

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 12

DRAFT Reporter's Notes--2021

These amendments to Rule 12(b)(5)(A), Rule 12(c)(4), and to the caption 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).

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 16

DRAFT Reporter's Notes--2021

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).

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 18

DRAFT Reporter's Notes--2021

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”).

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 28

DRAFT Reporter’s Notes--2021

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

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 29

DRAFT Reporter’s Notes--2021

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.").

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 31

DRAFT Reporter's Notes--2021

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.

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 37

DRAFT Reporter's Notes--2021

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

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 43

DRAFT Reporter's Notes--2021

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).