

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH**

**HAMPDEN, ss.**

**FAR-\_\_\_\_\_  
A.C. NO. 2020-P-1175**

**COMMONWEALTH OF MASSACHUSETTS,  
Petitioner**

**v.**

**ELIZABETH GEBO,  
Defendant-Respondent**

**COMMONWEALTH'S APPLICATION FOR  
FURTHER APPELLATE REVIEW,  
PURSUANT TO MASS. R. APP. P. 27.1**

**I. Request For Further Appellate Review**

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, the Commonwealth requests that this Court allow its petition for further review of the Massachusetts Appeals Court's published decision reversing the conviction of defendant Elizabeth Gebo, Commonwealth v. Gebo, 2020-P-1175 (Slip op., June 29, 2021). The Appeals Court ruled that the trial judge erred in denying the defendant's request to waive her right to a jury trial and proceed in a jury-waived trial and that, pursuant to this Court's decision in Commonwealth v. Pavao, 423

Mass. 798 (1996), the error required reversal.<sup>1</sup> The Commonwealth is seeking review of the Appeals Court's conclusion that the trial judge's error required reversal. In so concluding, the Appeals Court implicitly concluded that improper refusal to allow waiver of the right to a jury trial, based upon misapplication of Mass. R. Crim. P. 19, is a structural error. This decision is inconsistent with this Court's prior guidance as to which errors are, and are not, structural, and is further inconsistent with this Court's ruling in Commonwealth v. Collado, 426 Mass. 675 (1998), that errors resulting from incorrect application of Rule 19 are not structural. See id. at 678. Furthermore, as the Appeals Court noted, there are no other cases directly applicable to this situation; Collado is factually distinguishable, and the Appeals Court's reliance upon Pavao, supra, is misplaced. This lack of clear, directly applicable precedent from this Court and the conflict between existing precedent and the Appeals Court's decision furnishes a "substantial reason affecting the public interest and the interests of justice" to warrant further appellate review. Mass. R. App. P. 27.1(a).

## **II. Statement Of Prior Proceedings**

The Springfield District Court Clerk's Office issued a criminal complaint on July 25, 2017, charging the defendant with two counts of Assault and Battery by

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<sup>1</sup> The Appeals Court further ruled that the evidence against the defendant was sufficient under the standard set forth in Commonwealth v. Latimore, 378 Mass. 671 (1979), and therefore ordered a new trial.

Means of a Dangerous Weapon against a Person over the age of Sixty (G. L. c. 265, § 15A(a); Docket No. 1723CR005540, Counts 1-2) and one count of Violation of an Abuse Prevention Order (G. L. c. 209A, § 7; Docket No. 1723CR005540, Count 3). On January 17, 2018, at a Trial Readiness Conference, the defendant elected to assert her right to a jury trial. On January 28, 2018, the Commonwealth filed a nolle prosequi as to Count 3. The defendant was tried by a jury beginning on January 29, 2018, with Hadley, J., presiding. On the first day of trial, before the jury was empaneled, the defendant moved for relief from her election of a jury trial, seeking instead to have a jury-waived trial. The trial judge denied the defendant's motion, and the jury convicted the defendant of Count 2 after trial. The defendant timely filed a notice of appeal, and her appeal was entered in the Massachusetts Appeals Court on October 14, 2020. On June 29, 2021, the Appeals Court issued a published decision (Wolohojian, J.) reversing the defendant's conviction.

The Commonwealth is not seeking reconsideration or modification of the Appeals Court opinion pursuant to Mass. R. App. P. 27. *See* Mass. R. App. P. 27.1(b).

### **III. Statement Of The Relevant Facts**

As noted supra, the defendant's trial was held beginning on January 29, 2018. Immediately prior to jury empanelment, the defendant attempted to execute

a late waiver of her right to a jury trial and to instead proceed via a jury-waived trial. The facts relevant to that attempted waiver, and the trial judge's denial thereof, are accurately reported in the Appeals Court's decision.

The defendant timely appealed from her conviction. In her appellate brief, the defendant argued that the appropriate standard of review for the judge's error was the prejudicial error test. (D.Br. 17).<sup>2</sup> Her only further argument as to the standard of review was that the substantial risk of a miscarriage of justice standard set forth in Collado, supra, did not apply because the error in Collado was unpreserved, whereas the error in this case was clearly preserved. (D.Br. 17-19). She agreed that the error was not a structural error. (D.Br. 18). The defendant's sole argument of prejudice, however, was that the judge's erroneous ruling had deprived her of her right to make the strategic choice to proceed by way of a jury-waived trial rather than a jury trial. (D.Br. 18-19). In response, the Commonwealth argued that the trial judge did not err but that, if he did, the defendant was correct that the prejudicial error standard was the appropriate standard of review. (C.Br. 11-16). The Commonwealth argued that the improper deprivation of the right to make a strategic choice was the error itself, rather than prejudice from said error,

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<sup>2</sup> The defendant's Appeals Court brief is cited herein as "(D.Br. [page])"; the Commonwealth's is cited herein as "(C.Br. [page])."

and that the defendant had therefore failed to show prejudice and was not entitled to relief. (C.Br. 16-17).

#### **IV. Issue For Review**

Whether the appropriate standard of review for a preserved claim of erroneous denial of a request to waive the right to a jury trial is the prejudicial error standard, rather than the structural error standard used by the Appeals Court, and whether the defendant is not entitled to relief where she showed no prejudice resulting from the trial judge's error in this case.

#### **V. Appropriateness Of Further Appellate Review**

Under Mass. R. App. P. 27.1, when a party seeks Further Appellate Review, “[s]uch application shall be founded upon substantial reasons affecting the public interest or the interests of justice.” Under Mass. R. App. P. 11, which concerns requests for Direct Appellate Review, grounds for review include questions of first impression, questions of constitutional law, questions of strong public interest. In this case, despite contesting the point before the Appeals Court, the Commonwealth is not seeking review of the Appeals Court’s conclusion that the trial judge erred in denying the defendant’s request to waive her right to a jury trial. Instead, the Commonwealth is seeking review only of the Appeals Court’s conclusion that the judge’s error required a new trial. In so ruling, the Appeals Court noted that there is minimal case law on the subject of improper application

of Mass. R. Crim. P. 19. Gebo, 2020-P-1175, slip op. at \*10. Indeed, neither Pavao nor Collado, *supra*, to which the Appeals Court made reference, is directly applicable to this situation. See Collado, 426 Mass. at 678; Pavao, 423 Mass. at 803-804. Given the complete lack of directly applicable case law, this case therefore presents an issue of first impression. See Mass. R. App. P. 11; Mass. R. App. P. 27.1. Furthermore, in relying upon Pavao, the Appeals Court implicitly treated the statutory right to waive a jury trial as a constitutional right and a violation thereof as a structural error. Gebo, 2020-P-1175, slip op. at \*11-12; see G. L. c. 263, § 6; Mass. R. Crim. P. 19(a) Commonwealth v. Francis, 485 Mass. 86, 99-100 (2020); Pavao, 423 Mass. at 803-804. This Court should grant Further Appellate Review and should overrule the Appeals Court because the appropriate standard of review for a preserved claim of erroneous denial of a request to waive the right to a jury trial is the prejudicial error standard, and because the defendant is not entitled to relief where she showed no prejudice resulting from the trial judge's error in this case. See Commonwealth v. McDonagh, 480 Mass. 131, 142 (2018); Commonwealth v. Irene, 462 Mass. 600, 618 (2012); Collado, 426 Mass. at 678.

In its decision, the Appeals Court implicitly treated the trial judge's erroneous denial of the defendant's request to waive her right to a jury trial as a structural error. See Gebo, 2020-P-1175, slip op. at \*10-12. The Appeals Court did

not explicitly state this point, however, and indeed failed to state any standard of review. See id. Indeed, to the extent that a standard of review was ever discussed in this appeal, the defendant asserted that the appropriate standard of review was the prejudicial error standard, and the Commonwealth conceded, despite the minimal case law, that said standard was appropriate.<sup>3</sup> (D.Br. 17; C.Br. 16).

Insofar as the Appeals Court discussed the standard of review, the Appeals Court merely reiterated the discussions in Pavao and Collado, concluded that the error in this case was of a “substantive” type in contrast to the “procedural missteps” of Collado, and therefore reversed without further analysis. Id. at \*11-12. While this was not an explicit statement that the trial judge’s error was structural, however, such is clearly implied, as Pavao also implicitly, but not explicitly, treats the judge’s error in that case as structural. See id.; see also Pavao, 423 Mass. at 804.

Assuming that the Appeals Court treated the error as a structural error, and reversed for that reason, this Court should grant Further Appellate Review, because said conclusion was error, as the appropriate standard of review is the prejudicial error standard. See Collado, 426 Mass. at 678; Pavao, 423 Mass. at

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<sup>3</sup> Collado, supra, involved an unpreserved, and indeed invited, error as to the application of Mass. R. Crim. P. 19, and this Court accordingly deemed the standard to be whether the error created a substantial risk of a miscarriage of justice. Collado, 426 Mass. at 678. This choice of standard was explicitly based on the unpreserved nature of the error, however, and is therefore inapplicable here. See id. at 678 n.5. Neither the defendant nor the Commonwealth ever cited to Pavao, supra, much less suggested that it was in any way applicable to this case.

803-804. There are five standards of review applicable to errors on appeal: structural error; harmless error; prejudicial error; error creating a substantial likelihood of a miscarriage of justice; and error creating a substantial risk of a miscarriage of justice. See, e.g., Francis, 485 Mass. at 99-100; McDonagh, 480 Mass. at 142; Commonwealth v. Randolph, 438 Mass. 290, 296-97 (2002); Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). The prejudicial error standard of review applies to non-constitutional preserved errors, the substantial risk standard applies to unpreserved errors in non-capital cases, and the substantial likelihood standard applies to unpreserved errors in capital cases. See McDonagh, 480 Mass. at 142; Randolph, 438 Mass. at 296-97; Alphas, 430 Mass. at 13. The structural error and harmless error standards, meanwhile, are used only for preserved constitutional errors. See Francis, 485 Mass. at 99-100; Commonwealth v. Vasquez, 456 Mass. 350, 355 (2010). Most constitutional errors are subject to the harmless error test; structural errors are “‘constitutional error[s] of the first magnitude” and “‘deprive defendants of “basic protections”” that are essential for a criminal trial to ‘reliably serve its function as a vehicle for determination of guilt or innocence’ and ensure that a ‘criminal punishment may be regarded as fundamentally fair.’” Francis, 485 Mass. at 100 (modifications in original), quoting Commonwealth v. Valentin, 470 Mass. 186, 196 (2014), and Neder v. United States, 527 U.S. 1, 8-9 (1999). Where an error is structural and is properly



preserved, prejudice is conclusively presumed and reversal is required. Id. at 102, 104. Because the right to a jury-waived trial is statutory, rather than constitutional, erroneous denial of that right in favor of the constitutional right to a jury trial cannot be a structural error.<sup>4</sup> See G. L. c. 263, § 6; Mass. R. Crim. P. 19; Francis, 485 Mass. at 100. As a procedural error, the appropriate standard of review is therefore the prejudicial error standard. McDonagh, 480 Mass. at 142.

Accordingly, the Appeals Court erred in treating the error as a structural error, and its decision should therefore be overruled. See G. L. c. 263, § 6; Mass. R. Crim. P. 19; Francis, 485 Mass. at 100; McDonagh, 480 Mass. at 142.

In electing to rely on Pavao, supra, for guidance, the Appeals Court stated that it viewed only Pavao and Collado, supra, as “discussing the appropriate remedy” for the trial judge’s error. Gebo, 2020-P-1175, slip op. at \*10-11. But Pavao is entirely distinguishable, as the judge in that case erroneously allowed waiver of the right to a jury trial without conducting a colloquy as required by Ciummei v. Commonwealth, 378 Mass. 504 (1996), and therefore effectively deprived the defendant of his right to a jury trial. See Pavao, 423 Mass. at 804. As

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<sup>4</sup> Even assuming that those cases which note that structural errors are constitutional are not meant to limit structural errors to those that are constitutional in nature, no prior case has ever ruled a statutory or procedural error that did not also infringe upon a constitutional right to be a structural error, rendering the matter one of first impression that warrants guidance from this Court. See Francis, 485 Mass. at 100; Valentin, 470 Mass. at 196.

this Court noted, allowing harmless error analysis in the circumstances presented in Pavao “is inconsistent with the [constitutional] right to a jury trial altogether.” Id. While this Court never explicitly used the phrase “structural error” in Pavao, the language used is consistent with the language set forth in Francis and Neder, supra, describing structural errors. Id.; see Neder, 527 U.S. at 8-9; Francis, 485 Mass. at 100. Thus, Pavao is completely inapplicable to this case and does not, as the Appeals Court supposed, address the appropriate remedy for the trial judge’s error. See Pavao, 423 Mass. at 804. Without Pavao, the sole case to discuss the appropriate remedy for the erroneous application of Rule 19(a) appears to be Collado, which asserts the reversal for an unintentional violation thereof is warranted only if the error creates a substantial risk of a miscarriage of justice. See Collado, 426 Mass. at 678. Collado, however, is also distinguishable from this case, in that it concerns the erroneous allowance of waiver at the defendant’s request, rather than the erroneous denial of waiver when requested. See id. Collado supports the parties’ position that the appropriate standard is the prejudicial error standard, but this is, as mentioned supra, technically an issue of first impression, and this Court should therefore grant Further Appellate Review to provide guidance on this matter. See id. at 678 n.5.

Assuming the prejudicial error standard of review applies, this Court should also grant further appellate review and overrule the Appeals Court, because the

defendant failed to establish that she was prejudiced by the trial judge's error. See McDonagh, 480 Mass. at 142; Irene, 462 Mass. at 618; Collado, 426 Mass. at 678.

The defendant's sole claim of prejudice on appeal was that she was denied her statutory and procedural right to make the strategic choice between a jury trial and a jury-waived trial. (D.Br. 18-19). But denial of said statutory and procedural right is the error itself, rather than the prejudice resulting therefrom. See G. L. c. 263, § 6; Mass. R. Crim. P. 19; McDonagh, 480 Mass. at 142; Irene, 462 Mass. at 618.

Though the defendant claimed that she "decided that she would fare better before a judge" than before a jury, she failed to suggest even the barest basis for such a conclusion, much less to show that such a conclusion was reasonable. (D.Br. 19).

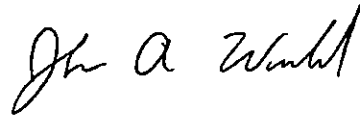
While the Appeals Court was entirely correct that the decision of whether to waive the right to a jury trial is strategic and need not be justified, the defendant's failure to cite to any fact to show actual prejudice from the denial of that strategic choice is a failure to make the showing required of her on appeal, and her conviction should have been affirmed. See McDonagh, 480 Mass. at 142; Irene, 462 Mass. at 618; Collado, 426 Mass. at 678. This Court should grant Further Appellate Review to clarify that the prejudicial error standard of review is applicable to this case and to affirm the defendant's conviction due to her failure to show prejudice resulting from the trial judge's error. See McDonagh, 480 Mass. at 142; Irene, 462 Mass. at 618; Collado, 426 Mass. at 678.

## **VI. Conclusion**

For the foregoing reasons, the Commonwealth requests that this Honorable Court grant it Further Appellate Review of the decision of the Appeals Court in Commonwealth v. Gebo, 2020-P-1175, specifically as to the questions of the appropriate standard of review and of whether the defendant's conviction should be affirmed.

19 July 2021

Respectfully submitted,  
THE COMMONWEALTH  
ANTHONY D. GULLUNI  
District Attorney  
Hampden District



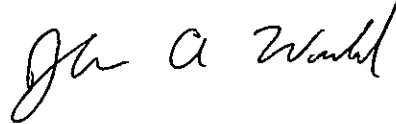
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**CERTIFICATE OF COMPLIANCE**  
**WITH MASS. R. APP. P. 16(k) & 27.1**

I hereby certify, as required by Mass. R. App. P. 16(k) and 27.1, that this application for further appellate review complies with the rules of court that pertain to the filing of applications for further appellate review. I also hereby certify that this application and petition complies with the length and typeface limitations in Rule 20(a)(4)(B) and Rule 27.1(b) because it is in Times New Roman font, size 14, and section 5 contains no more than 2,000 words, as determined using the word count function in Microsoft Word.

19 July 2021

Respectfully submitted,  
THE COMMONWEALTH  
ANTHONY D. GULLUNI  
District Attorney  
Hampden District

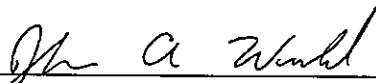


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**CERTIFICATE OF SERVICE**

I hereby certify under the pains and penalties of perjury that on this date, I served the Commonwealth's Application for Further Appellate Review on all parties by e-filing a copy upon the defendant, Elizabeth Gebo, by her attorney at:

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Date: July 19, 2021

# Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 20-P-1175

COMMONWEALTH

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vs.

ELIZABETH GEBO.

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Pending in the Springfield District

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Court for the County of Hampden

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Ordered, that the following entry be made on the docket:

Judgment vacated.

Verdict set aside.

By the Court,

Joseph F. Stanton, Clerk  
Date June 29, 2021.

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NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

20-P-1175

Appeals Court

COMMONWEALTH vs. ELIZABETH GEBQ.

No. 20-P-1175.

Hampden. April 13, 2021. - June 29, 2021.

Present: Meade, Wolohojian, & Massing, JJ.

Assault and Battery by Means of a Dangerous Weapon. Practice,  
Criminal, Trial jury-waived, Waiver of trial by jury.  
Constitutional Law, Trial jury-waived. Waiver.

Complaint received and sworn to in the Springfield Division of the District Court Department on July 26, 2017.

The case was tried before William P. Hadley, J.

Chrisoula I. Roumeliotis for the defendant.  
John A. Wendel, Assistant District Attorney, for the Commonwealth.

WOLOHOJIAN, J. The primary issue in this case is whether the judge erred in denying the defendant's motion to waive her right to a jury trial. We conclude that he did, and that the error warrants vacating the defendant's conviction.



Background. The charges stem from a domestic conflict between the seventy-five year old defendant and her seventy-six year old husband of fifty-five years. The husband reported that, on April 20, 2017, the defendant became irritated because he had left shoes on the porch of their house. An argument ensued, and the defendant swung a plastic chair and struck the husband's arm. After a jury trial, the defendant was convicted of assault and battery by means of a dangerous weapon on a person age sixty or over, G. L. c. 265, § 15A (a).<sup>1</sup>

A judge conducted a trial readiness conference approximately two weeks before the scheduled trial date. During the conference, the judge inquired whether the case would be tried to a jury. See Dist./Mun. Cts. R. Crim. P. 4 (e) (1996).<sup>2</sup> Defense counsel responded, "As of this point, yes." The judge replied, "Okay. Be subject to a motion when it's called for

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<sup>1</sup> The husband also reported that the defendant hit him on the head with a ladle. However, the defendant was acquitted of the separate charge of assault and battery by means of a dangerous weapon based on the ladle. In addition, the Commonwealth filed a nolle prosequi on a charge of violating a G. L. c. 209A abuse prevention order.

<sup>2</sup> "When the pretrial conference report is submitted, the court shall examine it for completeness, shall rule on any disputed discovery issues, and, unless discovery compliance is still pending, shall inquire if the defendant waives the right to jury trial." Dist./Mun. Cts. R. Crim. P. 4 (e).

trial next week or in the future." There was no further discussion of the topic during the conference.

The parties next appeared for trial before the trial judge, who was not the same judge who had conducted the trial readiness conference. As soon as the clerk called the case, the clerk informed the judge that the defendant had filed a rule 19 (a) motion for relief from election of jury trial.<sup>3</sup> The following exchange then took place:

The court: "Okay, and [the defendant] elected a jury trial previously?"

Defense counsel: "She had previously, Judge."

The court: "So what's the basis for waiving that at this point?"

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<sup>3</sup> As required by Mass. R. Crim. P. 19 (a), 378 Mass. 888 (1979), and Dist./Mun. Cts. R. Crim. P. 4 (e), the motion was made on a preprinted form of the trial court department, and it was accompanied by a waiver of jury trial form and defense counsel's certificate. The preprinted motion contained a list of possible bases for the motion. In this case, the defendant checked the box stating that "[s]pecific characteristics of this case have caused me to reconsider my original election," without giving any further explanation.

These preprinted forms, as amended, were promulgated by the District Court in response to the report and recommendations of the Supreme Judicial Court Working Group Regarding Procedures for the Waiver of Trial by Jury in the Boston Municipal Court and District Court Departments. See Memorandum from Chief Justice Paul C. Dawley (transmittal no. 1144), dated January 8, 2015; Report and Recommendations of the Supreme Judicial Court Working Group Regarding Procedures for the Waiver of Trial by Jury in the Boston Municipal Court and District Court Departments (March 28, 2013) (Working Group Report) 4.

Defense counsel: "Judge, we have consulted extensively today about the different options, and I understand we did not elect a jury waived trial on the 15th . . . I did speak with my client today again about what the different options were. I think given the facts of this case, given the time, context of this case, a jury waived trial is appropriate. I did go over the difference with my client and she believed given all the circumstances that she wanted a jury waived trial today."

The court: "Okay, well that really isn't a legitimate reason. I mean it's a legitimate reason as far as you're concerned, but lawfully under the current rules in Massachusetts there has to be a good cause and that does not amount to good cause."

Defense counsel: "I can only tell the court that I have attempted or on other occasions I have gone down to courtroom nine or courtroom 10 and been able to elect a jury waiv[ed] trial, given different circumstances so -- . . . [w]ith that understanding --"

The court: "Well, good for you. . . . My ruling is that's, that's not good cause under the standards for waiving a once elected jury trial. So that motion is denied. We have jurors and we will use them."

The prosecutor: "Judge, I would just say the Commonwealth does not object to a jury waived trial."<sup>4</sup>

The court: "I don't care. All right. I have to apply the law equally and that is not good cause. So the parties want a trial, you get a trial. It's going to be a trial in front of the jury. That is what was elected and to waive that on the day of the trial, part of the issue and I don't think it's me, but the issue of avoiding the appearance or the inkling of judge shopping, et cetera --"

Defense counsel: "And, there's no judge shopping here --"

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<sup>4</sup> Although it was not necessary in this case because the Commonwealth volunteered the information, we note that the better practice is for the judge to elicit the Commonwealth's position on the waiver before ruling. See Working Group Report, supra at 4.

The court: "It's done, it's done. I'll note your objection. I'll note the Commonwealth's objection if you want to, but we have jurors here today, it's a jury trial."

The judge then requested that twenty-five members of the jury pool be sent up to the court room. Once that occurred, the Commonwealth moved for trial. At this point, defense counsel requested a sidebar conference to inform the judge that, upon rereading rule 19, he believed that the judge had applied the incorrect standard in denying the motion to waive jury trial. Although the transcript contains gaps, it appears that the gist of defense counsel's argument was that the defendant did not have the onus of establishing good cause for the request, but rather that the judge could not deny the request without good cause to do so. The judge responded, "Okay, all right. It's on the record, still denied." The process of empanelling the jury then began, and the short trial followed.

Discussion. "The right to a jury trial is a fundamental right guaranteed to a criminal defendant in order to preserve a fair trial." Commonwealth v. Dietrich, 381 Mass. 458, 460 (1980). However, provided that the decision is made voluntarily and intelligently, a defendant may decide to waive the right to be tried before a jury. G. L. c. 263, § 6.<sup>5</sup> See Ciummei v.

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<sup>5</sup> "Any defendant in a criminal case other than a capital case, whether begun by indictment or upon complaint, may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him upon such indictment or

Commonwealth, 378 Mass. 504, 509 (1979). "That decision 'is primarily a decision regarding trial strategy'" (quotation omitted). Commonwealth v. Kopsala, 58 Mass. App. Ct. 387, 391 (2003), quoting Dietrich, 381 Mass. at 461. Although the defendant is entitled to the advice of competent counsel with respect to the decision, ultimately the decision to waive trial by jury belongs to the defendant alone. See Commonwealth v. Duarte, 477 Mass. 630, 638-639 (2017), cert. denied, 138 S. Ct. 1561 (2018). See also Jones v. Barnes, 463 U.S. 745, 751 (1983) (accused has ultimate authority to make fundamental decision whether to waive jury trial); Commonwealth v. Pavao, 423 Mass. 798, 803 (1996) (same). "In the end, the defendant must make an over-all estimate as to where he will fare better, before a judge or before a jury. If he goes to trial, he will presumably prefer to go to trial in the forum where he thinks his chances will be best." Dietrich, 381 Mass. at 461-462, quoting H. Kalven & H. Zeisel, *The American Jury* 28 (1966).

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complaint, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court." G. L. c. 263, § 6. There are, however, certain limits to this entitlement. For example, the statute does not apply to defendants facing capital charges. It also requires that all defendants charged with related offenses must make the waiver election before a jury has been empanelled in any one of their cases. G. L. c. 263, § 6.

The defendant may make his or her election to waive a jury trial at any time before the jury has been empanelled.<sup>6</sup> G. L. c. 263, § 6. See Commonwealth v. Collado, 426 Mass. 675, 677 (1998).<sup>7</sup> If the election is timely and in writing,<sup>8</sup> see Mass. R. Crim. P. 19 (a), 378 Mass. 888 (1979), then the judge is to conduct a colloquy to determine whether the waiver is voluntary and knowing. Id. See Ciummei, 378 Mass. at 509. "The colloquy provides a check that defense counsel has done his duty in discussing the choice with the defendant and that the defendant has participated in and comprehends the decision to waive the

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<sup>6</sup> Consistent with this, Dist. Ct. Supp. R. Crim. P. 10 (1987), which applies to criminal cases in Essex County as well as those in Hampden County (where this case was brought), provides that "[i]n the jury session, the defendant shall decide whether or not he or she will waive the right to jury trial no later than the commencement of trial." "[C]ommencement of trial" for these purposes should be read to refer to empanelment of the jury. This reading brings Dist. Ct. Supp. R. Crim. P. 10 in harmony with G. L. c. 263, § 6, and Mass. R. Crim. P. 19 (a). It also is consistent with the rule that "[i]n the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." Lupi v. Commonwealth, 434 Mass. 1018, 1018 (2001), quoting Serfass v. United States, 420 U.S. 377, 388 (1975).

<sup>7</sup> If the case is in the Boston Municipal Court or, as it was here, in the District Court, "consent to said waiver shall not be denied . . . if the waiver is filed before the case is transferred for jury trial to the appropriate jury session." G. L. c. 263, § 6. Because this case had been transferred to a jury session by the time the defendant filed her motion, it did not fall within this provision of the statute.

<sup>8</sup> In the District Court, the written waiver must be on a preprinted form, and be accompanied by a certificate of counsel. See G. L. c. 218, § 26A; Dist./Mun. Cts. R. Crim. P. 4 (e).

jury." Pavao, 423 Mass. at 804. Among other things, "[t]he judge should make sure that the defendant has conferred with his counsel about the waiver, and that he has not been pressured or cajoled and is not intoxicated or otherwise rendered incapable of rational judgment." Ciummei, 378 Mass. at 510. Commonwealth v. Hernandez, 42 Mass. App. Ct. 780, 784 (1997). But the judge should not inquire into the reasons for the defendant's tactical decision to waive a jury. "It is not the purpose of the colloquy to probe the defendant's understanding of the strength or weakness of the Commonwealth's case or the reasons why the defendant made the tactical decision to waive the jury." Kopsala, 58 Mass. App. Ct. at 391. Nor, as the judge here mistakenly thought, does the defendant need to show good cause for the choice. The focus of the judge's inquiry is only to determine whether the waiver is knowing and voluntary.

This is not to say that the judge is required in all circumstances to accept a defendant's waiver. A judge "may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record." Mass. R. Crim. P. 19 (a). In Commonwealth v. Collins, 11 Mass. App. Ct. 126 (1981), where we reversed the convictions on other grounds, we stated that the judge did not err in denying the defendant's motion to waive a jury trial given the "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." Id. at 141. In that circumstance -- where there was an apparent risk that the waiver would unfairly prejudice the defendant -- we concluded that the trial judge did not err in denying the defendant's waiver.

No such circumstance is presented here. Instead, the judge's stated reason for denying the waiver was to avoid "the appearance or the inkling of judge shopping."<sup>9</sup> "Judge shopping" is commonly understood to refer to the use of litigation tactics that are designed to steer a case towards a different judge who is perceived to be more favorable to one's cause. See

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<sup>9</sup> The judge may have used the term "judge shopping" to mean that the defendant was choosing to waive trial by jury because of the identity of the trial judge. Although neither party has cited to it, we recognize that the Working Group Report, supra at 35, suggests that "a waiver of trial by jury should not be permitted when it appears that the basis is the identity of the particular judge who would try the case." However, that sentence should not be read to mean that a defendant can waive the right to trial by jury only when he or she remains in a state of ignorance as to who the trial judge might be. Not only would such a reading be impracticable, its application would run afoul of G. L. c. 263, § 6, which, as we have noted above, permits waiver up until a jury has been empanelled. Similarly, consistent with the statute, the statement cannot be read to curtail the defendant's ability to make a tactical decision as to whether the case would be better tried before the current judge rather than a jury. Instead, that portion of the report should be understood to refer to judge shopping as we have described it here, that is, when it appears that the defendant has manipulated the process to get to a particular judge.



Commonwealth v. Pagan, 445 Mass. 315, 321 (2005); Demoulas v. Demoulas, 432 Mass. 43, 53 (2000); Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1, 15 (2013). The decision to have one's case decided by a judge rather than by a jury -- standing alone (as it does here) -- is not judge shopping. There is no suggestion in the record that the defendant's waiver here would have caused the case to be transferred to another judge, let alone to a specific judge the defendant preferred.<sup>10</sup> Nor is there anything in the record to suggest that the defendant steered the case to this particular trial judge. Instead, the record merely shows that the defendant sought to waive trial by jury on the first day of trial, with a judge she had done nothing in particular to get her case in front of. Such a scenario does not constitute good cause to reject a waiver of jury trial.

In short, the judge erred in denying the defendant's motion to waive trial by jury in the absence of good cause to reject the waiver. This leads us to the question of the appropriate remedy for the error. Cases involving errors arising from jury waivers are rare, and we have found only two cases discussing the appropriate remedy. In Pavao, the Supreme Judicial Court

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<sup>10</sup> The Commonwealth confirmed at oral argument that the defendant's waiver would not have caused the case to be decided by a different judge.

concluded that the failure to conduct a jury-waiver colloquy mandated reversal and that a harmless error analysis was inappropriate. The court stated that "the failure of the judge to conduct a colloquy cannot be overcome by the claim that the error was harmless where in a particular case there can be little doubt that a jury would have reached the same conclusion as the judge." Pavao, 423 Mass. at 804. In Collado, the trial judge erroneously allowed the defendant's motion to waive a jury trial, even though it violated rule 19 in two respects. First, the motion was untimely because it was made after the "empanelment process had begun." Collado, 426 Mass. at 676. Second, the moving defendant was not the only defendant in the case, and the codefendant did not waive his right to a jury. Apparently unaware of the requirements of G. L. c. 263, § 6, or rule 19 (a), the judge allowed the untimely motion after empanelment concluded, and conducted a hybrid bench/jury trial. Collado, 426 Mass. at 676. Considering these errors to be procedural, the court held that "an unintentional violation of either G. L. c. 263, § 6, or rule 19 (a) will result in reversal only if the defendant can show a substantial risk of a miscarriage of justice." Collado, 426 Mass. at 678.

This case falls closer to the type of substantive error in Pavao than to the procedural missteps in Collado. The defendant's motion was procedurally correct: it was timely made

on the required court form, and properly supported by counsel's certificate. See note 3, supra. The error here stems from the judge's mistaken view that the defendant was required to show good cause for her decision. In addition, the errors in Collado resulted in the erroneous allowance of the defendant's requested waiver; here the errors resulted in the erroneous denial of the defendant's motion. Thus, as in Pavao, we conclude that reversal is required.

Finally, we reject the defendant's argument that the evidence was insufficient to prove beyond a reasonable doubt that the chair as used was a dangerous weapon. Viewed in the "light most favorable to the Commonwealth," Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence permitted the jury to find that the defendant swung a plastic chair and struck her husband on the arm, "opened up" his left wrist, and caused an abrasion measuring approximately one inch by two and one-half inches. The injury bled profusely because the husband was on blood-thinning medication, and took more than ten days to heal. Considering the "nature and specific features of the object," "the circumstances surrounding the assault and the use of the object, and the manner in which it was handled or controlled," Commonwealth v. Rosa, 94 Mass. App. Ct. 458, 464 (2018), quoting Commonwealth v. Marrero, 19 Mass. App. Ct. 921, 922 (1984), the jury could permissibly conclude that the chair,

as used, was capable of producing serious bodily injury and, as such, was dangerous. Rosa, 94 Mass. App. Ct. at 463-464.

Judgment vacated.

Verdict set aside.