Committee For Public Counsel Services
Private Counsel Division
Criminal Appeals Unit & Innocence Program

Litigating New Trial Motions in Massachusetts:

A Rule 30 Resource Guide

This document was created as a basic resource guide for motions for a new trial filed pursuant to Massachusetts Rules of Criminal Procedure Rule 30(b). It does not include all applicable case law or claims and should not substitute for case-specific research and investigation.

PART ONE describes, in outline form, the foundational requirements and common fact patterns under Rule 30, including the elements needed to obtain relief on the basis of *newly discovered/newly available evidence*, *Brady violations*, and *ineffective assistance of counsel*. It also explores the line of cases in which the SJC has recognized that a "*confluence of factors*" that do not fall neatly within traditional categories of relief may nevertheless support the claim that a new trial is warranted because "justice may not have been done."

PART TWO offers practical tips for how to proceed with screening, investigating, and litigating new trial motions. Topics include *fact development* (document gathering, fact investigation, affidavits, experts, discovery and funds motions), *motions practice* (written requirements, where to file, requesting a hearing), *evidentiary hearings*, and *making a record for appeal*.

PART THREE lists helpful resources and contact information for counsel assignments made through the Private Counsel Division Appeals Unit and Innocence Program.

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Part One: Rule 30 Legal Framework

Legal standard in a nutshell

Under Rule 30(b), the motion judge may grant a trial:

- At **any time**
- If it appears that **justice may not have been done.**

Under the plain language of Mass. Rule Crim. P. 30(b), a trial judge may "grant a new trial at any time if it appears that justice may not have been done." "The fundamental principle of this rule is that, where it appears that justice may not have been done, the valuable finality of judicial proceedings must yield to our system's reluctance to countenance significant individual injustices."[1] This is true even if there was no constitutional error at trial.[2]

Traditional categories of relief

The Supreme Judicial Court has held that a new trial is required in several circumstances, including: (1) where *newly discovered evidence* "casts real doubt on the justice of the conviction" in the sense that the evidence "would probably have been a real factor in the jury's deliberation;" (2) where "*prejudicial constitutional error* occurred;" (3) where the defendant demonstrates a "*substantial risk of a miscarriage of justice*," defined as a "serious doubt whether the result of the trial might have been different had the error not been made."[3] A new trial is also required where a defendant can establish that he was prejudiced by the Commonwealth's failure to disclose exculpatory evidence[4] or deprived of an otherwise available ground of defense due to deficient performance of counsel. [5] Additionally, a new trial is required where a defendant demonstrates that his federal and state right to due process were violated because the Commonwealth presented, or failed to correct, testimony which it knew or should have known was false.[6]

Confluence of factors demonstrating justice may not have been done

While the SJC has collectively "crafted a latticework of more specific standards designed to guide judges' determinations in various types of situations," these individual standards "have not eclipsed the broader principle that a new trial may be ordered if 'it appears that justice may not have been done.'" [7] In such situations, the "appropriate test" is whether a defendant has received a "fair trial," and the "question of fundamental fairness can only be determined on a case-by-case basis."[8] The "touchstone [of the Court's Rule 30 analysis] must be to do justice, and that requires

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[1] *C v. Brescia,* 471 Mass. 381, 388 (2015).
[2] *Id.*; *C v. Epps*, 474 Mass. 743 (2016).
[3] *Brescia*, 471 Mass. at 389. See also *C v. Cowels,* 470 Mass. 607, 616-617 (2015) (newly available scientific evidence); *C v. Sullivan*, 385 Mass. 497, 503 (1982)*; C v. Martin*, 467 Mass. 291, 316 (2014) (prejudicial constitutional error); *C v. Childs*, 445 Mass. 529, 530 (2005) (miscarriage of justice); *C v. Randolph*, 438 Mass. 290, 297 (2002) (serious doubt re. result).
[4] *C v. Murray*, 461 Mass. 10, 22-23 (2011).
[5] *Strickland v. Washington,* U.S. 668 (1984); *C v. Saferian*, 366 Mass. 89, 96 (1974); *C v. Alcide*, 471 Mass. 150 (2015).
[6] *C v. Ware*, 482 Mass. 717, 721 (2019); *C v. Hurst,* 364 Mass. 604, 608 (1974); *Napue v. Illinois,* 360 U.S. 264 (1959).
[7] *Brescia*, 471 Mass. 389-90, quoting *C v. Lombardi*, 378 Mass. 612, 615-16 (1979).
[8] *Id*.

us to order a new trial where there is a substantial risk of a miscarriage of justice because a defendant was deprived of a substantial defense, regardless of whether the source of the deprivation is counsel's performance alone, or the inability to make use of relevant new research findings alone, or the confluence of the two."[9]

Abuse of Discretion and Appellate Review

Massachusetts courts afford trial court judges immense discretion when deciding whether to grant relief under Rule 30. For example, in *Commonwealth v. Toney*, 385 Mass. 575 (1982), the SJC affirmed the denial of a new trial motion without a hearing *even though* the Court recognized that the facts alleged by the Rule 30 motion would have supported the *allowance* of a new trial motion. The burden to overturn a trial court decision on a Rule 30 motion is very high, and a judge will only be reversed on appeal if s/he (1) made "*a significant error of law*," or (2) *abused his/her discretion*.[10] Moreover, greater deference is afforded to the motion judge if she also presided over the underlying trial.[11] However, a motion judge's discretion "is not boundless and absolute."[12]

Telling the Story of Injustice or Innocence

In light of the deference afforded to trial court judges who preside over Rule 30 motions, it is *critical* to make all efforts to *prevail at the trial court level* by convincing the motion judge that "justice may not have been done." Telling a compelling story of innocence or injustice – and telling it as vividly and creatively as possible – is the absolute key to success. Effective storytelling often benefits from the inclusion of an introduction that succinctly situates the grounds for relief against the backdrop of the evidence that led to the conviction.

Requesting an evidentiary hearing

With the exception of purely legal claims or those that rest solely on documentary evidence, it is essential to specifically request an *evidentiary hearing* on the Rule 30 motion. Although the decision whether to hold an evidentiary hearing rests within the sound discretion of the motion judge,[13] the Reporter's Notes to Rule 30 expressly caution that "[w]here a substantial issue is raised…the better practice is to conduct an evidentiary hearing."[14]

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[9] *Epps*, 474 Mass. at 767; *C v. Rosario,* 477 Mass. 69 (2017).
[10] *C v. Wright*, 469 Mass. 447, 461 (2014). See also *C v. Goodreau*, 442 Mass. 341, 348 (2004) ("To sustain an appellate claim that a judge committed an abuse of discretion, it must be demonstrated that no conscientious judge, acting intelligently, could honestly have taken the view expressed by [the motion judge].")
[11] *C v. Long*, 476 Mass. 526, 530 (2017).
[12] *C v. Kolenovic*, 471 Mass. 664, 672 (2015). See, e.g., *C v. Marrero*, 493 Mass. 338 (2024) (reversing denial of motion for new trial); *C v. Caldwell*, 487 Mass. 370 (2021) (same); *C v. Cameron*, 473 Mass. 100 (2015) (same).
[13] *C v. Figueroa*, 422 Mass. 72, 77 (1996).
[14] See, e.g., *Commonwealth v. Saarela*, 15 Mass. App. Ct. 403, 407 (1983) (remanding for evidentiary hearing where defendant and Commonwealth presented conflicting affidavits); *Commonwealth v. Companonio*, 420 Mass. 1003, 1003 (1995), *S.C.* 445 Mass. 39 (2005) (remanding for evidentiary hearing where affidavits were missing key elements).

Newly Discovered Evidence

Legal standard in a nutshell

1. Is it **new**?
2. Does it **cast doubt** on the justice of the conviction?

Evidence is "new" if it was: [15]

- ***Not known*** to defendant or counsel at time of trial (or earlier new trial motion)
- ***Not reasonably discoverable*** through the exercise of due diligence

Evidence "casts down on the justice of the conviction" if it is:

- ***Material, credible, and carries a measure of strength*** in support of the defense (not merely cumulative of other trial evidence)
- In the sense that it would "***probably have been a real factor*** in the jury's deliberations"

Categories of facts that can constitute "new" evidence include:

- Witness recantation
- New percipient witness who could not have been previously discovered[16]
- New DNA results[17]
- Newly available/ newly discovered scientific evidence undermining forensic evidence relied upon at trial

Methods of showing that evidence or witness not known or discoverable:

- Did Commonwealth withhold its existence?
- Did Counsel diligently search for and not find it?
- Is there a forensic test that had not yet been developed?
- Is there scientific research that bears on a material fact and had not yet been developed?
- Is there scientific research that had been developed but not yet achieved general scientific consensus?
- Is there scientific research that had been developed and achieved scientific consensus but not yet reached the point of *judicial* acceptance (or been ruled admissible)?[18]

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[15] *C v. Grace*, 397 Mass. 303, 305-306 (1986).

[16] Although newly discovered evidence that only impeaches the credibility of a witness is ordinarily insufficient, if the case depended on the testimony of a single witness and newly discovered evidence contradicts that testimony, that is sufficient for a new trial. *C v. Drayton*, 479 Mass. 479, 489 (2018).

[17] Importantly, new DNA testing need not provide definitive proof of innocence to support a claim for relief. *See, e.g., Marrero*, 493 Mass. 338 (DNA results remove from jury's consideration the only physical evidence linking defendant to crime), *Sullivan*, 469 Mass. at 351 (same), *C v. Cowels*, 470 Mass. 607, 616 (2015) (same), *Cameron,* 473 Mass. at 104-108 (DNA eliminated only corroboration of complainant's credibility). *But see C v. Duguay*, 492 Mass. 520 (2023).

[18] See *Cowels*, 470 Mass. 607 (DNA still experimental at time of trial).

Some examples of "new" scientific advancements

Arson/ fire scene analysis

Modern fire science analysis can reveal that the evidence relied upon at trial to support a theory that the fire was set is also consistent with an accidental fire.[19]

Microscopic hair analysis

In 2012, three DNA exonerations in which suspects had been connected to crime scenes through hair analysis prompted a national review of hair examiner testimony. Numerous courts have since considered whether the new scientific consensus on the nature and limitations of hair analysis evidence constitutes newly discovered evidence.[20]

"Shaken baby" or "abusive head trauma" research

Re-analysis of medical evidence in child death cases can sometimes establish that the diagnostic triad (retinal bleeding, bleeding in the protective layer of the brain, and brain swelling) relied upon to establish that a child died as a result of shaking is also consistent with other, non-criminal/ accidental theories of death.[21]

Eyewitness evidence

Certain fact patterns may support an argument that scientific research on eyewitness error is "new" or that changes in the *judicial understanding* of applicable scientific principles constitute "newly available evidence."[22]

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[19] *Rosario*, 477 Mass. 69 (affirming allowance of new trial motion based in part on advances in fire analysis since time of 1982 trial found by her to constitute newly available evidence).

[20] In *C v. Perrot*, No. 85-5415, 2016 WL 380123 (Mass. Super. Jan. 26, 2016), Judge Robert Kane granted a new trial after finding that "the new consensus on the limitations and nature of hair analysis evidence constitutes newly available evidence" that cast real doubt on the justice of the conviction. This was the first case in the nation in which a new trial was granted based solely on changes in hair science, without the benefit of exculpatory DNA evidence. See also *C v. Eagles*, 491 Mass. 210 (2023) (recognizing that recent scientific developments invalidating probabilistic testimony offered in support of hair testimony constitutes newly discovered evidence but affirming denial of motion for new trial where prejudice not established).

[21] *Epps*, 474 Mass. 743 (2016) (overturning denial of new trial where defendant deprived of substantial ground of defense due in part to changes in medical field that cast doubt on expert evidence on cause of death adduced at trial. *Cf. C v. Macharla*, No. 2015-128, 2019 WL 4261045 (Mass. Super. Aug. 19, 2019) (scientific debate over shaken baby syndrome warranted reducing jury verdict from second degree murder to involuntary manslaughter).

[22] *C v. Gaines,* 495 Mass. 525 (2024) (developments in eyewitness ID research in interim since 1975 trial constitute newly discovered evidence); *C v. Mercado*, 495 Mass. 763 (2025) (same, in interim since 2007 trial).

Ineffective Assistance of Counsel[23]

Legal standard in a nutshell

1. Was counsel's performance **deficient**?
2. Did it **prejudice** the defendant?

Counsel's performance was deficient if it was:

- ***Seriously incompetent***, inefficient or inattentive
- ***Fell measurably below*** that which might be expected from an ordinary fallible attorney

Defendant was prejudiced if counsel's performance:

- ***Deprived him*** of an otherwise available ***substantial ground of defense***
- Creating ***serious doubt*** about whether ***result might have been different***

Note: It is NOT necessary to prove that verdict would have been different.[24]

Common examples of ineffective assistance:[25]

- **Failure to adequately investigate** (getting and reviewing documents, examining physical evidence, interviewing witnesses, considering expert defenses)[26]
- **Failure to develop viable defense** (third party culprit, alibi, critical witness, unfulfilled promises in opening)[27]
- **Failure to seek funds for, or consult with an expert** (scientific, medical, psychiatric)[28]
- **Failure to have forensic tests performed**
- **Failure to raise viable objection** (prejudicial and excludable evidence; improper closing argument; failure to file motion to suppress evidence, statements, or identifications)[29]

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[23] *Grace*, 397 Mass. 303 (1986); *Saferian*, 366 Mass. at 96; *C v. Millien*, 474 Mass. 417, 432 (2016).

[24] *Millien*, 474 Mass. at 432, *citing Strickland*, 466 U.S. at 693 (defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case").

[25] *See generally C v. Alcide*, 472 Mass. 150 (2015) and *C v. Baran*, 74 Mass. App. Ct. 256 (2009).

[26] *C v. Haggerty*, 400 Mass. 437, 442 (1987) (failure to investigate only available defense); *Epps*, 474 Mass. at 758 (obligation to investigate "all potentially substantive defenses, particularly when an available defense is strong "relative to the availability and strength of other potential defenses.")

[27] *C v. Phinney*, 446 Mass. 155 (2006) (third party culprit defense); *C v. Farley*, 432 Mass. 153 (2000) (failure to advance defense through use of evidence, testimony and argument); *C v. Diaz*, 484 Mass. 69 (2020) (failure to investigate or call alibi witness); C *v. Hill*, 432 Mass. 704 (2000) (failure to call critical witness); *C v. Lane*, 462 Mass. 591 (2012) (failure to call witness promised to testify during opening).

[28] *Epps*, 484 Mass. at ## (failure to adequately investigate availability of expert assistance in challenge validity of SBS/AHT diagnosis); *Millien*, 474 Mass. at 430 (failure to obtain funds for SBS/AHT experts).

[29] *C v. Reid,* 400 Mass. 534 (1987) (failure to object to admission of D's prior convictions); *C v. Comita*, 441 Mass. 86 (2004) (failure to file motion to suppress that was reasonably likely to succeed on merits).

Brady Violation

Legal Standard in a Nutshell

1. Was it in the Commonwealth's ***possession, custody, or control***?
2. Was it ***exculpatory***?
3. Did it ***prejudice*** the defendant?

Summary

The Commonwealth's failure to disclose material, exculpatory evidence in its possession or control violates the defendant's federal and state constitutional rights,[30] and the Commonwealth's broad obligation under Massachusetts rules.[31] To obtain a new trial on the basis of a Brady violation, a defendant must show 1) that the evidence was in the possession, custody, or control of the Commonwealth, 2) that the evidence was exculpatory, and 3) prejudice.[32]

Evidence was in the Commonwealth's possession, custody, or control if:

- It was in the possession or control of the *prosecution* or *their staff*, OR
- It was in the possession or control of anyone who *participated* in the case investigation or evaluation and *reported to the prosecutor's office.*[33]

Evidence is exculpatory if it tends to ***negate the guilt of the defendant*** or ***support the defendant's innocence*****.**[34]

Examples include evidence that: (1) corroborates the defendant's story or a defense; (2) calls into question a material (if not indispensable) element of CW's theory of guilt, or (3) challenges the credibility of a key CW witness. [35]

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[30] *Brady v. Maryland*, 373 U.S. 83 (1963) (establishing federal constitutional due process obligation); *C v. Tucceri*, 412 Mass. 401, 407 (1992).

[31] Mass R. Crim. P. 14(a)(1)(A)(iii); see also *C v. Pope*, 489 Mass. 790, 798 (2022); *C v. Caldwell*, 487 Mass. 370 (2021).

[32] See *Sullivan*, 478 Mass. at 380.

[33] *Pope*, 489 Mass. at 798; See also *C v. Woodward*, 427 Mass. 659, 679 (1998) (requirement ordinarily extends to information in possession of the prosecutor or police, but can reach others such as a medical examiner); *C v. Bing Sial Liang*, 434 Mass. 131, 136 (2001) (victim-witness advocates have a duty to relay to the prosecutor any information they believe is exculpatory). But see *C. v. Wanis*, 426 Mass. 639, 643 (1998) (records of a police internal affairs division investigation not automatically within scope of R.14).

[34] See *Caldwell*, 487 Mass. at 375; *C v. Pisa*, 371 Mass. 590, 595 (1977). The evidence need not be "absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence." *C v. Laguer,* 65 Mass. App. Ct. 612, 618 (2006).

[35] *C v. Watkins,* 473 Mass. 222, 231 (2015), quoting *C v. Daniels,* 445 Mass. 392, 401-402 (2005); *Sullivan*, 478 Mass. at 380 (evidence that supports a *Bowden* defense is exculpatory); *Caldwell,* 487 Mass. at 375-376 (prosecutor's note documenting key witness's prior cooperation as an informant); *Sullivan,* 478 Mass. at 380 (competence of an expert witness); *Pope*, 489 Mass. at 798 (inconsistencies in CW's key witness testimony).

Demonstrating prejudice

The standard for prejudice depends on whether the evidence was subject to a specific request by the defendant, a general request for all exculpatory evidence, or no request at all.

- Specific request:[36] Defendant needs a ***substantial basis for claiming prejudice*** from nondisclosure.[37] Importantly, the SJC has noted that the specific request standard applies to all materials that fall under the mandatory discovery topics enumerated in Rule 14.[38]
- General/ no request: Defendant must show new evidence would ***probably have been a real factor*** in the jury's deliberations, or show a ***substantial risk*** that the jury would have reached a different conclusion.[39]

Non-disclosure of information only learned after trial

In *C v. Gaines*, the Supreme Judicial Court expressly wrestled with the prosecution's duty to disclose exculpatory evidence that comes into the government's possession, custody, or control after the conclusion of the trial. Despite concluding that the *constitutional* duty to disclose exculpatory evidence under *Brady* and art. 12 does not extend to information that comes to light *after* the conclusion of the trial, the Court nevertheless concluded that, "going forward, we read Rule 3.8(d) [of the Massachusetts Rules of Professional Responsibility] to require disclosure of any recantation known to the Commonwealth – regardless of its credibility or timeliness – to all defendants and, where applicable, their codefendants."[40]

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[36] *Tucceri*, 412 Mass. at 407 (observing that the more favorable standard that applies to specific requests is intended to motivate prosecutors to be cognizant of defendant's disclosure rights). See also *Pope*, 489 Mass. at 801.

[37] See *C v. Rodriguez-Nieves*, 487 Mass. 171 (2021) (defendant was prejudiced if he would have retained and called an expert to contradict the Commonwealth's factual assertions).

[38] *Rodriguez-Nieves*, 487 Mass. at 179 n.12.

[39] *C v. Murray*, 461 Mass. 10, 21 (2011).

[40] *Gaines*, 494 Mass. at 547, citing *Graham* v. District Attorney for Hampden District, 493 Mass. 348, 364 (2024) ("prosecutors cannot, consistent with their obligation to disclose exculpatory information, withhold at their discretion" exculpatory evidence).

"Justice May Not Have Been Done"
The Confluence of Factors Test

Legal Standard in a Nutshell

1. Are there **extraordinary or problematic factors** in case?
2. Acting in concert, do they demonstrate that **justice may not have been done**?

Evolution of the Test

Brescia (2015)

- Affirms MNT allowance where D has undetected stroke mid-way through testifying
- Concludes that an *extraordinary confluence of factors* hampered fairness

Epps (2016)

- MNT required due to *confluence* of counsel's *failure to find an expert* and *evolving scientific research* demonstrating that a credible expert could now offer important evidence in support of defense

Ellis (2016)

- Affirms allowance of MNT where only *some* of records were new
- New evidence can act in concert with previously known evidence to influence jury's global view of evidence & integrity of investigation
- Understanding prejudice requires examination of totality of case, including how new evidence might have changed the defense strategy in investigation, cross, and closing

Rosario (2017)

- Affirms allowance of MNT where *new fire science* combined with *irregularities in interrogation* (including medical diagnosis affecting voluntariness and police tactics)
- *Confluence of factors* created a substantial risk of a miscarriage of justice
- Like *Ellis*, looks out how new evidence (arson science) might have changed defense

Strategies for satisfying the Confluence of Factors Test

- Create a comprehensive fact record that considers how new issues influence old
- Leave no stone unturned in finding facts issues to include in MNT
- Encourage holistic review by motion judge of all evidence and factors
- Explain the impact of new evidence on every other piece of evidence, old and new
- Don't be deterred by principles of waiver

Part Two: Practical Tips for Developing New Facts

1. Investigation (witnesses, evidence, documents)
2. Affidavits
3. Rule 30(c)(4) post-conviction discovery
4. Rule 30(c)(5) post-conviction funds

Examples of possible investigation steps

Voluntarily Requesting case-related documents & evidence

- Prior defense counsel (trial & postconviction) & investigators
- Prosecutor (*may have exhibits, may voluntarily share file)*
- Trial court case files (*client's case file, co-defendant case files, trial exhibits)*
- Associated civil case files
- *Don't forget to talk to your client and ask them for copies of documents they may have!*

Public Records Requests to public agencies with relevant case documents

- Police (local and state)
- Prosecutor (*this can be a gold mine*)
- Labs & OCME (*all* labs involved; may need to specify each specialized unit)

Witness interviews

- Can *seek funds* (see below)
- If no funds, *attorney can interview* but *bring a witness* with you wherever possible
- In some cases, the *Innocence Program* may be able to provide investigation support
- Don't forget to interview key defense players (lawyers, investigators, trial experts)

Tips on Effective Affidavits

Civilian witness

- If the witness has something helpful to say, *get an affidavit!*
- If the witness previously testified or spoke with police, *be sure you know everything that they said before*
- Assume that the witness *will not be testifying* (even though you *want* an evidentiary hearing)
- Include *every important detail* (unlike a pre-trial affidavit for a motion to suppress)
- Explain *why information wasn't previously available* at time of trial, and any *relationship* between witness and defendant

Tips on Effective Affidavits (cont'd)

Expert witnesses

Clearly & concisely state opinion

Include a detailed & thorough explanation of the *basis* for opinion:

- **What was reviewed?** (transcripts, lab notes, defendant/witness interviews)
- **What generally accepted standards or experiments support the opinion?** (e.g. NPFA 921 (arson), DSM (mental illness), 2014 SJC ID Report or social science article (mistaken ID)

Support the opinion with **citations to the record** and **copies of significant articles attached**

Rule 30(c)(4) Discovery

Timing

- Under the rule, to move for discovery, *must also file a MNT*[41]
- May file one *simultaneously* with MNT
- Once discovery produced, MNT can generally be *amended* (but see "Tips" below)

Standard to Obtain

Is discovery *reasonably likely* to uncover evidence that *might warrant* granting MNT?[42]

If MNT based on **newly discovered evidence:**

- Must make ***specific*** (not speculative or conclusory) allegations that discovery sought…
- Could produce evidence that would have ***materially aided the defense*** against charges
- And could yield evidence that ***might have played an important role*** in deliberations[43]
- ***Not required*** to show that newly discovered evidence would have led to different verdict

Practical tips

- Even if can't meet burden, court may still be willing to force response to basic requests[44]
- If filing a preliminary motion for new trial to support a postconviction discovery request, be sure to clearly identify the motion as "preliminarily" and expressly state your intention to supplement the motion once discovery is provided
- If you think your client has an innocence claim, reach out to the Innocence Program for advice on additional avenues including discovery/testing pursuant to G.L. c. 278A

Key is to demonstrate:

- extent of efforts to locate independently & likely exculpatory value
- keeping in mind that denials of discovery are reviewed only for abuse of discretion

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[41] *C v. Montefusco*, 452 Mass. 1015, 1016 (2008).

[42] *C v. Daniels*, 445 Mass. 392, 406 (2005) (reversing denial of motion for post-conviction discovery)

[43] *C v. Morgan*, 453 Mass. 54, 61-62 (2009).

[44] *C v. Dubois*, 451 Mass. 20, 29-30 (2008) (D moves post-conviction for copy of interrogation tape not produced prior to trial, SJC concludes that even though there was no subst'l likelihood of miscarriage of justice, the Commonwealth's discovery response (that ADA unaware of any potentially exculpatory evidence not turned over) was insufficient).

<u>Rule 30(c)(5) Funds</u>

Timing

Unlike discovery, rule explicitly authorizes court to allow funds *before* MNT filed

Standard to obtain

- Costs must be reasonably ***associated with the preparation and presentation*** of a MNT and
- Enable assistance that is ***reasonably likely to uncover evidence*** that might warrant a NT[45]
- As with discovery, court has significant discretion

Purpose of funds

- Hire an expert
- Conduct forensic testing
- Conduct investigation

Other resources to keep in mind

Innocence Program Expert Funding System (grant dependent)

<u>Filing & Procedural Requirements</u>

Where to file

<u>First degree murder</u>

- *Before direct appeal*, file in SJC
- *After direct appeal*, file in trial court

<u>All other cases</u>

- *Before direct appeal*, file in trial court (must move to stay in Appeals Ct. if already docketed)
- *After direct appeal*, file in trial court

When to file

<u>First degree murder</u>

- If possible, file *before* direct appeal, because…
- Better standard ("substantial *likelihood*" v. "substantial *risk*" of miscarriage of justice).[46]
- Post-direct appeal MNT are subject to the gatekeeper provision, G.L. c. 278, §33E[47]

<u>All other cases</u>

- No time bar - may be filed prior to direct appeal (if appeal stayed) or years after trial/appeal

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[45] *Daniels*, 445 Mass. at 407.

[46] *C v. Hill,* 432 Mass. 704, 710 n. 14 (2000) (to establish substantial *likelihood, must show* that there was (1) an error at trial; (2) that likely influenced the jury's conclusion. The "substantial likelihood" standard applies to all unpreserved error, including ineffective assistance of counsel.

[47] After direct appeal, can *only* appeal the denial of a MNT if given permission by a single justice of the SJC. *Randolph*, 438 Mass. at 293, n.1.

Filing & Procedural Requirements, cont'd

Making a record

- The field is wide open, so include *any and all beneficial information*
- Be over rather than under-inclusive, attach all documents/studies that support claims
- Think creatively about how to present your facts, *including with visual aids*
- Tell a *comprehensive story of injustice or innocence.*

Waiver

- Any issue not raised at the first opportunity will be considered "waived"
- *Just because an issue is "waived," that does not mean it can't form the basis of a MNT*
- Waived issues still considered, just using "substantial risk of a miscarriage of justice" standard.[48][44]
- This is especially important in light of the recent "confluence of factors" line of cases

Getting a hearing

- Trial judge may rule on papers, with or without a written opposition[49]
- *Unless* you show that your motion raises a "substantial issue" warranting a hearing
- Judge considers adequacy of papers in deciding whether substantial issue raised[50]
- Where motion judge is trial judge, may use knowledge of trial record to make decision[47]
- *Consider how new evidence can revive consideration of previously rejected claims*[51]

Conducting a hearing

- May be evidentiary or nonevidentiary (motion judge decides)
- Defendant bears burden of proof

Standard of review for *prejudicial constitutional error*

- Once you show that prejudicial constitutional error occurred, court asks
- Was the error harmless beyond a reasonable doubt?
- Has *Commonwealth* shown that erroneous evidence did not contribute to verdict?

Standard of review for *all other types of error*

- Was there an error?
- Was it prejudicial?
- Did it materially influence the verdict?
- Was the conduct the result of a reasonable tactical decision?

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[48] *Randolph*, 438 Mass. at 293-295.
[49] *C v. Stewart*, 383 Mass. 253, 257-258 (1981).
[50] *C v. Morgan*, 453 Mass. 54, 64 (2009).
[51] See, e.g., *Ellis*, 475 Mass. at 480.

Appeal from Denial of MNT

Post-Direct Appeal in First Degree Murder

Can only appeal if Gatekeeper finds:

- Raises ***new and substantial issue*** that couldn't have been considered in course of 33E[52]
- ***New***: applicable law not sufficiently developed before; evidence not previously available
- ***Not new***: already addressed by SJC; could have been addressed if properly raised before
- ***Substantial*****:** meritorious in the sense of being worthy of appellate consideration

If denied: can only be reviewed on motion for reconsideration by the SJ who denied

If allowed: case goes to SJC

All other convictions:

Same procedure as direct appeal, no special gatekeeper requirement to pursue.

Standard of review:

- Significant error of law?
- Other abuse of discretion?

Interplay with eligibility for federal habeas relief

Keep in mind that individuals who are in custody under a state judgment may be eligible to file a federal habeas petition under 28 U.S.C. § 2254 challenging the validity of their conviction or sentence. Federal habeas relief is available where the state judgment "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." 28 U.S.C. § 2254(d)(1).[53] In addition to the strictly-enforced procedural requirements regarding exhaustion[54] and timing[55] of the habeas petition, federal courts only have jurisdiction to hear federal claims. For this reason, it is critical to *federalize* your constitutional claims, by citing and arguing appliable violations of the U.S. Constitution in your motion for new trial and any appeal from the denial of that motion.

[52] *Randolph*, 438 Mass. at 293 n.7.

[53] Habeas relief may also be available in the rarer circumstances where a state judgment "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Pay close attention to the court's understanding and treatment of factual and forensic evidence, for example, in your motion for new trial.

[54] 28 U.S.C. § 2254(b)(1)(A)-(B) requires that the individual exhaust all available remedies in the state or show that there is no available corrective process in the state or that circumstances exist that render such process ineffective to protect the rights of the applicant.

[55] *See* 28 U.S.C. § 2244(d)(1), establishing a one-year statute of limitations with the time running from different dates depending on the circumstances.

Part Three: Helpful Resources

Attorneys on the post-conviction panel who are filing Rule 30 motions should contact staff attorneys in the Private Counsel Division Criminal Appeals unit or the Post-Conviction Resource Attorneys with questions. Please email CAUAttorney@publiccounsel.net for contact information or look on the unit's webpage.

Attorneys working on Innocence Program cases will be assigned a staff point person to assist with questions, investigation and expert consultation, and review of Rule 30 pleadings prior to filing. For general questions about Rule 30 assignments through the Innocence Program, please email innocenceintaketeam@publiccounsel.net. For questions about Chapter 278A litigation (e.g. post-conviction forensic analysis/ discovery), please email 278Amotions@publiccounsel.net.