

EXPLANATION FOR PROPOSED RULE

Background

In *Commonwealth v. Selavka*, 469 Mass. 502 (2014), the Supreme Judicial Court considered the means by which the Commonwealth can seek revision of an illegal sentence. Neither of the two rules of criminal procedure which provide for alteration of a defendant's sentence, Rule 29, Revision or Revocation of Sentence, and Rule 30, Postconviction Relief, permit the Commonwealth to seek correction of an illegal sentence, but, as the Court noted, the Commonwealth must have some means to bring such a mistake to the court's attention, and the judge some authority to rectify the error. The Court thus concluded "that rule 29(a), with its sixty-day time frame, is the proper vehicle by which the Commonwealth may challenge illegal sentences." *Selavka*, 469 Mass. at 508. The Court went on to request that "this court's standing advisory committee on the rules of criminal procedure [] propose an amendment to rule 29(a) reflecting this conclusion." *Id.*

After considering the matter, the Standing Advisory Committee on the Rules of Criminal Procedure unanimously recommends that proposed Rule 29 be adopted.

Discussion of Proposed Rule 29

Current Rule 29(a), Revision or Revocation, authorizes the trial judge, on judge's own motion or that of the defendant filed within 60 days of sentencing (or the final determination in any appeal), to "revise or revoke [the] sentence if it appears that justice may not have been done." While an illegal sentence is one kind of sentence in which "justice may not have been done," see *Selavka*, 469 Mass. at 508 n. 7, the main purpose of the rule is to permit a judge, acting either on the judge's own motion or that of the defendant, to revise or revoke a lawful sentence which, after reflection, appears to be unjust. See *Commonwealth v. Rodriguez*, 461 Mass. 256, 260 (2012).

Under the proposed amendment, the Commonwealth may seek revision or revocation only to correct an illegal sentence; the rule does not provide the Commonwealth with the broader authority to seek alteration of a lawful sentence with which it disagrees. To make this clear, proposed Rule 29(a) is divided into two parts. Proposed Rule 29(a)(1), Illegal Sentences, authorizes the trial judge to revise or revoke an illegal sentence, acting on either the judge's or the prosecutor's motion filed within 60 days of sentencing. This new section, with its 60-day time limit, applies only to motions by the judge and the prosecutor to correct an illegal sentence. Because such sentence corrections have the potential to enhance the punishment, the double-jeopardy principle of finality requires this time limit. See *Selavka*, 469 Mass. at 514-515. In contrast, the defendant has the right under Rule 30(a) to challenge an illegal sentence "at any time," see Rule 30(a), a challenge that would cause no double-jeopardy problems.

Proposed Rule 29(a)(2), Unjust Sentences, preserves the judge's authority to act on the judge's or the defendant's motion, filed within 60 days, to revise or revoke a lawful sentence in the interests of justice. The proposed revision clarifies Rule 29(a)'s opportunity for filing such a motion following appellate review. The rule makes clear that extensions of the 60-day filing period beyond the imposition of sentence are limited to cases on direct review of the conviction, during which time the judgment of conviction is not final. *See Commonwealth v. White*, No. 08-P-766, 74 Mass. App. Ct. 1115, 2009 Mass. App. Unpub. LEXIS 788, at *3-*6 (Mass. App. Ct. June 4, 2009). It provides that the post-appeal 60-day filing period begins with the issuance of rescript under Mass. R.A.P. 23, and it replaces former Rule 29(a)'s ambiguous provision permitting a Rule 29(a) motion after an appellate court order or judgment having the effect of upholding the judgment of conviction.

Other than stylistic changes and minor technical changes to accommodate a prosecutor's motion to challenge an illegal sentence, current Rule 29(b) – (d) (addressing respectively affidavits, notice, and the place of any hearing) remains unchanged. Proposed Rule 29(e) is a new provision, providing that either party may appeal from a final order under the rule, consistent with recent case law. *See Commonwealth v. Selavka*, 469 Mass. 502, 507 & n.6 (2014); *Commonwealth v. Cowan*, 422 Mass. 546, 547 (1996); *Commonwealth v. Amirault*, 415 Mass. 112, 115 (1993); *Commonwealth v. Richards*, 44 Mass. App. Ct. 478, 481 (1998).

The proposed rule is not intended to work any substantive change on the current rule other than to provide narrow authority for the Commonwealth to move for, and appeal from a denial of, correction of an illegal sentence, and to clarify the opportunity to file a motion to revise and revoke following appellate review.