Mass. R. Crim. P. 12(c)(3)(A)(iii) and 12(d)(3)(A)(iii)

2020 Reporter's Notes

In *Commonwealth* v. *Petit-Homme*, 482 Mass. 775 (2019) the SJC referred to the Committee for review and reconsideration the immigration warning judges are required to give as part of plea colloquies or admissions to sufficient facts by Mass. R. Crim. P. 12(c)(3)(A)(iii)(b) and 12(d)(3)(A)(iii)(b) (the "rule [b] warning"). This warning (which is identical in both sections of the rule) is one of two that judges must give concerning potential immigration consequences of a guilty plea or admission.

The other warning, prescribed by General Laws c. 278, § 29D, is set forth in Mass. R. Crim. P. 12(c)(3)(A)(iii)(a) and 12(d)(3)(A)(iii)(a) (the "rule (a) warning"). It provides a general advisory that persons who are not citizens of the United States may face consequences under federal law of deportation, exclusion from admission or denial of naturalization, by the court's acceptance of their guilty plea, plea of nolo contendere or admission to sufficient facts.

In contrast to the general advisory in the rule (a) warning, the rule (b) warning provides a more specific advisory about the likelihood of the immigration consequences described in the rule (a) warning based on treatment under federal law of the offenses to which a defendant pleads guilty or makes an admission. Unlike the general advisory in the rule (a) warning, the accuracy of this warning depends on "a thorough, nuanced understanding of Federal immigration law," as well as detailed information concerning "the defendant's immigration history and status, criminal record, and the nature and circumstances of the pending charges." *Petit-Homme,* 482 Mass. at 786.

Without this detailed understanding of Federal immigration law, and the defendant's immigration and criminal history, this more specific warning may create a misimpression or misunderstanding among defendants, and when paired with the more general advisory creates a significant risk of confusion. For these reasons, the rule (b) warning was eliminated in this amendment.

Eliminating this warning in no way reduces counsel's obligation to assess the potential collateral consequences for a non-citizen defendant of a guilty plea, plea of nolo contendere or admission to sufficient facts. See *Padilla* v. *Kentucky*, 559 U.S. 356, 363-364 (2010); *Commonwealth* v. *DeJesus*, 468 Mass. 174, 182 (2014); *Commonwealth* v. *Clarke*, 460 Mass. 30, 48 n. 20 (2011), partially abrogated on other grounds by, *Chaidez* v. *United States*, 568 U.S. 342 (2013) ("receipt of such warnings is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea").

Standards of practice for representation require counsel to consider potential immigration consequences for a client throughout a case. Committee for Public Counsel Services, *Performance Standards Governing Representation of Indigents in Criminal Cases* §2.a.v. (Preliminary Proceedings & Preparation – Arraignment) (in rare circumstances when it may be appropriate to take advantage of an early disposition, especially one not involving a criminal

record, counsel should be aware of potential immigration consequences of a continuance without a finding); §§5.d.vi. and xiii. (Dispositions by Plea or Admission – Consequences of Conviction) ("Counsel must advise client, prior to any change of plea, of the consequences of conviction, including: . . . consequences for non-citizens; and possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States."); §7.a.vii. (Sentencing – Preparation) ("Defense counsel should be familiar with and consider: . . . collateral consequences of any sentence, including immigration consequences"). These standards apply equally to representation of juveniles. *Performance Standards Governing Representation of Juveniles in Delinquency and Youthful Offender Cases* §2.a.vi.(a) (Preliminary Proceedings – Arraignment); §§6.d.vi. and xviii. (Disposition by Plea or Admission); and §8.a.vi. (Sentencing), January 1, 2019, version 1.9, https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf. See also, Jennifer Klein, *Consequences of Criminal Convictions for the Noncitizen*, Immigration Practice Manual, 3d Ed. § 19-1 (2017) ("A criminal defense lawyer must determine the immigration status of the defendant at the beginning of representation.").

Mass. R. Crim. P. 19

2020 Reporter's Notes

Subdivision (a).

This amendment to Mass. R. Crim. P. 19(a) makes minor stylistic edits to provide consistency with amendments to Mass. R. Crim. P. 19(b) that were made to implement *Commonwealth* v. *Bennefield*, 482 Mass. 250 (2019).

When a defendant pleads not guilty and seeks trial by the judge instead of by a jury, there are two requirements for the valid waiver of the right to a jury trial. First, the judge must conduct an oral colloquy with the defendant to ensure that the waiver is entered knowingly and voluntarily. *Ciummei* v. *Commonwealth*, 378 Mass. 504, 509-10 (1979) (recommending colloquy address features of the jury's role, such as that the jury consists of community members, that defendant may participate in jurors' selection, that the jury's verdict must be unanimous, and that the jury decides guilt or innocence but that the judge alone will do this if the jury is waived). Second, a written waiver must be signed by the defendant and filed with the court. See G.L. c. 263, § 6, G.L. c. 218, § 26A, G.L. c. 119, § 55A. While the requirement for a colloquy was imposed by the Supreme Judicial Court under its superintendence function, and the requirement for a written waiver is statutory, "[a] waiver obtained without observing both requirements is ineffective." *Commonwealth* v. *Osborne*, 445 Mass. 776, 781 (2006).

In addition to these requirements, the judge must approve the waiver, and may refuse to do so for any good and sufficient reason. See *Commonwealth* v. *Collins*, 11 Mass. App. Ct. 126, 141 (1981) ("judge's conclusion that certain pretrial matters which came to his attention, including statements of defense counsel, would unfairly prejudice, at least in appearance, the rights of the defendant is a 'good and sufficient reason'"). A judge who has decided pretrial matters that involved passing on the defendant's credibility, for example, might conclude that the court's impartiality as a factfinder could reasonably be questioned. *Commonwealth* v. *Adkinson*, 442 Mass. 410, 412-416 (2004) (trial judge properly reminded defendant during colloquy waiving jury that he had denied codefendant's motion to suppress her confession implicating defendant, and that he would use his best efforts to disregard this preliminary ruling and consider anew voluntariness of the confession at a jury-waived trial).

When a defendant pleads guilty and waives a trial by jury, by contrast, there is no requirement for a written waiver of the right to a jury trial. *Commonwealth* v. *Hubbard*, 457 Mass. 24, 26 (2010) ("There is no requirement that, when accepting a defendant's tender of a guilty plea, a defendant's waiver of the right to a trial with or without a jury be in writing."). There remains, however, a requirement for a colloquy on the record in connection with the defendant's tender of a guilty plea as an element of due process. *Commonwealth* v. *Evelyn*, 470 Mass. 765, 769 (2015) ("[T]he judge must engage the defendant in a colloquy before accepting the plea because due process requires that a guilty plea should not be accepted, and if accepted must be later set aside, unless the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made.") (Internal quotations omitted). See also, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); Mass. R. Crim. P. 12(c)(3) and 12(d)(3).

Subdivision (b).

This amendment to Mass. R. Crim. P. 19(b) implements *Commonwealth* v. *Bennefield*, 482 Mass. 250 (2019), by specifying the procedure through which a defendant may waive the right to a full jury after jeopardy has attached. The Court held in *Bennefield* that a colloquy on the record is essential to establish a valid waiver. Id. at 257. It referenced with approval the principles applicable to the colloquy required for a valid waiver of the right to a jury trial. See *Ciummei* v. *Commonwealth*, 378 Mass. 504, 509-510 (1979). As in the earlier rule, the defendant must also file with the court a signed, written waiver of the right to a full jury. This waiver will be valid, however, only with the accompanying colloquy. *Bennefield*, id. Furthermore, the absence of a written waiver would not, by itself, be a ground for vacating a conviction. Id.