**PROPOSED Rule 29 REPORTER'S NOTES**

**May 23, 2016**

This amendment to Rule 29 is intended to fill a gap in the Rules of Criminal Procedure identified by the Supreme Judicial Court in *Commonwealth v. Selavka*, 469 Mass. 502 (2014), in which the Court upheld the Commonwealth's authority to move to correct an illegal sentence. After noting that neither former Rule 29(a) nor Rule 30(a) permitted a Commonwealth motion to revise or revoke an illegal sentence, the Court 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. This amendment to Rule 29 permits the Commonwealth to seek such relief.

**Rule 29(a) Revision or Revocation.**

Rule 29(a)(1), Illegal Sentences, provides that, within 60 days after a trial judge imposes a sentence, either the Commonwealth or the judge may move to revise or revoke that sentence if any part of the sentence is illegal. While Rule 29(a) has long authorized a trial judge to increase a sentence under Rule 29(a), either because the sentence imposed is illegal or, on reflection, unjust, see *Commonwealth v. Aldoupolis*, 386 Mass. 260, 268-270 (1982), former Rule 29 did not authorize the Commonwealth to seek revision or revocation of a sentence for any purpose. See *Selavka*, 469 Mass. at 506. Rule 29(a)(1) makes it clear that the judge's authority to correct an illegal sentence remains unchanged, but the rule further permits the Commonwealth to seek such relief. This narrow provision for a Commonwealth motion to revise or revoke a sentence is intentionally limited to correcting an illegal sentence; it does not permit a motion to increase a legal sentence that the prosecutor considers to be legal but unduly lenient.

Rule 29(a)(1)'s authority to challenge an illegal sentence within 60 days of sentencing is limited to the Commonwealth and the trial judge for two reasons. First, the defendant is already authorized to file such a motion. Rule 29(a)(2), Unjust Sentences, leaves unchanged the defendant's right to challenge a sentence "if it appears that justice may not have been done," which includes a sentence imposing punishment not permitted by law. See *Selavka*, 469 Mass. 508 n. 7. Quite apart from Rule 29(a), Rule 30(a) gives the defendant the right to challenge an illegal sentence at any time.

Second, a successful prosecution or judicial motion to revise or revoke an illegal sentence that is too lenient would result in additional punishment, which, if unduly belated, would implicate the defendant's double-jeopardy interest in sentence finality even though the original sentence was illegal. See *Selavka*, 469 Mass. at 509. The Court in *Selavka* concluded that limiting the potential for such upward adjustment of an illegal sentence to Rule 29(a)'s 60-day timeframe marks a reasonable balance between a defendant's interest in sentence finality and society's interest in enforcement of the sentencing laws. *Selavka*, 469 Mass. at 508. Rule 29(a)(1) thus provides for a 60-day time limit for the Commonwealth to file a motion seeking, or

for the judge to initiate consideration of, the revision or revocation of an illegal sentence. After that, any motion to revise or revoke an illegal sentence must come from the defendant under Rule 30(a), which would raise no double-jeopardy problems.

Rule 29(a)(1) includes revocation as a potential remedy for an illegal sentence that is too lenient, in part because that sentence might have been the result of a guilty plea from which the defendant could have withdrawn had the sentence been more harsh than it was. See Rule 12(c)(4) (permitting defendant to withdraw (1) from a District-Court plea if the judge intends to impose a sentence in excess of defendant's request and (2) from a Superior-Court plea if the judge intends to sentence in excess of either the agreed recommendation or the prosecutor's recommendation); Rule 12(d)(4) (requiring a judge who accepts a plea agreement providing for both a charge concession and a specific sentence to impose the agreed sentence and permitting the defendant to withdraw if the judge rejects the plea agreement); former Rule 12(c)(2) (permitting defendant to withdraw (1) from a District-Court plea if the judge intends to impose a sentence in excess of defendant's request and (2) from a Superior-Court plea if the judge intends to sentence in excess of an agreed recommendation on which the plea was contingent). At the very least, such a case would require re-sentencing, with the defendant presumably having the right to withdraw the plea if Rule 12 would have afforded that right at the plea hearing and initial sentencing. See *Selavka*, 469 Mass. at 514-515.

Rule 29(a)(2), Unjust Sentences, clarifies former Rule 29(a)'s provision for filing a motion to revise or revoke an unjust sentence following appellate review.

First, the rule makes clear that, other than the imposition of sentence, the only event that triggers the sixty-day period to file a Rule 29(a)(2) motion is the appellate court's issuance of the rescript in a case on direct review. If the conviction is affirmed, the issuance of the rescript marks the point at which the conviction becomes final, see *Foxworth v. St. Amand*, 457 Mass. 200, 206 (2010), making it an appropriate time for filing a motion to revise or revoke the sentence based on that conviction. Although on its face the rule does not limit such motions to cases in which the conviction is affirmed, as a practical matter, a conviction's reversal would result in vacation of the sentence, leaving nothing to revise or revoke.

Pegging the beginning of the sixty-day filing period to the rescript's issuance permits a defendant whose conviction is affirmed by the Appeals Court to seek either rehearing or further appellate review without impinging on the time period for filing a motion to revise and revoke. Rule of Appellate Procedure 23 requires the Appeals Court, after deciding an appeal and mailing the decision to the parties, to wait twenty-eight days before issuing the rescript, see Mass. R.A.P. 23, thereby affording the parties time to file for rehearing or further review. See Mass. R.A.P. 27 (petition for rehearing to be filed within fourteen days of decision); Mass. R.A.P. 27.1 (application for further review to be filed within twenty days of decision). If either is granted, the rescript's issuance is stayed pending disposition of that proceeding. See Mass. R.A.P. 23. Finally, the appellate court's issuance of the rescript, finalizing a conviction which is affirmed, is

a procedural event of which the defendant would surely be aware and thus a fair time for the sixty-day filing period to begin. The amendment eliminates the uncertainty caused by basing the time period on the trial court's receipt of the rescript, which was subject to the vagaries of mail delivery and clerical document processing.

Second, by confining the extension of the sixty-day filing period to cases on direct review, Rule 29(a)(2) clarifies the reach of its predecessor. Former Rule 29(a) did not specify whether a rescript on appellate review of a collateral attack on a sentence would allow a Rule 29 motion, though the Appeals Court found in an unpublished opinion that it would not. *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). The rule's purpose is to permit the trial judge to revise or revoke a sentence that, based on the facts existing at the time of sentencing, appears in retrospect to have been unjust. See *Commonwealth v. Rodriguez*, 461 Mass. 256, 260 (2012); *Commonwealth v. DeJesus*, 440 Mass. 147, 152 (2003). This purpose is best served if the sentence review prompted by the motion occurs reasonably soon after the sentence's imposition. See *Commonwealth v. Barclay*, 424 Mass. 377, 380 (1997) (holding Rule 29 motion must be decided within reasonable time of its filing); *Commonwealth v. Layne*, 386 Mass. 291, 295-296 (1982) (noting that, with "the passage of time from the date of sentencing, it becomes increasingly difficult for a trial judge to make the determination called for by [then Rule 29(a)] without improperly considering postsentencing events"). Rule 29(a)(2) accordingly limits the filing time to sixty days from the imposition of sentence or from the issuance of the rescript in any direct appeal, the latter filing period commencing as soon as the conviction becomes final. The former rule's provision permitting filing within sixty days of any appellate court order or judgment "denying review of, or having the effect of upholding, a judgment of conviction" has been deleted as being either redundant (if the order or judgment in question is part of the rescript concluding a direct appeal), or not sufficiently clear.

Finally, Rule 29(a)(2) achieves gender neutrality.

**Rule 29(b) Affidavits**

Rule 29(b), Affidavits, is amended to accommodate the Commonwealth's narrow authority to file a motion to revise or revoke an illegal sentence under the rule, authorizing both parties to file appropriate affidavits in that event. Consistent with Rule 18(a)(3), the amended rule further provides that the judge may deny a motion filed under Rule 29(a) without a hearing, based solely on the affidavits. Mass. R. Cr. P. 18(a)(3), Presence [of Defendant] Not Required, 378 Mass. 887 (1979) ("A defendant need not be present at a revision or revocation of sentence pursuant to Rule 29 or at any proceeding where evidence is not to be taken)." However, any revision or revocation of a sentence under Rule 29, whether because the sentence imposed is illegal or unjust, must be predicated on a hearing. See E. B. Cypher, Revise or Revoke of Sentence Hearings, 30A Criminal Practice and Procedure, §30:27 (4th ed. Mar. 2015). See also *Thompson v. United States*, 495 F.2d 1304, 1307 (1st Cir. 1974) (vacating post-trial sentence

imposed *in absentia* to correct an illegal sentence, holding defendant must be present for re-sentencing; cited by Reporter's Notes to Mass. R. Cr. P. 18(a), Presence of Defendant, as example of sentencing requiring defendant's presence). Although the defendant does not have the right to present evidence at this hearing, see *Commonwealth v. Coggins*, 324 Mass. 552, 556-557, cert. denied, 338 U.S. 881 (1949), he or she has the right to be present and to be heard. See *Aldoupolis v. Commonwealth*, 386 Mass. 260, 275-276 (1982); E. B. Cypher, Presence of the Defendant at the [Rule 29] Hearing, 30B Criminal Practice and Procedure, §41:12 (4th ed. Mar. 2015). Further, any victim(s) covered by G.L. c. 258B, Rights of Victims and Witnesses of Crime, may present a victim-impact statement at such a hearing. See *Commonwealth v. Doucette*, 81 Mass. App. Ct. 740, 742, rev. denied, 463 Mass. 1103 (2012) (upholding judge's discretion under G.L. c. 258B, § 3(p) to permit victims to be heard on Rule 30(a) motion for a new trial, adding that "[t]he victim's family was also entitled [under the statute] to make a victim impact statement at sentencing or disposition").

**Rule 29(c) Notice – (d) Place of Hearing**

Rule 29(c), Notice, and Rule 29(d), Place of Hearing, are amended (1) to recognize the Commonwealth's narrow authority to file a motion to revise or revoke an illegal sentence, and (2) to achieve gender neutrality.

**Rule 29(e) Appeal**

Rule 29(e) provides that either party may appeal from a final order under the rule. This provision clarifies that the Commonwealth may appeal a denial of its motion to revise or revoke an illegal sentence. Prior to Rule 29(e), a defendant's right to appeal the denial of a motion to revise or revoke a sentence was well established, see *Commonwealth v. Richards*, 44 Mass. App. Ct. 478, 481 (1998), as was the Commonwealth's right to appeal the allowance of such a motion. See *Commonwealth v. Cowan*, 422 Mass. 546, 547 (1996) (recognizing Commonwealth's right under G.L. c. 211, § 3 to appeal District Court allowance of Rule 29 motion); *Commonwealth v. Amirault*, 415 Mass. 112, 115 (1993) (same under G.L. c. 278, § 28E for Superior Court motion). In contrast, while the Commonwealth had the right to move to correct an illegal sentence and presumably the attendant right to appeal the denial of such a motion, see *Commonwealth v. Selavka*, 469 Mass. 502, 507 & n. 6 (2014), its avenue for pursuing that appeal was not clear. *Id.* Rule 29(e) cures that deficiency.