

Subdivision (b). The objective of subdivision (b) is to encourage the disposition of post-conviction motions upon affidavit. Presently, the rule in Massachusetts is that the use of affidavits in lieu of oral testimony is discretionary with the trial judge. *Commonwealth v. Coggins*, 324 Mass. 552, 5 N.E.2d 200 (1949). The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate by the trial judge. See Mass.R.Crim.P. 30(c)(3).

Subdivision (c). The provision of Mass.R.Crim.P. 32, relative to service and notice, are incorporated by this subdivision.

Subdivision (d). This provision is paralleled in subdivision c(7) of Mass.R.Crim.P. 30 and is intended to expedite the disposition of motions for post-conviction relief.

**RULE 30. POST CONVICTION RELIEF**

(Applicable to District Court and Superior Court)

(a) **Unlawful Restraint.** Whoever is imprisoned or restrained of his liberty pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or to correct the sentence which he is then serving upon the ground that his confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) **New Trial.** The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

**(c) Post Conviction Procedure.**

(1) **Service and Notice.** The moving party shall serve the District Attorney with a copy of any motion filed under this rule; the moving party shall serve the Attorney General with a copy of any motion filed under subdivision (a) of this rule.

(2) **Waiver.** All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in his original or amended motion. Any grounds not so raised are waived unless the judge in his discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) **Affidavits.** Each moving party shall file and serve and each party opposing a motion may file and serve affidavits where appropriate in support of his respective position. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) **Discovery.** Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party

may authorize such discovery as is deemed appropriate and as would be available in civil cases, subject to appropriate protective order.

(5) **Counsel.** The judge in his discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule.

(6) **Presence of Moving Party.** A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) **Place of Hearing.** All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever he is then sitting.

(8) **Appeal.** An appeal from a final order under this rule may be taken to the Appeals Court by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) **Appeal Under G.L. c. 278, § 33E.** If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of his costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

Amended effective April 14, 1995.

**Reporter's Notes**

This rule, which marks a significant departure from prior Massachusetts practice, is derived from a number of sources. See Fed.R.Crim.P. 33, 35; ABA *Standards Relating to Post-Conviction Remedies* (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) Rule 632 (1974).

Subdivision (a). This subdivision consolidates the previously distinct procedures of habeas corpus and writ of error. Although these two remedies have been applied to separate and distinct issues, there seems little reason to maintain a