

Proposed Mass. R. Crim. P. 12(b)(6)

(6) **Pleas Reserving Appellate Review.** With the written agreement of the prosecutor, the defendant may tender a plea of guilty while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges. The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the ruling or rulings would render the Commonwealth's case not viable on one or more specified charges. The judge, in an exercise of discretion, may refuse to accept a plea of guilty reserving the right to appeal. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea on any of the specified charges. If the defendant withdraws the guilty plea, the judge shall dismiss the complaint or indictment on those charges without prejudice, unless the judge determines otherwise.

Proposed Reporter's Notes to Rule 12(b)(6)

Notes to Subdivision (b)(6)

This new subdivision, modeled on Fed. R. Crim. P. 11(a)(2) and the rules of many states, enables a defendant to enter a plea reserving a right to appeal (commonly called a "conditional plea"). Under this rule, a defendant may, with the prosecutor's agreement, plead guilty, appeal a ruling the defendant believes is erroneous, and, if successful on appeal, withdraw the plea and presumptively obtain dismissal of the charge. This new subdivision is not applicable to nolo contendere pleas.

A guilty plea, voluntarily and intelligently made, ordinarily "waives all nonjurisdictional defects." *Commonwealth v. Cabrera*, 449 Mass. 825, 830 (2007) (citing *Garvin v. Commonwealth*, 351 Mass. 661, 663-664 (1967)), Adverse rulings thus cannot be appealed, even by a defendant who might otherwise plead guilty, without the time and expense of a trial. As the Supreme Judicial Court recognized in *Commonwealth v. Gomez*, 480 Mass. 240 (2018), the Federal Rules of Criminal Procedure and the law of most states permit defendants to enter a guilty plea conditioned on the right to appeal a specified ruling of the court. *See, e.g.*, Fed. R. Crim. P. 11(a)(2). In *Gomez*, the Court exercised its superintendence authority under G.L. c. 211, § 3 to authorize conditional guilty pleas provided the Commonwealth and the court agreed, and the defendant specified the ruling on which appellate review was sought. *Gomez, supra* at 252. This subdivision implements *Gomez* by permitting guilty pleas in which the defendant reserves for appellate review one or more rulings.

This procedure facilitates plea bargaining and conserves judicial resources. These savings are greatest when the rulings reserved for appeal effectively dispose of the case; thus, the procedure requires that the Commonwealth agree that reversal of the ruling subject to appeal would render its case on the specified charge or charges not viable. The viability of a case or a

charge includes situations in which, should the reserved ruling be reversed, the Commonwealth would choose not to proceed. The viability standard also appears in S.J.C. Order regarding *Applications to a Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2)* (June 8, 2016) (applications for interlocutory appeal by the Commonwealth must include a "statement whether the Commonwealth has a viable case without the suppressed evidence, and the strength of that case, if viable").

This rule requires the parties to specify, by written agreement, the ruling or rulings reserved for appeal and the charge or charges that would presumptively be dismissed if the defendant prevails on appeal and chooses to withdraw the guilty plea. The ruling or rulings should be identified by stating the name of the motion or pleading ruled upon, the date of the ruling or rulings, and the judge who issued the ruling. The charge or charges should be identified by reference to the complaint and offense or count of the indictment. The written agreement should be filed with the court and become part of the record for appeal. A guilty plea reserving appellate review of a specified ruling or rulings may be tendered under either Mass. R. Crim. P. 12(d)(2) or 12(c)(2). As with any guilty plea, the judge has discretion to refuse to accept a plea reserving appellate review. *See* Mass. R. Crim. P. 12(a)(3).

If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea on the specified charge or charges, and that charge or those charges shall be dismissed without prejudice, unless the judge determines otherwise. Such an exercise of judicial discretion could be appropriate in circumstances in which the defendant prevails in part or in which further proceedings are required. If the judge does not intend to dismiss the specified charge or charges, the judge should indicate that intention to the defendant before the defendant withdraws the guilty plea.

