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Requesting Substitute Criminal Sanctions on Appeal: Referral to the Joint Divisions

The procedural limits on belated applications under Article 545-bis of the Italian Code of Criminal Procedure referred to the Joint Divisions (Sezioni Unite) by the Italian Supreme Court of Cassation, Criminal Division, Order no. 35458/2026

MG Metodo Giuridico Editorial Board

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Current Legal Framework as of 13 November 2026: By Order no. 35458 of 6 October 2026, the Italian Supreme Court of Cassation, Criminal Division, referred to the Joint Divisions (*Sezioni Unite*) the question concerning the admissibility of requesting the application of substitute criminal sanctions for the first time on appeal, delineating the boundaries between appellate procedural preclusions and the devolutive principle.

ABSTRACT

This article examines the controversial question of the procedural admissibility of **requesting substitute criminal sanctions on appeal** for the very first time in second-instance proceedings, an issue referred to the Joint Divisions (*Sezioni Unite*) by Order no. 35458/2026 of the Italian Supreme Court of Cassation, Criminal Division. The inquiry explores the interplay between the **devolutive principle**, the cooperative sentencing procedure introduced by the **Cartabia reform**, and the scope of both ordinary and transitional appellate procedural preclusions. Through a comparative assessment of conflicting Supreme Court approaches, the study outlines the operational implications for **defence counsel** and individualized sentencing standards.

Key Takeaways

- **Referral to the Joint Divisions:** Order no. 35458/2026 of the Italian Supreme Court of Cassation, Criminal Division, refers to the Joint Divisions (*Sezioni Unite*) the split in authority over the admissibility of an application for substitute sanctions submitted for the first time on appeal where the statutory prerequisites already existed at first instance.
- **Repeal of the mandatory judicial notice:** Legislative Decree no. 31/2024 abolished the mandatory *ex officio* judicial notice following the reading of the operative part of the judgment, thereby ruling out any procedural nullity for failure to initiate an immediate sentencing dialogue.
- **Ordinary defence mandate vs. special power of attorney:** Submitting an application for substitution falls within the ordinary powers of defence counsel, whereas formally expressing the defendant's consent requires a special power of attorney (*procura speciale*) whenever the substitute penalty entails rehabilitative prescriptions or behavioural obligations.
- **Development through supplemental grounds of appeal:** An application for substitute sanctions raised in supplemental grounds of appeal is admissible provided that it is functionally linked to a specific original ground challenging sentencing and the quantum of punishment.

CASE DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Criminal Law & Sentencing & Criminal Enforcement

LEADING DECISION
Italian Supreme Court of Cassation, Criminal Division, Order of 6 October 2026, no. 35458 — Refers to the Joint Divisions (Sezio

Legal Principle / Editorial Headnote

Whether, for the purpose of the admissibility on appeal of a request to apply substitute sanctions for short-term custodial sentences pursuant to Article 545-bis of the Italian Code of Criminal Procedure, where the relevant statutory conditions were already met during first-instance proceedings and did not supervene as a consequence of the appellate decision, the application must necessarily have been submitted during the first-instance trial or whether it may lawfully be advanced for the first time in the statement of appeal.

01. INTRODUCTION: ORDER NO. 35458/2026 OF THE ITALIAN SUPREME COURT OF CASSATION, CRIMINAL DIVISION

By Order of 6 October 2026, no. 35458, the **Italian Supreme Court of Cassation, Criminal Division**, referred to the **Joint Divisions (*Sezioni Unite*)** a central procedural question arising from the Cartabia reform[1]. The interpretive conflict directly concerns the admissibility of a **request for substitute criminal sanctions on appeal** submitted for the first time in second-instance proceedings, where the statutory prerequisites for their application already existed during the first-instance trial and did not arise from a subsequent downward adjustment of the sentence on appeal. The referral addresses a deep split among the ordinary criminal panels, divided between the strict enforcement of **appellate procedural preclusions** and the broad scope of the **devolutive effect** operating in favour of the accused.

The statutory framework reshaped by Legislative Decree no. 150 of 10 October 2022, together with the corrective amendments introduced by Legislative Decree no. 31 of 19 March 2024, fundamentally reclassified substitute measures for short-term custodial sentences. The introduction of **Article 20-bis of the Italian Criminal Code** elevated these sanctions to the rank of **principal criminal penalties** restricting personal liberty, superseding their historical

characterization as extrinsic post-conviction benefits. Corresponding to this substantive transformation is the procedural mechanism governed by **Article 545-bis of the Italian Code of Criminal Procedure**, under which the **trial court** assesses the applicability of the new non-custodial sanctions immediately upon delivering a conviction carrying a prison sentence not exceeding four years.

The practical implementation of this two-stage sentencing mechanism has raised a delicate question regarding the temporal boundaries of party submissions. Specifically, the issue is whether a failure to apply for substitution at first instance triggers a **statutory forfeiture / time-bar (*decadenza*)** against the defendant, preventing him or her from raising the request in the statement of appeal, or whether the devolution of sentencing enables the appellate court to reassess the nature of the penalty. The referring bench emphasized that the absence of an express statutory prohibition must be weighed against the cooperative architecture of the reformed sentencing procedure, which pursues goals of timely **procedural caseload reduction** as well as compliance with the constitutional principle of **proportionality of punishment** under Article 27(3) of the Italian Constitution.

02. THE STATUTORY FRAMEWORK AND THE STRUCTURE OF THE SUBSTITUTION SUB-PROCEEDING

The procedural architecture set out in **Article 545-bis of the Italian Code of Criminal Procedure** governs access to the substitute sanctions introduced by the 2022 reform, establishing a consensually oriented procedural module triggered immediately after the reading of the operative part of the judgment. Under the original wording enacted by Legislative Decree no. 150/2022, the provision required the first-instance judge, upon finding that the statutory prerequisites were met, to issue a formal **notice to the parties** so as to open adversarial submissions on substitution. That sequence was designed to allow the defendant either to express immediate consent or to request an adjournment in order to prepare a social reintegration programme and submit documentary proof of suitable accommodation.

This mechanism was subsequently recast by the corrective decree enacted through Legislative Decree no. 31 of 19 March 2024, which abolished the mandatory nature of the formal post-verdict judicial notice. As highlighted by the **Italian Supreme Court of Cassation, Criminal Division**, in Order no. 35458 of 6 October 2026, the corrective intervention overcame the rigidity of the earlier procedural sequence, converting what had been a mandatory judicial duty into a discretionary power to open an interlocutory sentencing phase[1]. Consequently, a trial court's omission to issue such notice does not give rise to any **procedural nullity (voidness *ab initio*)**, but rather reflects an implicit finding that the substantive requirements for conversion are absent.

A second pivotal point clarified by the referring order concerns the representative powers of defence counsel. On this score, Supreme Court authority draws a sharp distinction between filing an application for substitution and formally expressing consent to the substitute sanction. An ordinary **defence mandate** suffices to submit the initial request, as doing so constitutes the exercise of a procedural faculty aimed at mitigating punishment. Conversely, expressing consent affects the convicted person's **strictly personal rights**: where the measure entails restrictive conditions or affirmative obligations to act—such as home detention or community service work—consent cannot be validly given by counsel lacking a **special power of attorney (*procura speciale*)**, unless the defendant attends the hearing in person and thereby enables counsel to act purely as a spokesperson (*nuncius*).

This distinction between the faculty to apply and the consensual nature of acceptance illuminates the **cooperative model** that characterizes the entire legal regime governing substitute sanctions. Applying these non-custodial penalties requires genuine cooperation from the defendant alongside tailored assessments prepared by the external probation and penal execution office. It is precisely from competing readings of this cooperative framework that the ordinary criminal

panels have reached divergent conclusions as to whether the defence bears a strict burden of timely initiative at first instance.

03. THE SPLIT IN CASE LAW: STRICT PRECLUSION VERSUS THE COOPERATIVE MODEL

3.1 — The Timely Initiative Doctrine and Procedural Forfeiture

The first and stricter line of authority holds that a request for the application of substitute criminal sanctions raised for the very first time in the statement of appeal is inadmissible. Courts subscribing to this view emphasize the consensual structure of the institution, inferring a **burden of immediate initiative** incumbent upon the defendant during the first-instance trial whenever the factual and statutory prerequisites are already satisfied.

This restrictive position was articulated by the **Italian Supreme Court of Cassation, Criminal Division**, in Judgment of 6 May 2026, no. 16307, concerning proceedings that were pending at first instance when the Cartabia reform entered into force[2]. That ruling held that, pursuant to **Article 95 of Legislative Decree no. 150/2022**, the defendant bore a mandatory obligation to submit the application before the trial court. Failure to act in a timely manner bars any revival of the request at the appellate stage, where the issue may properly be entertained solely as a **specific ground of appeal** challenging an express refusal issued by the first-instance judge.

Along the same restrictive lines stands Order of 18 March 2026, no. 10332, of the **Italian Supreme Court of Cassation, Criminal Division**, which rules out the exercise of ***ex officio* powers** by the appellate bench in the absence of a specific defence challenge[3]. Because **Article 597(5) of the Italian Code of Criminal Procedure** establishes an exhaustive list of exceptions to the devolutive principle that does not include substitute sanctions, omitting the request from the statement of appeal precludes *ex officio* intervention by the second-instance court and renders any subsequent complaint before the Court of Cassation inadmissible under Article 606(3) of the Code of Criminal Procedure.

3.2 — Comparative Table: Conflicting Approaches Before the Supreme Court of Cassation

This pronounced interpretive divergence goes to the heart of the relationship between the parties' duty of procedural cooperation and the protection of defence rights in sentencing. The restrictive approach conceives of the substitution sub-proceeding as a procedural option demanding immediate invocation at first instance, reasoning that inaction exhausts the power of election and consolidates the custodial sentence imposed. By contrast, the expansive view rests on the strict legality of appellate preclusions, maintaining that sentencing determination remains fully devolvable to the appellate court whenever the defence challenges the adequacy of the punitive treatment.

Procedural Dimension	Restrictive Approach	Expansive Approach
First-instance initiative	**Mandatory burden** Timely application before the trial court is required on pain of procedural forfeiture.	**Unfettered faculty** No codified statutory preclusion exists; the application may be submitted on appeal.
Admissibility on appeal	**Inadmissible** Permitted solely as an appellate challenge against an express refusal at first instance.	**Admissible** May be raised either in the principal statement of appeal or via supplemental grounds.
Appellate *ex officio* powers	**Excluded under Art. 597** Substitute sanctions do not fall within the exceptions listed in Art. 597(5) Code Crim. Proc.	**Reviewable omission** The trial judge's failure to exercise discretionary substitution powers is subject to review.
Supervening prerequisites	**Permitted *ex lege*** Apply *ex officio* under Art. 598-bis Code Crim. Proc. if the sentence drops to four years or less.	**Permitted *ex lege*** Full operation of *ex officio* substitution powers following appellate sentence reduction.

This systematic comparison demonstrates that the judicial conflict pertains exclusively to the fate of an application where the statutory conditions already existed *ab origine*. The forthcoming ruling of the Joint Divisions (*Sezioni Unite*) will have to clarify whether emphasizing **defence diligence** bars appellate judicial protection of non-custodial sentencing options. The outcome of that inquiry will directly shape procedural safeguards, determining whether access to non-custodial sanctions may lawfully be subjected to strict forfeiture deadlines not expressly laid down in the Code of Criminal Procedure.

04. REQUESTING SUBSTITUTE CRIMINAL SANCTIONS ON APPEAL BETWEEN PRECLUSIONS AND THE DEVOLUTIVE PRINCIPLE

4.1 — The Expansive Approach: Devolution, Strict Legality, and Absence of Statutory Prohibitions

Standing in sharp contrast to the restrictive view, a second line of case law holds that an application for substitute sanctions may validly be submitted for the first time in appellate proceedings. Its doctrinal foundation rests on the **principle of strict legality (*tassatività*)** governing procedural preclusions and grounds of appellate inadmissibility: in the absence of an express **statutory bar**, the constitutional right of defence cannot be curtailed merely on account of inaction during the first-instance trial.

That solution was endorsed by the **Italian Supreme Court of Cassation, Criminal Division**, in Judgment of 14 October 2025, no. 33776, which quashed and remanded an appellate judgment that had declared an application under Article 95 of Legislative Decree no. 150/2022 time-barred[4]. The Supreme Court ruled that a request for substitute

criminal sanctions may be advanced for the first time on appeal because no statutory provision forbids doing so; within this permissive line of authority cited by Referral Order no. 35458/2026, it is further stressed that an appellant is not confined to the submissions formulated before the trial court and remains entitled to devolve appellate review over the non-exercise of **discretionary substitution powers**.

The absence of explicit restrictions within the text of **Article 598-bis of the Italian Code of Criminal Procedure** corroborates the operation of the **devolutive effect** in favour of the accused. Determining the appropriate punitive treatment constitutes a sentencing issue open to comprehensive reassessment by the appellate court, which remains duty-bound to align the penalty with the rehabilitative aim enshrined in Article 27 of the Italian Constitution.

> Sentencing determination constitutes a matter fully devolvable on appeal whenever the defence challenges the adequacy of the punitive treatment, without inaction at first instance exhausting the right to request a substitute sanction.

4.2 — Admissibility in Supplemental Grounds of Appeal and the Nexus with Sentencing Determination

A significant opening toward belated applications was articulated by the **Italian Supreme Court of Cassation, Criminal Division**, in Judgment of 29 July 2026, no. 28804, addressing **supplemental grounds of appeal under Article 585(4) of the Italian Code of Criminal Procedure**[5]. Emphasizing the inclusion of substitute measures among the principal penalties listed in **Article 20-bis of the Italian Criminal Code**, the Court inferred that a request introduced through supplemental grounds is fully admissible provided that it relates to a specific original ground of appeal challenging the quantification of the principal sentence.

The requirement of a **functional nexus** presupposes that the original statement of appeal contains specific criticisms regarding sentencing determination and the statutory criteria under **Article 133 of the Italian Criminal Code**, as purely generic grievances will not suffice. Where the appellant has specifically contested the excessive severity of the sentence imposed, a subsequent request for home detention or community service work represents a coherent development of the sentencing head already devolved to the appellate court.

This conclusion harmonizes with the procedural principles governing the renewal of evidentiary hearings on appeal and the appellate court's powers of **probative supplementation**[D1]. Allowing access to substitute criminal sanctions via supplemental grounds affords defence counsel a flexible procedural avenue to bring forward supervening factual developments or newly secured accommodation and employment opportunities for the defendant.

05. OPERATIONAL IMPLICATIONS AND NOMOPHYLACTIC PROSPECTS

5.1 — Operational Differences Between Original Conditions and Supervening Prerequisites

In examining this area of law, it is essential to draw a rigorous **procedural distinction** between two fundamentally dissimilar scenarios. On the one hand lies the case in which the statutory prerequisites for substitution materialize for the first time on appeal as a result of the **partial reversal or reduction of the contested judgment**; on the other hand stands the situation in which all objective conditions already existed *ab origine* during the first-instance trial.

In the former scenario, procedural preclusion **plainly does not apply**. That hypothesis is expressly governed by **Article 598-bis(4-ter) of the Italian Code of Criminal Procedure**, which regulates **supervening sentencing eligibility**

whenever a custodial sentence is reduced on appeal to four years or less. Under such circumstances, the appellate court's power of substitution may even be exercised *ex officio*, since no prior procedural inaction can fairly be imputed to the appellant.

Conversely, the question referred to the Joint Divisions (*Sezioni Unite*) concerns the **distinct procedural posture** in which the custodial penalty imposed at first instance already fell within the four-year statutory ceiling, yet defence counsel submitted no request before the trial judge. It is precisely within this sphere that demands of **defence procedural diligence** clash with the constitutional principle of proportionality in punishment, calling for an authoritative nomophylactic resolution.

5.2 — When Is a Request for Substitute Criminal Sanctions Admissible on Appeal?

A request for substitute criminal sanctions on appeal is undisputedly admissible whenever the statutory eligibility criteria supervene as a consequence of an appellate reduction of the sentence. Where, however, those prerequisites were already met at first instance, the admissibility of an application submitted for the first time in the statement of appeal or through supplemental grounds currently remains *sub iudice* before the Joint Divisions (*Sezioni Unite*).

Pending the ruling of the Joint Divisions, **defence counsel** must exercise the utmost procedural caution. From the standpoint of the **burden of proof** and pleading specificity, prudent practice dictates raising the substitution request directly in the **principal statement of appeal**, supported by documentary evidence attesting to suitable accommodation and lawful employment, so as to pre-empt potential **objections of inadmissibility** grounded in untimeliness or lack of specificity.

Furthermore, where the application seeks non-custodial sanctions entailing behavioural prescriptions, counsel must obtain an express **special power of attorney (*procura speciale*) to give consent**, or else ensure the defendant's personal attendance at the appellate hearing. Taking this precaution secures timely proof of the defendant's willingness to comply and facilitates the preparation of **social reintegration programmes** in coordination with the external probation and penal execution office.

06. CONCLUSIONS: STRIKING A SYSTEMIC BALANCE BETWEEN PROCEDURAL ORDER AND INDIVIDUALIZED SENTENCING

Referral Order no. 35458 of 6 October 2026 of the **Italian Supreme Court of Cassation, Criminal Division**, prompts a systemic reflection on the delicate equilibrium between procedural timelines and the **individualization of sentencing**. Transitioning toward a penal model centred on **substitute criminal sanctions** directly applied by the trial court undoubtedly presupposes good-faith cooperation among procedural participants. Nevertheless, the legislative repeal of mandatory *ex officio* judicial notice should not harden into an insurmountable procedural barrier that insulates punitive proportionality from appellate review.

The question referred to the Joint Divisions (*Sezioni Unite*) goes to the core of the **function of criminal appeals** and the effectiveness of the constitutional standard of **proportionality of punishment**. While the restrictive approach safeguards procedural expedition and finality, the expansive reading ensures that criminal sanctions remain consistently anchored to the rehabilitative mandate enshrined in **Article 27(3) of the Italian Constitution**, giving full effect to the devolutive scope of appellate jurisdiction.

The forthcoming decision of the **Joint Divisions (*Sezioni Unite*)** is therefore called upon to establish a settled interpretive benchmark capable of reconciling procedural efficiency with the principle of *favor rei*. Resolving this split in

authority will restore legal certainty for practitioners and consolidate uniform sentencing standards across criminal justice administration.

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Statutory Provisions

- Article 545-bis of the Italian Code of Criminal Procedure — Conviction carrying a custodial sentence not exceeding four years and substitution of short-term custodial sentences.
- Article 598-bis of the Italian Code of Criminal Procedure — Chamber decisions in appellate proceedings and supervening eligibility for substitute criminal sanctions.
- Article 597 of the Italian Code of Criminal Procedure — Scope of appellate jurisdiction, the devolutive principle, and exhaustive *ex officio* exceptions.
- Article 20-bis of the Italian Criminal Code — Substitute sanctions for short-term custodial sentences.
- Law no. 689 of 24 November 1981 — Amendments to the criminal justice system, Articles 53 et seq.
- Legislative Decree no. 150 of 10 October 2022 — Comprehensive reform of criminal procedure (Cartabia reform) and transitional regime under Article 95.
- Legislative Decree no. 31 of 19 March 2024 — Supplementary and corrective provisions in the field of criminal procedure.

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1. **Italian Supreme Court of Cassation, Criminal Division, Order of 6 October 2026, no. 35458** — Refers to the Joint Divisions (*Sezioni Unite*) the question concerning the admissibility of requesting the application of substitute criminal sanctions for the first time on appeal where the relevant statutory prerequisites already existed during first-instance proceedings. Outcome: referred. Para.: Reasons for the Decision.
2. **Italian Supreme Court of Cassation, Criminal Division, Judgment of 6 May 2026, no. 16307** — Holds that a request for substitute criminal sanctions submitted for the first time on appeal is time-barred where the trial was already pending at first instance on 30 December 2022 under Article 95 of Legislative Decree no. 150/2022. Outcome: declared inadmissible. Para.: Ground on sentencing.
3. **Italian Supreme Court of Cassation, Criminal Division, Order of 18 March 2026, no. 10332** — Excludes *ex officio* substitution powers on the part of the appellate court in the absence of a specific and reasoned ground of appeal, holding that the exceptions under Article 597(5) of the Code of Criminal Procedure do not apply. Outcome: declared inadmissible. Para.: Reasons for the Decision.

4. **Italian Supreme Court of Cassation, Criminal Division, Judgment of 14 October 2025, no. 33776** — Affirms the admissibility of requesting the substitution of a custodial sentence for the first time in appellate proceedings given the absence of express statutory preclusions. Outcome: quashed and remanded. Para.: Ground on substitute sanctions.

5. **Italian Supreme Court of Cassation, Criminal Division, Judgment of 29 July 2026, no. 28804** — Recognizes the admissibility of an application for substitute sanctions raised in supplemental grounds of appeal where functionally linked to an original ground contesting the quantum of punishment imposed. Outcome: quashed and remanded. Para.: Reasons for the Decision.

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