

To: Secretary, Advisory Rules Committee  
From: David Peck  
Re: Suggestion to Amend N.H. Crim. R. 11(c)  
Date: May 30, 2022

In 1981, the New Hampshire Supreme Court held that conditional guilty pleas are not permitted in New Hampshire, thereby joining a minority of jurisdictions. State v. Parkhurst, 121 N.H. 821 (1981). A conditional guilty plea generally is a plea by a defendant of guilty that specifically reserves the right to appeal a particular ruling — often, a ruling denying a motion to suppress. If the defendant prevails on the appeal, then the defendant is permitted to withdraw his guilty plea.

Conditional guilty pleas are now permitted either by statute, court rule, or case law in approximately 30 jurisdictions, including federal courts. Glenn v. Commonwealth, 635 S.E. 2d 697 (Va. Ct. App. 2006); Commonwealth v. Gomez, 104 N.E.3d 636, 640-42 (Mass. 2018). In addition, the ABA Standards for Criminal Justice, Standard 21-1.3 provides: “Where the only contested issues in a prosecution can be raised and determined by decisions on pretrial motions, such as motions to suppress evidence, motions to exclude confessions, and motions challenging the sufficiency of the charging papers to state an offense, a procedure should be established to permit entry of a final judgment of conviction, on the basis of a guilty plea or a stipulation of the facts necessary for conviction, without foreclosing subsequent appeals on the contested issues.”

Most jurisdictions require the consent of the court and/or the prosecutor to a conditional guilty plea, and require the defendant to specify the pretrial motion from which he seeks to appeal. Gomez, 104 N.E.3d at 641-42; see, e.g., Me. R. Crim. P. 11(a)(2) (“With the approval of the court and the consent of the attorney for the State,

a defendant may enter a conditional plea of guilty or nolo contendere. A conditional plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for appellate review. If the court approves and the attorney for the State consents to entry of the conditional plea of guilty or nolo contendere, the parties shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the conditional plea. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.”).

A result of not allowing conditional guilty pleas is that a defendant must typically proceed to trial in order to preserve his appellate rights, even if the defendant desires only to appeal from a particular pretrial ruling, such as a motion to suppress. As the United States Supreme Court has recognized, this is a “completely unnecessary waste of time and energy.” Lefkowitz v. Newsome, 420 U.S. 283, 292 (1975). Parkhurst is an example — although the defendant and the State in that case agreed to a plea of guilty for the charge of burglary, reserving only the right to appeal the trial court’s ruling on a motion to suppress, the New Hampshire Supreme Court refused to allow the appeal. Rather, the court remanded the case, requiring the defendant to “either withdraw his plea and proceed to trial, or waive his right to appellate review of the motion to suppress and be resentenced.” Parkhurst, 121 N.H. at \_\_\_\_.

The reason Parkhurst gives for rejecting conditional guilty pleas is the fear that the practice will undermine the public’s confidence in the integrity of the criminal justice system. The court stated that it cannot endorse the use of a conditional guilty plea to test the government’s ability to prove what has already been

admitted. As noted above, the majority of jurisdictions, including the federal courts, all permit conditional guilty pleas. Nothing indicates that confidence in the integrity of the criminal justice system has been eroded as a result. Moreover, despite Parkhurst, the New Hampshire Supreme Court has on occasion permitted a conditional guilty plea appeal to go forward. In State v. Nelson, 161 N.H. 58 (2010), the trial court denied the defendant's motion to dismiss for failure to comply with time limits in the Interstate Agreement on Detainers. The supreme court recited that the defendant thereafter "pled guilty, but reserved the right to appeal the denial of his motion to dismiss." Without any explanation, however, the court accepted the appeal and decided it on the merits.<sup>1</sup>

My suggestion is to join the majority of jurisdictions that permit conditional guilty pleas. Adoption of a court rule is an appropriate means for doing so. As the New Hampshire Supreme Court has explained, "the adoption of a new rule of criminal procedure should ordinarily be accomplished through rulemaking." State v. Locke, 166 N.H. 344 (2014); see State v. Ramos, 149 N.H. 118 (2003) (Dalianis, J., dissenting).

Rule 11(c) of the N.H. Criminal Rules provides:

(c) Negotiated Pleas – Circuit Court-District Division and Superior Courts

(1) Permissibility. If the court accepts a plea agreement, the sentence imposed by the court shall not violate the terms of the agreement.

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<sup>1</sup> As a practical matter, if Parkhurst is to be enforced, courts must do so sua sponte. Conditional guilty pleas will usually, if not always, be the result of a plea agreement. Thus, it is unlikely that any party will object to an appeal taken pursuant to a plea agreement that specifically permits the appeal.

(2) Court's Rejection of Negotiated Plea. If the court rejects a plea agreement, the court shall so advise the parties, and the defendant shall be afforded the opportunity to withdraw the plea of guilty or nolo contendere.

(3) Sentence Review. See Rule 29(k)(14)(c).

My recommendation is to adopt a new paragraph under section 11(c) addressing negotiated conditional guilty pleas. A possibility, based largely upon Massachusetts Criminal Procedure Rule 12(b)(6), would be to add the following new subsection:

(1-a) Conditional Pleas. As part of a plea agreement, the defendant may tender a plea of guilty while reserving the right to appeal any ruling or rulings that would, if reversed, render the State'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 State's case not viable on one or more specified charges. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea. If the defendant withdraws the guilty plea, the judge shall dismiss the complaint or indictment on those charges, unless the State shows good cause to do otherwise. The appeal shall be governed by Supreme Court Rules, provided that a notice of appeal is filed within thirty days of the acceptance of the plea.

Pursuant to Supreme Court Rule 51, I note that I do not believe that exceptional circumstances justify expedited consideration of this suggestion. I do not wish to be heard by the Committee. My address is 36 NE Village Road, Concord, NH 03301 (skipwd@comcast.net).