

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on
the *29th* day of *January*, in the year two thousand and fifteen:
present,

HON. RALPH D. GANTS)
HON. FRANCIS X. SPINA)
HON. ROBERT J. CORDY)
HON. MARGOT BOTSFORD)
HON. FERNANDE R.V. DUFFLY)
HON. BARBARA A. LENK)
HON. GERALDINE S. HINES)

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 striking Rule 12 and inserting the new
Rule 12 attached hereto.

The amendments accomplished by this order shall take effect on May 11, 2015.

_____) Chief Justice
)
HON. FRANCIS X. SPINA)
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)
HON. ROBERT J. CORDY)
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HON. MARGOT BOTSFORD)
) Justices
)
HON. FERNANDE R.V. DUFFLY)
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RULE 12. Pleas and Plea Agreements

(a) Pleas In General.

(1) **Pleas That May Be Entered and by Whom.** A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18(b). Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) **Admission to Sufficient Facts.** In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) **Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts.** A judge may accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts only after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts.

(b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement.

(1) **In General.** The defendant may tender a guilty plea, a plea of nolo contendere, or an admission to sufficient facts to warrant a finding of guilty without entering into a plea agreement with the prosecutor. Alternatively, if the defendant intends to tender a plea of guilty or an admission to sufficient facts, the prosecutor and the defendant may enter into a plea agreement pursuant to Rule 12(b)(5).

(2) **Plea Discussions.** The judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.

(3) **Inquiry as to the Existence of a Plea Agreement.** After being informed that a defendant intends to plead guilty or to admit to sufficient facts, the judge shall inquire as to the existence of a plea agreement.

(4) Pleas Without an Agreement. If the defendant intends to plead guilty or nolo contendere or to admit to sufficient facts and there is no agreement under Rule 12(b)(5), the judge shall follow the procedures set forth in Rule 12(c).

(5) Pleas Conditioned Upon an Agreement. The defendant may enter into a plea agreement with the prosecutor if the defendant intends to plead guilty or admit to sufficient facts but not if the defendant intends to plead nolo contendere.

(A) A plea agreement may specify both that the parties agree on a specific sentence, including the length of any term of probation, and that the prosecutor will make one or more of the following charge concessions: amend an indictment or complaint; dismiss, reduce, or partially dismiss charges; not seek an indictment; or not bring other charges. The judge shall follow the procedures set forth in Rule 12(d) when the parties enter into a plea agreement that includes both an agreement to a specific sentence and a charge concession. If the judge accepts the plea agreement and the defendant's plea, Rule 12(d) requires the judge to sentence the defendant according to the terms of the plea agreement.

(B) When the plea is conditioned on a plea agreement other than one described in Rule 12(b)(5)(A), the judge shall follow the procedures set forth in Rule 12(c).

(c) Procedure If No Plea Agreement or If Plea Agreement Does Not Include Both a Specific Sentence and a Charge Concession.

(1) Disclosure of the Terms of Any Plea Agreement. If the parties have entered into a plea described in Rule 12(b)(5)(B), the parties shall disclose the terms of that agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

(2) Tender of Plea. The defendant's plea or admission shall be tendered to the judge.

(3) Colloquy. The judge shall:

(A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:

(i) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or

without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

- (ii) of the maximum possible sentence on the charge, and, if applicable,
 - (a) any different or additional punishment based upon subsequent offense provisions of the General Laws;
 - (b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;
 - (c) the mandatory minimum sentence on the charge; and
 - (d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;
- (iii) of the following potential immigration consequences of the plea:
 - (a) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere, or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization; and
 - (b) that, if the offense to which the defendant is pleading guilty, nolo contendere, or admitting to sufficient facts is under federal law one that presumptively mandates removal

from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.

(B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.

(C) Rights of Victims and Witnesses of Crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. At any time prior to imposing sentence, the judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(4) Disposition Requests.

(A) When there is no agreed-upon recommendation as to sentence. The judge shall give both parties the opportunity to recommend a sentence to the judge. In the District Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the defendant's request without first giving the defendant the right to withdraw the plea. In the Superior Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the prosecutor's recommendation without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(B) Where there is an agreed-upon recommendation as to disposition. The judge shall inform the defendant that the sentence imposed will not exceed the terms of the agreement without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(5) Findings of Judge; Acceptance of Plea. The judge shall inquire whether the defendant still wishes to plead guilty or nolo contendere or admit to sufficient facts. If so, the judge will then make findings as to whether the plea or admission is knowing and voluntary, and whether there is an adequate factual basis for the charge. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(6) Sentencing. After acceptance of a plea of guilty or nolo contendere or an admission, the judge shall sentence the defendant.

(A) Conditions of Probation. If the judge's disposition includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

(B) Intent to Impose Sentence Exceeding Requested Disposition. In District Court, if the judge decides to impose a sentence that will exceed the defendant's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In Superior Court, if the judge decides to impose a sentence that will exceed the prosecutor's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In both District and Superior Court, the judge may indicate to the parties what sentence the judge would impose.

(d) Procedure If Plea Agreement Includes Both a Specific Sentence and a Charge Concession.

(1) Disclosure of the Terms of the Plea Agreement. The parties shall disclose the terms of the plea agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

- (2) Tender of Plea. The defendant's plea or admission shall be tendered to the judge.
- (3) Colloquy. The judge shall:
 - (A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:
 - (i) that by a plea of guilty or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;
 - (ii) of the maximum possible sentence on the charge, and, if applicable,
 - (a) any different or additional punishment based upon subsequent offense provisions of the General Laws;
 - (b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;
 - (c) the mandatory minimum sentence on the charge; and
 - (d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;
 - (iii) of the following potential immigration consequences of the plea:

- (a) that, if the defendant is not a citizen of the United States, the guilty plea or admission may have the consequence of deportation, exclusion from admission, or denial of naturalization; and
- (b) that, if the offense to which the defendant is pleading guilty or admitting to sufficient facts is under federal law one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.

(B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.

(C) Rights of Victims and Witnesses of Crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. The judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(4) Review; Acceptance or Rejection of Plea Agreement. The judge must accept or reject the plea agreement before the judge accepts a guilty plea or admission. The judge should not accept a plea agreement without considering whether the proposed disposition is just. At any time prior to the acceptance or rejection of the plea agreement, the judge may continue the plea hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination whether the plea agreement provides for a just disposition in the case.

(A) Accepted Plea Agreement. If the judge accepts the plea agreement, the judge shall inform the defendant that the judge will impose the sentence, including the length of any term of probation, provided in the plea agreement.

(B) Rejected Plea Agreement. If the judge rejects the plea agreement, the judge shall, on the record and in open court (or, for good cause, in camera on the record):

- (i) inform the parties that the judge rejects the plea agreement, but the judge may indicate to the parties what sentence the judge would impose or what additional information the judge will require before the judge may make this determination;
- (ii) allow either party to withdraw from the plea agreement; and
- (iii) allow the defendant to withdraw his or her plea or admission.

(5) Findings of Judge as to Plea Agreement and Plea; Acceptance of Plea. If the judge has accepted the plea agreement, the judge shall inquire whether the defendant still wishes to plead guilty or admit to sufficient facts. If so, the judge will then make findings as to whether the plea agreement and plea or admission are knowing, voluntary, and supported by an adequate factual basis. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(6) Sentencing. After accepting the plea agreement and the plea or admission, the judge shall impose sentence according to the terms of the plea agreement. If the plea agreement includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

(e) **Availability of Criminal Record and Presentence Report.** Prior to sentencing under Rule 12(c)(6) or to the judge's decision to accept or reject a plea agreement under Rule 12(d)(4), the judge, prosecutor, and counsel for the defendant shall have an opportunity to review the defendant's criminal record and any report of the presentence investigation as described in Rule 28(d)(2). In extraordinary cases, the judge may except from disclosure to the parties parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or

otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.

STATEMENT OF OPPOSITION TO THE
ADOPTION OF REVISED MASS. R. CRIM. P. 12

LENK, J. Apart from changing the current Rule 12 of the Massachusetts Rules of Criminal Procedure to require that plea discussions with a judge be on the record, I am not persuaded that further, let alone extensive, revision to the rule is necessary or desirable. As then Justice Herbert P. Wilkins wrote in 1991, "I decline to join in the promulgation of a rule that apparently is intended to deal with a problem that is not shown to exist." Statement of Opposition to the Adoption of Revised Supreme Judicial Court Rule 3:07, DR 7-108(D), August 26, 1991.

The key impetus for changing Rule 12 stems from our decisions in Commonwealth v. Rodriguez, 461 Mass. 256 (2012) and Commonwealth v. Dean-Ganek, 461 Mass. 305 (2012), "holding that former Rule 12 permitted a judge to impose a sentence more lenient than the sentence agreed to in a plea agreement accepted by the judge . . . [and that] jeopardy attaches when the judge accepts the plea . . . thus preventing the prosecution's withdrawal in such a case, even when the plea agreement included negotiated charge concessions." Reporter's Notes to Proposed Rule 12(b) - (e) of the Massachusetts Rules of Criminal Procedure. Apart from continuing to think both that these cases were correctly decided and that the current Rule 12 embodies highly desirable judicial discretion, I am unaware of any instance in which a judge has accepted a plea in the context of a charge concession and then imposed a sentence more lenient than that jointly recommended in a plea agreement.

The current rule has worked quite well for quite some time, and has the not inconsiderable virtue of being familiar to bench and bar. Although the rule as changed is narrower than earlier proposed versions and Rule 29 remains unchanged, it is still a solution in search of a problem. To the extent that the adopted Rule 12 seeks to circumscribe the exercise of judicial discretion, even in limited circumstances, it is misguided and most unfortunate.

Chief Justice Gants and Justice Hines have authorized me to say that they join in this statement.