

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

At the Supreme Judicial Court holden at Boston within and
for said Commonwealth on the twenty-second day of February, in
the year two thousand and twenty-two:

present,

<u>KIMBERLY S. BUDD</u>)	
)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
)	Justices
)	
<u>DAVID A. LOWY</u>)	
)	
)	
<u>ELSPETH B. CYPHER</u>)	
)	
)	
<u>SCOTT L. KAFKER</u>)	
)	
)	
<u>DALILA ARGAEZ WENDLANDT</u>)	
)	
)	
<u>SERGE GEORGES, JR.</u>)	

ORDERED: That the Massachusetts Rules of Criminal Procedure
adopted by order dated October 19, 1978, as amended,
to take effect on July 1, 1979, are hereby amended as
follows:

Rule 12 By deleting the word "sentence" in the first and
second sentence of Mass. R. Crim. P. 12 (b) (5) (A)
and inserting in lieu thereof the word "disposition".

Rule 12 By deleting the word "sentence" in the heading of
Mass. R. Crim. P. 12 (c) and inserting in lieu thereof
the word "disposition".

- Rule 12 By deleting the word "sentence" in the heading and first sentence of Mass. R. Crim. P. 12 (c) (4) (A) and inserting in lieu thereof the word "disposition".
- Rule 12 By deleting the word "sentence" in the first sentence of Mass. R. Crim. P. 12 (c) (4) (B) and inserting in lieu thereof the word "disposition".
- Rule 16 By inserting the words "or the imposition of probation or the entry of an order of continuance without a finding" at the end of the first sentence of Mass. R. Crim. P. 16 (a) after the words "pronouncement of sentence".
- Rule 18 By deleting Mass. R. Crim. P. 18 (a) (1) and inserting in lieu thereof the following Mass. R. Crim. P. 18 (a) (1):
- (1) Defendant absenting self. If a defendant present at the beginning of a trial thereafter is absent without cause or without leave of court, the trial may proceed to a conclusion in all respects except the imposition of sentence or probation as though the defendant were still present.
- Rule 18 By deleting the words "at his own" in Mass. R. Crim. P. 18 (a) (2) and inserting in lieu thereof the word "upon".
- Rule 18 By deleting the word "sentence" in Mass. R. Crim. P. 18 (a) (3) and inserting in lieu thereof the word "disposition".
- Rule 28 By deleting the word "he" in Mass. R. Crim. P. 28 (a) and inserting in lieu thereof the words "the defendant".
- Rule 28 By deleting the word "his" in the third sentence of Mass. R. Crim. P. 28 (b) and inserting in lieu thereof the word "defense".
- Rule 28 By deleting the word "his" in the first sentence of Mass. R. Crim. P. 28 (c) and inserting in lieu thereof the word "the".

- Rule 28 By deleting the word "him" in the second sentence of Mass. R. Crim. P. 28 (d) (1) and inserting in lieu thereof the words "the defendant".
- Rule 28 By deleting the word "sentence" the first time it appears in Mass. R. Crim. P. 28 (e) (ii) and inserting in lieu thereof the words "a disposition".
- Rule 29 By deleting the word "sentence" in the heading of Mass. R. Crim. P. 29 and inserting in lieu thereof the word "disposition".
- Rule 29 By deleting Mass. R. Crim. P. 29 (a) (1) and (2) and inserting in lieu thereof the following Mass. R. Crim. P. 29 (a) (1) and (2):
- (a) Revision or Revocation.
- (1) Illegal Dispositions. The trial judge, upon the judge's own motion, or the written motion of the prosecutor, filed within sixty days of a disposition, may revise or revoke such disposition if the judge determines that any part of the disposition was illegal.
- (2) Unjust Dispositions. The trial judge, upon the judge's own motion, or the written motion of a defendant, filed within sixty days of a disposition, within sixty days of issuance of a rescript by an appellate court on direct review, or within sixty days of the disposition of criminal charges against a codefendant may, upon such terms and conditions as the judge shall order, revise or revoke such disposition if it appears that justice may not have been done.
- Rule 31 By deleting Mass. R. Crim. P. 31 (d) and inserting in lieu thereof the following Mass. R. Crim. P. 31 (d):
- (d) Disposition other than imprisonment or fine. A judge in the exercise of discretion may stay an order imposing a disposition other than immediate imprisonment or a fine if an appeal is taken.
- Rule 37 By deleting the word "sentence" in the heading of Mass. R. Crim. P. 37 (a) and inserting in lieu thereof the word "disposition".

Rule 43 By deleting the word "sentence" in the third sentence of Mass. R. Crim. P. 43 (b) (3) (iii) and inserting in lieu thereof the word "disposition".

The amendments accomplished by this order shall take effect on April 1, 2022.

ORDERED:

<u>KIMBERLY S. BUDD</u>)	
)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
)	Justices
)	
<u>DAVID A. LOWY</u>)	
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<u>DALILA ARGAEZ WENDLANDT</u>)	
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<u>SERGE GEORGES, JR.</u>)	

REPORTER'S NOTES

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 12. Pleas and plea agreements

Reporter's Notes--2022

These amendments to Rule 12(b)(5)(A), Rule 12(c)(4), and to the heading of Rule 12(c), implement the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020), to reflect more accurately that potential outcomes in criminal cases may include continuances without a finding or other non-conviction dispositions. *Id.*, 485 Mass. at 8-9 (noting uses of both “sentence” and “disposition” in the rule).

Rule 16. Dismissal by the prosecution

Reporter's Notes--2022

This amendment to Rule 16(a) clarifies when the prosecuting attorney's authority to enter a nolle prosequi of a pending case ends, based on the meaning of "sentence" required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020). The prosecuting attorney has wide and exclusive authority to enter a nolle prosequi, as a matter of both constitutional separation of powers and common law. *Commonwealth v. Cheney*, 440 Mass. 568, 574 (2003). This authority extends to any time before the pronouncement of sentence or the imposition of probation or a continuance without a finding. *Commonwealth v. Boyd*, 474 Mass. 99, 103 (2016).

Rule 18. Presence of defendant

Reporter's Notes--2022

This amendment makes two changes to bring the rule into conformity with current law and practice. First, it removes gendered pronouns and references in Rule 18(a)(1) and (2) and clarifies that a defendant's presence is required for imposition of any sentence or the imposition of probation. Rule 18(a)(1) allows a trial to proceed to its conclusion after a defendant is absent without cause or leave of the court but requires the defendant's presence for imposition of sentence. A defendant has a right to be present at sentencing. *Commonwealth v. Pacheco*, 477 Mass. 206, 215 (2017) (citing *Commonwealth v. Williamson*, 462 Mass. 676, 685 (2012)). This amendment clarifies that the defendant's presence is also required for imposition of probation. The amendment uses "sentence" rather than "disposition" because the defendant's presence would not be required for a dismissal.

Second, in Rule 18(a)(3) the amendment implements the terminological change from "sentence" to "disposition" required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020), to reflect more accurately that potential dispositional outcomes in criminal cases subject to a Rule 29 motion to revise and revoke may include continuances without a finding. *Id.*, 485 Mass. at 10 ("a continuance without a finding disposition may fairly be considered a sentence for the purposes of Rule 29").

Rule 28. Judgment

Reporter's Notes--2022

This amendment to Rule 28(e)(ii) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020). Gendered language was also removed in Rule 28(a), (b), (c), and (d)(1).

Rule 29. Revision or revocation of disposition

Reporter's Notes--2022

This amendment addresses two aspects of the operation of Mass. R. Crim. P. 29. The first clarifies the applicability of Mass. R. Crim. P. 29(a)(1) when the Commonwealth seeks to redress an illegal disposition following a continuance without a finding, or other non-conviction disposition, rather than following a conviction. The second sets forth a narrow exception in Mass. R. Crim. P. 29(a)(2) to the sixty-day time limit for filing a motion to revise or revoke an unjust sentence when the motion is based on the disposition of criminal charges against a codefendant.

In *Commonwealth v. Beverly*, 485 Mass. 1 (2020), the Supreme Judicial Court held that Mass. R. Crim. P. 29 was the appropriate vehicle for the Commonwealth to challenge as an illegal disposition a continuance without a finding imposed without any terms or conditions, or without a term of probation. The Court explained that a continuance without a finding was a “disposition” pursuant to G.L. c. 278, § 18, and that “where the sentencing disposition of the criminal case is claimed to be illegal, whether it be a conviction, straight probation, or a continuance without a finding, it is subject to a challenge pursuant to a rule 29 motion to revise or revoke.” *Id.* at 10. This amendment to Rule 29 implements *Beverly* by replacing “sentence” with “disposition” to reflect more accurately the circumstances under which relief is available under this rule.

In *Commonwealth v. Tejeda*, 481 Mass. 794 (2019), the Supreme Judicial Court recognized under its superintendence authority a limited exception to the rule that motions to revise or revoke must be based upon facts existing at the time of the original disposition. *Tejeda* involved an armed robbery in which the coventurers were tried separately. *Tejeda*’s trial occurred first, and upon conviction he received a sentence for the robbery of six to eight years. His coventurer’s later trial also resulted in a conviction, for which he received a sentence (from a different judge) of five to seven years. *Tejeda* moved for revision of his sentence based on the disparity between his disposition and that of his coventurer, given his own lesser or at most equal culpability in the crime.

The Supreme Judicial Court acknowledged that ordinarily the trial judge weighing a motion to revise or revoke may consider whether the sentence was unjust only “in light of facts as they existed at the time of the sentencing.” *Tejeda, id.*, citing *Commonwealth v. DeJesus*, 440 Mass. 147, 152 (2003) (“[A] motion to revise or revoke can rely only on facts or circumstances that existed at the time of sentencing”). However, the disposition of a codefendant and any disparity between the sentences of codefendants are appropriately considered at sentencing. It would be arbitrary, the Court found, to permit consideration of a codefendant’s sentence when imposed contemporaneously with that of the defendant yet preclude it when the codefendant is sentenced more than sixty days after the defendant. *Tejeda*, 481 Mass. at 797.

Thus the Court in *Tejeda* allowed a limited exception permitting the trial judge to consider the subsequent facts of the codefendant’s sentence in weighing a motion to revise or revoke when the codefendant was tried separately, sentenced later, convicted of the same crime, and where at

the time of the original sentencing it was reasonably apparent that the defendant was less culpable than or equally culpable to the codefendant. *Tejeda*, 481 Mass. at 796-797. This amendment to Rule 29 furthers the principle elucidated in *Tejeda* by allowing a defendant to move, or a trial judge sua sponte, to consider the disposition of criminal charges against a codefendant at any time within sixty days of that disposition, even though more than sixty days have passed since the defendant's sentencing.

Although this amendment provides a third period for revision of a disposition, the sixty-day period in which to file a motion under Rule 29 remains jurisdictional. See *Commonwealth v. Sitko*, 372 Mass. 305, 312-313 (1977) (under Rule 29 predecessor G.L. c. 278, § 29C judge lacks power to extend the sixty-day period); *Commonwealth v. Rodriguez*, 461 Mass. 256, 260 (2012) (A judge “is not barred from reducing a sentence the judge has imposed until the time limits established in rule 29 to revise or revoke a sentence have expired.”).

While a judge’s authority under Rule 29 to revise or revoke an illegal or unjust disposition is subject to this sixty-day period, when the disposition is one of probation the judge may always amend the conditions of probation under proper circumstances, so long as the judge does not significantly increase the severity of the original probation terms. *Buckley v. Quincy Division of the District Court Department*, 395 Mass. 815, 817, 819 (1985) (“The addition of reasonable conditions to an individual’s probation does not constitute a revision or revocation of a sentence under rule 29.”) See also, Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing (March 2016, Updated October 2019), Commentary to Principle 10 (noting prospect of removal or relaxation of probation conditions can be a valuable incentive for promoting compliance with probation) at 16-17 (<https://www.mass.gov/doc/criminal-sentencing-in-the-superior-court-best-practices-for-individualized-evidence-based/download>); Boston Municipal Court and District Court Sentencing Best Practice Principles (August 27, 2017), Principle 7 (judge may incorporate written provision in sentencing that after a period of successful compliance the court may consider early probation termination or vacation of certain conditions of probation as an incentive, and that this principle is not intended to abrogate authority under Mass. R. Crim. P. 29) at 2 (<https://www.mass.gov/doc/sentencing-best-practices-district-court-and-boston-municipal-court/download>).

Rule 31. Stay of execution; relief pending review automatic expiration of stay

Reporter's Notes--2022

The amendment to Rule 31(d) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020). The amendment also clarifies that any non-imprisonment disposition may be stayed, including an order imposing probation or a continuance without a finding.

Rule 37. Transfer of cases

Reporter's Notes--2022

The amendment to the heading of Rule 37(a) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020).

Rule 43. Summary contempt proceedings

Reporter's Notes--2022

The amendment to Rule 43(b)(3)(iii) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020).