal, you must file a docketing statement. The form can be obtained at http://www.mass.gov/courts/appealscourt/docs/crimndocketingstatement.pdf . The docketing statement requirement does not apply to the Supreme Judicial Court. The form should be e-filed.

E-FILING AND ELECTRONIC NOTIFICATION

The Appeals Court requires all documents in criminal cases, including briefs and record appendices, to be filed electronically. In order to do so, you must register with the Appeals Court's eFiling vendor at http://www.efilema.com. You can register before you have a case docketed in the Appeals Court. Registration allows you to eFile documents, and allows the Appeals Court to send you notices of procedural events and rulings via e-mail. For more information on the Appeals Court's eFiling system, see https://www.mass.gov/guides/electronic-filing-at-the-appeals-court#-registration-for-e-filing-through-efilema.com-generally.

The SJC uses the same eFiling vendor as the Appeals Court, located at http://www.efilema.com. When you are dealing with the SJC, you must select the option for that Court. For more information on e-filing with the SJC, see https://www.mass.gov/how-to/e-filing-in-the-supreme-judicial-court-clerks-office-for-the-commonwealth
You can also subscribe to receive the advance sheets of the SJC and the Appeals Court electronically at http://www.massreports.com

STAYS OF EXECUTION OF SENTENCE

Upon filing of the notice of appeal, A defendant may file a motion to ***Stay Execution of Sentence*** pending the decision on the appeal. When a sentence is stayed, the defendant is released from custody, but he stops serving the time on his sentence. Our performance standards give assigned counsel discretion to file after consultation with the client. It is

important to point out to the client that, if the stay is granted but the appeal is unsuccessful, he will have to go back to jail or prison and serve the balance of his sentence. Some clients may prefer to serve the time rather than risk having a stay granted and later vacated. Also, it is normally not advisable to seek a stay if the client is on "straight" probation, because the client is running the time on his probationary sentence while the conviction is being appealed. If the defendant violates probation and his probation is revoked, he may then seek a stay of any committed sentence that is imposed.

The motion must first be filed with the trial judge.[20] If the motion is denied, the defendant may appeal the denial under M.R.A.P. 6(b) to the single justice of the appellate court where the case will be heard. [21] There is no deadline for filing the motion, and there is no bar to filing successive motions. A successive filing may be in order if there are changed circumstances.

The two criteria that must be satisfied are (1) reasonable likelihood of success on the merits, and (2) questions of security, including risk of flight. The standard of "reasonable likelihood of success" is not onerous. It requires only a showing that the issue is "worthy of presentation to an appellate court," that the issue has "some reasonable possibility of success."[22] Because of this, it is necessary that appellate counsel become familiar with the issues before filing the motion, even where need for prompt relief that prevents waiting for the transcripts to be produced. Even at this early stage of the appeal, developing and presenting an overarching theory of the case that synthesizes the issues will increase the likelihood that the motion will be allowed. For questions of security, the court will apply the criteria used in determining bail under GL c. 276, Section 58. [23] In addition, the court will consider whether the defendant is a potential danger to the community or is likely to commit more offenses. [24] As a practical matter, a defendant with a long record and/or a history of defaults has a slim chance of being granted a stay, regardless of the strength of the issues. On the other hand, if the client is a good candidate, counsel should consider developing a release plan. This is particularly so because Rule 6 provides that release may be conditioned on "reasonable terms." In developing a release plan, counsel should contact Kristen Dame, the Director of Social Work for the CPCS

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[20] M.R.Crim.P. 31.

[21] The defendant should file a motion to waive the filing fee if the case has not yet been docketed in the appellate court. An affidavit of counsel that the client has been found indigent by the lower court he or she has been assigned by CPCS should suffice.

[22] Id.

[23] These include past defaults or flight, prior convictions, the nature of the offense, the sentence imposed, roots in the community financial resources, employment record, mental illness or drug dependency.

[24]

private counsel division, at kdame@publiccounsel.net, who can advise on obtaining funds for a social worker to develop a plan.

In appealing a denial,[25] the defendant can seek a temporary stay from the trial court judge. The appeal to the single justice must state that the motion was denied by the trial court, or that the relief sought is "not practicable," or that the lower court failed to afford the relief sought.[26] Any decision by the lower court should be filed with the motion, along with the reasons for the denial, and any parts of the record relied on.[27] Any facts relied on that are in dispute should be supported by affidavit. A denial by the single justice may be appealed to the full court.

In appealing the denial, counsel should request hearing, although hearings are not always granted. In seeking a hearing, it is advisable to contact the Commonwealth and propose a hearing date, the timing of which should conform with the provisions of M.R.A.P. 6(b)(2). These hearing are usually informal and, in any event, the decision is expedited. The SJC has held that, in reviewing the lower court's ruling on security, the single jus*tice* may apply the "abuse of discretion" standard or may review the decision *de novo.*[28] A denial by the single justice may be appealed to the full bench of the appellate court. The decision of the full bench is final . M.R.A.P. (b)(3). However, it is an open question whether a denial by the full bench of the appeals court may be appealed to the single justice or full bench of the SC if FAR or DAR is allowed (see below regarding FAR and DAR).

BRIEFING THE CASE.

Once a case is entered on the docket of the Appeals Court, the appellant has 40 days to file the brief and record appendix.[29] You will usually need to file a ***Motion for Enlargement of Time for Filing Brief.*** The standard for granting an extension is "good cause shown."[30] Currently, the Appeals Court has an informal policy of granting only one extension, not to exceed 120 additional days.

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[25] *Commonwealth v. Hodge* (No.1), 380 Mass. 851 (1980); *Commonwealth v. Hodge* (No. 2).

[26] M.R.A.P. 6 (b)(1).

[27] *Id.*

[28] *Commonwealth v. Cohen,* 456 Mass. 128 (Mass. 2010).

[29] M.R.A.P. 19(a).

[30] M.R.A.P. 14.

You should request as much additional time as you realistically need and can reasonably justify, at least 60 to 90 days in the usual course. File a detailed affidavit in support of the motion. You can always file the brief early if it is finished ahead of the deadline. Grounds for an extension may include the length of the transcripts, the number and complexity of the issues, your overall workload (including any other briefs pending in the appellate courts), and any previously scheduled vacation time, personal commitments, or health reasons. Provisional panel members should remember your mentor needs to review your brief before filing, and the brief may have to undergo one or more revisions. The best practice is to file the motion about one week before the initial 40-day due date. As with all documents filed in the Appeals Court (except for ex-parte motions, which are rarely filed) the motion should be served on the Commonwealth. Normally, you will serve documents on the Commonwealth electronically.[31]

After you have read the transcripts, provisional panel members should consult with your mentor about what issues to brief. After you have selected the issues, you must meet with your client and discuss the issues.[32] You must provide a draft of the brief to your client prior to filing if the client requests it. If your client wants an issue briefed that you feel lacks merit, and you cannot dissuade the client from insisting upon it, you *must* brief the issue according to the procedures laid out in *Commonwealth v. Moffett.* [33] (The Moffett procedure is discussed in Chapter 3.) When the brief is completed, provisional panel members must submit a draft to your mentor and you may not file your brief until your mentor approves it for filing.

APPLICATIONS FOR DIRECT APPELLATE REVIEW.

After the case is docketed in the Appeals Court, either the defendant or the Commonwealth may seek to bypass the Appeals Court by filing with the Supreme Judicial Court an ***Application for Direct Appellate Review (DAR*)**.[34] The decision whether to seek direct appellate review is a strategic one and should be based on which forum is more likely to rule in your client's favor.

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[31] Registration with EfileMA.com constitutes consent to receive electronic service in all cases. All documents submitted electronically through www.EfileMA.com may also be electronically served through www.EfileMA.com, provided the other party or party's attorney has registered with www.EfileMA.com. Normally an appellate ADA will be registered for e-filing. If an attorney not registered with www.EfileMA.com, service should be made by the conventional methods (e.g., paper copies and regular mail).

[32] The Performance Standards Governing Post-Conviction assignments require that you meet with your client within 3 weeks of receipt of the transcripts to discuss the appellate issues.

[33] 383 Mass. 201 (1981).

[34] M.R.A.P. 11.

Provisional members of the panel should consult on this question with their mentors. The SJC may also grant direct appellate review *sua sponte* after the brief is filed in the Appeals Court.

Under M.R.A.P. 11 the various criteria for allowing direct appellate review are: (1) questions of first impression and novel questions of law; (2) questions of law concerning the state or federal Constitutions that were raised in the lower court; and (3) questions of broad public interest.[35] Generally, cases of first impression, or cases seeking to change the law or to make new law, are more likely to be successful in the SJC than in the Appeals Court, which is bound by SJC precedent. The format for the DAR application is set out in M.R.A.P. 11(b) and is discussed in Chapter 2. The filing requirements are set out in M.R.A.P. 11(d) and (g).

M.R.A.P. 11(a) allows any party 21 days after docketing to apply for direct appellate review (DAR), but enlargements are routinely granted. The motion to extend can be filed before the DAR application. The DAR application must be served in the Commonwealth. At this time, eFiling of the DAR application is not mandatory in the SJC but is strongly encouraged. It is not necessary to file a copy of the application for DAR with the Appeals Court because the Appeals Court now receives automatic notification from the Supreme Judicial Court when an application for direct appellate review is filed.

The filing of a DAR application does not extend the time for filing the brief in the Appeals Court. You can file a motion to stay appellate proceedings in the Appeals Court on the grounds that a DAR application is pending. If the DAR application is denied, the defendant may still seek further appellate review (FAR) in the SJC if he loses in the Appeals Court. But the SJC is more likely to grant direct appellate review than further appellate review, since it only requires two justices to vote to allow DAR, while a grant of further appellate review requires three votes. [36]

If DAR is granted, the SJC will decide all issues raised in the Appeals Court. If the Commonwealth has not yet filed its brief, you have the option of filing a new brief in the SJC within 21 days.[37] Reasonable extensions are routinely allowed. If a motion to extend filing deadline is allowed, the SJC will set a briefing schedule. You may propose a briefing schedule in the motion. Filing a new brief is often advisable since, unlike the Appeals Court, the SJC is not

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[35] *Id.*

[36] As of the time of the writing of this manual, FAR applications are allowed less than 5% of the time, while DAR applications are allowed approximately 40% of the time.

[37] M.R.A.P. 11(g) (2).

bound by Massachusetts precedent, and will normally take a broader view of the issues, including the majority and minority rule in other jurisdictions as well as public policy arguments.

(If the Commonwealth has already filed its brief in the Appeals Court, no new briefs may be filed, except that you may file a reply brief on or before the last date allowable had the case not been transferred, or within 14 days after the date on which the appeal is docketed in the Supreme Judicial Court, whichever is later. Reasonable extensions are normally granted.)

A new brief may be filed electronically. The SJC will then notify you of how many paper copies to file (usually four copies). If you do not file a new brief, the brief filed in the Appeals Court will be transferred to the SJC, and you will receive an order of how many additional copies to file (usually four). At oral argument, the party who is granted direct appellate review argues first. Argument is before the full seven justice bench of the SJC, and 15 minutes is normally allotted to each party for argument.

FILING OF THE BRIEF AND RECORD APPENDIX IN THE APPEALS COURT.

As mentioned above, the Appeals Court now requires that all briefs and record appendices in criminal cases be filed and served electronically through the Court's eFiling vendor at www.eFileMA.com. Instructions for e-filing and service may be found at https://www.mass.gov/guides/electronic-filing-at-the-appeals-court#-registration-for-e-filing-through-efilema.com-generally. In addition, one paper copy should be sent to the client, and one should be sent to CPCS by e-mailing it to the administrative assistant of our unit, Maudelcia Tuitt, at mtuitt@publiccounsel.net, and, for provisional members, one should be sent to your mentor. The brief and record appendix must conform to the formal and technical provisions of M.R.A.P. 16, 18, and 20, which should be reviewed and followed carefully. See also the Sample Appellant's brief.

After your brief is filed, the Commonwealth has 30 days to file its response.[38] Expect the Commonwealth to seek an extension. After the Commonwealth's brief is filed, you have 14 days to file a ***Reply Brief***.[39] You can file a motion for an extension of time if necessary, and the Court will usually grant a short extension of up to about 30 days. While filing a reply is not

[38] M.R.A.P. 19(c).

[39] *Id.*

mandatory, it is advisable to file one if any response to the Commonwealth's brief is called for, because the Appeals Court can decide the case without holding an oral argument.

LATE FILING OF THE BRIEF.

If a brief is not filed by the due date, there is a three-step procedure under Appeals Court Rule 19.0,[40] by which the Court may dismiss the appeal on its own motion for failure to file the appellant's brief. In the first step, the Appeals Court sends a notice to counsel that the appeal will be dismissed within 21 days unless the clerk receives a motion to enlarge the time for filing supported by an affidavit. A copy of the notice is also sent to Liz Dembitzer, the Director of Criminal Appeals, who will you a letter or e-mail asking for an explanation. In the second step, if no brief is filed within 21 days or an extension granted, the Appeals Court without further notice enters the dismissal on its docket. In the third step, the Appeals Court sends notice of the dismissal to the trial court.

If you receive a Rule 19 notice, and file your brief within the 21st day period along with a motion to enlarge the time for filing, the brief will usually be accepted for filing. Nevertheless, you should avoid receiving a Rule 19 notice. Anticipate ahead of time whether you are going to be able to file your brief by the due date. Provisional panel members should keep in mind that your mentor must review and sign off on your brief before it can be filed, and that some modifications may be necessary. If you are a provisional member concerned about not being able to meet the deadline, you should consult with your mentor. Keep in mind also that if your client has requested to see a draft of the brief and approve it, you cannot file the brief until receiving that approval.

CASE ASSIGNMENTS IN THE APPEALS COURT

In the Appeals Court, after the time for filing a reply has passed, each criminal case is reviewed by a staff attorney, who makes a recommendation to one of a few justices who are responsible for assigning the case to one of two lists: the "A" list, in which cases receive 15 minutes of argument per side, a "B" list, which are decided without oral argument. The case is then assigned randomly to a three-judge panel that will hear and decide the case. The judges on the panel can decide to move a case from one list to another. When the panel receives a case, the parties are notified which list their case has been placed on.

[40] The Appeals Court Rules should not be confused with the Rules of Appellate Procedure.

Placement on the non-argument list usually, but not always, means affirmance. If you receive notice that your case has not been listed for argument, you should consider filing a motion to grant oral argument, focusing on why your case is meritorious.

Cases are assigned to a panel two months before the month when the panel is scheduled to hear cases. Panels sit 2 or 3 times during the month and usually hear about 12 cases in a sitting. When the panel receives a case, the senior judge of the panel decides whether the senior judge or one of the other two judges on the panel will be responsible for writing the decision.

In the Supreme Judicial Court, the full bench normally decides every case (except that first degree murder appeals are often heard by panels of five justices), and holds a hearing in every case. Because of this, it usually takes longer for a case to be reached in the SJC than in the Appeals Court.

RULE 16(l) LETTERS TO THE COURT.

If a new opinion that is relevant to your case is issued after you have filed your brief or after oral argument M.R.A.P. 16 (l) allows you to send a letter to the clerk of the appellate court, notifying the court of the decision, including the name of the case and the citation. Your letter should reference the page of the brief or the point argued orally.

ORAL ARGUMENT.

The waiting time for the scheduling of argument after a case is assigned to a panel varies considerably; it can take 3 to 6 months or even longer. If a case is chosen for argument, the clerk's office will send a "Notice Seeking Information on Unavailability" roughly six weeks before the scheduled argument date.[41] The Notice requires the recipient to notify the Appeals Court of any pre-planned unavailability, in order to assist the court in scheduling a firm date for argument. To the extent possible, the clerk will schedule the oral argument to avoid conflicts.

Once the oral argument has been scheduled, the clerk's office will send a Notice of Argument, about a month before the hearing date. The recipient must respond to the notice specifying the name of the attorney who will present oral argument for a specific party. Once the notice issues, any request for postponement must be made by motion and should be filed "reasonably in advance" of the date.[42] The court will not allow continuances except for "grave cause," such

[41] Counsel of record who have properly registered to receive e-mail notice will be sent this notice electronically; those who have not registered to receive e-mail notice will receive a hard copy by U.S. Mail.

[42] M.R.A.P. 22(b).

as an unavoidable scheduling conflict, serious health reason, or other extraordinary circumstances. While M.R.A.P. 22 provides for waiving oral argument, you may not do so without first getting permission from your client as well as the Director of Criminal Appeals, who is unlikely to agree, because it is rarely in the client's interest to forgo oral argument.

The Court now has a staggered system for scheduling argument in which it indicates the approximate time the case will be called. You should check this list the day before the argument in case the scheduling has changed.

The appeal is heard by the three-judge panel that was assigned to the case. If co-defendants are arguing together you must divide up the 15-minute argument time. In this situation you may ask for additional time but will probably not be granted more than 5 minutes, if that. It is a public hearing, but incarcerated defendants are not brought in. Whether or not your client is incarcerated, you should notify him of the date of the hearing. You argue first and the Commonwealth argues second, unless you are representing the defendant on an interlocutory appeal taken by the Commonwealth, in which case you will argue second. There is no rebuttal argument. You may respond to the district attorney's argument by a letter to the court "to correct a factual misstatement during oral argument, or when such a writing was expressly allowed or requested by the court during the argument, or upon allowance of a motion to submit such a writing."[43] Any writing allowed during oral argument must state that the court allowed the submission. A submission not in compliance with these requirements may be struck by the court.[44]

Although the Appeals Court has an internal policy that cases should be decided within 130 days of argument, in practice it can take 4 to 6 months or longer for the Appeals Court to issue its decision. As you can see from this section, the entire appellate process from notice of appeal to the Court's decision normally takes about a year, varying greatly depending on how promptly the transcript is produced.

POST-DECISION PRACTICE.

When you receive the decision from the Appeals Court, you should immediately write to your client and send him a copy of the decision. The written decision consists of the order of disposition, called the "rescript,"[45] and the court's written opinion. An appellate decision in a

[43] M.R.A.P. 22(c).

[44] M.R.A.P. 22(c).

[45] Traditionally, the term "rescript" has had several meanings. It meant either the order of disposition, the slip opinion that appears in the advance sheets, or a short decision that is published at the end of a reporter. The 2019 amendments to the definitions contained in M.R.A.P. 1(c) clarify that, for the purpose of the Rules, "rescript"

criminal case will usually result in one of three dispositions: judgment affirmed; judgment reversed and case remanded for a new trial; or conviction reversed, judgment for the defendant, which bars retrial. Other possible dispositions are affirmance on some counts and reversal on others, remand for a hearing, or remand for re-sentencing.

Once the entire appellate process has concluded, if your client's conviction is reversed, or if the case is remanded for a hearing or for re-sentencing, you must contact the bar advocate program for the county in which the trial court is located and inform them that a trial attorney needs to be assigned to the case.

Twenty-eight days after the decision issues, the rescript is sent to the trial court and entered on the trial court's docket. This period may be extended or stayed for reasons that are discussed below.

If the decision is unfavorable in whole or in part, the defendant has two options. He may file a Motion for Reconsideration in the Appeals Court.[46] He may also file an Application for Further Appellate Review (FAR) in the Supreme Judicial Court in addition to or in lieu of the Motion for Reconsideration.

Motion for Reconsideration

A Motion for Reconsideration must be filed in the Appeals Court within 14 days of the date of the decision. The specified grounds for the motion are that the Court either overlooked or misapprehended particular points of law or fact. The motion must be served on the Commonwealth. Oral argument in support of the motion is not allowed except by leave of Court. The motion will be decided by the panel that decided the appeal. If the motion is granted the court may reconsider the case with or without allowing argument or further briefing, or may make any order that it deems appropriate.

The filing of a Motion for Reconsideration automatically stays issuance of the rescript. You may seek additional time to file a Motion for Reconsideration, but the court will generally not allow

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means "the appellate court's order, direction, or mandate to the lower court disposing of the appeal." By contrast, the term "decision" is defined as "the court's written opinion, memorandum and order pursuant to Appeals Court Rule 1:28, or other final adjudicative order in the case."

[46] M.R.A.P. 27.

more than a week or so. If you move for additional time you must also file a Motion to Stay Issuance of the Rescript.

Application for Further Appellate Review

The defendant or the Commonwealth may file an ***Application for Further Appellate Review*** *(FAR)* in the Supreme Judicial Court within 21 days of the date of the Appeals Court's decision.[47] The filing of a motion for reconsideration does not preclude filing for FAR. The motion for reconsideration does not toll the time for filing for FAR, and both may be pending simultaneously. You must inform the SJC in the FAR application whether a ***Petition for Rehearing*** is pending.

You may move the SJC for an enlargement of time to file an FAR before the FAR is filed. Such motions are routinely allowed. Once the FAR is filed in the SJC, the clerk will notify the Appeals Court and the rescript will be stayed automatically. It is not necessary to file a copy of the FAR in the Appeals Court, because the SJC notifies the Appeals Court of the filing.

If the appeal was unsuccessful in whole or in part in the Appeals Court, you must inform your client of his right to file for FAR, and you must file for FAR unless the client instructs you not to. It is particularly important to file for FAR if a client has a long sentence and has raised constitutional issues, because FAR must be requested in order to exhaust state remedies, which is necessary to preserve rights to review in the federal courts. Federal rights are protected whether the FAR is granted or denied, as long as federalized constitutional issues are articulated in the FAR petition (and SJC brief, if FAR is granted).

The FAR application will be granted "for substantial reasons affecting the public interest or the interests of justice ..."[48] and is similar to the standard for granting DAR (see above). The contents and form for the FAR are spelled out in M.R.A.P. 27.1(b). You must attach a copy of the Appeals Court's opinion to the application. You must also attach any order of the lower court that is being appealed. If the Appeals Court's decision refers to pages of the Commonwealth's brief, you must attach those pages as well.

If you are not able to get in touch with your client, you must file an FAR in order to protect your client's right to further appellate review, unless there is a strategic decision not to. If your client's conviction was reversed in part and affirmed in part, provisional members should discuss with your mentor and all panel members should discuss with your clients whether it is

[47] M.R.A.P. 27.1(f).

[48] M.R.A.P. Rule 27.1(e).

strategically advisable to seek FAR, because the SJC can overrule the Appeals Court and affirm those convictions that the Appeals Court reversed.

If FAR is granted, all issues raised in the Appeals Court may be decided anew by the SJC, or the Court may limit review to specific issues. You have the option of filing within 14 days of docketing a motion for permission to file a new brief. The SJC has the discretion to grant the motion beyond the 14-day period, but you must file a motion for leave to file the request for permission late. If the motion is allowed, the SJC will set a briefing schedule. You may propose a briefing schedule in the motion. Filing a new brief is often advisable, because the SJC is not bound by precedent and will take a broader view of the issues than the Appeals Court. Provisional members of the panel – and certified members who have never briefed a case in the SJC -- should consult on this question with their mentors or with CPCS. If you are allowed to file a new brief, you should follow the SJC's preference and e-file it, after which the court will notify you how many paper copies to file (usually four).

COLLATERAL ATTACKS ON A CONVICTION

If FAR is denied, or if the SJC grants review but affirms your client's convictions in whole or in part, there are three time-sensitive options available for seeking further relief:

(1) The defendant has 90 days from the date of either the denial of FAR or SJC's Decision (not the rescript) to file *a petition for certiorari in the United States Supreme Court.*

(2) The defendant has one year plus 90 days from either the denial of FAR or the date of the SJC's decision (not the rescript) to file a petition for *a writ of habeas corpus in United States District Court under 28 U.S.C. 2254.*

(3) In addition, whether or not the defendant sought FAR, he has 60 days from the date that the trial court receives the rescript to file *a Motion to Revise and Revoke Sentence under M.R.Crim.P. 29***.** This may be done whether or not the defendant has previously filed a motion to revise and revoke, and even if it was previously filed and denied.[49] This 60 day filing period is jurisdictional and the judge is without discretion to enlarge it.

[49] Rule 29 requires that motions to revise and revoke a sentence must be filed within sixty days of any of the following events: (1) imposition of sentence; (2) receipt by the trial court of a rescript after affirmance or dismissal of an appeal, or (3) entry of any order or judgment of an appellate court denying review or having the effect of upholding a judgment of conviction (e.g., the denial of a motion for a new trial).

Below is an explanation of these provisions.

Motion to Revise and Revoke Sentence[50]

M.R.Crim.P. 29 authorizes the trial judge to reconsider the defendant's sentence and to reduce it "if it appears that justice may not have been done." You may file a motion to revise and revoke without seeking prior approval from the Director of Criminal Appeals. Be advised that the judge also has the power to rule on the motion by *increasing* the sentence,[51] and the client should be advised of this prior to filing the motion. Rule 29 requires that the motion be supported by one or more affidavits.[52] The affidavit(s) should be as complete as possible because Rule 29(b) authorizes the judge to decide the motion "on the basis of facts alleged in the affidavits and without further hearing." In ruling on the motion, the judge can only consider facts that were in existence at the time of sentencing. [53] Accordingly, the affidavits should only contain facts that either were not presented at sentencing, or that were not properly taken into account when the court imposed sentence. The courts may consider such factors as the circumstances of a pending or prior offense, impact on the family, medical condition, or disparate treatment of codefendants.[54] A defendant may either request a specific reduction in sentence, or generally request a reduction in the court's discretion. The rule provides no specific time limit on the court's power to act if the motion is timely filed, but a hearing should be requested within a "reasonable period of time." [55]

[50] Portions of the material on the topics Motion to Revise and Revoke, New Trial Motion, and Petition for a Writ of Habeas Corpus were derived from E. Blumenson, *Massachusetts Criminal Practice*, (4th edition, 2012, copyright by Eric Blumenson), and are used by permission,. This material was updated to 2021 for use in this manual. The book may be accessed and downloaded free of charge at https://www.suffolk.edu/law/faculty-research/faculty/faculty-forms-and-resources/massachusetts-criminal-practice.

[51] *Commonwealth v. Derry*, 26 Mass. App. Ct. 10, 12–13 (1988).

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

[53] *Commonwealth v. Layne,* 386 Mass. 291, 295 (1982) (the purpose of Rule 29 "is to permit a judge to reconsider the sentence he has imposed and determine, *in light of the facts as they existed at the time of sentencing* whether the sentence was just.")(emphasis supplied); *citing Commonwealth v. Sitko*, 372 Mass. 305, 312–14 (1977).

[54] *See Derry*, supra.

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

Motion for a New Trial.

Your client's constitutional and statutory rights to counsel on direct appeal do not extend to collateral attacks on his conviction. But in some cases you may need to file a ***Motion for a New Trial*** under M.R.Crim.P 30**.** For example, it may be necessary or advisable to file a Rule 30 motion: (1) in order to raise an issue based on matters not evident on the face of the record, such as ineffective assistance of counsel or newly discovered evidence; (2) to bolster a factually thin record in order to help the appeal; or (3) if your chance of success appears to be better in front of the trial judge. Issues normally. [56] You must get approval from the Director of Criminal Appeals before filing the motion.

If you are being mentored, you should discuss with your mentor whether to file a new trial motion. Depending on the issue, you may have to decide whether to file the motion before or after the direct appeal is decided. If your mentor agrees that a new trial motion is appropriate, you still need approval from the Director of Criminal Appeals. If the appeal is pending in the appellate court, you must file a motion to stay the appellate proceedings before filing the motion. The appellate court will normally allow these stays, but may require you to file a report periodically, usually every thirty days, stating the procedural posture of the motion.

The judge is required to grant a new trial "if it appears that justice may not have been done." [57]The motion may be filed "at any time." Any grounds not contained in the original or amended motion are considered waived, unless the judge exercises his or her discretion to reach the issue, or if the grounds could not reasonably have been raised in the original or amended motion. [58] However, even if the judge does not resurrect the issue, the appellate court will still review waived constitutional claims under the " substantial risk of a miscarriage of justice" standard.[59] A defendant is also not deemed to have waived a claim if its constitutional

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[56] A non-exclusive list of grounds are include prosecution's failure to disclose exculpatory evidence, jury misconduct, recanting witnesses, mental incompetency, unpreserved trial errors, new scientific developments. In addition the issues may be viewed together as a "confluence of factors." *Commonwealth v. Brescia, 471 Mass. 381, 396 (2015).*

[57] M.R.Crim.P. 30(b).

[58] M.R.Crim.P 30(c)(2).

[59] *Commonwealth v. Francis*, 485 Mass. 86 , 106 (2020). Under this standard, the court must still grant relief when it is "left with uncertainty that the defendant's guilt has been fairly adjudicated." *Commonwealth v. Randolph,* 438 Mass. 290, 294-295 (2002) ; *quoting Commonwealth v. Azar,* 435 Mass. 675, 687 (2002); *quoting Commonwealth v. Chase,* 433 Mass. 293, 299 (2001).

significance was not established until after the trial, appeal, or previous postconviction motions.[60]

The defendant must file his motion supported by one or more affidavits containing the facts that he is relying on and, if a "substantial issue" is raised, the judge must hold a hearing.[61] If the affidavits present a "prima facie case for relief," the judge may authorize the defendant to conduct discovery.[62] For this reason, you should conduct as much investigation and informal discovery as possible before filing, so that you can submit affidavits containing a strong case for relief. For this purpose you may move for funds for an investigator or expert, which motion the judge has discretion to allow prior to filing the motion. The Commonwealth may be heard on the motion for funds. If a hearing is granted, the defendant cannot rely on the affidavits but must call witnesses and present evidence to support his claim.

On Appeal, the decision to deny a motion for a new trial lies within the sound discretion of the trial judge. However, the court will reverse if the denial of the motion is "manifestly unjust" or the trial was infected with prejudicial constitutional error." [63] The motion judge's discretion is broadest where she was also the trial judge, and her ruling will be upheld as long as evidence exists in the record to support it. [64] Where the motion judge did not preside at trial, the appellate court is in as good a position to assess the trial record and will defer only to the motion judge's findings regarding testimony and evidence admitted at the hearing on the motion.[65] However, regardless of whether the motion judge was also the trial judge, the appellate court will examine the motion judge's ruling for errors of law.[66]

Additional training information on new trial motions, including how to screen for possible collateral relief cases in which the conviction has already been affirmed on appeal, can be found on the web page where this manual is located, under the title, *Investigating New Trial Motions*.

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[60] *Commonwealth v. Randolph, 438 Mass. 290, 295 (2002).*

[61] M.R.Crim.P. 30(c)(3).

[62] M.R.Crim.P. (c)(4.)

[63] *Commonwealth v. Petabella*, 459 Mass. 177, 179 (2011).

[64] *Commonwealth v. Morgan,* 453 Mass. 54, 64 (2009).

[65] *See Commonwealth v. Haley*, 413 Mass. 770, 773 (1992); *Commonwealth v. Grace*, 397 Mass. 303, 307 (1986) .

[66] *Commonwealth v. Morgan,* 453 Mass. 54, 64 (2009).

BRINGING THE CASE TO FEDERAL COURT

If you believe there are federal constitutional issues preserved in the case which justify pursuing federal relief, you must get approval from the Director of Criminal Appeals before filing a federal habeas corpus petition with the United States District Court or a petition for certiorari with the United States Supreme Court. Even if you do not believe there are any meritorious federal issues, you must inform your client of his right to pursue these remedies *pro se* if there are federal claims that have been exhausted. Below is a brief explanation of the federal remedies available to state prisoners, federal habeas corpus, and petition for certiorari. These areas of the law are extremely complex and it is beyond the scope of this manual to discuss these subjects in any depth. If you believe that your client has a meritorious federal constitutional claim that has been raised on appeal and should be brought to federal court, you should discuss it with your mentor or the Director of Criminal Appeals, and you must get permission from the Director before filing the claim. If you are allowed to go forward, you must file a motion in the federal court to appoint counsel under the Criminal Justice Act ("CJA") and must withdraw from the case if the motion is allowed.

Petition for a Writ of Habeas Corpus

The federal habeas corpus statute, entitled the "Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)" allows state prisoners to seek relief in the federal courts for violation of their rights under under the *federal* constitution.[67] In order to seek federal habeas relief, the client must be "in custody", meaning incarcerated, on probation, or on parole. Moreover, the claims must have been "exhausted," meaning that they were raised in both the Appeals Court *and* the SJC *as federal constitutional issues*. Although it is not required that the state appellate courts reached the federal issue, the issue must have been "fairly presented"[68] so that the state appellate court had the opportunity to decide the federal issue. For this reason, in briefing an appeal, it is important to federalize any appellate claim to which the U.S. Constitution applies, particularly where the petitioner is serving a lengthy sentence.

As mentioned above, the one year and 90 day[69] filing deadline begins to run from the date the SJC denies the petitioner's FAR petition, or decides the issue against him after allowing FAR to

[67] Codified at 28 U.S.C. §§ 2254.

[68] *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Picard v. Connor*, 404 U.S. 270, 277 (1971).

[69] While the ADEPA provides for a one year filing deadline, the 90 day period during which a petitioner may file a petition for certiorari to the United States Supreme Court is added to the filing period. *See Clay v. United States*, 537 U.S. 522, 524-25, 527 (2003)

proceed. This time period is subject to exceptions. The one-year time period is tolled during the time in which a "properly filed application for state post-conviction or other collateral review" is pending. In this regard, state postconviction proceedings continue to be "pending" while relief is sought in the trial court, such as by a motion for a new trial, and in subsequent appellate proceedings of any denial of the motion. In addition, If the Supreme Court creates a new constitutional right and makes that right retroactively applicable to cases on collateral review, then the one-year period would run from the date that such a right was established.[70] Also, if the claim involves newly discovered evidence, the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence will start the period.[71] In addition, the doctrine of "equitable tolling" has been applied to the filing deadline, [72] so that the filing period is tolled during, for example, a petitioner's period of mental incompetence[73] or other incapacity.

To get relief, the habeas petitioner must show the court that the underlying state adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the State court proceeding. This is a very difficult standard to meet, and federal habeas litigation should only be undertaken where there is a reasonable chance of meeting these challenging standards. In addition, several categories of constitutional claims are restricted from habeas review. First, claims under the Fourth Amendment may not be raised, unless the petitioner did not have a full and fair opportunity to litigate the claim in the state court,[74] or if it forms the basis for a different cognizable claim, such as ineffective assistance of counsel.[75] Second, a guilty plea waives the right to bring a federal habeas action as to constitutional violations alleged to have occurred prior to entry of the guilty plea, although constitutional violations in the taking

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[70] 28 U.S.C. § 2244(d)(1)(C)

[71] 28 U.S.C. § 2244(d)(1)(D)

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

[73] *Riva v. Ficco,* 615 F.3d 35, 39-40 (1st Cir. 2010) (dismissal of federal habeas petition vacated and case remanded for further development of record regarding petitioner's mental illness as a potential impairment to his ability to seek legal relief);

[74] *Stone v. Powell,* 428 U.S. 465 (1976)

[75] *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

of the plea itself are still cognizable. [76] *Third,* a claim of actual innocence based on newly discovered evidence unaccompanied by separate "constitutional claim" does not constitute a basis for federal habeas jurisdiction.

AEDPA restricts the petitioner's ability to obtain an evidentiary hearing in the federal court. If the factual basis of the claim was not established in the state court, the habeas court shall not hold an evidentiary hearing unless the claim relied on: (1) a new rule of constitutional law made retroactive to cases on collateral review; or (2) a factual predicate that could not have been discovered through the exercise of due diligence and that such facts establish actual innocence by clear and convincing evidence.

Petition for Certiorari to the United States Supreme Court

A petition asking the United States Supreme Court to review the judgment of the state appellate court (called a "petition for certiorari") must be filed within ninety days after the state appellate court rules on the case.[77] This is a request that the Supreme Court order a lower court to send up the record of the case for review. The Court usually is not under any obligation to hear these cases, it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have significant precedential value. [78] These grounds should be emphasized in the Petition. Four of the nine Justices must vote to accept a case.

The Court has strict rules about the form of the brief that must be filed by the petitioner.[79] The court requires that 40 copies of the petition to be filed but, on the allowance of a motion to proceed in forma pauperis, only 10 need be filed, and the motion can be filed with the briefs. A petition for a writ of certiorari "should be stated briefly and in plain terms "

The petition should contain the following: questions presented for review, which should be short and not argumentative; a list of parties; a list of proceedings in the lower court; a statement of the basis for the Supreme Court's jurisdiction; the constitutional provisions involved; a factual statement, including specification how and when the federal question was raised in the state court, with quotations to the record so as to show that the federal question

[76] *See McMann v. Richardson,* 397 U.S. 759 (1970) (petitioners who entered guilty pleas with the advice of counsel were not entitled to challenge voluntariness of their confessions by way of habeas corpus hearings).

[77] For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.

[78] In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year.

[79] Those rules may be found here: https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf

was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari; A direct and concise argument amplifying the reasons relied on for allowance of the writ; and an appendix containing the rulings being appealed, along with any related rulings by the lower court(s) in the case. If the Petition does not conform to the Court's rules, the clerk will return it indicating the deficiency, and a corrected petition submitted within 60 days of the clerk's letter will be deemed timely. Any party may file a supplemental brief bringing new authority to the Court's attention. A reply to the Commonwealth's opposition to the petition may be filed.

If the petition is granted, counsel will be notified and the case scheduled for briefing and argument. If the record has not previously been filed, the clerk will request the court in possession of the record to certify and transmit it. If the petition is denied, the clerk will enter an order an notify the parties. A petition for rehearing may be filed,

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APPENDIX TO CHAPTER ONE:

ELECTRONIC FILING IN THE MASSACHUSETTS APPELLATE COURTS

The following is a summary of the provisions of the Appeals Court's rules on eFiling. Information on eFiling can also be found at the following websites:

For the Appeals Court: https://www.mass.gov/guides/electronic-filing-at-the-appeals-court

For the Supreme Judicial Court: https://www.mass.gov/how-to/e-filing-in-the-supreme-judicial-court-clerks-office-for-the-commonwealth

E-filing registration. *All attorneys with cases in the Appeals Court must register for e-filing* with *the Court's e-filing vendor at www.eFileMA.com.* The website provides technical instructions on e-registration and e-filing. Instructions on eFiling can also be found on the Appeals Court's website on eFiling, included above.

E-Filing in criminal cases is mandatory in the Appeals Court. In the SJC it is still discretionary but "highly encouraged".

Documents that must be e-filed. All documents filed in the Appeals Court in criminal cases must be eFiled, except that e-filing is discretionary with fully impounded documents. Partially impounded documents must be e-filed. All documents that are e-filed should be submitted electronically *only*, and not with paper copy duplicates.

Waiver of the electronic filing requirements. Any document required to be e-filed may be filed on paper *only* upon allowance of a motion to waive the e-filing requirement, preferably filed in advance or with the document. The motion must contain a showing of undue hardship, significant prejudice, exigency, or other good cause.

Designation of Impounded Documents. If you are e-filing a brief that contains impounded material, you must designate the document as impounded using the appropriate field on www.EfileMA.com. You must also mark any impounded document as impounded on the cover or first page of the document, as you would with a paper document. See M.R.A.P. 16(m).

Service of Documents e-Filed in the Appeals Court. Registration with EfileMA.com constitutes consent to receive electronic service in all cases. All documents submitted electronically through www.EfileMA.com may also be electronically served through www.EfileMA.com, provided the other party or party's attorney has registered with www.EfileMA.com. If a party's representative has not registered with www.EfileMA.com, service should be made by the conventional methods (e.g., paper copies and regular mail).

CHAPTER 2: THE RECORD ON APPEAL

INTRODUCTION

The record is the foundation for the appeal. The appellate judges decide cases based solely on what is contained in the trial court record,[1] which is referred to in the appellate rules as the "record on appeal."[2] On a direct appeal assignment, you are responsible for obtaining and reviewing the entire record, as well as important documents that are not part of the record. This chapter explains what is contained in the record, how it is produced, how to obtain transcripts and other necessary documents, how to cure transcript production delay, and how to handle information that is impounded or confidential.

WHAT CONSTITUTES THE RECORD ON APPEAL

M.R.A.P. 8(a) defines the record on appeal as consisting of the "documents and exhibits on file, the transcript of the proceedings, if any, and the docket entries." Transcripts are transcribed mainly from audio recordings by transcriptionists, although some are taken down by court reporters.[3] Superior Court and District Court docket sheets may be found online at https://www.masscourts.org/eservices/home.page.2 [4]

The "documents and exhibits on file" that constitute the record may include but are not limited to:

- Indictments (Superior Court)

[1] As discussed in Chapter 1, to raise a post-conviction claim based on facts outside record, you must file a new trial motion in the trial court under M.R.Crim.P. 30, introduce those facts by means of affidavits and, if a hearing is granted, present evidence. Keep in mind that you must get the approval of the Director of Criminal Appeals before you can file a Rule 30 motion.

[2] M.R.A.P. 8(a).

[3] The audio recording system has replaced court reporters (stenographers) as the method of producing transcripts. Court reporters are still used on an occasional basis and are discussed later in this chapter.

[4] You should establish a Masscourts account, rather than using the public search function. Having a Masscourts account gives you access to more docket sheets as well as documents linked to the online dockets. Some District Court dockets are still only available by photocopying at the court clerk's office.

- Complaints and Applications for Complaints (District Court)
- Pretrial conference reports *(Not normally needed for a direct appeal absent special circumstances)*
- Clinical evaluations of the defendant for competency to stand trial and criminal responsibility that have been filed in court. *(Note that court evaluations should be treated as confidential. The rules governing the handling of confidential information are discussed at the end of this chapter).*
- Pleadings, including motions, affidavits, motion exhibits, and attachments
- Proposed jury voir dire questions
- Court orders, including findings of fact and rulings of law, memoranda of decision, and endorsements on motions
- Exhibits, both trial exhibits and motion exhibits
- Items marked for identification at trial or during a motion session
- Proposed jury instructions
- Written questions from the jury
- Verdict slips
- Sentencing memoranda, including any probation reports on sentencing
- Any other material that was filed with the court

What Is Not Part of the Record

The following items are not part of the appellate record unless filed in the trial court by a party. Usually, but not always, they will be filed as attachments to a motion to suppress or dismiss. These items are usually provided to the defense by the Commonwealth as discovery, and will be found in the trial attorney's file. If they are not, you should determine if they exist, and obtain them if they do.

Discovery materials

- Police reports, interrogation and interview notes, documentation of identification procedures
- Video and audio recordings (911 calls, bodycam, surveillance, interrogations
- Grand jury minutes (*Note that Grand jury minutes are made confidential by statute. The rules governing the handling of confidential information are discussed at the end of this chapter).*
- Phone information (such as Cellbrite reports)
- Search warrant and arrest warrant applications, affidavits, and returns

- Criminal Offender Record Information of witnesses (CORI materials)[5]
- Crime lab reports and crime lab file (e.g. drug analysis certificates, ballistics reports, fingerprint reports, autopsy reports
- Discovery Notices

Defense Investigation and Work Product Materials

- Defense investigator reports
- Expert resumes and reports
- Defendant's mental health and/or medical records
- Internal memos
- Correspondence between counsel
- Defense counsel's running sheet.

THE RECORD APPENDIX

Counsel should distinguish between the "Record on Appeal" and the "Record Appendix." The Record Appendix is a separate volume, filed along with the appellate brief, which consists of photocopies of documents from the trial court record that are included because they are relevant to the appeal. The form and contents of the record appendix are discussed below.

HOW TO OBTAIN THE RECORD AND OTHER DOCUMENTS FOR A DIRECT APPEAL

This section discusses how to obtain documents for a direct appeal that are part of the record. as well as documents outside the record that should be reviewed. In the addendum to this manual you will find a ***Direct Appeal Checklist*** of documents that should be obtained and reviewed as part of the process of preparing a direct appeal. Although many of these documents are not part of the record on appeal, it is important to review them in order to get a complete understanding of the case, and to determine whether to file a motion for a new trial motion under M.R.A.P. 30, in lieu of a direct appeal. (See Chapter on Screenings and New Trial Motions, below). The completed checklist should be submitted to the Director along with your brief when the brief is filed. Keep in mind that you must obtain permission from the Director of the Criminal Appeals Unit, Private Counsel Division, before litigating a new trial motion.

[5] You should also have a copy of your client's CORI. If it is not in the trial file, you should complete a CORI request form and submit it to the Probation Department to obtain it.

Obtaining the court file and the exhibits

After receiving an assignment and entering your appearance in the trial court (and in the Appeals Court if the case has already been docketed there), you should go to the trial court clerk's office, review the court file, and obtain a complete copy of the file. The various clerk's offices have different procedures for providing copies, so contact the clerk ahead of time and find out what they are. Also find out whether any special arrangements need to be made for viewing the exhibits and items marked for identification.[6] Make any such arrangements ahead of time to save yourself an additional trip to the courthouse. Some courts have begun allowing counsel to scan exhibits either with a flat-bed scanner or apps on their phones. Exhibits and items marked for identification are usually kept in the court file in District Court cases, but kept separately in the Superior Court. Some courts may require a motion to photocopy exhibits. If there are charges associated with obtaining copies, pay the charges out of pocket and bill CPCS for reimbursement. In cases where you need a color copy of a photographic exhibit, and the clerk's office doesn't have a good color copier, ask (or if necessary file a motion) to take the exhibit to an outside copier that will do color copying. This is also true when the details of a photograph cannot be captured by the clerk's office photocopy machine.

The trial court is required to retain the exhibits and items marked for identification until the appeal is decided. Nevertheless, some district courts return the exhibits to the parties. To see these exhibits you will need to contact the district attorney or trial counsel. If the district attorney has them, contact the DA's appellate unit, inform them that you need copies of exhibits, and they will assign the case to an appellate ADA. (The DA's office normally does not assign a case until they receive the defendant's brief).

You should also make arrangements to view any physical exhibits, which are often returned to the Commonwealth. (Contraband, such as guns, drugs and money are sometimes returned to the DA, to be kept by the police until the disposition of the appeal). Contact the Commonwealth's appellate unit and inform them that you need to see the physical exhibits, and they will assign an appellate ADA to the case.

If the Commonwealth loses or destroys exhibits in its possession, it can seriously compromise your client's right to a fair appeal. If this appears to be the case, file a ***Motion to Preserve Evidence***. This will serve to protect your client's rights if the government cannot locate the

[6] It is important to view and obtain copies of the items marked for identification, because these may form the basis of an appellate issue, such as exclusion of exculpatory evidence.

exhibits and may provide grounds for a new trial. Copies of exhibits can be substituted for the original for inclusion in the record appendix, but you must make sure that the copies are identical to the documents that were introduced into evidence or marked for identification.

Obtaining Trial Counsel's File.

It is important to obtain and review the trial counsel's complete file, including the portions that are not part of the record. CPCS Performance Standards, page 4.7 appointed trial attorneys "fully cooperate with appellate counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product."[7] Massachusetts Rule of Professional Conduct 1.15A also requires the entire to produce the *complete original file*, including all attorney work product. The trial attorney may require a Release of File signed by the client. You should tell court-appointed trial counsel that he or she can bill for the attorney's time and costs in providing the file. (The attorney can re-open the attorney's NAC on the case by contacting CPCS.[8]) If you have trouble contacting the court-appointed attorney, or if the attorney is not cooperating, contact an attorney in the Private Counsel Division Criminal Appeals Unit for guidance.

Once you have received the trial counsel's file, it is a good practice to segregate it from the court file, to avoid confusing what is and what is not part of the trial court record. You should also discuss the case with the trial attorney and get the attorney's views on the trial, the appellate issues, the client, and any other information relevant to the appeal.

TRANSCRIPT PRODUCTION

The transcript production process is governed by M.R.A.P. 8(b) and by several Court Rules. The appellate court has no role in the transcript production process**.** Trial counsel is responsible for ordering the recordings of the proceedings from the trial court clerk using the FTR recording system. (see below). The trial court clerk is responsible for sending the recording to The Office of Transcription Services (OTS)[9] , and trial counsel is responsible for submitting an online order form to OTS. OTS reviews the order and, upon approval, sends the recording to an approved court transcriber. The transcriber transcribes the recording and sends a draft as a PDF file to

[7] Under CPCS Performance Standards, appointed attorneys are required to keep case running logs. Appellate counsel should always request trial counsel's case running log.

[8] Attorneys should email ebill@publiccounsel.net with their NAC number to request to re-open the NAC.

[9] At this writing, the Supervisor at OTS is Therese Wilson, whose e-mail address is therese.wilson@jud.state.ma.us. There are also six "transcript coordinators" who process the transcript orders.

OTS. OTS reviews the transcript for conformity with the trial court's specified format. Upon approval, the transcriber e-mails copies of the transcript as a PDF document to defense counsel and the trial court clerk. The trial court sends copies to the appellate court and the DA's office.

Under court rules, transcript orders of less than ten days of trial must be completed in 30 days. Transcripts consisting of more than ten days of trial must be completed in 60 days. *OTS does not normally keep track of how long the transcribers have their orders.* It is the responsibility of counsel to keep track of the time and contact OTS if the transcript goes over the applicable deadline. It is also the attorney's responsibility to review the transcripts after receiving them to make sure they are a complete and accurate transcription of the recording.

Note that OTS requires transcribers to complete two forms: an Audio Assessment Form and a Transcript Assessment Form. These forms are submitted to OTS by the transcriber if they find a problem with the recorded audio. The completed Transcript Assessment Form is included at the end of the transcript and indicates places where the transcriber could not transcribe the recording accurately due to problems with the audio.

<u>What Transcripts to Order</u>

When you receive your assignment, you should determine whether all of the necessary transcripts have been ordered, and you must order any that have not been ordered.[10] These will normally be audio recordings that must be ordered through the FTR online system. The necessary transcripts include the complete trial and all substantive pretrial motions. Motion proceedings should include the following: [11]

- Hearings on motions to dismiss[12]

[10] Under M.R.A.P. 8(b)(1)(a), the appellant must order the transcripts within 14 days of the filing of the notice of appeal. This time limit is not normally enforced. As mentioned in Chapter 1, CPCS performance standards, as well as M.R.A.P. 8(b)(1)(A), require assigned trial counsel to order the transcripts, but you must order them if trial counsel fails to do so.

[11] Trial Court Executive Office Transmittal 19-6, dated February 27, 2019, requires the defendant in a criminal appeal to order the following transcripts: hearings on motions to dismiss and to suppress evidence, hearings on motions in limine, Jury Empanelment, Trial, Verdict, Disposition, Evidentiary post-trial hearings. See page 4.

[12] Transcripts of substantive motions to suppress or dismiss should be obtained and reviewed *whether or not they involved an* evidentiary hearing. Non-evidentiary hearings on pretrial motions may be relevant to an appeal because appellate issues may be raised and preserved by counsel during argument at non-evidentiary hearings.

- Hearings on motions to suppress evidence (e.g., Search and Seizure, Statements of Defendant, Identification, etc.)
- Hearings on motions in limine

The trial transcript should contain the following:

- Motions in limine
- Empanelment
- Opening statements
- All testimony
- Sidebars, motions and arguments of counsel, judge's rulings, and objections
- Charge conference
- Closing arguments
- Judge's charge to the jury
- Jury questions
- Verdict
- Sentencing
- Post-trial motions

You should also listen to the recording of the arraignment, as there may be issues that arise from the arraignment proceedings.[13] Whether to order transcripts of routine proceedings such as bail hearings, pretrial conferences, or continuances depends on whether, you find after investigating the case, that they may be relevant to an appellate issue. [14] For example, pretrial conferences may involve discovery issues, and continuances may implicate speedy trial issues under M.R.Crim.P 36 or the Constitution. If you are unsure you should listen to the audio and then decide if a transcript is necessary.

When you get your assignment, check with the trial court clerk to see which transcripts have been ordered. You will need to order any outstanding transcripts using the online FTR system. If you are not sure which transcripts were ordered, check with the clerk, or with OTS, to see the recordings were ordered and transcripts procedures. If so, compare the order with the docket

[13] *See e.g. Commonwealth v. Frances,* 485 Mass. 86, 99-100 (2020) (Structural error occurred where defendant not informed at arraignment that assigned counsel was not approved by CPCS to handle murder cases).

[14] For example, if a motion to dismiss on speedy trial grounds was filed, you may need to review transcripts of the pretrial proceedings where counsel objected to any continuances. Or appealing the denial of a defense motion for sanctions for failure to make discovery may require reviewing all of the proceedings where the matter was discussed.

sheet and make sure that all the necessary transcripts have been ordered. If they were not, submit a supplementary request. M.R.A.P. 8(b) requires that the order be placed within 14 days of the filing of the Notice of Appeal though, as a practical matter, orders are accepted outside of this time frame. (This will be unavoidable if you received the assignment more than 14 days after the Notice of Appeal was filed, which will almost certainly be the case.)

Note: There is no charge for a transcript ordered for a direct appeal in an indigent criminal case, and it is not necessary to file a motion for funds. If the clerk or a transcriptionist tells you they need payment or an allowed motion, send them a copy of your NAC and point out the checked box indicating that it is a direct appeal. If they still demand payment, contact OTS at ots@jud.state.ma.us.

Ordering transcripts using the FTR audio recording system.

The Massachusetts trial court uses an audio recording system created by the FTR ("For the Record") company for transcript production. [15] In this system, recordings of courtroom proceedings are stored on an off-site server (i.e. on "the cloud"). These recordings are accessed over the internet. See https://us.court.fm/ A Transcriber transcribe the recordings and e-mails them to the trial court clerk and to defense counsel PDF document. The clerk sends copies in PDF form to the appellate court and the Commonwealth

The following is an overview of how to use the system oriented for defense counsel. You can find more detailed information in the FTR User Guide. [16]

ORDERING TRANSCRIPTS THROUGH THE FTR RECORDING SYSTEM

1. You must first create an account with FTR on the Court.fm website, at https://us.court.fm

[15] Audio recordings have replaced the stenographers, known as Court Reporters that used to be employed to produce transcripts in the Superior Court. Court reporters are still used on an occasional basis for cases involving homicides or major felonies. See below for a discussion of how to obtain transcripts produced by court reporters.

[16] You can get in touch with FTR Support at 877-650-0958 or by e-mailing them at mass.support@fortherecord. You can also get help by going to fortherecord.com/Support and completing the help form. Be sure to select FTR Court.fm in the product list to ensure the right team receives your inquiry.

2. Once you have registered, click on the "new request" button and complete the New Request Form by inputting the requested information about the case and the proceedings you want transcribed.

3. The "New Request" online form asks for the date and the start and end times of the proceedings you want, along with the number of courtroom where the proceeding took place. You should be able to find this information on the docket sheet. If the case was heard in several segments on the same day, select one start and end time that includes all segments. You can request recordings from several days, if necessary. Each day of trial constitutes a separate order.

   PRACTICE TIP: If information regarding the times or courtroom is missing from the docket sheet, contact the clerk. They may have it in a log book. It is the clerk's responsibility, under District Court Special Rule 211, to note the start and end times of each proceeding. Some clerk's offices, in lieu of taking down this information, have been sending a *full day's recording* to the attorney and expecting the attorney to listen to the recording and find the location of the proceedings to be transcribed. THIS IS THE CLERK'S RESPONSIBILITY, NOT COUNSEL'S. If an assistant clerk is uncooperative, contact the Clerk Magistrate at firstname.lastname@jud.state.ma.us.

4. The "cost waiver" dialogue box asks if there is an affidavit of indigency on file. Select "yes" for all court appointed cases. Otherwise the clerk will not process the request until payment is received. Remember, THERE IS NEVER A CHARGE FOR A TRANSCRIPT FOR A DIRECT APPEAL IN AN INDIGENT CRIMINAL CASE.

5. Once you submit your audio request, it will be reviewed by the clerk's office to make sure that the case description is accurate, that your client has been found indigent, and that it does not contain confidential or protected material. NOTE: When you submit your audio request a charge will appear. This charge will be waived by the clerk once she verifies indigency.

6. After you submit the request, the clerk will send you an e-mail notifying you that they have received your request and that a decision to approve it is pending.

7. Upon approval, the clerk will send you an e-mail that will include a link to the "streaming" audio of the recording(s) you requested. Note that the email is sent as coming from FTR, not the individual clerk's office. Listen to it to make sure that the clerk has correctly selected the proceedings that you want. If necessary, adjust the time counter to determine the exact times of the proceedings you want transcribed.

8. If the clerk denies your request, the e-mail will indicate what the problem is. You should contact the clerk in order to resolve the problem.

   IMPORTANT: If the clerk deems any part of the proceedings to be confidential there will be a gap in the recording they send back which will alert you that something is missing. The defendant has a right to a complete transcript for his or her appeal. Attorneys who are denied access to material they are entitled to should speak to the clerk and may need to file a motion to get access.

9. Once you have listened to the recording, complete and submit the online transcript request form. It will ask you for the start and end times of the recording you want.

   PRACTICE TIP: When completing the New Request Form, indicate in the comments box that you want to be sent *downloadable* audio. It is advisable to have a copy of the recording in case there are any problems with the accuracy of the transcript. Also, FTR deletes the recordings from their server after one year, so downloading the recording is the only way to preserve it.[17]

10. Upon approval of your transcript request, you must complete and submit a transcript order form to OTS. This is an online form that can be found here: https://macourtsystem.formstack.com/forms/transcript_order_form Complete the form and click on the "submit form" button to submit the form to OTS.

11. OTS will review your order form and, upon approval, send a link to the recording to a transcriber selected from a list of approved court transcribers. You will receive notice that the transcriber has received the recording, and you will be contacted by the transcriber.

    PRACTICE TIP: Court administrative policy states that the due date for a transcriber to produce a transcript *after receiving the assignment from OTS* is determined by the number of hours of audio and that **in no event should the length of time for producing the audio be more than 90 days.** If a transcriber fails to meet the deadline, contact the transcriber directly and find out what the problem is. If you cannot resolve the problem with the transcriber, contact the Office of Transcription Services at ots@jud.state.ma.us and ask them for help. Oversight of the transcribers is the responsibility of OTS, and individual assignments are assigned to "transcript coordinators." Determine who the

[17] Please note that the audio can only be downloaded and played by using the FTR Player. Windows Media Player, QuickTime etc., will not open these files. The FTR player can be obtained from the FTR website: www.fortherecord.com

transcript coordinator is for your transcript and get in touch with them. (There is more on curing transcript production delay later in this chapter.)

12. When the transcript is completed, the transcriber will email a PDF of the transcript to OTS for approval. Upon approval by OTS, the transcriber will send a PDF of the transcript to the parties - i.e. the defense counsel who placed the order, the Commonwealth, and the *trial court* clerk. Clerk will send the transcript as a PDF document to the appellate court and the Commonwealth.

    NOTE: The trial court is trying to locate courtrooms where the microphones need to be moved for better recording. Please report to us edembitzer@publiccounsel.net any problems with microphone placement or with inaudible recordings.

The "JAVS" Audio Recording System

Prior to the installation of the FTR system in 2018, the court used a system called "JAVS".[18] You may be assigned an older case that was recorded using the JAVS system. In the JAVS system, the recordings were kept on a server in the courthouse, and the clerks burned CDs of the requested recordings and mailed them to the transcribers. All the JAVS recordings were supposed to have been transferred to the FTR offsite servers when the new system was installed, but there have been reports that some of these recordings are missing. If a recording is missing from one of your cases, find out from the clerk if it was originally recorded using JAVS. If it was, contact FTR support at to see if they can help you retrieve it. If not, you will have to reconstruct the record. Record reconstruction is discussed in the next chapter.

Ordering Additional Transcripts

If you learn after your case has been docketed in the appellate court that some necessary transcripts were not ordered, you must file a Motion to Stay the Appeal Until all Missing Transcripts are Produced. The appellate court will either stay the proceedings and request that a status report be filed every 30 days or will vacate the entry of the appeal without prejudice pending production of omitted portions of transcript.

Court Reporters

In Superior Court cases, transcripts were traditionally produced by stenographers, referred to as Court Reporters. Today, almost all Superior Court proceedings are recorded using the FTR system. Reporters are used only on an occasional basis. When you get a Superior Court

[18] The acronym stands for "Justice Audio Visual Solutions".

assignment, check the entry for each necessary proceeding on the docket sheet[19] and see whether it was recorded on FTR or by a court reporter. All proceedings recorded using the FTR system must be ordered through FTR. For proceedings taken down by a court reporter, the court reporter must be contacted and the order placed directly with the court reporter. The contact information for the official court reporters can be found here. https://www.mass.gov/files/documents/2016/08/os/official-court-reporters-list.pdf If you have to place an order with a court reporter, give the reporter your NAC number and instruct him or her to bill CPCS directly for the transcript. DO NOT pay the reporter out of pocket. If the reporter insists on prepayment, contact the Director of Criminal Appeals.

When the reporter completes the transcript, the reporter will send it as a PDF on a CD directly to the clerk, who will make copies and distribute them to the parties and the appellate court. The practices of the clerk's offices vary. Some will send you a CD and some will send you a hard copy. (Note that when an audio recording is being transcribed, the transcriber will send you a copy directly via e-mail with the transcript attached as a PDF file.

If you have a production problem with a court reporter, contact Tashiva Williams, the court administrator responsible for overseeing the reporter. She can be reached at tashiva.williams@jud.state.ma.us. If you are unable to resolve the problem, contact the Director of the Appeals Unit for the Private Counsel Division for guidance.

CURING TRANSCRIPT PRODUCTION DELAY

Timeliness of transcript production

Assuring the timeliness of transcript production is a crucial aspect of criminal appellate practice. The Office of Transcript Services is responsible for monitoring the timeliness of transcript production. But you cannot rely on OTS. You must monitor production of the transcripts in your case, and contact OTS to cure any delay in production. Keep in mind that the trial court clerk will not release any of the transcripts to the parties and will not assemble the record until *all* of the transcripts have been submitted.[20] As a practical matter, *you* are responsible for seeing that the transcripts are produced in a timely fashion, that they are complete and accurate, and that the record is promptly assembled and sent to the appellate court. This is a very important

[19] Superior Court docket sheets can be found online at https://www.masscourts.org/eservices/home.page.2 .

[20] The Appeals Court has no role in the transcript production process. As mentioned in Chapter 1, until all the transcripts are produced and the record is assembled, the case remains under the jurisdiction of the trial court, not the appellate court.

responsibility. Your client's right to liberty is slipping away with each day that his transcript is late or must be reconstructed, and his rights may be prejudiced if inaccuracies or omissions go uncorrected.[21]

Preventing and Curing Transcript Production Delay

As stated above, the due date for the production of a transcript is determined by the number of hours of audio to be transcribed, and in no event should take more than 90 days.
To prevent transcript delay, when you receive your assignment, you must determine where each transcript is in the production process, and then calendar in an appropriate time for production to reach the next stage. Then you must follow up. If production of a transcript is lagging behind schedule, you must take appropriate action to cure the delay.

Delay by the trial court

Clerks can cause transcript production delay by failing to in a timely fashion process an FTR request for an audio recording or failing to forward a copy of the Transcript Order Form to the Office of Transcription Services (OTS). When you receive your assignment, check and see whether all of the necessary transcripts have been ordered and order any that have not been. If all the necessary transcripts have been ordered, find out if the clerk has sent the order to OTS and, if so, whether OTS has sent the order to a transcriber. If it has, see if the transcriber has completed it and sent it to OTS for approval. If that has happened, see whether the transcriber has sent copies of the transcripts to you and to the trial court clerk. If the transcript is hung up at any of these stages, contact the appropriate entity trial court clerk, OTS, or transcriber - find out the reason for the delay and attempt to resolve it. If an assistant clerk is being uncooperative, contact the clerk-magistrate at firstname.lastname@jud.state.ma.us.

Delay by a transcriber

If a transcriber exceeds the deadline for production (see above), contact the transcriber and find out what the problem is. If the transcriber is uncooperative, ask for help from the Office of Transcription Services at ots@jud.state.ma.us. OTS is responsible for contracting with and overseeing the transcribers. They will intercede when informed that at transcriber has exceeded a deadline. Sometimes that problem is that the transcriber has too much work. If that is the case, ask OTS to reassign the order to another transcriber. At OTS, each transcript assignment is overseen by a "transcript assignment coordinator." If there is delay, the coordinator may be able to help solve the problem.

[21] Undue delay is a violation of your client's right to Due Process. You can file a motion seeking dismissal if you can show that the delay prejudiced the defendant's right to appeal. See *Comm. v. Gruska,* 30 Mass. App. 940 (1991). This is a very difficult standard to meet. A more practical avenue is to file a motion to stay execution of sentence pending production of the transcripts.

Delay by a court reporter

If a court reporter is overdue producing a transcript, contact the reporter directly and find out what the problem is. The reporter's name will be listed on the docket sheet at the date that the transcript was ordered[22]. If the reporter is uncooperative, contact Tashiva Williams, the court administrator responsible for overseeing the court reporter, at tashiva.williams @jud.state.ma.us at 617-788-7303. Often the solution is to have the transcript order assigned to a different court reporter.

Contacting the Administrative Offices of the Trial Court

When all other methods have failed to produce results, some practitioners have had success by contacting one of the court's the administrative offices, either that of the Trial Court, Superior Court, or District Court, as the case may be. Contacting the administrative offices should not be done routinely, but only when all other non-litigation methods have been exhausted.

Motions to Compel Production of Transcript

Traditionally, when a transcript delay problem could not be resolved informally, the standard procedure was to file a *Motion to Compel Production of Transcript* with the trial judge. If the judge allowed the motion, the judge would order a certain period of time, usually 30 days, for the transcript to be produced. If the reporter or transcriber did not produce the transcript within the deadline, defense counsel would have to file a *Motion to Show Cause Why the Reporter or Transcriber Should not be Held in Contempt*. If allowed, the judge would find reporter in contempt and the reporter could be either fined or jailed until the transcript was produced. In appropriate cases, counsel would also file **a *Motion to Stay Execution of Sentence*** until the transcript was produced.

Motion practice is not a very efficient method of court management. Motions can be pending for months, can be denied by the judge, and ignored by the reporter or transcriber. A better approach is to use the administrative methods described above and to use motion practice as an additional means of putting pressure on the system if necessary. (Note: it is not advisable to contact Justice Carey while a motion to compel is pending).

[22] Contact information for court reporters can be found on the mass.gov website, at https://www.mass.gov/files/documents/2016/08/os/official-court-reporters-list.pdf

ASSEMBLY OF THE RECORD

Once the trial court clerk receives all the transcripts, it is the clerk's duty under M.R.A.P. 9 to assemble the record and send it up to the appellate court. However, the only documents that are actually sent up are the transcripts (as a PDF file), the docket sheet, indictments or complaints, a *list* of witnesses, a *list* of exhibits, and a *list* of the papers on file. The actual pleadings and exhibits are retained by the lower court until the appeal is disposed of. For this reason, you must include in the record appendix to your brief any pleading, exhibit, or other document that is part of the record that is relevant to the appeal, or the judges will not have access to it.

If you want the appellate court to see an actual physical exhibit, you must file a motion in the appellate court to have the exhibit sent up to the appellate court. You will need to make arrangements with the trial court clerk to have the item transferred. The only exhibits that may not be sent to the appellate court are contraband: drugs, guns, and money.

Delay in Record Assembly.

Record assembly is the process by which the clerk sends the transcripts and related materials up to the appellate court. Under M.R.A.P. 9 (e)(1)(a), the clerk must assemble the record within 21 days of receiving the last transcript. If the clerk has exceeded this deadline, contact the trial clerk's office and find out what the problem is. If that doesn't solve the problem, *Zatsky v. Zatsky*, I36 Mass. App. Ct. 7, 12-13 (1994) recommends complaining to the appeals court clerk and, if that doesn't solve the problem, filing a motion with the single justice of Appeals Court to compel the clerk to assemble the record promptly or waive assembly as a prerequisite to entering the appeal.

CITATION TO THE RECORD IN THE APPELLATE BRIEF AND THE RECORD APPENDIX

In the brief, all statements of fact must be cited to the transcript or to the contents of the record appendix, and the record must support every factual assertion made in the brief. [23] Only material that is part of the record on appeal may be included in the record appendix and cited.

IMPOUNDED AND CONFIDENTIAL MATERIAL

If a brief contains material that is impounded or made confidential by statute, rule, or court order, the cover of the brief should be clearly marked CONTAINS IMPOUNDED MATERIAL. If the record appendix contains confidential material, the cover of the record appendix should also be marked this way. You must also file a written notice with the clerk, with a copy to the

[23] M.R.A.P. 16.

Commonwealth, that there is impounded or confidential material in the brief or record appendix. You may not refer to impounded or confidential material at oral argument.

There are many statutes that make various types of records and information confidential. An extensive list of statutes and rules making material confidential can be found at https://www.mass.gov/trial-court-rules/uniform-rules-on-public-access-to-court-records-addendum-records-excluded-from An article on impoundment procedures in the Appeals Court can be found on the Appeals Court's website at http://www.mass.gov/courts/court-info/appealscourt/appeals-court-help-center/appellate-courts-impoundment-procedures-.html.

If the name of a person has been impounded or made confidential by statute, rule, or court order, you must preserve that confidentiality in briefs and oral arguments. M.R.A.P. 16(d). You must use a pseudonym in place of the true name of the alleged victim in any case where the defendant was charged with any of the following offenses, *even if he or she was acquitted of the charge*.[24]

- Indecent Assault and Battery on Child Under Fourteen.
    - Rape.
    - Rape of a Child.
    - Rape and Abuse of a Child.
    - Assault with Intent to Commit Rape.
- Assault on Child under Sixteen with Intent to Commit Rape.
- Human Trafficking -- Sexual Servitude.

In addition, the name of the alleged victim of any of these offenses must be redacted from any place in the record appendix where it appears. Normally a pseudonym or fictitious initials are used.

[24] See G.L. c. 265, s. 24C (as amended 2012).

COMMITTEE FOR PUBLIC COUNSEL SERVICES
APPEALS AND POST-CONVICTION ADVOCACY TRAINING MANUAL

CHAPTER 3: CASE ANALYSIS AND ISSUE SELECTION

This Chapter discusses the legal standards that apply to the direct appeal of a conviction or sentence. In deciding a direct appeal, the appellate court looks only at the trial court record, and will not consider any information that is outside the record.[1] The Court's decision in a direct appeal of a conviction is based on three criteria: (1) whether there was legal error; (2) whether the error was preserved for appellate review; (3) and whether the error was prejudicial, which means that the error may have affected the outcome. Preservation determines the standard of review the court will apply in deciding the issues. The court reviews issues that were preserved at trial more favorably to the defendant than issues that were not preserved. Preservation is not essential in a direct appeal, however, because the Court will still reverse in a criminal case if it finds that an unpreserved error created a "substantial risk of a miscarriage of justice."[2] Moreover, if an error is considered a "structural defect," then prejudice will be presumed.[3] This chapter discusses the standards that apply to each of these these three criteria, and how they interact.

The discussion of these standards can be very technical. Never lose sight of the fact that the overarching consideration in appealing a criminal conviction is *fairness.* The appellate court will reverse if it is convinced that the defendant did not get a fair trial.

CASE ANALYSIS

The theory of the case at trial

A trial is a contest in story-telling. Each party tries to persuade the jury[4] to accept its point of view of the events. This point of view is referred to as the party's "theory of the case." The Commonwealth's theory is consistent with guilt, the defense with innocence or mitigation.

The Commonwealth's theory consists of its version of who committed the offense and how it occurred. It offers to support its theory in the witnesses it calls and evidence it introduces, and

[1] M.R.A.P. 8(a). Convictions based on information outside the trial court record must be challenged collaterally by means of a new trial motion under MRCP 30. Panelists must get permission to file a new trial motion.
[2] *Commonwealth v. Freeman*, 352 Mass. 556, 564 (1967).
[3] *Commonwealth v. LaChance*, 469 Mass. 854, 867 (2014).
[4] In this Chapter, the term 'jury' is meant to include a judge acting as fact-finder in a jury-waived trial.

any inferences it wants the jury to draw from the evidence. Because the Commonwealth has the burden of proof, the defendant normally builds his theory on the weaknesses in the Commonwealth's case, either by attacking the government's evidence, presenting exculpatory evidence, or a combination of both. The defendant may also choose to present evidence in support of an affirmative defense, such as self-defense, or lack of criminal intent. Keep in mind that the defendant does not have to persuade the jury to accept his theory; he only has to present it convincingly enough to raise a reasonable doubt as to the correctness of the government's theory. This is an important principle to keep in mind when crafting a prejudice argument for an appeal.

Sometimes a defendant does not present "his version" of the facts. Rather, the defendant focuses solely on the weaknesses government's theory, arguing that the theory is implausible, or that it is not supported by reliable evidence. This is another way to prevent the Commonwealth from meeting the high standard of reasonable doubt.

The theory of the case on appeal

The theory of the case on appeal is based on the theory presented at trial. The importance of particular facts is determined by their relationship to the theory of defense at trial. The story the defense was telling at trial and story that you are telling on appeal are part of the same story.

Mastering the record

Analyzing a case for appellate review properly requires becoming intimately familiar with the trial court record.[5] Appellate judges usually decide cases based on the facts, you must know the record cold in order to present the facts as persuasively as possible. Appellate claims often involve the interaction between various events that occurred in the lower court. So it is important to get a sense of the case as a whole. **A list of the fundamental information you should know can be found at the end of this chapter**. In reading the transcripts, pay attention to both the testimony and the procedural events. Creating a transcript index helps in gaining familiarity. The docket sheet should also be studied carefully in order to get a detailed understanding of the procedural history of the case. There is a checklist at the end of this chapter which lists all of the documents you should review in preparing an appeal**.**

Spotting the issues

Spotting issues for appellate review requires a thorough knowledge of criminal substantive and procedural law. It is beyond the scope of this manual to cover this vast topic. In order to deepen your knowledge of criminal law, and in order keep abreast of the developments in the law, you should subscribe to and read on a regular basis the advance sheets the decisions of

[5] See Chapter 2 for an explanation of what is contained in the trial court record.

the Massachusetts appellate courts and the U.S. Supreme Court in criminal cases as they come out.[6] **There is a list of research tools at the end of this chapter.**

Errors of law arise primarily from procedural events that prevent the defendant from presenting his theory to the jury. These errors are most likely to occur in areas where the parties' theories are in conflict, as the defendant asserts his challenges to the government's case and the government pushes back trying to shore up its weaknesses. These are usually evidentiary issues regarding the testimony of a witness, where the judge either: (1) admits the Commonwealth's evidence over defense objection; or (2) excludes exculpatory evidence over defense objection.[7] They may also be "structural" errors, which are inherently prejudicial, and require reversal without a specific showing of prejudice.[8] (Structural errors are discussed below).

The flow of information to the jury

One way of looking at appellate errors is to consider the flow of information to the jury. This information is given to the jury from four sources:

1. Testimony and evidence
2. arguments of counsel
3. the judge's instructions
4. Any extraneous influences

Any issue that involves the flow of information to the jury requires showing that its effect on the jury prejudiced the defense. This can be information the jury *should* have heard, or information the jury *should not* have heard. Structural errors do not involve the flow of information to the jury, and so don't require a showing of prejudice. Rather, structural errors are inherently prejudicial, because they affect the fairness of the proceedings themselves.

Preserved and unpreserved errors

Errors are "preserved" for appellate review by motions and objections made in the lower court. In order to preserve an issue it must be brought to the attention of the judge, and a ruling must be made. If in the above example defense counsel had not objected to the introduction of the

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[6] The Massachusetts cases can be subscribed to online at www.massreports.com or http://www.socialaw.com/slips.htm?sid=120

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[7] When defense evidence is excluded, the defendant must make an "offer of proof," in order to preserve the error for appellate review. This is discussed below.

[8] *Commonwealth v. LaChance*, 469 Mass. 854, 857 (2010); *citing* Commonwealth v. Cohen (No.1) 456 Mass. 94, 118-119 (2010) (properly preserved claim where counsel objected to court room closure at trial).

hearsay evidence, issues would have not been preserved, and would be considered waived. Where the appellate court finds that an issue is waived in a criminal case, it will apply a standard of review that is more difficult to meet than if the issue had been preserved below.

It is not hard to spot preserved errors. These errors arise from rulings against the defendant the lower court judges make on motions and objections. Preserved errors include the denial of pre-trial motions to suppress or dismiss, and motions in limine. Spotting unpreserved errors requires more knowledge and experience because there are no procedural events to flag these issues. Employ your own instincts as to what was not fair about the trial, and follow those instincts. They can lead to viable issues.

Whether an error is preserved or unpreserved determines the standard of review the appellate court will apply in determining whether the error was prejudicial. An unpreserved error will be subject to a higher that is, more difficult, standard than preserved error. The standards of review and the rules of preservation are discussed below.

Measuring prejudice

The appellate court will not reverse for error unless the error was prejudicial. The degree of prejudice required depends on what standard of review the appellate court will apply. To find prejudice, the court must find that the error affected the judgement to some degree, otherwise the court will find "harmless error." The degree of prejudice the defendant must show to win the appeal depends on the standard of review the court applies.

The SJC has set out a series of indicia that it considers in determining whether an error was prejudicial or harmless. This test is referred the *Mahdi*[9] test, after the case that collected these various indicia:

- the relationship between the evidence and the premise (or theory) of the defense;
- the weight or quantum of evidence of guilt;
- the frequency of the reference (including during the prosecutor's closing); and
- the use and/or effect of curative instructions.
- the importance of the evidence to the prosecution's case.[10]

The SJC has stated that "these factors are not exclusive or exhaustive. Nevertheless, this scoreboard method to distinguish harmless from harmful error is useful."[11]

[9] *Commonwealth v. Mahdi*, 388 Mass. 679, 696-697 (1983) and cases cited.
[10] *Commonwealth v. Dagraca,* 477 Mass. 546, 553 (2006) (adding this sixth factor to the five *Mahdi* factors. *See Commonwealth v. McNulty,* 458 Mass. 305, 320 (2010).
[11] *Mahdi, supra.*

The first factor refers to the principle, discussed above, that prejudice should be viewed in light of the theory of defense. The more central to the case the area of dispute affected by the error, the greater the degree of prejudice. For example, an error that prevented impeaching of a key government witness would be more prejudicial than an error in the impeachment of a minor witness. Likewise, the exclusion of exculpatory evidence would be more prejudicial if it was the only evidence on the issue than if it was merely cumulative of other exculpatory evidence that was admitted.

As to the second factor, the appellate court looks at the strength of the government's case. Where there is overwhelming evidence of guilt, the Court is more likely to find harmless error.[12]

With respect to the third factor, prejudice is determined by viewing the errors in the context of the trial as a whole. For example, the prejudicial impact of erroneously admitted incriminating evidence can be aggravated where the prosecutor emphasizes the evidence in closing argument.[13] Or prejudice may increase where improper evidence has an adverse impact on many aspects of the theory of defense.[14] Similarly, several errors affecting the same issue may create reversible error where none of them would by itself.[15]

Regarding the fourth factor, although the appellate courts have found that curative instructions may alleviate prejudice,[16] they have reversed where the instructions were merely standard and not focused on the error,[17] or where it found that the prejudicial impact of the error was so serious that even a forceful curative instruction did not cure the error.[18]

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[12] *Mahdi,* supra.

[13] *Commonwealth v. Mattei,* 455 Mass. 840, 855 (2010) (reversing where prosecutor in closing described improper DNA evidence as "very important in this case"… "creat[ing]links in the chain," and "help[ing] to put all of those pieces of other evidence together," into "a big, clear picture").

[14] *Commonwealth v. Woodbine,* 461 Mass. 720, 741 (2012) (reversing where "the improperly admitted evidence had the dual purpose of both tying the defendant to the crime and supporting [the witness]'s credibility, thus intensifying the harm to the defendant's rights").

[15] *Commonwealth v. Orton*, 58 Mass. App. Ct. 209, 215 (2003) ("although we have ruled that several of the claimed errors in and of themselves were not prejudicial, we lack fair assurance that the combined effect of the errors in this trial, all of which went directly to the disputed issue of identification, did not influence the jury verdicts and deprive the defendant of a fair trial).

[16] *Commonwealth v. Silva,* 455 Mass. 503, 518 (2009).

[17] *Commonwealth v. Beaudry, 445 Mass. 577, 585* (2005) *("*At no time did the judge focus on the transgression at issue, specifically, that the prosecutor was inviting the jury to draw an inference that could not be supported by the record").

[18] *Commonwealth v. Bacigalupo,* 455 Mass. 485, 492 (2009) ("We cannot accept limiting instructions as an adequate substitute for the defendant's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all").

With respect to the fifth factor, heavy reliance by the government on inadmissible evidence exacerbates its prejudicial impact.[19]

Keep in mind that for structural defects prejudice is presumed. Structural defects are not subject to harmless error analysis, but rather require automatic reversal without a showing of actual harm.[20] Structural defects are discussed more fully below.

Selecting the issues

After reviewing the record, identifying the potential issues and assessing their prejudicial effect, you must weigh the relative strength of the issues in order to decide which ones to raise on appeal. In order to be able to properly identify and evaluate issues, both preserved and unpreserved, you must view the events in the context of the defendant's theory of the case at trial, and the case as a whole, applying your own sense of fairness. Factors to consider include, but are not limited to:

- The factual and legal strength of the argument that the defendant's rights were violated;
- The standard of review for error: is it discretionary, or *de novo?*
- Whether the argument relies on clearly established law or calls for new law or an extension of the law and the rights that have been afforded defendants;
- How prejudicial the error was, that is, the extent to which the error could have affected the verdict.
- What is the standard of review for prejudice, (see discussion below concerning's standards of review) which determines the amount of prejudice to the defendant must show was caused by the error, or whether the error is reversible without a showing of prejudice.
- How persuasive is the case in a common sense way.

One way of assessing the strength of an issue is to consider how the Commonwealth will respond. The typical responses the government raises are that:

- No error of law occurred.
- The error was not preserved for appellate review, so that the issue is waived, or a high standard of review applies.

If error occurred then the error was **harmless** because:

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[19] *See e.g., Commonwealth v. Tyree, 455 Mass. 676, 684 (*reversing where "the repeated emphasis on the improperly admitted evidence in the prosecutor's closing argument … reflect[ed] the centrality of that evidence to the Commonwealth's case…").

[20] *Commonwealth v. Hampton*, 457 Mass. 152, 163 (2010).

- There was overwhelming evidence of guilt;
  The error was merely tangential and not central to the case
- The evidence erroneously admitted was merely cumulative of properly admitted evidence;
- The error was cured by the judge's curative instructions.
- Any or all of the above

You should consider the response to each of these arguments in determining the relative strengths and weaknesses of each issue you consider.

THE STANDARDS OF REVIEW

The standard of review determines how the appellate court will view the issue. There are standards of review for determining whether the trial judge committed a legal error, and standards of review for determining whether the error was prejudicial. The standard of review for error determines the degree of deference the appellate court should give to the trial judge's ruling. The standard of review for prejudice assumes that error occurred and determines the how much prejudice the error must have created in order to constitute reversible error. If the court finds no error occurred, it will affirm without reaching the question of prejudice.

Note that M.R.A.P. (a)(9)(B) provides that the standard of review should be stated in the brief. This is understood to mean the standard of review for prejudice. However it is good practice to include the applicable standard for error as well, and to point out which is which. (These statements can be put in their own section at the beginning of the argument, or in the section to which they apply).

The standards of review for error

The "abuse of discretion" standard.

The standard of review for error is determined by whether the error is of constitutional or non-constitutional dimension. Where the claim is not of constitutional dimension, the appellate court will apply a deferential standard, in which it must determine whether the judge's ruling was an "abuse of discretion." This standard has been recently been redefined as requiring a situation in which a judge "… made a 'clear error in judgement in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." ."[21] Under this standard, the appellate court will not overrule the trial judge unless it finds that the judge abused his discretion in making the ruling. (As a practical matter, the appellate court will usually find error if it disagrees with the ruling the judge made.)

[21] *LL. v. Commonwealth, 470 Mass. 169, 185, note 27 (2014).*

Most determinations as to the admissibility of evidence lie "within the sound discretion of the trial judge." [22] However, where an evidentiary ruling implicates the defendant's constitutional rights, it may be reviewable as a constitutional error, which applies a more favorable standard of review. In these situations, appellate counsel should consider whether there are constitutional ramifications to the error that would take it out of the judge's discretion. For example, admitting hearsay evidence may implicate the defendant's right to confrontation. (constitutional error is discussed more fully below).

There is legal error if a trial judge erroneously concludes that he or she has no discretion to decide a particular issue. Such action deprives the defendant of his right to appeal to the trial judge's discretion. [23] In these circumstances, the appellate court will normally remand the case for a ruling by the trial court judge, which ruling may then be appealed if it is averse to the defendant.

The "*de novo* review" standard

Where the claim is that the error violated the defendant's constitutional rights, state or federal, the appellate court reviews the issue "*de novo*." In *de novo* review, the appellate court does not give deference to the trial judge's ruling, but decides the issue "anew" as it were. Because the appellate court does not give the trial judge's decision deference, this standard of review is more favorable to the defendant than the abuse of discretion standard.

The "clearly erroneous" standard for judicial fact finding

Whether the appellate court reviews the judge's ruling deferentially or *de novo*, it must apply any findings of fact the judge made[24] unless they are "clearly erroneous."[25] Findings are clearly erroneous when, although there is record support, reviewing court is left with "definite and firm conviction that a mistake has been committed."[26] The courts have found a judge's findings of fact clearly erroneous even where there was record support for the finding.[27] An appellate court may supplement a suppression motion judge's subsidiary findings with evidence from the record that is uncontroverted and undisputed and where the judge explicitly or

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[22] *Commonwealth v. Bins*, 465 Mass. 348, 364 (2013).

[23] *Commonwealth v. Adjutant*, 43 Mass. 649, 666 (2005) ("Although the judge might properly have excluded the evidence within her discretion after weighing its probative value against its prejudicial effect, we do not speculate as to what the judge would have done had she recognized her discretion.")

[24] The higher court defers to the judge, because the judge "has [had] an opportunity to observe the conduct of the witnesses, their fairness and intelligence, and can judge better than the full court possibly can of the degree of credibility to be given to their testimony."

[25] *Commonwealth v. Tremblay,* 480 Mass. 645, 655 (2018).

[26] *Commonwealth v. Castillo*, 89 Mass. App. Ct. 779, 781 (2016)

[27] *Commonwealth v. Castillo*, 89 Mass. App. Ct. 779, 781 (2016) ("findings are "clearly erroneous" when, although there is record support, reviewing court is left with definite and firm conviction that a mistake has been committed").

implicitly credited the witness's testimony. However, the mere absence of contradiction is not enough to permit supplementation with facts not found by the judge.[28] In no event is it proper for an appellate court to engage in what amounts to independent fact finding in order to reach a conclusion of law that is contrary to that of a motion judge who has seen and heard the witnesses, and made determinations regarding the weight and credibility of their testimony.[29]

The standards of review for prejudice

If the appellate court finds error that is not structural in nature, then must determine whether the error was prejudicial. If the impact of the error does not meet the applicable standard for prejudice, the error will be considered "harmless." and the appellate court will not reverse on that issue. In order to prevail, the defendant must show that there is some *possibility* that the error could have affected the jury's verdict.

Stated another way, the Court must decide whether the result *might* have been different if the error had not occurred. If not, then the error is deemed to be harmless. For example, an error in introducing identification evidence would be considered harmless in a case where the defendant admitted he committed the act but claimed that he acted in self-defense. Similarly, an error in a jury instruction on an element of a charge that was not contested would be harmless. The defendant does not have to show that the result *would* have been different had the error not occurred, for it is not possible to determine in hindsight what the jury *would have done.* Rather, the defendant only has to show that there was *some possibility* that the error could have affected the outcome. The degree of possibility that the error could have affected the result is measured by the standards of review.

Unlike the standard of review for error, which is determined only by whether the error was of constitutional dimension, the standard of review for prejudice is determined by two factors: whether the error was of constitutional or non-constitutional dimension, *and* whether the error was "preserved" for appellate review in the lower court. Whether or not an error is preserved determines the standard of review for prejudice. Preserving an error requires bringing the error to the lower court judge's attention and giving the judge an opportunity to correct the error. There are many rules that apply to determining whether an error has been properly preserved, and those rules are discussed later in this chapter.
Keep in mind that measuring prejudice is not an exact science, and that you should not be deterred from raising a strong issue simply because the issue was not preserved. Reversals based on unpreserved issues are legion.

[28] *Commonwealth v. Douglas*, 472 Mass. 439, 444 (2015).
[29] *Id.*

Preserved Constitutional Error

A preserved constitutional error gets the most favorable standard of review. Where there is preserved constitutional error, "the Commonwealth bears the burden of demonstrating that the error was harmless beyond a reasonable doubt."[30] What is significant about this standard is not only that it sets a low bar for finding prejudice (which favors the defendant), but it *places a high burden on the Commonwealth* to show that the error was harmless. The other standards of review for prejudice – prejudicial error and substantial risk of a mismarriage of justice - implicitly place this burden on the defendant.

To preserve a constitutional issue, the defendant must raise the issue in the trial court *as a constitutional issue.*[31] Preservation of constitutional issues is discussed below.

Keep in mind that it is important to federalize issues in the state appellate courts if at all possible in order to preserve federal habeas corpus rights and the right to review by the United Stated Supreme Court. This is particularly important for a defendant who is serving a long sentence.

It is also important to remember that the Massachusetts Declaration of Rights provides greater protections in many areas of criminal law and procedure than the United States Constitution.[32] So it is important to cite the Massachusetts Declaration of Rights when you are arguing constitutional error. Even if there is no SJC case directly on point, you may be able to convince the SJC to create or enhance a new state constitutional right that provides your client with protection than the federal constitution fails to offer.

Preserved non-constitutional error

The intermediate standard of review for prejudice is applied to preserved non-constitutional error. It is commonly referred to as the "prejudicial error" standard.[33] **"**An error is prejudicial if we cannot find with fair assurance that it did not substantially sway the verdict."[34] The full definition, quoted by the SJC from *Kotteakos v. United States*, 328 U.S. 750 (1946), is as follows:

> [i]f, when all is said and done, **the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand**. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed

[30] *Chapman v. California*, 386 U.S. 18, 24 (1967); *Commonwealth v. Hoyt*, 461 Mass. 143, 155 (2011).

[31] *Commonwealth v. Galicia,* 447 Mass. 737, 746 (2006).

[32] *See, e.g., Commonwealth v. Upton*, 394 Mass. 363, 374-375 (1985) (retaining the Aguilar-Spinelli test for anonymous informants and rejecting the "totality of the circumstances" test adopted in *Illinois v. Gates,* 462 U.S. 213 (1983).

[33] *Commonwealth v. Vuthy Seng*, 456 Mass. 490, 502 (2010).

[34] *Commonwealth v. De Pina*, 476 Mass. 614, 624 (2017) (internal quotations and citations omitted).

> by the error, it is impossible to conclude that substantial rights were not affected. **The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error**. It is rather, even so, **whether the error itself had substantial influence. If so, or if one is left in grave doubt, then the conviction cannot stand**.[35]

Id. at 764-765 (emphasis added).

This definition "underscores that the focus of the prejudicial error standard is the impact of the error on the minds of the jury."[36] It is important to remind the appellate court they must consider the effect of the error on the *jury's* ability to fairly decide their case, and not substitute their own view for that of a reasonable jury.[37]

Unpreserved error

Issues that are not preserved and that do not come within an exception to the preservation requirement, are considered waived. Waiver is not absolute, however, because, **in criminal cases "all claims, waived or not, must be considered**."[38] In this regard, the Court has stated that the difference lies in the standard of review that the court applies when it considers the merits of an unpreserved claim." [39]

Unpreserved claims are reviewed under the highest, that is, the most difficult, standard for the defendant to meet. Under this standard, often referred to as the *Freeman*[40] standard, the appellate court will only grant relief if the defendant can show that the error resulted in a "substantial risk of a miscarriage of justice."[41] This standard applies to unpreserved constitutional issues as well as nonconstitutional issues. The court will grant relief for unpreserved claims when it is "left with uncertainty that the defendant's guilt has been fairly adjudicated." [42] The standard is satisfied where the appellate court harbors "a serious doubt whether the result of the trial might have been different had the error not been made."[43] In

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[35] *Commonwealth v. Dung Van Tran*, 463 Mass. 8, 21 (2012); *quoting Kotteakos, supra (emphasis supplied).*

[36] *Dung Van Tran, supra.*

[37] *Commonwealth v. Bradway,* 62 Mass. App. Ct. 280 (2004) ("Weighing and crediting the testimony are for the trier of fact, and we will not substitute our judgment for that of the trier of fact.")

[38] *Commonwealth* v. *Randolph*, 438 Mass. 290, 293-294 (2002*) (emphasis supplied)*. This would not apply to rights that are *intentionally* waived. For example, trial counsel may intentionally waive the right to have the courtroom open to the public during empanelment, in which case the appellate court would not review the claim. *See Commonwealth v. Lavoie*, 464 Mass. 83 (2013).

[39] *Randolph, supra.*

[41] *Commonwealth v. Freeman*, 352 Mass. 556 (1967).

[42] *Commonwealth* v. *Azar*, 435 Mass. 675, 687 (2002), *quoting Commonwealth v. Chase*, 433 Mass. 293, 299 (2001).

[43] *Commonwealth v. Cash*, 64 Mass. App. Ct. 812, 815 (2005), *quoting from Randolph*, 438 Mass. at 297

some circumstances, a combination of errors may create a substantial risk of a miscarriage of justice even where none alone would require reversal.[44]

The courts have equated the substantial risk standard with the standard for finding ineffective assistance of counsel.[45] So normally there is nothing to be gained by couching an unpreserved issue in terms of ineffective assistance.[46] (Ineffective assistance is discussed more fully below.)

Structural Error: No Showing of Prejudice Required

Structural error, also referred to as *per se* error, is reversible without a showing of prejudice. "Structural error . . . is error that necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."
Commonwealth v. Hampton, 457 Mass. 152, 163 (2010).

As the SJC explains it (with a little help from the U.S. Supreme Court):

> "Structural error . . . is in a category distinct from trial errors, such as the improper admission of evidence, from which specific harm may be seen to flow."
> Structural errors stand apart from trial errors because structural errors "affect[ ] the framework within which the trial proceeds" and thereby "defy analysis by 'harmless-error' standards," whereas trial errors "occur during the presentation of the case to the jury," and "may therefore be quantitatively assessed in the context of other evidence presented."[47]

Structural error has been described as "an error that permeate[s] the entire conduct of the trial from beginning to end or affect[s] the framework within which the trial proceeds."[48] Structural defects violate fundamental requirements for a fair trial, or create an "uneven playing field" that skews the adversarial contest against the defendant.

The following is a partial list of such structural defects:

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[44] *Commonwealth v. Cancel*, 394 Mass. 567, 576 (1985) (The three errors were: the introduction of inadmissible prejudicial hearsay testimony, which was unpreserved; impermissible impeachment of a defense witness, which was preserved but harmless alone; and prosecutor's improper remarks on defendant's failure to call alibi witnesses, where there was no evidence that such witnesses existed).
[45] *Comm. v. Vinnie,* 428 Mass. 161, 164 (1998).
[46] *See Azar*, 435 Mass. at 686-687 ("Because the alleged ineffectiveness amounts to nothing more than a failure to preserve claims for appeal, we need only ask whether those claimed errors produced a substantial risk of a miscarriage of justice.")
[47] *LaChance,* 469 Mass. at 864, *quoting Arizona v. Fulminante*, 499 U.S. 279, 291, 307–308, 309–310, (1991).
[48] *United States c. Rescio,* 371 F.3d 1093 (2004).

- Lack of jurisdiction.[49]

- Defects in the complaint or Indictment, such as failure to set forth the essential elements of the charge.[50]

- Improprieties in the grand jury proceedings,[51] or failure to establish probable cause before grand jury.[52]

- Competency to stand trial.[53]

- Lack of criminal responsibility.[54]

- Right to public trial (e.g., closed courtroom during empanelment).[55]

- Errors in the jury composition or empanelment.[56]

- Violation of right to counsel due to actual conflict of interest.[57]

- Biased judge (failure to recuse). [58]

- Error in the jury instruction on reasonable doubt. [59]

- Double jeopardy violations.[60]

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[49] *Commonwealth v. Fafone,* 416 Mass. 329 (1993) (no evidence from defendant's telephone calls from Florida to principal that he knew principal would distribute drugs in Massachusetts).
[50] G.L. c.277, s.47A; *Commonwealth v. Cantres*, 405 Mass. 238, 239-240 (1989).
[51] *Commonwealth v. O'Dell,* 392 Mass. 445, 446-450 (prosecutor improperly withheld exculpatory evidence from grand jury).
[52] *Commonwealth v. McCarthy*, 385 Mass. 160, 161-163 (1982) (court must dismiss indictment where grand jury fails to hear any evidence of criminal activity by the defendant).
[53] *Commonwealth v. Chatman,* 466 Mass. 327 (2013).
[54] *Commonwealth v. McHoul,* 352 Mass. 544 (1967) (standard for incompetency defined).
[55] *Commonwealth v. Cohen (No. 1),* 456 Mass. 94 (2010)(right to public trial).
[56] *Batson v. Kentucky*, 476 U.S. 79 (1986) (racial discrimination in jury selection process offends federal Equal Protection Clause); *Commonwealth v. Soares,* 377 Mass. 461 (1979) (same rule under Massachusetts Declaration of Rights).
[57] *Commonwealth v. Hodge,* 386 Mass. 165 (1982) (defense counsel's law partner concurrently represented a prosecution witness in an unrelated civil matter).
[58] *Cf. Commonwealth v. Adkinson,* 442 Mass. 410 (2004).
[59] *Sullivan v. Louisiana*, 508 U.S. 275, 280-281(1993) (error in reasonable doubt instruction); *accord Commonwealth v. Burnett*, 428 Mass. 469, 474-475 (1998).

Note that in some instances claims of error based on structural defects can be waived.[61] This normally happens when trial counsel does not preserve the issue below (see following discussion on issue preservation). Under those circumstances the standard of review for unpreserved error will apply, even if the error is of constitutional dimension. Counsel should analyze the procedural context surrounding a structural defect to determine whether the doctrine of waiver is implicated.

ISSUE PRESERVATION

The Rules of Issue Preservation

Because preservation of an issue determines the standard of review for prejudice (though not for error), it is important to determine whether an issue was preserved. Generally, an error is preserved if the defendant brings it to the trial judge's attention in time for her to prevent the error or cure any prejudicial effect it may have had. The basis for the preservation rule is three-fold: to avoid requiring a retrial for a problem that could have been cured the first time, as a matter of comity between the higher and lower courts, and to discourage defense counsel from 'sowing the seeds of error.'[62]

Errors are commonly preserved by objections, motions, sidebar conferences, offers of proof, and proposed jury instructions. The technical requirements for issue preservation are discussed below. If there is a question about whether trial counsel satisfied the preservation requirements, the relative strength of the arguments for and against preservation should be considered. In making this determination, the actual words spoken by counsel and the judge and the context of the exchange are critical, and such passages should be quoted verbatim in the brief to support a preservation argument.

> *COMMENT:* From the defense point of view, the preservation rule is grossly unfair, as it penalizes the defendant for the failures of his attorney. The same can be said of the high standard that is applied for reviewing claims of ineffective assistance of counsel. Perhaps for this reason many experienced practitioners believe that the standard of review does not have a significant effect on how the judges view the issue. This may be

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[60] *Benton* v. *Maryland*, 395 U.S. 784, 793-796 (1969) (Under Fifth Amendment no person shall be twice tried or punished for the same crime); *Costarelli v. Commonwealth,* 374 Mass. 677, 681-685 (1978) (same rule under Massachusetts common law).

[61] *See, e.g., Commonwealth v. Lavoie, supra* (right to public trial may be waived); *Commonwealth v. Burnett*, 428 Mass. 469, 474-475 (1998) (error in reasonable doubt instruction waived for failure to raise on direct appellate review). *Mains v. Commonwealth*, 433 Mass. 30, 33 (2000) (same).

[62] See Wayne R. LaFave, Wayne, R. et. al. *Appeals and Collateral Remedies,* § 27.5(d)

> because assessing prejudice is not an exact science, particularly when it is based on distinguishing between phrases like "harmless beyond a reasonable doubt," "had a substantial influence [on the verdict", and "created a substantial risk of a miscarriage of justice." Moreover, from the advocate's point of view, the arguments for error and prejudice will be exactly the same no matter which standard of review applies. And cases that reversed based on unpreserved errors are legion. Accordingly, where you find that an error was prejudicial, you should not let a high standard of review deter you from raising the issue on appeal.

Objections

Under MRCP 22 the defendant preserves an issue for appellate review by making known to the court "at the time of the ruling or order the action he seeks or his objection to an action of the court."

There is no requirement for specific language such as 'I object', as long as what counsel says is sufficient to inform the court of the action sought.[63] If the defendant has no opportunity to object, the absence of the objection does not prejudice his appeal.[64]

The defendant *may* state the legal grounds, but may not argue unless requested by the judge.[65] A general objection (i.e., an objection unaccompanied by a statement of its ground) is sufficient to preserve the defendant's challenge to the admissibility of evidence that the Commonwealth seeks to elicit, if the ground for exclusion should have been obvious to the judge and opposing counsel without stating it.[66] If the defendant gives specific grounds for an objection, he can only appeal on the grounds specified.[67]

Timeliness of objection

In order to preserve an issue, the defendant is required to call the error to the judge's attention at the first opportunity. This has been defined as "immediately, or as soon as [counsel] learns of" the error. Timeliness is determined from the context. For example, in *Commonwealth v. Hoppin,* 387 Mass. 25, 29 n.4 (1982), where the judge overruled the defendant's objection and refused repeated requests for sidebar until the jury was excused at the end of the day, counsel's objection was deemed timely. In *Commonwealth v. Martin*, 417

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[63] *Commonwealth v. Almeida*, 34 Mass. App. 901, 902 n.2 (1993)*; Commonwealth v. Choice*, 47 Mass. App. 907, 908 ("ritualistic" objection not necessary).

[64] MRCP 22.

[65] *Id*.

[66] *Commonwealth v. Cancel,* 394 Mass. 567, 573 (1985). For a detailed example of a sufficient general objection, see *Commonwealth v. Martin*, 417 Mass. 187, 189-191 & n.2 (1994). For extensive analysis of the insufficiency of a particular general objection, see the *Cancel* case at 569-572.

[67] *Commonwealth v. Beauchamp*, 49 Mass. App. Ct. 591, 604, fn. 4 (2000).

Mass. 187 (1994), a child molestation case, the defendant objected to a witness giving inadmissible testimony about his "instincts" as to what happened during the incident:

> Q Did you have an instinct about what the defendant did?
> A. Yes (no objection raised)
> Q What were those instincts? "
> D. OBJECTION.
> J. OVERULED
> A. The defendant molested her.

On appeal, the Commonwealth argued that the objection was not timely, that it should have come after the previous question. But the Appellate Court held that the objection was timely because only after the second question "was it clear that no answer would be admissible." Id. at 189.

Renewal of objection

An objection or Motion to Strike, once made and overruled, is sufficient to preserve the defendant's right to challenge on appeal any subsequent evidence or argument to which the adverse ruling applies.[68]

Motion to Strike

When a Commonwealth witness, in responding to an unobjectionable question, makes an inadmissible statement before the jury, the correct way to preserve the issue is by a verbal motion to strike, not an "objection." For example, in *Commonwealth v. Cancel*, 394 Mass. 567, 573 (1985) defendant appealed claiming that the defendant's rights under *Miranda* were violated by the admission into evidence of the defendant's denial of an accusation. The exchange was as follows:

> Q: What did you say to D?
> A: I said to D, 'a lot of people told me you were responsible.'
> ATT: OBJECTION.
> CT: OVERULED.
>
> [not clear at this point whether W's statement was admissible]
>
> Q: What did D say?

[68] *See Commonwealth v. Rubio,* 27 Mass. App. Ct. 506, 511 n.4 (1989). (statement by defendant). For other examples, *see Commonwealth v. Lara*, 39 Mass. App. Ct. 546, 550 (1995) ("ethnicity line of questions*"); Commonwealth v, Bibby*, 35 Mass. App. Ct. 938, 941 (1993) (improper reference in prosecutor's closing argument); *Commonwealth v. Liberty*, 27 Mass. App. Ct. 1, 7 (1989) (prosecutor's question to defense witness seeking to elicit inadmissible response).

A: He denied it. (No objection).

Counsel did not preserve the issue because the objection was premature. The defendant should have moved to strike after the answer was given.

But a defendant's objection to the witness's statement and request for a bench conference will suffice to preserve the issue if the "objection and the discussion during the bench conference make it clear that [counsel] wanted the answer struck and the jury instructed to ignore the [witness]'statement." [69]

Curative instructions

An objection does not need to be accompanied by a request for a curative instruction in order to preserve appellate rights.[70] If a curative instruction is given, the defendant can still raise the issue on appeal, if the curative instruction was inadequate to cure the prejudice, even if the defendant doesn't claim inadequacy at trial.[71] But the issue is not preserved if defense counsel acquiesces in the curative instruction and specifically indicates that he was satisfied.[72]

Preserving a constitutional issue

It is important to raise an issue as a constitutional issue if at all possible, because constitutional issues get the most favorable standard of review for error and for prejudice. Also, in order to seek federal habeas corpus review of a state conviction on an issue, or review by the United States Supreme Court, the defendant must raise the issue in the state court as a constitutional issue. However, in order for these constitutional standards of review to apply, defense counsel must raise the issue in the trial court *as a constitutional issue*.[73] The standard for determining constitutional preservation is not onerous, however.[74] Use of constitutional language, terminology, and principles that govern constitutional analysis are sufficient to preserve a constitutional issue.[75]

For example, in *Commonwealth v. Galicia*, 447 Mass. 737 (2006), although the objection to hearsay testimony at trial standing alone was inadequate to preserve the constitutional issue, the Court also looked to the defendant's motion in limine. The motion contained language that the evidence at issue bore insufficient "indicia of reliability" and that its introduction would deprive the defendant of the opportunity to "cross-examine" the witnesses.[76] This language

[69] *Commonwealth v. Quincy Q.,* 434 Mass. 859, 873 n.19 (2001).
[70] *Commonwealth v. Smith,* 387 Mass. 900, 911 (1983).
[71] *Commonwealth v. Cancel*, 394 Mass. 567, 574 (1985); *Commonwealth v.* Mosby, 11 Mass. App. Ct. 1, 11 n.4. (1980).
[72] *Commonwealth v. Beaudry,* 445 Mass. 577, 587 (2005).
[73] *Galicia*, 447 Mass. at 746-747.
[74] *Id*., *Commonwealth v. Koney*, 421 Mass. 295, 299 (1995).
[75] *Galicia, supra.*
[76] *Galicia*, supra.

was sufficient to preserve the issue based on the Confrontation Clause by "using the terminology and principles that then governed confrontation clause analysis."[77]

If an issue of constitutional dimension issue was not preserved as a constitutional issue, the appellate court will review the claim under the "prejudicial error" standard if it was preserved as a non-constitutional issue[78]or, if it was not otherwise preserved, under the unpreserved error standard to determine whether there was a substantial risk of a miscarriage of justice.[79] However, "[t]he adequacy of the objection has to be assessed in the context of the trial as a whole." *Commonwealth v. Koney*, 421 Mass. 295, 299 (1995).

A motion to suppress or dismiss on constitutional grounds preserves the constitutional issue without having to make an objection at trial.[80] If, however, there was no constitutional issue raised, the defendant must object to the introduction of the evidence at trial to preserve the issue.[81]

Issues raised under the Massachusetts Declaration of Rights

For an issue to be preserved under the Massachusetts Declaration of Rights, trial counsel must specifically raise the objection *under* the Massachusetts Declaration of Rights. It is advisable for trial counsel to invoke the Mass. Declaration of Rights even if there is no case on point, because the Court has frequently held that the Declaration provides greater protection than the U.S. Constitution, and you want to try to persuade the court that those rights should apply to your client.

In considering the appeal of the denial of a motion to suppress, the appellate court is not obliged to consider grounds that were not raised in the motion, particularly if they require resolution of factual questions.[82] In some instances, however, such claims may be reviewed under the substantial risk of a miscarriage of justice standard as if they were properly preserved.[83]

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[77] *Galicia, supra.*

[78] Galicia, *supra.*

[79] *Commonwealth v. Nardi*, 452 Mass. 379 (2008).

[80] *Commonwealth v. Welton,* 428 Mass. 24, 25-26 (1998).

[81] *Id.*

[82] *Commonwealth v. Johnston*, 60 Mass. App. Ct. 13, 20-21 (2003), *citing Commonwealth v. Barnes*, 399 Mass. 385, 393-394 (1987). See also M.R.Crim.P. 13 (all grounds for suppression must be raised in the suppression motion).

[83] *Johnston, supra*, at fn. 7 and cases cited. In *Johnston,* the defendant's motion claimed that he had not been advised of his Miranda rights before questioning, but claimed on appeal that the warning on the waiver form he signed was defective. The court found waiver, ruling that "[t]here is a significant difference between a claim that Miranda warnings were not provided prior to questioning and a claim that a warning was given but was defective."

Motions in Limine

If the judge denies a defendant's motion in limine, the issue is preserved without the requirement of an objection at trial.[84] This applies whether or not the motion was based on constitutional grounds.[85] However, "where what is being addressed and resolved at the motion in limine stage differs from what occurs at trial, the defendant still must object at trial to preserve his or her appellate rights."[86]

Jury empanelment

When the defendant's motion to strike for cause is denied, the defendant must object *and* must exhaust all of his peremptory challenges.[87] If the defendant challenges the government's strike as being discriminatory based on race, ethnicity, or gender, the defendant must object if the judge denies the challenge in order to preserve the issue.[88] Note that a ruling on defense objection whether a peremptory challenge of a juror by the Commonwealth is discriminatory is reviewed under the abuse of discretion standard.[89]

Sidebar and *voir dire*

An objection to the judge's ruling admitting or excluding evidence at the conclusion of a sidebar conference or voir dire preserves the defendant's appellate rights with respect to that evidence without renewal of the objection when the evidence is elicited before the jury.[90] But objection to exclusion must normally be accompanied by an offer of proof (see below).

Offers of proof

Generally, the defendant must make an offer of proof when the Commonwealth's objection is sustained or if defense evidence or questioning is excluded.[91] The offer of proof must be sufficient for the appellate court to determine both whether exclusion was error and the

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Id. at 20. The court pointed out that the failure to raise the issue in the motion could constitute ineffective assistance of counsel, though it did not reach that issue. *See Commonwealth v. Buckman,* 461 Mass. 24, 40 (2011) (ineffective to fail to file a motion to suppress that would have been successful).

[84] *Commonwealth v. Grady*, 474 Mass. 715, 719 (2016).

[85] *Id.*

[86] *Id.*

[87] *Commonwealth v. Wygrzywalski*, 362 Mass. 790, 793 (1973).

[88] See discussion on discriminatory jury strikes in the section of this chapter on Tests for Specifical Situations, above.

[89] *Commonwealth v. Scott*, 463 Mass. 561, 571 (2012) (a finding of no pattern of discriminatory challenges within judge's discretion) *Cf. Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (where prima facie case has been shown, "trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous").

[90] *See Commonwealth v. Kruah*, 47 Mass. App. Ct. 341, 345 (1999) (sidebar conference); *see also Commonwealth v. Avala*, 29 Mass. App. Ct. 592, 598 n.8 (1990) (voir dire).

[91] *Commonwealth v. Dyer*, 460 Mass. 728, 744 (2011) ("no error may be predicated on a ruling excluding evidence unless 'the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which the questions were asked'"); *Quoting* Mass. R. Evid. § 103(a) (2) (2011).

prejudicial effect of exclusion.[92] But the error in excluding the evidence is preserved without an offer where "the substance of the evidence. was apparent from the context within which questions were asked."[93]

Prosecutor's improper closing argument

Objection to a specific statement in the prosecutor's closing argument is sufficient to preserve appellate rights if the objection is made either immediately after the offending statement,[94] or at the bench immediately following the conclusion of the prosecutor's argument.[95] A timely objection to the closing which is overruled does not need to be accompanied by a request for a curative instruction in order to preserve appellate rights.[96]

Erroneous Jury Instructions

To preserve errors in jury instructions, the defendant must object before the jury retires.[97] But if the defendant made a specific request for a particular jury instruction, and the judge rejects that request and gives an instruction inconsistent with it, the issue of the correctness of the judge's refusal to give the requested instruction is preserved for appellate review without defense counsel's stating an "objection" either when the request is refused or at the completion of the judge's charge of the jury.[98]

Litigating preservation on appeal

If there is a question of whether an issue was preserved on the record, you should assess the arguments for and against preservation. If you decide to claim that the issue was preserved, you should quote *verbatim* the language from the transcript, cite the applicable rule of preservation, then explain how trial counsel's actions, satisfied the legal standard. And, as a practical matter you should be able to show how the judge was given a fair opportunity to prevent or cure the error. Finally, you should argue in the alternative that reversal is required even under the higher standard of review applied to unpreserved error. In so doing, it is useful to analogize to cases where the court reversed even applying the higher standard.

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[92] *Commonwealth v. Rosario,* 444 Mass. 550, 558 fn.2 (2005).

[93] *Commonwealth v. Chase,* 26 Mass. App. Ct. 578, 581 (1988). *See also Commonwealth v. Rosario,* 444 Mass. 550, 558 fn.2 (2005) (even without any formal offer of proof, the issue is preserved if the judge understands the purpose for which the defendant intends to use the evidence).

[94] *See, e.g., Commonwealth v. Sevieri,* 21 Mass. App. Ct. 745, 754 & n.10 (1986).

[95] *See Commonwealth v. Kelly*, 417 Mass. 266, 270 n.6 (1994), and cases cited.

[96] *Commonwealth v. Smith*, 387 Mass. 900, 911 (1983).

[97] M.R.Crim.P. 24(b).

[98] *Commonwealth v. Biancardi*, 421 Mass. 251, 252-254 (1995).

EXCEPTIONS TO THE PRESERVATION REQUIREMENT

There are a number of exceptions to the preservation requirement. There are differing standards of review that apply to the various exceptions.

Jurisdictional defects

Jurisdictional defects, including failure of the complaint or indictment to set forth essential elements, must be recognized by the court at any stage.[99]

Retroactivity

In some cases, a defendant whose case is pending on appeal may want to take advantage of an appellate case that was decided after he was convicted. This depends on several factors: (1) was the decision handed down before his first direct appeal was decided; (2) is the rule a "new rule" or an "old rule"; and (3) if a new rule, was the rule applied retroactively, or prospective only.

"New rule" vs. "old rule"

The first question is whether the rule is a "new rule" or an "old rule." Defendants may always rely on old rules, but not necessarily with respect to new rules. Rulings that break with legal precedent are considered new rules. New rules apply only to convictions that occurred after the decision was handed down, subject to exceptions. By contrast, an old rule is a rule that does not break any new legal ground, but is considered merely an application of established precedent.

New rules are the exception, they usually involve significant changes in the law. In these cases, the court usually states whether it is announcing a new rule, and whether or not it is retroactive. If the court deems the rule a "new rule," and announces that it is retroactive - possibly back to a specific date - then a defendant convicted before the decision issued may take advantage of the ruling (as long as his conviction comes within any time frame set by the decision).

On the other hand, if the court deems the rule a new rule, and does not make the rule retroactive, then the defendant must show that the rule should be applied retroactively to *his case*. He does this by showing that his case was on appeal at the time that the ruling came down.

Retroactivity - Legal Precedent

A defendant may take advantage of a new rule decided after his conviction and before his first appeal.[100] A new rule for the conduct of criminal prosecutions is to be applied retroactively to

[99] G.L. c.277, Section 47A; *Commonwealth v. Andler*, 247 Mass. 580, 581 (1924); *Commonwealth v. Palladino*, 358 Mass. 28, 30-31 (1970).

all cases, state or federal, pending on direct review or not yet final, including cases in which the new rule constitutes a 'clear break' with the past."[101]. The Supreme Court reasoned that "the integrity of judicial review" requires that a new rule be applied to all similar cases which have not reached final judgment, and that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323.

Under these circumstances, failure to preserve the issue will be excused where "new rules of constitutional dimension that were decided after the defendant's trial and where the constitutional principle that was violated was not sufficiently developed at the time of the defendant's trial to afford the defendant a genuine opportunity to raise his claim."[102] If the exception applies to a constitutional issue, the standard of review will be the same as for preserved constitutional error, that is, whether the error was harmless beyond a reasonable doubt. [103] But the Court will find waiver where the theory raised on appeal was sufficiently developed at the time of the petitioner's trial to afford the defendant a genuine opportunity to raise his claim.[104]

Insufficient Evidence

A motion for a required finding of not guilty[105] brought under MRCP 25 preserves the issue of sufficiency of the evidence.[106] But a claim of insufficient evidence is *always reversible* even if not preserved, and without a showing of prejudice, because it inherently constitutes a substantial risk of a miscarriage of justice.[107] In determining sufficiency, the court will view the evidence and draw all reasonable inferences in the light most favorable to the Commonwealth in order to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[108]

Ineffective Assistance of Counsel

Where the conduct of trial counsel falls below constitutional standards, the defendant may claim a violation of his right to effective assistance of counsel under the Sixth Amendment and Article 14 of the Massachusetts Declaration of Rights. These claims are reviewable even though

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[100] *Le Blanc v. Commonwealth*, 363 Mass. 171, 173-174 (1973).

[101] *Commonwealth v. Bowler*, 407 Mass. 304, 306 (1990), *quoting Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

[102] *Commonwealth v. Connolly*, 454 Mass. 808, 830 (2009).

[103] *Id.*

[104] *DeJoinville v. Commonwealth*, 381 Mass. 246, 248 (1980).

[105] This is sometimes referred to a "directed verdict" though that nomenclature applies only to civil cases.

[106] see M.R.Crim.P. 25(a).

[107] *Commonwealth* v. *McGovern,* 397 Mass. 863, 867-868 (1986).*Commonwealth v. Grandison*, 433 Mass. 135, 140 n.8 (2001). Insufficiency also violates the due process right to proof beyond a reasonable doubt of every element of the crime. *In re Winship,* 397 U.S. 358, 361-364 (1970).

[108] *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979), *quoting Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979).

unpreserved, because trial counsel could not be expected to assert that his performance was incompetent. The standard of review for ineffective assistance of counsel has been equated with the substantial-risk-of-a-miscarriage-of-justice standard applied to unpreserved error. [109] This standard would include a situation where the failure to raise an issue at trial amounts to ineffective assistance of counsel.[110]

The test for ineffective assistance is divided into two prongs that equate with error and prejudice. Under the Massachusetts Declaration of Rights, this standard, referred to as the *Saferian* standard, is defined as "whether there has been a serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, then typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense." [111] If the state standard is met, the federal standard is necessarily met as well.[112] Where defense counsel made a strategic or tactical decision that the defendant now challenges, the Court will find ineffectiveness only where the decision was "manifestly unreasonable." [113]

First-degree murder cases

G.L. 278, § 33E bestows exclusive jurisdiction in the Supreme Judicial over first degree murder cases Court and allows for plenary review. In the absence of objection, the standard of review under 33E is whether there is a substantial *likelihood* of a miscarriage of justice. [114] This standard is considered more favorable than the standard for ineffective assistance,[115] and more favorable than the substantial *risk* of a miscarriage of justice standard applied to unpreserved errors.

TESTS THE APPELLATE COURTS APPLY TO SPECIFIC SITUATIONS

Appellate counsel should be familiar with some of the particularized standards the appellate courts apply to specific types of issues, and should brief these issues according to the applicable test. Though this list is not exhaustive, below are some examples that commonly arise.

[109] *Commonwealth v. Wright*, 411 Mass. 678, 681-682 (1992); *See Commonwealth* v. *Egardo,* 426 Mass. 48, 49-50 (1997.
[110] *Randolph*, 438 Mass. at 295-296
[111] *Commonwealth v. Saferian*, 366 Mass. 89 (1974).
[112] *Commonwealth v. Fuller*, 394 Mass. 251, 256 n.3 (1985).
[113] *Commonwealth v. Walker*, 460 Mass. 590, 598-599 (2011).
[114] *See, e.g., Commonwealth v. Silva*, 455 Mass. 503, 529 (2009).
[115] *Commonwealth v. Painten,* 439 Mass. 536, 549-550 (1999).

Insufficient Evidence

The test for insufficient evidence is very difficult to satisfy because the court must view the evidence *its light most favorable to the Commonwealth*, *notwithstanding the contrary evidence presented by the defendant*, is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged." [116] This standard is commonly referred to as the "Latimore standard", from which case the test is derived. [117] Under this standard, all reasonable inferences must be drawn in the in the light most favorable to the Commonwealth. The inferences drawn "need only be reasonable and possible; [they] need not be necessary or inescapable."[118] Nevertheless, to sustain the denial of a directed verdict, it is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must find that there was enough evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt.[119]

But do not confuse this standard with the Commonwealth's burden of proof beyond a reasonable doubt, it is only a burden of production. No matter how strong a defense the defendant presented, if the Commonwealth produced evidence on every element that meets this standard, the case is properly before the jury.

The judge's findings and rulings

If a judge in denying a defense motion or objection makes findings of fact and rulings of law, you must address those findings and rulings in his appellate brief. The appellate court "will accept the judge's subsidiary findings of fact absent clear error[, and t]he weight and credibility to be given oral testimony is for the judge."[120] The appellate court will, however, "independently review the correctness of the judge's application of constitutional principles to the facts found."[121]

The appellate court may supplement the facts found by the motion judge with uncontroverted testimony from the motion hearing and where Appellate courts may supplement a judge's findings of fact if the evidence is uncontroverted and undisputed,[122] or where the judge explicitly or implicitly credited the witness's testimony .[123] But, "in the absence of subsidiary findings, the appellate court assumes that the judge's determination of credibility was adverse

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[116] *Commonwealth v. Sandler*, 368 Mass. 729, 740 (1975)

[117] *Commonwealth v. Latimore,* 378 Mass. 671, 376-379 (1979), *quoting Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979)

[118] *Commonwealth v. Grandison,* 433 Mass. 135, 141 (2001).

[119] *Latimore, supra at 678.*

[120] *Commonwealth v. Yesilciman*, 406 Mass. 736, 743 (1990).

[121] *Commonwealth v. Murphy,* 442 Mass. 485, 492 (2004).

[122] *Commonwealth v. Silva,* 440 Mass. 772, 773 (2004); *Commonwealth v. Isaiah I.*, 448 Mass. 334, 337 (2007) (Appellate court considers uncontroverted testimony that "in no way contradict[s] the motion judge's findings [but] merely fill[s] out the narrative").

[123] *Isaiah I.,* 448 Mass. at 337.

to the losing party."[124] Also, in assessing a motion judge's decision, the appellate court looks to the record of the suppression hearing, not the trial.[125] For this reason, a separate fact section based on the hearing transcript is normally included in the brief whenever appealing the denial of a pre-trial motion in which an evidentiary hearing was held.

Discriminatory juror strikes

It is a violation of a defendant's rights under the state and federal constitutions for the Commonwealth to strike a prospective juror based on race or other protected class.[126] To raise the issue, the trial attorney should object to the Commonwealth's discriminatory strike or strikes.[127] The judge must then conduct a three step inquiry.[128] In the first step the defendant must present a prima facie case that the strike was discriminatory. Once the defendant has made this showing, the burden shifts to the Commonwealth to come forward with a neutral explanation for challenging black jurors.[129] Finally, the "judge must determine "whether the explanation is both 'adequate' and 'genuine' "[130]

The SJC has "emphasized repeatedly that the first-step burden. . . is minimal… and that [r]ebutting the presumption of propriety is not an onerous task."[131]

Prosecutor's closing remarks

In deciding whether a prosecutor's improper closing remarks constituted reversible error, The Court "considers the remarks in the context of the entire argument, the trial testimony, and the judge's instructions to the jury." [132] An error is nonprejudicial only if it appears certain that the improper argument did not affect the jury's verdict.

In making this determination the appellate court considers the following factors: (1) whether the defendant seasonably objected to the argument: (2) whether the prosecutor's error limited to collateral issues or whether it went to the heart of the case; (3) what the judge told the jury, generally or specifically, that might have mitigated the prosecutor's mistake; and (4) generally whether the error in the circumstances possibly made a difference in the jury's conclusions.[133]

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[124] *Commonwealth v. Lanoue*, 392 Mass. 583, 588 (1984) ([t]he appellate court "shall not disturb this determination because the judge had the unique opportunity to observe and evaluate the witnesses and resolve the issue of credibility.")

[125] *Commonwealth v. Grandison*, 433 Mass. 135, 137 (2001).

[126] *Batson v. Kentucky, 476 U.S. 79, 88 (1986;. Commonwealth v. Sanchez,* 485 Mass. 491, 493 (2020).

[127] *See Sanchez, supra* at 494.

[128] This inquiry "mirrors" the procedure in *Batson*. *Sanchez,* at 510.

[129] *Batson*, supra, at 97.

[130] *Sanchez*, at 493.

[131] *Sanchez,* at 510.

[132] *Commonwealth v. Hrabak*, 440 Mass. 650, 654 (2004).

[133] *Commonwealth v. Beaudry,* 445 Mass. 577, 584-585 (2005).

Note that whether the defense lodged a timely objection is a factor in assessing prejudice *and* determines whether the overall standard of review is for preserved or unpreserved error.[134]

Erroneous jury instructions

The appellate court will evaluate jury instructions "as a whole, looking for the interpretation a reasonable juror would place on the judge's words ... and not by scrutinizing bits and pieces removed from their context."[135] Even if the defendant meets this test for error, he still has to show prejudice according to the applicable standard of review, depending on whether or not the issue was preserved. (The method for preserving errors in jury instructions is discussed below.)

Failure of the Commonwealth to disclose exculpatory evidence

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, a prosecutor must disclose exculpatory information to a defendant that is material either to guilt or punishment. *Matter of Grand Jury Investigation*, 485 Mass. 641, 646 (2020). If there was only a general request for exculpatory evidence made at trial, the test is whether the undisclosed evidence would have "been a real factor in the jury's deliberations."[136] This standard has been equated with the substantial risk of a miscarriage of justice standard applied to unpreserved error.[137] If there was a specific request for the evidence in question, then the test is whether there is "a substantial basis . . . for claiming prejudice from the nondisclosure."[138] Note that this issue would normally need to be raised by way of new trial motion, in order to put the newly discovered evidence into the record.

MOFFETT BRIEFS: Raising issues requested by the defendant

You may get cases where the client wants to raise one or more issues that you feel do not have legal merit. This may occur at the early stages of your relationship, before you have had a chance to read the transcripts and analyze the case. It is understandable that a client would have strong views about grounds for reversal at this stage, before you have had an opportunity to provide him with your analysis of the case. Often a client will forget about meritless issues he has brought up when he hears the issues you believe do have legal merit. Some clients may, however, insist that their issues be briefed. Under Massachusetts jurisprudence, and CPCS performance standards, you are *required* to present your client's issues to the appellate court,

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[134] *Randolph, 438 Mass. at* 293-295.

[135] *Commonwealth v. Harris, 464 Mass. 425, 435 (2013).*

[136] *Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992).*

[137] *Id.*

[138] *Id. at 412.*

even if you feel they are frivolous. The standards and procedures for doing this are set out in the case of *Commonwealth v. Moffett.*[139]

The *Moffett* case states that you cannot withdraw solely on the grounds that your client wants to raise what you believe are frivolous issues. Rather, after receiving counsel's advice, if your client insists, you must brief the issue, or the best issue you can find. You cannot take a position against your client as to the merits of the issue.

The Court states that counsel should "present the contention succinctly in the brief in a way that will do the least harm to the defendant's cause." *Moffett*, at 208, citing I ABA Standards for Criminal Justice. The Court cites the ABA standards in suggesting that the lawyer deal with any frivolous contention "sketchily and without developing it in detail or pressing it on the court". (2d ed. 1980) "Even if counsel has doubts about the merits of the appeal, he or she must prepare and submit a brief arguing any issues that are arguable. Counsel need not espouse unsupportable contentions insisted on by the defendant, but should present them sketchily, simply designating pertinent portions of the trial and cite relevant cases."[140]

The Moffett disclaimer

If you feel that, for ethical reasons, you must disassociate yourself from what you believe is a frivolous issue, you may include a disclaimer in a preface to the brief concerning that issue. If you do so, you must send a copy of the brief to the client along with a letter directing the client's attention to preface, and informing him that he has 30 days to file additional materials. You must serve a copy of this letter on the Commonwealth. If the client files additional materials, the Commonwealth has 30 days to respond.[141] If you include a mere cursory presentation, you must include the Moffett notice, because the court may otherwise deem the argument "insufficient**."**[142]

If the Appeal Court finds that a "Moffett issue" has merit, it may appoint new counsel or order rebriefing or reargument.

RESEARCH TOOLS

The following Research tools are often used by appellate criminal lawyers in this Commonwealth.

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[139] *Commonwealth v. Moffett,* 383 Mass. 201 (1981)

[140] *Moffett,* 383 Mass. at 208.

[141] *Moffet,* 383 Mass. at 203-209.

[142] See M.R.A.P. 16(a)(4).

Substantive Criminal Law

Hon. J. Nolan and L. Sartorio, *Criminal Law 3d (Vol. 32, Massachusetts Practice Series)* (Thomson West 2014).

J.F. Comerford, *Fundamental Principles of Massachusetts Criminal Law: A Quick Reference Guide* (Flaschner Judicial Institute 2004 and supp. 2008).

W. LaFave, *Substantive Criminal Law 2d, Vols. 1 and 2 (*Thomson West / West's Criminal Practice Series 2013).

Criminal Procedure

E. Blumenson, *Massachusetts Criminal Practice* (4th edition, 2012, copyright by Eric Blumenson). This book may be accessed and downloaded at no charge at https://www.suffolk.edu/law/faculty/23662.php. Note that the book has not been updated since 2012. Any information or case law in the book should be researched and shepardized to make sure that it is still up to date.

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FOUNDATIONAL INFORMATION NEEDED TO PREPARE A CRIMINAL APPEAL

In order to gaining a complete understanding of the appeal, a criminal appellate advocate should know the following foundational information about the case.

BACKGROUND INFORMATION

Identities of Persons Involved in the Proceedings

- What is the name of the client and where is he located?
- What court was the case tried in?
- Who was the trial judge?
- Who was the judge for pre-trial motions (if any)?

- What is the name, address and telephone number of trial counsel?
- Were there any changes of counsel from arraignment through sentencing?
- Who was the trial prosecutor? Was there a different prosecutor for Pre-trial motions?

The Charges

- What were the charges?
- What are the elements of the charges?
- Which charges was the defendant convicted of (included any lesser-included offenses)?
- What penalties do the charges the defendant was convicted of carry?
- How were the other charges disposed of (by jury verdict of not guilty, directed verdict, dismissal, nolle prosse, guilty filed)?
- Were there any charges on which the jury could not reach a verdict?

The Factual Allegations (see prosecutor's opening statement)

- What is the defendant accused of doing?
- Who did the defendant allegedly do this to (unless "victimless" crime such as drugs, OUI, etc.)?
- Who, if anyone, did the defendant allegedly do this with?
- Where and when did these events allegedly occur?
- Who allegedly witnessed the events involved?
- Did the defendant make any statements? What did he say? When, where, to whom, under what circumstances?

THE PRE-TRIAL PROCEEDINGS

- What was the defendant's bail status, and did it change from arraignment through verdict?
- What are the provisions of the Pretrial Conference Report?
- What pre-trial motions were filed by the parties (motions to suppress, dismiss, severe, discovery motions)?
- What Affidavits, exhibits or attachments were submitted in support of each motion?
- For each motion, was a hearing held, and was it an evidentiary hearing? (If evidentiary, who were the witnesses and what exhibits were introduced)?
- What was the ruling on each pre-trial motion?
- Were the transcripts of each significant motion hearing produced? (Check the docket sheet against the transcripts actually produced.)
- For each pre-trial motion did the judge make written or oral findings and rulings?

THE TRIAL

Structure of the Trial

- What was the theory of the case at trial?
- Was the defendant tried with any co-defendants?
- Was the defendant tried as a principal or a joint venturer?
- Were there any motions in limine or other "morning-of-trial" motions (such as Motion for Continuance, or to Sever Counts or co-defendants)?
- Were any stipulations entered into by the parties (check pre-trial conference report and "morning-of-trial" proceedings)?

Jury Empanelment

- Did the parties submit proposed jury voire dire questions? Did the judge refuse any questions proposed by the defense?
- Did the parties make any motions or lodge any objections during empanelment? With what results?
- Did the defendant exercise any "for-cause" challenges? With what results?
- Did the defendant exhaust his peremptory challenges?
- Did the defendant express that he was "content" with the jury?
- Did the judge give preliminary instructions to the jury? Any objections?
- Were the jurors allowed to pose questions during trial?

The Defense Theory at Trial

- What was the theory of defense? (read opening and closing statements)
- Was there an affirmative defense, such as self-defense or insanity?
- Did the defense introduce affirmative evidence? If so, for what purpose?
- How did the prosecutor seek to counter the theory of defense and any affirmative defense(s)?

The Trial Proceedings and Evidence

- How long was the trial?
- Did the defendant make any objections to the prosecutor's opening statement?
- Did the defendant make an opening statement? If so, when?
- Who were the witnesses for each side, and what was their testimony offered to prove (element of offense, identity of perpetrator, affirmative defense, impeachment, etc.)?
- What exhibits were introduced, and what were they offered to prove?
- Were there any expert witnesses and if so, what was their area of expertise and

what opinion did they offer?
- What items were marked for identification and never introduced?
- Were any chalks used and, if so, what were they used to demonstrate?
- What objections, motions, and sidebars occurred during trial (including during opening and closing statements) and with what results?
- Did the defendant testify?
- Were any objections to impeachment of the defendant or defense witnesses overruled?
- Were any objections to impeachment of prosecution witnesses sustained?
- Were any proposed defense witnesses or exhibits excluded?
- Did any subpoenaed defense witnesses fail to appear?
- Did anything unusual happen during the trial (such as a juror being excused, motion for a mistrial)? If so, how were these events handled?

The Jury Instructions and Deliberations
- What jury instructions were requested by each party, were they submitted in writing, how were they ruled on, and were any objections lodged?
- Did the judge refuse any instructions proposed by the defense?
- What did the judge's jury instructions cover?
- Were any objections made after the jury charge?
- Was a special verdict slip prepared?
- Did the jury submit any questions during deliberations?
- Were any supplemental jury instructions given?
- Were there any motions made during jury deliberations?
- Was there a Tuey, or "shot gun" charge given during deliberations?

Sentencing
- What penalties were requested by the parties and what penalties were imposed?
- What grounds were argued by the parties in support of their respective sentencing positions?
- Did either of the parties lodge any objections at sentencing?
- Did the complainant or others make a "victim impact statement?"
- Did the defense address the court at sentencing?
- What sentence was imposed for each charge?
- Were recidivist penalties imposed?
- What reasons did the judge give for imposing his sentence?

Post-trial proceedings
- Did the defendant make a post-verdict motion for a new trial or to reduce the verdict?
- Were any other post-verdict motions filed (motion to revise and revoke sentence, motion for reduction in verdict, motion for new trial).
- When was the Notice of Appeal filed, and was it timely?
- If not timely, was a motion to enlarge time for filing Notice of Appeal submitted

and ruled on by the trial court (or, if the Notice of more than 60 days after sentencing, by the Appeals Court)?

Status of the Appeal

- Has the clerk ordered the transcripts, including all significant pre-trial motions?
- Has the record assembled? If not, what transcripts are still pending and when were they ordered?
- Has the case been docketed in the appellate court? If so, when is the appellant's brief currently due?

CHAPTER 4: RECORD RECONSTRUCTION ON APPEAL:

HOW TO DEAL WITH MISSING OR INCOMPLETE TRANSCRIPTS.

An indigent criminal defendant has a constitutional right to be provided with a free transcript of his trial for his direct appeal.[1] You may receive assignments, however, in which the court is unable to provide you with a complete transcript or even with any transcript at all. This can be due to a recording system malfunction, loss of a court reporter's notes, or a host of other reasons. **It is the responsibility of appellate counsel to attempt to restore or reconstruct the record and to move for a new trial if the record cannot be adequately reconstructed.** Under existing law, a defendant is not entitled to a new trial due to missing transcripts, unless he can demonstrate that the record cannot be adequately reconstructed to present the defendant's appellate claims.[2] This chapter discusses the standards, techniques, and procedures for reconstructing the record and how to move for a new trial when adequate reconstruction is not possible.

RESTORING THE ORIGINAL TRANSCRIPTS.

Before attempting to reconstruct the record, you should see if the missing portions of the transcripts are, in fact, available. How you undertake to do this depends on whether the proceedings were transcribed from an audio recording or were taken down by a court reporter.[3]

Restoring transcripts made from electronic recordings

The majority of transcripts are transcribed from audio recordings made using the "FTR" audio recording system.[4] If a transcriber cannot understand a passage in a recording, the transcriber will mark the passage "inaudible" in the text and will indicate where these passages occur and

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[1] *Draper v. Washington,* 372 U.S. 487 (1963); *Commonwealth v. Harris,* 376 Mass. 74 (1978). Although there is no constitutional right to an appeal, where a state provides for an appeal, that appeal must comport with due process.

[2] *Harris,* 376 Mass. at 80.

[3] As a reminder, you should always check the docket sheet as soon as you receive your assignment and make sure that all of the trial and motion hearing transcripts have been ordered. If any were not, they should be ordered promptly through FTR at https://us.court.fm. (see Chapter 2). If they were taken down by a court reporter, place the order with the clerk's office. The clerk is responsible for ordering transcripts for direct appeals from the reporters. No motion should be necessary.

[4] See Chapter 2 for an explanation of the FTR system.

what the problem is on a "Transcript Accuracy Evaluation Sheet" included at the end of the transcript. (Note that there will be no indication of whether the missing portion is a word, a sentence, a paragraph or more.)

Your first step should be to listen to the recording and see if you can make out what was being said.[5] If you can make it out, contact the transcriber and ask that they transcribe those portions.[6] (If you are having difficulty understanding certain passages you can ask the trial attorney for help.[7]) If the transcriber will not cooperate, contact the Office of Transcription Services at ots@jud.state.ma.us and 617-878-0225. If the portion is garbled, or the sound is completely missing, contact "FTR help" and ask if they can fix the problem. They can be reached at support@fortherecord.com, and 888 819-4580. Their website is located at https://us.court.fm.

If FTR cannot solve the problem, file a motion for funds to have the recording electronically enhanced by an independent audio restoration specialist. A list of audio restoration specialists is available from the CPCS Forensic Resources Unit.[8] Have the specialist listen to the recording. If the specialist believes it can be restored, get the specialist's affidavit, including his or her qualifications and rates, and file it in support of the motion. [9] (You may need to download the recording from the FTR website in order to provide the recording to the audio reconstruction specialist. Downloading of FTR recordings is explained in Chapter 2).

If the missing portions of the recording cannot be restored, you will have to try to reconstruct the missing portions.

Restoring transcripts produced by court reporters

While most transcripts are produced from audio recordings, court reporters are still used in some cases in the Superior Court, and older cases may have been taken down by a reporter. It is unusual for portions of a transcript produced stenographically to be missing. The problem more often occurs with court reporters who are "voice writers." Voice writers repeat the in-

[5] The recording should be available on the FTR website at https://us.court.fm.

[6] When you order a recording, you should include in the comment box that you want a downloadable copy of the recording. That way, you will have access to it and will be protecting it from future loss.

[7] If the trial attorney was court-appointed, you can tell her that she can bill for her time by contacting CPCS and asking to re-open his or her NAC. To re-open a NAC the attorney should email ebill@publiccounsel.net.

[8] You may email this unit at forensics@publiccounsel.net

[9] If the motion for funds is denied in the district court, you can appeal the denial. An appeal from a District Court ruling goes to the Appellate Division of the District Court. An appeal from a Superior Court ruling goes to the single justice of the Appeals Court. See G.L. c.261, s.27A-D.

court testimony by speaking into a cone and having their voice recorded, which they later transcribe. The problem usually arises when there is a glitch in their recording.

If the transcript was produced by a stenographer, contact the stenographer and find out what the problem is and whether it can be remedied.[10] It may be an oversight that the stenographer can fix. If the problem is with a voice writer's recording, ask for a copy of the recording, and go through the same process as you would if the recording was produced through the FTR system, described above.[11]

If a stenographic reporter has lost her notes or a voice writer her tapes, ask whether the reporter made a backup recording. Many reporters make a live audio recording of the proceedings in case they need to refer to them. These backup tapes may contain the missing information. Most reporters treat these backup tapes as their own personal property, and you may need to get a court order to obtain them.

If you cannot get in touch with a reporter, or if the reporter is uncooperative, contact Tashiva Williams, the Superior Court administrator who oversees the reporters, at tashiva.williams@jud.state.ma.us; her telephone number is 617-788-7303. In some situations, particularly with older cases, the transcript may be unavailable because the reporter has retired or moved out of state. If Tashiva Williams cannot solve the problem, you may have to file a motion and (hopefully) get a court order for the reporter to either produce the transcript or deliver the reporters notes to be transcribed by another reporter or a voice writer's tapes to be transcribed by a transcriptionist.

If you cannot fully restore the missing portions of the transcript by any of the methods described above, you will have to reconstruct the transcript.

Seeking a stay of appellate proceedings.

If you are trying to correct, restore, or reconstruct a transcript, and the case has not yet been docketed in the appellate court, you can contact the trial court clerk's office, explain the situation, and ask if they will hold off on assembling the record until you have been able to restore or reconstruct the transcript. This is done informally. There is no provision for it in the rules, and no motion will lie. Some clerks will do this, some won't.

[10] A list of official court reporters with their contact information can be found at https://www.mass.gov/files/documents/2016/08/os/official-court-reporters-list.pdf

[11] Some voice writers may tell you that their tapes are proprietary. But voice writers routinely provide their tapes to transcribers when requested to do so by the trial court administrative office due to production delay. If the voice writer will not provide the recordings, contact Tashiva Williams (see above).

If you need to correct, restore, or reconstruct a transcript, and your case has already been docketed in the appellate court, you must move to stay the appellate proceedings. That way the clock will not be running on your briefing time. The Appeals Court will either stay the proceedings and order you to file a status report every thirty days, or the Court will vacate the entry of the appeal without prejudice, and will re-enter the case when you notify it that the record is complete.

RECONSTRUCTING THE RECORD.

Introduction

While an indigent defendant appealing his or her conviction is entitled to a free transcript of the trial and related proceedings, the defendant is not automatically entitled to a new trial due to a missing or incomplete transcript. Rather, when a transcript is not available in whole or in part through no fault of the parties, **appellate counsel is responsible for undertaking reconstruction of the missing portions of the record and must exhaust his or her efforts before the defendant can seek a new trial due to the missing transcripts.** This section discusses the legal standards and procedures that apply to record reconstruction, gives practical advice on how to approach reconstruction, and explains how to move for a new trial when the record cannot be adequately reconstructed.

Constitutional Standards for Reconstruction of Transcripts.

The Due Process and Equal Protection Clauses entitle an indigent criminal defendant appealing his conviction to be furnished with "a record of sufficient completeness to permit a full and fair appellate review of his appellate claims."[12] Where a complete transcript is not available, however, "alternative methods" of reporting trial proceedings are constitutionally permissible.[13] The fact that the transcript is unavailable through no fault of the parties does not warrant a new trial unless the trial proceedings cannot be reconstructed sufficiently to present the defendant's claims.[14]

In order to satisfy constitutional requirements, the reconstructed record must "place before the appellate court an *equivalent* report of the events at trial from which the appellant's contentions arise".[15] In order to pass muster, the reconstructed record must allow the

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[12] *Commonwealth v. Harris*, 376 Mass. 77 (1978); *relying on Draper v. Washington,* 372 U.S. 487 (1963). *Harris* is the controlling case on transcript reconstruction in Massachusetts. If you need to reconstruct, you should read *Harris*.

[13] *Harris,* 376 Mass. at 77; *Draper,* 372 U.S. at 192-193.

[14] *Harris.* 376 Mass. at 78.

[15] *Draper,* 372 U.S. at 495-496 (emphasis supplied).

defendant to "bring before the appellate court an account of the events sufficient to allow it to evaluate the defendant's contentions".[16] If the proceedings cannot be reconstructed to adequately present the defendant's claims, the defendant must be granted a new trial.[17]

THE RECONSTRUCTION PROCESS

Reconstruction by stipulation

M.R.A.P. 8 (e) provides for situations where there are omissions or inaccuracies in the transcript or inaudible recordings. The rule states that reconstruction can be made by stipulation or by motion. It is preferable to reconstruct by stipulation if possible, as it is less time-consuming and not subject to the uncertainty of motion practice. In trying to reach a stipulation, your first step should be to conduct your own reconstruction efforts. This will require having the trial attorney review the transcript in order to determine what happened in the missing portions. (This process is discussed in more detail in the next section). If you can determine what happened during the missing portions, memorialize it in an affidavit of the attorney, send it to the appellate prosecutor, and ask if the Commonwealth will stipulate to the contents of the affidavit. (You will have to ask the DA's appeals unit to assign the case to an assistant appellate DA, as the Commonwealth otherwise doesn't assign cases until they receive the defendant's blue brief).

Verbatim reconstruction is not necessary unless an issue turns on the specific language used. But you must make sure that the reconstruction contains all the information necessary to support the issues being raised on appeal. The burden is on the appellant to present the

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[16] *Harris,* 376 Mass. at 77, *citing Draper*, 372 U.S. at 495-496.

[17] *Harris,* 376 Mass. at 79. The *Harris* standard is based on the assumption that the defendant knows what issues he wishes to raise. This puts new appellate counsel at a severe disadvantage with respect to unpreserved issues and instances of ineffective assistance of counsel. If trial counsel is unavailable, then a new trial motion may lie. *See Commonwealth v. McWhinney*, 20 Mass. App. Ct. 444, 446 (1985) *and cases cited* ("*at least where trial counsel is available* . . . the defendant [must] come forward with articulable claims with reference to which the reconstruction can be judged) (emphasis supplied)". This principle arguably should apply if counsel has no memory of the issues. There is no easy answer to this problem. *But see Commonwealth v. Flint, 81 Mass. App. Ct. 794, 801-802* ("[W] here there is no dispute about what evidence was presented at trial and the judge was able to reconstruct the missing record, including the matters that were and were not the subject of an objection, there is no impediment to [appellate] counsel performing her role as an 'active advocate' or to this court's duty to conduct a meaningful review").

appellate court with an adequate record.[18] The appellate court may deny relief if the record is not complete enough to allow the judges to properly evaluate the issues raised. [19] This also applies to reconstruction by motion. It is not advisable to rely on the Commonwealth for any missing material, due to the government's inherent bias in favor of an error-free trial.[20]

If you can reach an agreement with the Commonwealth, file the stipulation in the trial court for approval by the trial judge. If the trial judge approves the stipulation, file it in the Appeals Court, serve a copy on the Commonwealth, include the stipulation in the record appendix to your brief, and cite to it your fact section where necessary.

Reconstruction by Motion Hearing

If you cannot reach a stipulation with the Commonwealth, then you must file a motion to reconstruct the record under M.R.A.P. 8 (e) containing your version of what transpired in the missing portions. Your motion should be supported by affidavits and any relevant documents that are available. Anyone with firsthand knowledge of the trial may submit an affidavit. The trial judge can also rely on the judge's own notes and memory. [21] The judge 's task is to determine whether the record can be adequately reconstructed to present any errors alleged

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[18] *Commonwealth v. Robicheau*, 421 Mass. 176, 184 n. 7 (1995) (appellant is responsible for presenting an adequate record for review; SJC would not assume that defense counsel objected where transcript presented was incomplete and so reviewed issue as unpreserved).

[19] *See e.g. Commonwealth v. Bernier*, 366 Mass. 717, 720, 322 N.E.2d 414 (1975) (declining to address issues raised by the defendant, where he did not include "in a record on appeal all of the evidence, facts or information pertinent to the issue[s]"). *But see Commonwealth v. Woody*, 429 Mass. 95 (1999) (missing testimony could not have supplied the evidence necessary to defeat a motion for a required finding of not guilty where the missing evidence "could only have been supplied by the arresting officer and his testimony was complete").

[20] *See Hardy v. United States*, 375 U.S. 277, 290 (1964) ("A lawyer appointed to represent the defendant's interests should not be required to delegate his responsibility for determining whether error occurred to the participants whose conduct may have formed the basis for the error").

[21] Under *Harris* 376 Mass at 79, "all evidence and testimony relevant to reconstructing the events at trial should be received." Sources of information that may be used to reconstruct the record include, but are not limited to:

- Recollections of the trial attorneys and others who attended the trial.
- Notes the trial attorneys made before and during trial.
- Transcripts of related proceedings (e.g., suppression hearings, grand jury minutes, probable cause hearings, etc., etc.).
- All trial related papers. (e.g., docket sheets, motions, affidavits, exhibits, proposed jury instructions, judge's findings, rulings, and orders).
- Memories of the witnesses.
- The judge's recollection and contemporaneous trial notes.
- The judge's usual custom and practice.

by the defendant. If the judge concludes that it cannot, the judge must order a new trial.

While *Harris* suggests that a reconstruction hearing should a cooperative undertaking, and that the attorneys should "use their best efforts to ensure that a sufficient reconstruction is made if at all possible"[22], as a practical matter, reconstruction hearings are adversarial proceedings, and the Commonwealth can be expected to provide a version that is error-free due to their bias in favor of an error-free trial. For this reason you should be extremely cautious about relying on any information provided by the Commonwealth. How to prepare a Rule 8 (e) motion and conduct the hearing is discussed in the next section.

The trial attorney's files

While *Harris* indicates that the trial attorney's files should be made available,[23] you should object to being required to disclose anything that implicates the defendant's right against self-incrimination or that compromises the defense of the case (such as a defense investigator's reports and witness interviews or reports of defense experts) or invades the confidentiality of attorney-client communications. By the same token, you should be entitled to the Commonwealth's complete file, since attorney-client privilege is not an issue, and should move for the file if the Commonwealth will not produce it voluntarily.

The judge's findings

After the hearing, the judge must make findings as to the contents of the missing record, and determine whether the resulting reconstruction is adequate to present any errors alleged by the defendant.[24] While the appellate court must view the judge's findings with "deference," the findings must be based on reliable evidence, such as :"(1) available transcripts of related proceedings, (2) the judge's own memory and customary practice, (3) the testimony of the trial lawyers and (4) contemporaneous secondary sources such as the trial notes of the lawyers."[25] A judge's failure to base her findings on reliable evidence may provide grounds for vacating the findings and ordering a new trial. Likewise, the case law requires that a reconstruction should be a "full narrative statement" and not merely a summary.[26] If you feel that the judge's reconstruction is not satisfactory, you should move for a new trial. Litigating a new trial motion under *Harris* is discussed below.

Partial reconstruction.

The *Harris* case states that, if the missing events cannot be completely reconstructed, the judge must determine whether a partially reconstructed record is adequate to present the errors

[22] *Harris*, 376 Mass. at 79.
[23] *Id*.
[24] *Id.* at 79-80.
[25] *Commonwealth v. Flint*, 81 Mass. App. Ct. 794 (2012) and cases cited.
[26] *Draper v. Washington*, 372 U.S. at 496-497.

alleged by the defendant. [27] According to *Harris,* a partially reconstructed transcript may be satisfactory "if the portions of the record dealing with the defendant's claims provide adequate appellate review for the defendant."[28] If the defendant makes a "colorable claim" that he must have access to the complete transcript in order to fairly present his appeal, the burden is on the Commonwealth to show that only a portion of the transcript or an alternative will suffice for an effective appeal on those grounds.[29]

From the defendant's perspective, partial reconstruction will not be satisfactory unless the omitted portions are not relevant to the appeal. This will rarely be the case, because demonstrating the prejudicial effect of an error requires reviewing *all* the evidence (see discussion on filing a new trial motion below).

Verbatim reconstruction.

Verbatim reconstruction is usually not necessary, but may be required where an issue turns on the specific language used at trial – such as claims of improper closing argument, erroneous jury instructions, or proper preservation of an appellate issue.[30] Also, in any case in which the prejudicial effect of an error must be demonstrated, it may be necessary to include certain verbatim cross-examination testimony of government witnesses in order to demonstrate the exculpatory value of the witness's testimony.[31] Inability to reconstruct these portions verbatim may be grounds for a new trial.

RECONSTRUCTION TECHNIQUES

Here are some suggestions on how to proceed in trying to reconstruct the record. You should keep track of all of your efforts in order to be able to demonstrate to the trial court that you have exhausted your efforts and that the record cannot be adequately reconstructed.[32]

Your first step should be to familiarize yourself with the case as much as possible from all available sources, including but not limited to any extant transcripts, discovery, court documents, and discussion with the trial attorney and the client. Read the discovery materials

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[27] *Harris*, *supra* at 79.

[28] *Id*. at 80.

[29] *Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971). *See Britt v. North Carolina*, 404 U.S. 226, 230. (1971).

[30] *McWhinney*, 20 Mass. App. Ct. at 447 (1985) (where issue raised was inflammatory closing remarks by prosecutor, new trial required where closing argument could not be reconstructed verbatim).

[31] *Id.* (reconstruction that did not include cross-examination was inadequate).

[32] *Harris, supra at* 78 (defendant must "demonstrate that reconstruction is impossible" in order to get a new trial).

in order to get a sense of the Commonwealth's prima facie case and any impeachment material. Contact the trial attorney, obtain the attorney's file, and review it. [33]

Working with trial counsel

Once you have familiarized yourself with the case, you should discuss reconstruction with trial counsel. Provide counsel a copy of the extant transcripts and any materials counsel does not already have, and get counsel's best recollection of what transpired during the omitted portions. Have counsel refer to the notes he took during trial. In most cases trial counsel will be the only reliable source of information. But you should be alert to other sources, particularly if trial counsel does not have a good memory of the proceedings. Your client can be a useful a source of information, though you may need to corroborate what he tells you because the judge may not find the client's affidavit credible.

Find out the defense theory from trial counsel, as this will provide the framework for reconstructing the record and determining the potential issues. Ask what appellate issues counsel is aware of, how they were preserved, and if she is aware of any unpreserved issues. Find out what counsel's strategy was for cross-examining each witness, as this may help to reconstruct missing cross-examination. Ask what impeachment materials were available and how they were used. Get from the attorney an overall sense of the trial, what the key legal and factual issues were, and whether she feels that anything was unfair, even if the attorney cannot define the legal error. This may help to identify unpreserved issues.

Working with the Commonwealth

In addition to reviewing the extant record and working with trial counsel, you should contact the appeals unit of the district attorney's office and ask them to assign an appellate prosecutor to case for purposes of reconstruction. (Normally the DA's appeals unit does not assign cases until they receive the defendant's brief). If there is a dispute over the contents of the missing portions, ask for corroborating documentation of the government's position. You are entitled to review all relevant materials from the prosecutor's file. [34] Do not, however, disclose anything from the defense file that implicates the defendant's right against self-incrimination, his trial strategy, or his right to attorney-client confidentiality.

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[33] Trial counsel is required to cooperate under professional standards as well as CPCS performance guidelines. Under these standards, appellate counsel is entitled to the client's *complete original file*, including all attorney notes and work product, once the trial attorney is provided with a release from the client. If the attorney was court-appointed, you can inform him that he can bill for his time by contacting CPCS and reopening his NAC. (The attorney should email ebill@publiccounsel.net to request the NAC be reopened). If a court appointed attorney is uncooperative, contact a staff attorney in the CPCS private counsel trial support unit for help. The attorney will need the name of trial counsel, the name and docket number of the case and a summary of your efforts.

[34] *Harris*, *supra* at 79. *Harris* states that reviewing the relevant contents of the attorneys' files should be part of the reconstruction effort.

Reconstructing testimony

The direct testimony of the government's witnesses may be gleaned from the complaint, grand jury minutes, police reports, witness interviews and other discovery, as well as the prosecutor's pre-trial and trial notes, defense counsel's trial notes, and the transcript of his opening statement and closing argument, if available. Check with trial counsel to see whether any of the witnesses' testimony varied from what is contained in these materials. Such inconsistencies may have been used for impeachment, provided exculpatory evidence, or provided grounds for a claim of insufficient evidence.[35]

The *Harris* case indicates that interviewing witnesses who testified at trial is appropriate.[36] Any statements gleaned from witnesses should be documented by an affidavit from the witness or a defense investigator in contemplation of the reconstruction hearing.

It is very important to reconstruct cross-examination of the government's witnesses. This is where the weaknesses in the government's case are revealed. Identifying those weaknesses is usually necessary in order to show that an error was prejudicial and not harmless. If counsel is having difficulty remembering, you may be able to deduce the cross-examination strategy of a witness from the theory of the case and the witness's direct testimony. Point out to counsel that the missing cross-examination ought to be reconstructed consistent with the theory of defense because the court should not assume that counsel's performance fell below constitutional standards for effective assistance of counsel.[37] Document impeachment testimony from discovery and any other materials outside the record.

Reconstructing procedural events.

It is important to reconstruct procedural events where potential appellate issues were raised and preserved. These include objections, sidebars, jury and witness voire dire, motion hearings, and sentencing.

Reconstructed procedural events should include the nature of and grounds for the objection, the judge's ruling, and her reasoning, if any. Keep in mind that a motion in limine preserves the issue without an objection being lodged at the time the evidence was offered, but only as

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[35] *See Commonwealth v. Watts*, 22 Mass. App. Ct. 952, 953 (1986) (new trial required where parties could not agree on whether evidence of length of gun barrel was sufficient to convict defendant of gun charge).

[36] *See Harris*, *supra* at 78 ("[A]ll the major witnesses are presently available to assist in reconstructing the record. ").

[37] *See Strickland v. Washington,* 466 Mass. 668, 689 (1984) ("[A] court must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance…") (emphasis supplied).

to the issue that was raised in the motion in limine.[38] If the attorney cannot remember the grounds for an objection, a general objection is sufficient to preserve the issue if the ground for exclusion should have been obvious.[39] If the attorney cannot remember what happened at a sidebar, you may be able to deduce it from the context of the examination in light of the theory of defense.

If the missing sidebar followed the sustaining of an objection by the prosecutor, you should determine whether defense counsel made an offer of proof, as this would normally be necessary to preserve the issue. If counsel has no memory, you may be able to deduce what evidence defense counsel was trying to elicit from the context of the examination in light of the theory of defense. You may be able to determine the factual basis for the offer of proof from the discovery materials, witness interviews, defense investigative materials, or other sources outside the record. If so, you should offer the material in support of your motion to reconstruct.

MOVING FOR A NEW TRIAL DUE TO INCOMPLETE TRANSCRIPTS.

As stated above, the defendant is entitled to a new trial if the record cannot be reconstructed sufficiently to allow him to adequately present his claims to the appellate court.[40] The defendant has the initial burden of showing that adequate reconstruction is impossible,[41] or that he is prejudiced by the lack of a complete record.[42] Once the defendant comes forward with an "articulable claim" as to why the reconstruction is inadequate the Commonwealth then bears the burden of showing the sufficiency of the reconstruction.[43]

In filing a ***Motion for a New Trial Due to Incomplete Transcripts***, you should include your affidavit detailing your efforts at reconstruction and explaining why the record cannot be adequately reconstructed to present the defendant's issues. In determining adequacy, the courts have looked to the following criteria:

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[38] *Commonwealth v. Grady*, 474 Mass. 715, 718-722 (2016).

[39] *See Commonwealth v Martin*, 417 Mass. 187, 189-191 & n.2 (1994) (general objection sufficient); *Cf. Cancel*, 394 Mass. at 569-572 (general objection not sufficient).

[40] *Harris*, *supra* at 77-78.

[41] *Id*. at 78.

[42] *Flint,* 81 Mass. App. Ct. at 801-802.

[43] *McWhinney, 20 Mass. App. Ct. at 446; See also Mayer*, 404 U.S. at 195; *citing Draper*, *supra* at 498;; *Britt v. North Carolina*, 404 U.S. 226, 230 (1971).

1. The percentage of the record that needs to be reconstructed;[44]

2. The materiality of the missing portions to the issues the defendant wishes to raise;[45]

3. The degree to which the material portions of the record can be reconstructed;[46]

4. The extent to which the parties have memories of what occurred during the missing portions;[47]

5. The availability of contemporaneous notes taken at trial;[48]

6. The availability of objective evidence supporting the judge's findings and supporting her resolution of any disputes;[49]

7. The extent to which the judge and defendant must rely on the memory of the prosecutor;[50]

8. Any lack of cooperation by the prosecutor.[51]

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[44] *Draper*, *supra* at 496 *("*No relevant portions of the stenographic transcript were before*"* the trial court).

[45] *Id*. ("The arguments … could not be determined on their merits … without recourse, at a minimum, to the portions of the record of the trial proceedings relating to this point").

[46] *Id*. at 497 (judge's reconstruction that was neither a narrative nor a summary of the actual testimony at the trial, but was merely a set of conclusions, not adequate).

[47] *Id*. (Findings of court were "premised upon recollections as of a time nearly three months after trial and, far from being a narrative or summary of the actual testimony at the trial, was merely a set of conclusions".) *Cf. McWhinney, 20 Mass. App. Ct .at 446 and cases cited* ("at least where trial counsel is available . . . the defendant [must] come forward with articulable claims with reference to which the reconstruction can be judged").

[48] *Draper, 372 U.S. at 497* ("The only available description of what occurred at the trial was the summary findings of the trial court and the counter-affidavit filed by the prosecutor. The former was not in any sense like a full narrative statement based upon the detailed minutes of a judge kept during trial.")

[49] *Id*.

[50] *Hardy v. United States*, 375 U.S. 277, 290 (1964) ("A lawyer appointed to represent the defendant's interests should not be required to delegate his responsibility for determining whether error occurred to the participants whose conduct may have formed the basis for the error.")

[51] *Harris*, 376 Mass. at 79 ("The attorneys involved at the trial, are under an affirmative duty to use their best efforts to ensure that a sufficient reconstruction is made if at all possible.")

If your motion for a new trial is denied, you must file a notice of appeal in order to preserve the issue. On appeal, you will need to argue in the alternative both that the record is inadequate *and* that, if the court finds it adequate, that the extant record supports the defendant's claims.

Practical advice on bringing new trial motions due to lack of a complete transcript.

With regard to new trial motions based on incomplete transcripts, the Harris case presents a "Catch 22" situation. Under Harris the defendant has the burden of showing that the record "cannot be reconstructed sufficiently to raise the defendant's claims." [52] But in Harris, appellate counsel was also trial counsel and so was aware of the issues that arose at trial. This is not possible where there is new counsel on appeal, as will be the case with your assignments. Rather, you will have to rely on trial counsel's memory, which may be imperfect. Also, trial counsel cannot be expected to be aware of unpreserved issues or to know of or admit to instances of ineffective assistance of trial counsel.[53] The Appeals Court in Commonwealth v. Flint, 81 Mass. App. Ct. 794 (2012) held that this did not violate the defendant's right to effective assistance of appellate counsel.[54] It based its ruling on its finding that the record had been completely reconstructed by the trial judge based on his memory, his notes, and his custom and practice. [55]

Flint can be distinguished from situations in which the record cannot be completely reconstructed, and *Harris* can be distinguished from cases where appellate counsel was not trial counsel. Together, these cases can be used to support the argument that a new trial motion is required where the record cannot be completely reconstructed and where you are successor counsel. *See Commonwealth v. Watts*, 22 Mass. App. Ct. 952, 953 (1986) (new trial required due to the impossibility of adequately reconstructing the record). An argument can be made not only based on the defendant's due process rights, but also his constitutional right to effective assistance of appellate counsel.[56] However, the SJC has been clear that Massachusetts law does not require a defendant receive a complete record of the trial, only enough to determine the merits of the underlying issues. See *In the Matter of M.C.,* 481 Mass. 336, 345 – 350[57].

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[52] *Id.* at 79.

[53] *See Commonwealth v. Lanoue*, 409 Mass. 1, 2-4 (1990) (it would be "unrealistic to expect [the defendant's] first attorney to have raised a claim calling his own competence into question.")

[54] For the right to effective assistance of appellate counsel, see, e.g., *Breese v. Commonwealth*, 415 Mass. 249, 250 n.1 (1993).

[55] *Flint*, 81 Mass. App. Ct. at 801-802.

[56] *See Lanoue, supra.*

[57] It is worth noting that the appellant in *M.C.* did not seek to correct the record in the trial court. It is unclear whether this influenced the court's decision.

Normally, a new trial motion under *Harris* should include the argument that the record cannot be considered complete unless it contains *all* the evidence in some form, because the prejudicial effect of an error can only be determined by looking at its effect on the jury in the context of *all* the evidence presented. For example, for preserved constitutional error to be found, the court must be able to "confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt" (emphasis supplied).[58] Similarly, for preserved non-constitutional error, the court must determine prejudice only "after pondering *all that happened without stripping the erroneous action from the whole* ..." (emphasis supplied) [59]And for unpreserved errors, the standard is whether the error is "sufficiently significant *in the context of the trial t*o make plausible an inference that the [jury's] result might have been otherwise but for the error" (emphasis supplied).[60] In particular, it is the *cross-examination* of Commonwealth witnesses where exculpatory evidence can be expected to emerge. So mere reconstruction of the Commonwealth's prima facie case is insufficient for the defendant to satisfy any of these standards.

As a practical matter, anecdotal information indicates that the more of the transcript that is missing, the more likely a judge is to grant a new trial. This may be the result of the understanding that all the evidence must be considered to determine the prejudicial effect of an error cannot be demonstrated.

[58] Commonwealth v. Miles, 420 Mass. 67, 73 (Mass. 1995); *relying on Chapman v. California*, 386 U.S. 18, 23 (1967).

[59] *Commonwealth v. Flebotte*, 417 Mass. 348, 353 *quoting Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946).

[60] *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999) and cases cited.