

DRAFT

ORDER GOVERNING APPEALS

FROM CONVICTIONS OF MURDER IN THE FIRST DEGREE

General Laws c. 278, § 33E, is intended to provide defendants with a comprehensive review of their convictions and to ensure that their appeals are finally adjudicated without undue delay. The dual goals of rendering justice and achieving finality are documented in the statute's legislative history.

After a direct appeal from a conviction of murder in the first degree has been entered in the Supreme Judicial Court, the statute requires motions for a new trial to be filed in the Supreme Judicial Court. The timing of filing and adjudicating such new trial motions has been a major factor in the significant delay in the resolution of the direct appeals. The court has, in the past, typically stayed the direct appeal for an indefinite time while a defendant investigates, prepares, and files a new trial motion, and thereafter until the motion has been heard and decided, typically after referral by this court to the Superior Court. Consequently, direct appeals of convictions of murder in the first degree have sometimes remained on this court's docket for five, ten, fifteen, or more years.

To promote the timely filing and adjudication of new trial motions in these cases so that the direct appeals and any appeals from the rulings on the new trial motions may be heard and decided without undue delay, this ORDER sets forth the following protocol:

(a) Special master or single justice. The court shall appoint a special master to oversee the progress of first degree murder appeals and motions for a new trial and to implement and enforce the terms of this Order. Alternatively, the court may designate one of the Justices to perform that role. All references in this Order to "the special master" shall mean either the special master or any Justice who has been designated by the court for these purposes.

(b) Time for filing motions for a new trial. In any case in which the defendant contemplates filing a motion for a new trial in this court after the direct appeal has been entered and having the ruling on that motion considered in conjunction with the direct appeal, the defendant must file the motion as soon as reasonably practicable, but no later than eighteen months after the entry of the

direct appeal. Extensions may be granted by the special master, on a case-by-case basis, based on a compelling showing of need. Review of the denial of a motion for a new trial filed within eighteen months or within the period of any authorized extension will be considered with the direct appeal. Review of the denial of a motion for a new trial filed after eighteen months (or after the extended deadline) will not presumptively be considered with the direct appeal.

(c) Status conferences. An initial status conference with counsel for the defendant and counsel for the Commonwealth shall be held before the special master within four months of the date of entry of the direct appeal. Further status conferences presumptively shall be held at nine, twelve, and fifteen months after the direct appeal has been entered, or at such other intervals as determined by the special master. The special master, in consultation with the clerk, will set the specific dates for these conferences.

(1) At the four-month status conference, the defendant's counsel will be required to report whether the defendant intends to file a motion for a new trial. If no motion will be filed, the briefing schedule for the direct appeal will begin to run and will follow the time periods set forth in Mass. R. A. P. 19 (c) (1).

(2) Unless the defendant will not be filing a motion for a new trial, at each status conference following the four-month conference, the defendant's counsel shall report with specificity on (i) the progress that has been made in investigating and pursuing the motion for a new trial; (ii) the next steps that are planned; and (iii) any difficulties that have been encountered or are anticipated that might affect the timely filing of the motion for a new trial. The report may be given orally, unless the special master requires it to be in writing.

(3) At the twelve-month status conference, if a motion for a new trial has not been filed, the defendant's counsel shall report definitively whether a motion for a new trial will be filed. If counsel reports that a motion will be filed, counsel will then have up to six additional months to file the motion. If no motion will be filed, the briefing schedule for the direct appeal will begin to run and will follow the time periods set forth in Mass. R. A. P. 19 (c) (1).

(4) If, at any point after the initial status conference, it becomes apparent to counsel that a motion for a new trial will not be filed,

counsel shall so advise the clerk and counsel for the Commonwealth immediately, in which case the briefing schedule for the direct appeal will begin to run and will follow the time periods set forth in Mass. R. A. P. 19 (c) (1).

(5) The special master may adjust the schedule for these periodic status conferences, and the time for the ultimate filing of a motion for a new trial, on a case-by-case basis.

(d) Action on motions. When a motion for a new trial is filed during the pendency of a direct appeal, G. L. c. 278, § 33E, authorizes the Supreme Judicial Court either to rule on the motion or to remand it to the Superior Court for hearing and determination there. If a motion is timely filed in accordance with this Order and is remanded to the Superior Court, the Supreme Judicial Court ordinarily will not require briefs to be filed for the direct appeal until the motion has been decided in the Superior Court.

(e) Time for filing briefs. As stated in paragraph (b) above, the denial of a motion for a new trial filed within eighteen months or within the period of any authorized extension will be considered with the direct appeal. When a motion for a new trial has been decided in the Superior Court, after the record has been assembled and the appeal from the ruling on the motion is entered in this court, the time for filing briefs addressing both the direct appeal and the ruling on the new trial motion (in a situation where the motion has been denied), or for filing briefs on the new trial ruling alone (in a situation where the motion has been allowed), will be set by the clerk as required by Mass. R. A. P. 19 (c) (2); presumptively, the briefing schedule will be ninety days for the appellant's brief, ninety days thereafter for the appellee's brief, and thirty days for any reply brief.

(f) Changes of counsel. If, during the pendency of an appeal, new counsel is appointed or has been retained to represent the defendant, counsel shall file a notice of appearance in this court immediately. The deadlines previously set forth in this Order and by the special master shall remain in effect despite the change in counsel, but the special master may adjust the time for filing new trial motions, and for status conferences, for good cause.

(g) Time for filing gatekeeper applications. Until further order of the court, gatekeeper applications pursuant to G. L. c. 278, § 33E, may be filed within ninety days of entry of the Superior Court's ruling on a new trial motion that is

subject to the gatekeeper provisions set forth in the final sentence of G. L. c. 278, § 33E.