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RE: Proposed changes to Mass. R. Crim. P. 12 regarding conditional guilty pleas

Dear Attorney Berenson,

Thank you for the opportunity to provide comments in response to the amendment to Mass. R. Crim. P. 12 proposed by the Standing Advisory Committee on the Rules of Criminal Procedure. The Committee for Public Counsel Services is pleased with the decision of the Supreme Judicial Court in *Commonwealth v. Gomez*, 480 Mass. 240 (2018), allowing conditional guilty pleas for the first time in Massachusetts. But CPCS would suggest that the rule ultimately adopted should be changed to allow for conditional guilty pleas over the objection of the prosecution under limited circumstances, as suggested by seven members of the Standing Advisory Committee in Appendix A to the submission to the Rules Committee.

Assigning the Commonwealth a formal "veto" over the defendant's ability to enter a conditional guilty plea will – in almost every case – have no substantive impact other than affording the prosecution greater leverage in plea negotiations. This is simply unnecessary. As it stands, the vast majority of criminal convictions are obtained by plea rather than trial. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[N]inety-four percent of state convictions are the result of guilty pleas."). The Commonwealth already has enormous, overpowering leverage over every plea, to the point that even *factually innocent* defendants sometimes plead guilty. See Rakoff, *Why Innocent People Plead Guilty*, N.Y. Review of Books (Nov. 20, 2014); *Town of Newton v. Rumery*, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring) ("The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated.").

If the Commonwealth believes that a defendant has a substantial claim, it may be willing to offer significant charge or sentencing concessions to try to push the defendant into an unconditional plea. See Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 Minn. L. Rev. 1985, 2033 (2016). This obviously has troubling

implications, as it requires defendants to choose between their liberty and strong constitutional claims. See Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564, 577-585 (1980). Defendants should at least be afforded the opportunity to make this choice for themselves. In the vast majority of circumstances – at least ninety-four percent of the time – existing prosecutorial leverage suffices to secure a guilty plea.

But to allow the Commonwealth to *start* negotiations with a veto over the right to appeal – a right, it should be said, that belongs to the defendant by statute, see G.L. c. 278, § 28 – will short-circuit this give-and-take by allowing the Commonwealth to take a conditional guilty plea off the table from the beginning. If the amended rule is intended to "facilitate[] plea bargaining," *Gomez*, 480 Mass. at 250, a prosecutorial consent requirement does not serve that goal. Under the proposed rule, if the defendant wants to enter a conditional plea and the Commonwealth does not, there will be no plea. If the defendant wants to retain his appellate rights, the case will have to go to trial because he has nothing to offer the Commonwealth in exchange for its agreement to a conditional plea. But if the rule allowed a conditional guilty plea over the Commonwealth's objection, the Commonwealth would have the leverage to entice the defendant with some additional concession to make the plea unconditional. As a consequence, amending Rule 12 to allow conditional pleas over the Commonwealth's objection will facilitate plea bargaining, and possibly even encourage the parties to negotiate conditional pleas down to unconditional pleas. Assigning all points of leverage to one side of a negotiation is not a means to ensuring fair agreements.

As Appendix A to the Standing Advisory Committee's memorandum points out, requiring prosecutorial consent to conditional guilty pleas is also not consistent with past jurisprudence. The SJC has already explained that, when a defendant enters a plea of guilty, "at no point does the judge ask for or need the Commonwealth's consent." *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 309 (2012). This rule need not change when a plea is conditional. Further, as Appendix A recognizes, it appears that at least eight states – including New York, California, Texas, and Florida – already allow conditional guilty pleas over the government's objection.

One can surmise that the purpose of the prosecutorial consent requirement is to avoid allowing defendants to enter conditional pleas that vitiate the harmless error doctrine – when the outcome of the pretrial motion will have a negligible effect on the trial itself. But this purpose is amply served by the requirement that the outcome of the motion would affect the viability of the Commonwealth's case. Indeed, the only legitimate reason for a prosecutor to oppose a conditional guilty plea would be over concerns about viability – where the Commonwealth thinks it can win the case even *without* the evidence that is the subject of a motion to suppress. Under the text proposed in Appendix A, plea judges will be able to assess whether the ruling on the pretrial motion would affect the viability of the case and allow conditional guilty pleas raising "substantial" issues, even over the Commonwealth's objection. That judicial role will help to avoid needless appeals.

A prosecutorial consent requirement may lead to abuse. For example, armed with a veto, some prosecutors might be tempted to refuse a conditional guilty plea specifically because they know that the order on the pretrial motion is vulnerable on appeal. The Commonwealth's

substantial plea bargaining leverage already "allow[s] constitutional criminal law's regulated entity – the prosecution team – to set the terms of its own regulation, simply by pushing constitutional claims that might misalign with prosecutors' institutional incentives beyond the reach of adjudication altogether." Crespo, *Regaining Perspective*, 100 Minn. L. Rev. at 2037; see also *id*. at 2040 (advocating the elimination of the prosecutorial consent requirement and adoption of rule akin to that proposed in Appendix A). The Commonwealth does not need formal control over which cases reach appellate courts. If conditional pleas are allowed over the Commonwealth's objection, prosecutors will still retain enormous power over which appeals get heard.

Finally, and more fundamentally, allocation of the "right" to a conditional plea to the Commonwealth rather than the defendant would enshrine in Rule 12 a troubling notion: that the prosecution's consent is necessary to protect the criminal justice system against defendants who might unreasonably abuse this new procedure. But there is the possibility of unreasonableness on both sides of plea negotiations. Under the rule as currently drafted, surely there will be some prosecutors (either as a matter of office policy or individual choice) who will not agree to conditional guilty pleas even on occasions when they are called for. See generally Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470-76 (2004). Defendants may seek conditional pleas when they should not, in which case (under the text proposed in Appendix A) the judge may veto their decision. Or, prosecutors might disallow conditional pleas when they should allow them, in which case (under the proposed rule) *no one* can override this decision. As currently drafted, the rule only recognizes and guards against the potential unreasonableness of defendants, and allows the Commonwealth to police their plea decision. Such one-sidedness has no place in the Rules of Criminal Procedure.

The Committee for Public Counsel Services would urge the Rules Committee to adopt the proposed text of Appendix A to the Standing Advisory Committee's submission. At the very least, CPCS agrees with those seven members of the committee who believe that their proposal is worthy of further study.

I again thank you for the opportunity to submit these comments.

Respectfully Submitted,

Anthony J. Benedetti