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Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Comments on Proposed Amendment to Rule 12 of the Mass. Rules of Criminal Procedure

Dear Attorney Berenson:

On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the proposed amendment. The BBA appreciates and recognizes the efforts put forth by Standing Advisory Committee on the Rules of Criminal Procedure in crafting this proposal.

The proposed amendment was distributed to relevant BBA Sections, and the Criminal Law Section Steering Committee discussed them at length and offers the attached comments. Please note that the enclosed document does not constitute a position of the BBA as a whole but rather reflects the views of individual members of the Section. We hope that they may be useful to the Committee as it considers the proposed best practices.

Thank you for providing members of the bar with an opportunity to weigh in on this important proposal, and please feel free to contact me should you have any questions or concerns.

Very truly yours,

Jon Albano

Jonathan M. Albano
President

Comments of the Boston Bar Association's Criminal Law Section Steering Committee on the Proposed Amendment to Rule 12 of the Mass. Rules of Criminal Procedure (February 7, 2019)

In response to an invitation for comment, the Boston Bar Association's ("BBA") Criminal Law Section Steering Committee reviewed the proposed amendment to Rule 12 of the Mass. Rules of Criminal Procedure. The BBA notes that these comments do not represent a formal position of the Association but rather are a collection of comments from interested members intended to help the Committee in consideration of the proposed best practices.

Prosecutorial Consent Requirement:

Members of the section were concerned about the text of the proposed rule requiring that the Commonwealth's case be rendered not viable and requiring the Commonwealth's consent to the conditional plea. Both requirements would seem to serve the same purpose: avoiding allowing defendants to enter conditional pleas even when the outcome of the pretrial motion would not have a substantial impact on the merits of the underlying case. This is a questionable premise, as it seems unlikely that defendants will forgo the benefit of plea bargaining to appeal insubstantial claims. But, even accepting it as true, there does not need to be two mechanisms in the rule to address it. As a result, multiple members of the section thought that it would make sense to include additional, complementary language to the rule that would allow conditional guilty pleas over the Commonwealth's objection, in some circumstances, that would be within the discretion of the plea judge. Empowering the judge to accept or reject such pleas would avoid the sorts of baseless or needless appeals that the proposed consent requirement is intended to guard against. This would be consistent with current precedent interpreting Rule 12, which does not require prosecutorial consent to unconditional guilty pleas. See Commonwealth v. Dean-Ganek, 461 Mass. 305, 309 (2012) ("[T]the Commonwealth makes a fundamental error in assuming that its 'consent' is required for a defendant's tender of a guilty plea. ... A defendant must consent to a guilty plea because he relinquishes his constitutional right to trial by pleading guilty. The Commonwealth relinquishes nothing where a defendant pleads guilty; it has simply obtained the guilty finding it would have sought at trial without the time and expense of a trial. Therefore, in a plea colloquy, the Commonwealth's only role is to provide the factual basis for the charge; at no point does the judge ask for or need the Commonwealth's consent."). It also appears that California, North Carolina, New York, Texas, Wisconsin, Alabama, Florida, Kentucky, Ohio, and Texas all allow conditional guilty pleas without requiring the consent of the prosecutor. See Commonwealth v. Gomez, 480 Mass. 240, 247 n.11 (2018). There has been no reporting of adverse outcomes in those states.

Other members of the section were concerned about removing the prosecutorial consent requirement. They pointed out that Gomez itself cites a preference for the federal rule, which incorporates prosecutorial consent, and the majority of states require such consent. Those members also pointed out that defendants might try to abuse the procedure as an alternative to an interlocutory appeal, and trial judges might jump at the chance to clear a case from their docket. Thus, obviating the prosecutorial consent requirement could lead to abuse of this procedure. These members also thought it would make sense to require the consent of both parties because it would encourage and facilitate plea bargaining, as

Gomez itself suggests in its citation to United States v. Mezzanatto, 513 U.S. 196, 208 (1995).

In an effort to bridge this divide, one member of the section suggested that perhaps the rule could provide a list of factors to guide a judge's exercise of discretion, with the prosecutor's position given some level of "special" consideration. Perhaps something like: "The trial judge, in determining whether to accept a conditional guilty plea, should consider the fairness to the defendant of accepting or rejecting the conditional plea, the potential strength of any appeal, and the effect of such plea on trial court and appellate court efficiency and on any victims or witnesses, and should give special but not determinative weight to the position of the Commonwealth." Additionally, as a further compromise on the viability requirement, perhaps the factors above could include "the effect that a reversal of the pretrial ruling would have on the viability of the Commonwealth's case." Listing these factors might serve to prevent judges from just instinctively allowing conditional guilty pleas to move cases off their own dockets, as some members of the section fear.

The "Not Viable" Requirement:

Members of the section were also concerned about the potential limits of the "not viable" requirement as not capturing the full sweep of circumstances in which a conditional guilty plea might make sense. For instance, one could imagine a circumstance in which the Commonwealth's case is a "slam dunk" if certain evidence is admitted, while suppression would at least make the case triable from the defense perspective. In this circumstance, the Commonwealth's case is certainly "viable" either way, but the outcome of the pretrial motion still has a dispositive impact on the defendant's decision to take the case to trial and has a significant outcome on the case. Also, the "not viable" requirement does not seem to capture pretrial motions about enhancements, which has nothing to do with the factual strength of the case but everything to do with its outcome. As a result, the section suggested that perhaps the "not viable" language could be broadened to something like: "... render the Commonwealth's case not viable **or substantially weakened** on one or more charges."

Other members of of the section did not think that this change was necessary as Rule 15 interlocutory appeal applications will allow for appeals of such pretrial motions. Rule 15 applications for interlocutory appeal can address claims that are "substantial" but not conclusive. Some felt it may, in practice, be better to favor the use of conditional pleas instead of Rule 15 interlocutory appeals. In terms of court efficiency, conditional pleas take significant time if there is a trial after the appeal, but at the same time interlocutory appeals take just as long if the same occurs. At times, there may be significant benefits to the use of a conditional plea over a interlocutory appeal: defendants can start serving their sentences, doing rehabilitative programming and earning good time, as opposed to being stuck in pretrial detention; civilian witnesses and/or victims are able to move on with their lives as they're no longer left waiting to testify (at least where the Commonwealth's case really would not be viable -- it seems like the viability requirement is most appropriate in true victim cases where it's not ideal to be trying three years later after all the appeals have run); resources are not expended on police officer-witnesses time and testimony.

Single-Charge Conditional Please Sentencing Issues

Even though it makes sense to specify the charges that would be affected by the appeal from the conditional plea, there ought to be an explicit possibility for re-sentencing on the entire package if any charges are reversed, just as after a normal post-trial appeal. As the rule is currently written, it seems like the rest of the charges just stand as they were, which

(a) could either lead to a windfall for the defendant, or (as in the case of concurrent sentences) no benefit at all, and (b) could lead to complicated sentencing gymnastics by the trial judge to avoid those possibilities, or even deter the judge from accepting a conditional plea at all if the sentence structure doesn't allow for such maneuvering. When there is a single-charge conditional plea, there should be some mechanism to re-open sentencing on the entire package of charges (if the defendant is successful in the appeal).

Rules of Appellate Procedure Reference

The rule could be clarified to say that the normal rules of appellate procedure will apply to appeals taken from conditional guilty pleas. This may go without saying, but – particularly because this is such a new procedure – the parties should know that these appeals are governed by familiar rules. Several members of the section thought the new rule's omission of any reference to the appellate rules could cause confusion.