SJC-13506

Commonwealth of Massachusetts
Supreme Judicial Court

COMMONWEALTH

v.

NELSON BARROS

BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES, BOSTON BAR ASSOCIATION, AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF MR. BARROS & REVERSAL

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Corporate Disclosure Statement

Pursuant to Mass. R. App. P. 17(c)(1) and Supreme Judicial Court Rule 1:21, amici make the following disclosures. The Committee for Public Counsel Services (CPCS) is a statutorily-created agency established by G.L. c. 211D, § 1. The Boston Bar Association (BBA) is a bar association established almost 250 years ago and currently has more than 14,000 members. The Massachusetts Association of Criminal Defense Lawyers (MACDL) is a 501(c)(6) organization. Amici do not issue any stock or have any parent corporations, and no publicly held corporation owns stock in any amici.

Statement of Interest

CPCS is a statutorily created statewide agency established by G.L. c. 211D, §§ 1 et seq., whose responsibility is "to plan, oversee, and coordinate the delivery" of legal services to certain indigent litigants, including defendants in criminal cases and juveniles in delinquency and youthful offender proceedings. G.L. c. 211D, §§ 1, 5. CPCS's Immigration Impact Unit (IIU) provides training, support and case-specific consultation regarding the immigration consequences of criminal conduct to the approximately 3,000 staff attorneys and bar advocates representing indigent persons in Massachusetts. The IIU advises defense counsel in individual pending cases, assists them in advocating for immigration-safe dispositions and assists post-conviction counsel in evaluating the sufficiency of trial counsel's advice and advocacy. CPCS thus has a significant interest in ensuring that criminal defendants do not unknowingly waive their right to counsel, and in protecting noncitizen criminal defendants from unwittingly waiving their right to advice and advocacy by counsel to mitigate the severe immigration consequences that result from criminal convictions.

The BBA, with more than 14,000 members, traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. Its mission is to advance the highest standards of excellence for the legal profession, facilitate access to justice, foster a diverse and inclusive professional community, and serve the community at large. The BBA's interest in the case relates most strongly to the fundamental importance of access to counsel to the proper administration of justice. The complexity of the legal system that litigants confront underscores the benefits that lawyers can provide to clients, and that complexity is especially daunting—as well as fraught with hidden danger—in the dual contexts of criminal law and immigration law, as presented by the instant case.

MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

Preparation of Amicus Brief

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

Issues Presented

On October 19, 2023, this Court solicited amicus briefing on the following question:

Whether, under article 12 of the Declaration of Rights, the plea judge was obligated to conduct a colloquy with the defendant before accepting his waiver of his right to counsel prior to his guilty plea.

Amici address this issue, as well as a second:

Whether, under article 12 of the Declaration of Rights, the colloquy required with a defendant before they proceed *pro se* either to trial or to a guilty plea or admission to sufficient facts must include a statement that an attorney would provide specific advice and advocacy related to any potential immigration consequences that could result from a conviction or admission.

Summary of Argument

This Court has held that criminal defendants cannot knowingly, voluntarily, and intelligently waive the right to counsel at trial without "a subjective understanding of [that] decision and its consequences." *Commonwealth v. Barnes*, 399 Mass. 385, 391 (1987). Though there are no particular words that a judge must say to a defendant seeking to proceed to trial *pro se*, the judge must ensure that the defendant is aware of "'the seriousness of the charges, the magnitude of [the] undertaking, the availability of advisory counsel, and the disadvantages of self-representation.'" *Id.* at 391, quoting *Commonwealth v. Jackson*, 376 Mass. 790, 795 (1978). Post at pp. 16-18.

The question presented in this case is whether, under art. 12 of the Massachusetts Declaration of Rights, a judge must similarly ensure that unrepresented defendants who plead guilty or admit to sufficient facts understand the gravity of their situation and the perils of self-representation. And the answer must be yes.

Defendants are entitled under art. 12 to be heard in their defense by counsel at their election at every critical stage of the proceedings, including a hearing on a tender of plea. Post at p. 16. The work that defense attorneys do matters not only at trial but also in the vastly greater number of cases that result in pleas: before a defendant pleads guilty (or admits to sufficient facts), a competent defense attorney will do considerable work both to accurately advise the client about whether it makes sense to plead rather than go to trial, post at pp. 11-14, and then, if a decision is made to resolve the case with a plea, to obtain the best possible outcome for the client, post at pp. 14-16. Much of that work involves consideration and analysis of legal principles and defenses, statutory concerns, and consequences of conviction that are almost certain to be unknown to an uncounseled lay defendant, post at pp. 13-14. The danger of self-representation is thus as great at a plea hearing as at a trial—but it is likely less obvious to an untrained defendant. Requiring a judge to inform the defendant that there are perils involved in undertaking a *pro se* plea or admission imposes no great burden on the courts and is necessary to protect the right to counsel guaranteed by art. 12. Post at pp. 18-23.

Moreover, whether a *pro se* defendant resolves a case with a trial or a plea, the judge must inform them that the right to counsel includes, for noncitizens, the right to specific advice and advocacy related to the immigration consequences of the case. Post at pp. 23-26. Since the Supreme Court's landmark decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), this Court has repeatedly emphasized the duty imposed on criminal defense attorneys by the Sixth Amendment and particularly by art. 12 to learn the immigration status of criminal defense clients, understand how the charges against them might impact that status, and engage in advocacy aimed at minimizing adverse immigration consequences, especially deportation. Post at pp. 23-24. The Court has done so out of recognition that for many noncitizen defendants, potential immigration consequences are the most important aspect of

their case. Post at pp. 25-26. A defendant cannot knowingly, intelligently, and voluntarily waive the right to counsel unless informed by a judge that the right includes a right to advice and advocacy that attempts to mitigate those immigration consequences. Post at pp. 26-27.

Argument

I. Article 12 of the Massachusetts Declaration of Rights entitles defendants intending to admit to sufficient facts or plead guilty to the same judicial warning regarding the disadvantages of self-representation that is required before a defendant proceeds to trial *pro se*.

A. Defense lawyers play an important role in criminal cases, whether or not they go to trial.

1. A defense lawyer in a criminal case does a great deal of work before advising a client about their prospects at trial.

"The role of defense counsel is a key component of our criminal justice system, as it provides the accused with an advocate skilled in the process and trained to counter the power of the prosecution." *Commonwealth v. Johnson*, 80 Mass. App. Ct. 505, 509 (2011). This is true whether or not a defendant opts to go to trial; indeed, a competent defense attorney does a great deal of work in order to effectively advise a client about whether to go to trial or attempt to negotiate a plea. See *id.* ("assistance of counsel provides criminal defendants with innumerable benefits, including pretrial preparation and investigation").

That work includes investigation (often with the aid of a professional investigator) into the facts of the case and an assessment of the credibility of the government's witnesses, an evaluation of the physical evidence, and an exploration of the possible existence of any favorable defense witnesses. See, e.g., *Commonwealth v. Baker*, 440 Mass. 519, 529 (2003) (criminal defense lawyer constitutionally obligated to conduct independent investigation). See also CPCS Assigned Counsel

Manual, Policies and Procedures, Version 1.16 (Nov. 17, 2023), 4.14-4.15 (Assigned Counsel Manual); American Bar Association, Criminal Justice Standards for the Defense Function (4th Ed., 2017), 4-3.7(b), 4-4.1 (ABA Standards).[1] A competent defense lawyer will seek preservation and discovery of any evidence that could aid the client, whether in the possession of the government or third parties, including any potentially inconsistent witness statements, any video evidence, or any biological/forensic evidence. See Assigned Counsel Manual, 4.15-4.17. See also ABA Standards 4-4.1(c). And a competent lawyer will consider whether an expert might aid the defense. See *Commonwealth v. Richards*, 485 Mass. 896, 906 (2020) ("manifestly unreasonable" for counsel not to retain expert relevant to voluntariness of defendant's statements and *Miranda* waiver). See also Assigned Counsel Manual 4.17; ABA Standard 4-4.1(d).

A lawyer preparing to advise a client about whether to proceed to trial will also conduct legal research. See *Hinton v. Alabama*, 571 U.S. 263, 274 (2004) (unreasonable for attorney to be ignorant of "point of law that is fundamental to his case" and to fail to "perform basic research on that point"). Counsel will explore the viability of potential motions to suppress physical evidence, identifications, and statements, motions to dismiss based on lack of probable cause or constitutional problems with the statute in general or its application in the case, and motions in limine to exclude particularly prejudicial evidence. See Assigned Counsel Manual

[1] A lawyer's assessment of the government's case includes consideration of whether a Commonwealth witness might assert a right not to testify, such as a spousal or Fifth Amendment privilege. The complaining witness in this case was the defendant's wife, who thus had a spousal privilege. R.A. 13-14. G.L. c. 233, § 20. While Mr. Barros, of course, had no right to insist that she exercise that privilege, a competent defense attorney could have advised him not to enter an admission to sufficient facts before it was known whether she would decline to testify. It is unclear on this record if the government's case would have been viable without her testimony; it undoubtedly would have been weakened.

at 4.15, 4.17; ABA Standards 4-4.6(a). And counsel will, of course, research possible defenses, including whether the client may have acted in self-defense, defense of another, or out of necessity or duress, whether the client lacked the requisite *mens rea* for the crime charged, whether the defendant lacked criminal responsibility, and whether the statute of limitations for the offense has run. See *Commonwealth v. Long*, 476 Mass. 526, 532 (2017) ("Trial counsel must conduct a reasonable investigation into possible defenses, even if counsel ultimately does not pursue those defenses at trial."). See also *Commonwealth v. McRae*, 54 Mass. App. Ct. 27, 29-30 (2002) (attorney ineffective for abandoning viable defense in favor of defense "premised on an incorrect view of the law").

Finally, and as discussed in greater detail in Part II of this brief, a lawyer evaluating whether to advise a client to go to trial or negotiate a plea must make a reasonable inquiry into the client's immigration status. *Commonwealth v. Lavrinenko*, 473 Mass. 42, 43 (2015). If the lawyer learns that the client is not a citizen, the lawyer must determine what the immigration consequences of a guilty plea or conviction after trial would be. See *Commonwealth v. Marinho*, 464 Mass. 115, 124-125 (2013). Given the likely importance of potential immigration consequences to the client, they may be determinative of the client's ultimate decision to go to trial or take a deal. *Commonwealth v. DeJesus*, 468 Mass. 174, 184 (2014) ("[A] noncitizen defendant confronts a very different calculus than that confronting a United States citizen. For a noncitizen defendant, preserving his 'right to remain in the United States may be more important to [him] than any jail sentence.'") (citation omitted).

Only after review of all of these complex factual and legal questions can an attorney offer competent advice to a client about whether proceeding to trial is a good idea. See *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion) ("an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his

informed opinion as to what plea should be entered"). But the uncounseled lay defendant likely will not even be aware of many of these considerations—let alone be equipped to undertake analysis of them alone.

2. *Defense lawyers have expertise in assessing plea offers and in advocating for clients at sentencing.*

Of course, the attorney's assessment of the client's prospects at trial is only part of the equation in preparing to advise the client about whether a plea makes sense; the attorney must also consider what kind of plea deal might be negotiated, and, if no deal is struck, what kind of sentence a judge is likely to impose in the absence of an agreement. Obviously, an attorney must be familiar with the potential statutory penalties for each possible conviction, including the possibility of any sentencing enhancement. See Assigned Counsel Manual at 4.31. The attorney will also consider what kind of sentence is likely to follow a plea, and how it differs from the sentence that would likely follow a guilty verdict at trial. See *id.* at 4.20; *Commonwealth v. Tirrell*, 382 Mass. 502, 510 (1981) (acknowledging "risk of a more serious sentence after a trial and conviction" rather than after a plea). In other words, the lawyer will assess what the client has to lose if convicted after trial rather than after a plea.

When a prosecutor makes a plea offer to a defendant through counsel, counsel's experience guides an assessment of whether or not the offer is a good one.[2] And a defense attorney presented with an unattractive plea offer can make a counteroffer, proposing modifications to the terms either of the sentence or of the charge or charges to be admitted. "The art of negotiation is at least as nuanced as

[2] A competent attorney who lacks sufficient experience in a particular court to have an informed view about the practices of the prosecutors and judges there will consult with more experienced attorneys to gain information. Assigned Counsel Manual at 4.4.

the art of trial advocacy." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (citation omitted). But an uncounseled lay defendant is almost certain to lack both the relevant perspective to assess a plea offer, and the confidence and knowledge to make an improved counteroffer.

Moreover, in District Court (or the Boston Municipal Court), defense counsel will be aware that if a plea agreement cannot be reached with the prosecution, the defendant has the option of submitting a proposed plea to the judge, with a recommendation for a specific disposition, and then withdrawing it if the judge expresses an intent to impose a more severe penalty. G.L. c. 278, § 18. Attorneys understand that this procedure can be an effective way to reach a favorable disposition even when the two sides cannot agree on a fair result. But though the defendant-capped plea is "an essential part of the fairness calculus in the guilty plea process," *Charbonneau v. Presiding Justice of Holyoke Div. of Dist. Court. Dept*., 473 Mass. 515, 522 (2016), it is also a right that an uncounseled lay defendant is unlikely to know they have.

Finally, competent defense counsel will identify, and attempt to mitigate, any consequences arising from a conviction or admission beyond the sentence or punishment imposed by the judge. Perhaps most critically, this includes immigration consequences, which implicate specific constitutional requirements, as discussed in the next section of the brief. *Commonwealth v. Sylvain (I)*, 466 Mass. 422, 436 (2013) (art. 12 requires defense counsel to advise on immigration consequences of conviction). Counsel for noncitizen defendants must not only advise their clients about the immigration consequences of any plea but also must attempt to negotiate an immigration-safe disposition. *Marinho*, 464 Mass. at 127-128 (defense counsel has duty to advocate for disposition that mitigates immigration consequences); Assigned Counsel Manual 4.21. And counsel must identify any collateral consequences arising from any conviction or sentence, including loss of license,

sex offender registration or the possibility of sexually dangerous person proceedings, parole or probation revocation, and civil forfeiture of property. See Assigned Counsel Manual 4.21, 4.32; ABA Standards 4-5.4, 4-5.5. Any of these consequences may be critically important to a defendant made aware of them by counsel.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Indeed, 94% of state convictions in this country are secured as the result of guilty pleas. *Id*. Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144, quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992) (emphasis original). And a criminal defense attorney's work to prepare a client and case for resolution by plea, rather than at trial, is not some side gig to their real job; it *is* their real job. A competent attorney brings a great deal of skill, nuance, and expertise to the task of ensuring that the resolution reached is optimal for the client in terms of the offense(s) of conviction, the sentence imposed, and the immigration and collateral consequences.

B. A knowing and voluntary waiver of the right to counsel cannot be made by a defendant who does not know how an attorney might be of assistance, so a judge must caution *pro se* defendants about the perils of self-representation before accepting an admission or plea.

1. *Because any waiver of the right to counsel is invalid unless it is knowing and voluntary, Massachusetts has required that a defendant proceeding to trial* pro se *be aware, among other things, of the "disadvantages of self-representation."*

"It is beyond dispute that a defendant's decision whether to plead guilty or proceed to trial is a critical stage in a criminal proceeding for which he is constitutionally entitled to the effective assistance of counsel." *Commonwealth v. Mahar*, 442 Mass. 11, 14 (2004). And a waiver of that right to counsel must be "knowing, voluntary, and intelligent to be effective." *Commonwealth v. Clemens*, 77 Mass. App. Ct.

232, 240 (2010). This Court has not yet explicitly addressed what is required under art. 12 of the Massachusetts Declaration of Rights to establish that a *pro se* defendant choosing to plead guilty or admit to sufficient facts has knowingly, voluntarily, and intelligently waived the right to counsel. But it has held, in the context of a *pro se* defendant at trial, that the defendant must be made "adequately aware of the seriousness of the charges, the magnitude of his undertaking, the availability of advisory counsel, and the disadvantages of self-representation." *Commonwealth v. Martin*, 425 Mass. 718, 720 (1997), quoting *Commonwealth v. Barnes*, 399 Mass. 385, 390-391 (1997), *Commonwealth v. Jackson*, 376 Mass. 790, 795 (1978). These requirements are consistent with, but arguably more robust than, the requirements set forth in *Faretta v. California*, 422 U.S. 806, 835 (1975) (knowing and intelligent waiver of the right to counsel requires that the defendant be made aware of the "dangers and disadvantages of self-representation").

Though our courts have not prescribed specific "questions that a judge must pose to an accused who desires to represent himself," *Martin*, 454 Mass. at 719-720, substantially more is required than merely inquiring as to whether the defendant is aware that they have a right to counsel and instead choose self-representation. See *Commonwealth v. Cote*, 74 Mass. App. Ct. 709, 712 (2009) (Lenk, J.) (vacating conviction where judge "informed the defendant of his right to counsel," but "neither advised him of the perils of self-representation nor asked any questions designed to establish that the defendant understood the implications of his choice"). For example, this Court has approved a waiver of counsel made after the judge twice explained to the defendant the "problems" and "disadvantages" associated with self-representation, inquired into his understanding of his rights, gave him an opportunity to speak to counsel about his decision, and made counsel available to him at trial (the defendant had been represented in pretrial proceedings). *Barnes*, 399 Mass. at 387, 391. See also *Commonwealth v. Lee*, 394 Mass. 209, 218-219 & n.2

(1985) (colloquy adequate which covered defendants' lack of legal training, limited education, and maximum sentence, and advised that the case was very "serious" and it was "very foolish" to proceed *pro se*; "sophistication" indicated by defendants' citation to cases establishing their right to represent themselves was relevant consideration).

2. *This Court should hold that article 12's robust protections require that the necessary colloquy before a defendant goes to trial* pro se *also applies before a defendant pleads guilty or admits to sufficient facts without counsel.*

This Court has never held that the judicial warning required before a *pro se* defendant elects to go to trial does not also apply when a *pro se* defendant pleads guilty or admits to sufficient facts.[3] As a matter of state constitutional law, it should now hold that it does apply. Given the many perils of an uncounseled guilty plea or admission, of which the *pro se* defendant may be entirely ignorant, a judge must engage in the same colloquy regarding a waiver of counsel whether a defendant is proceeding *pro se* to trial or to a plea/admission.[4]

As the Commonwealth has pointed out, the rule proposed here is not the rule under the Sixth Amendment. In *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), the Supreme Court rejected an argument that the Sixth Amendment to the United States

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[3] The Appeals Court has assumed, without explicitly deciding, that *pro se* defendants who plead guilty must also be cautioned about the perils of self-representation. See *Commonwealth v. Najjar*, 96 Mass. App. Ct. 569, 578-581 (2019) (assessing adequacy of waiver of counsel colloquy for defendant who subsequently pled guilty).

[4] The rule urged here should also apply to pleas of *nolo contendere*, which are equivalent to guilty pleas. See Cypher, 30A Massachusetts Practice, Criminal Practice and Procedure §24:15 (4th ed.)

Constitution requires a judge to inform a defendant about the dangers and disadvantages of a *pro se* guilty plea, and held instead that the federal "constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea."

But *Tovar* cannot, of course, resolve the state constitutional question at issue here: whether, before a waiver of counsel can be considered knowing, voluntary, and intelligent within the meaning of art. 12 of the Massachusetts Declaration of Rights, a judge must inform a defendant that it is perilous to proceed *pro se*. Our system of judicial federalism requires this Court to undertake an independent analysis of the meaning of art. 12's promise that "every subject shall have a right . . . to be fully heard in his defense by . . . his council at his election." "Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 328 (2003), quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995). See Kafker, State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval, 49 Hastings Const. L. Q. 115, 135-36 (2022).

And there is good reason to do so here. First, there is no question that art. 12 is more robust than the Sixth Amendment in defending the rights of the accused. See, e.g., *Commonwealth v. Johnson*, 417 Mass. 498, 503 (1994) ("Unlike the Sixth Amendment," art. 12's face-to-face confrontation right is "indispensable"). This Court has held that the right to counsel provision of art. 12 is stronger than the Sixth Amendment's. See *Commonwealth v. Stote*, 456 Mass. 213, 217 & n. 8 (2010) (art. 12 "provides broader protection than the Sixth Amendment to the United States Constitution" in entitling to reversal, without any showing of prejudice, a

defendant whose right to counsel was impaired because his lawyer had actual conflict of interest). See also *Lavrinenko*, 473 Mass. at n. 25 (refugee defendant entitled under art. 12 to be advised by counsel of risk of deportation upon guilty plea, regardless of "whether this result is dictated by Federal constitutional law").

Second, the reasoning of *Tovar is* not persuasive, and the rule it adopts does not advance the purposes of art. 12's right to counsel guarantee. In *Tovar,* the Supreme Court reiterated prior case law "describ[ing] a 'pragmatic approach to the waiver question' . . . that asks 'what purpose a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage,' in order 'to determine . . . . the type of warnings and procedures'" required for a valid waiver. 541 U.S. at 90, quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). That framework is essentially unobjectionable.[5] But the Court subsequently concluded that at a guilty plea hearing—at least for a charge as "straightforward" as operating under the influence of alcohol, the crime to which Mr. Tovar pleaded guilty, 541 U.S. at 93—a judge need do no more than simply inform a defendant of the right to counsel. That conclusion is entirely at odds with our state constitutional requirement that a waiver of that right must be knowing and voluntary.

Given the many complex considerations that inform both a counseled decision about whether to plead guilty or go to trial, see *supra* Part I.A.1., and the effective negotiation of a favorable plea deal, see *supra* Part I.A.2., it can be just as perilous to proceed *pro se* at a plea hearing as it as at trial. Cf. *Brady v. United States*, 397 U.S. 742, 748 n. 6 (1970) ("an intelligent assessment of the relative advantages of

[5] However, too narrow a focus on "the particular stage of the proceeding" is not appropriate where, as here, the defendant lacks counsel *throughout* the proceedings, culminating in a tender of plea hearing.

pleading guilty is frequently impossible without the assistance of an attorney"). But absent a judicial warning, the dangers of pleading guilty without counsel are not nearly as obvious as the dangers of self-representation at trial. Cf. *Patterson*, 487 U.S. at 299-300 ("more searching" waiver inquiry required for *pro se* defendant at trial than during postindictment questioning because "dangers and disadvantages of self-representation" at the trial stage are "less substantial and more obvious"). A defendant who believes the Commonwealth is likely to be able to present the evidence alleged in a complaint or indictment may be under the false impression that there is nothing an attorney could do. Without counsel, that same defendant may also fail to appreciate all of the consequences of a guilty plea or admission to sufficient facts.

And additional concerns are presented for a defendant, like Mr. Barros, who decides not to plead guilty but to admit to sufficient facts. Though a continuance without a finding (CWOF) is, of course, a more favorable disposition than a guilty plea, it may also be a trap for the unwary. Given the promise of dismissal at the conclusion of a successful probation period, an unrepresented defendant is likely not to understand that, for immigration purposes, a CWOF constitutes a conviction, even though it is not a conviction under Massachusetts law. See *Commonwealth v. Villalobos*, 437 Mass. 797, 802-803 (2002). The same defendant may also fail to appreciate that if they are found to have violated the terms of their probation, the CWOF can be revoked and a guilty finding and jail sentence imposed, without an opportunity to contest the Commonwealth's evidence. See *Commonwealth v. Tim T.*, 437 Mass. 592, 596 (2002).

The text of art. 12 emphasizes—in contrast to the Sixth Amendment—that the right to counsel applies "at [the defendant's] election." But a defendant cannot meaningfully elect to forgo counsel if they have not been advised of the dangers and disadvantages of doing so—defendants do not know what they do not know.

And it bears mention that a *pro se* defendant who pleads guilty, or admits to sufficient facts, may well speak to only one attorney during the course of the case: the prosecutor. That, of course, is no substitute for the right to counsel that art. 12 provides. Cf. *Von Moltke*, 332 U.S. at 725 ("The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be."). Some help from the judge is required to make the waiver knowing, intelligent, and voluntary.

An explicit holding that art. 12 requires the same advisory for a defendant waiving counsel before a plea or admission as is necessary before trial would impose no heavy burden on our courts. Judges already understand what inquiry is required to ensure that a defendant is knowingly waiving the right to counsel. Indeed, given that this Court has never suggested that the same colloquy is *not* required before a waiver of counsel at a plea hearing and at a trial, it is likely that many trial judges are already following the rule amici urge here. Judges are not required to pose any particular questions in their inquiry on a waiver of counsel; they simply must do enough to be sure that the defendant is aware of "the seriousness of the charges, the magnitude of his undertaking, the availability of advisory counsel, and the disadvantages of self-representation." *Martin*, 425 Mass. at 720 (further citation omitted). This does not require much, but it does require more than merely informing the defendant of the nature of the charges, the maximum sentence, and the right to counsel.

The Supreme Court got it right more than fifty years before *Tovar*, when it recognized that a "waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." *Von Moltke*, 332 U.S. at 721. Because of the gravity of the waiver, and the very real danger that a lay defendant will simply fail to appreciate the difference that counsel could make, this Court should hold that art. 12

requires no less searching a judicial inquiry when a defendant waives counsel before a plea than before a trial.

II. Article 12 also entitles defendants intending to admit to sufficient facts or plead guilty to a judicial warning that if they are a noncitizen, a waiver of counsel includes waiver of the right to an attorney's expertise and advice about the immigration consequences of the case.

Article 12's requirement that any waiver of counsel at a tender of plea hearing be knowing and voluntary also means the judge must inform every defendant that if they are a noncitizen, the waiver includes giving up the right to an attorney's expertise and advice about the immigration consequences of the pending charges. Without this awareness, a noncitizen defendant cannot truly comprehend the magnitude of the undertaking of self-representation, the seriousness of the charges they face, or the disadvantages of proceeding *pro se*.

A. Noncitizen defendants are entitled to counsel's specific, individualized immigration advice and expertise.

In 2010, the Supreme Court of the United States held that the Sixth Amendment required criminal defense counsel to advise defendants whether a plea carries immigration consequences, and that failure to do so constituted ineffective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). Since then, this Court has affirmed the requirements under the Sixth Amendment and imposed even more robust obligations on defense attorneys under art. 12 to provide specific, individualized advice to noncitizen defendants regarding the immigration consequences of pending criminal cases, as well as a duty, when appropriate, to negotiate with prosecutors and advocate at sentencing for immigration-safe dispositions. This advice is essential for defendants when deciding whether to plead guilty or go to trial, and defense counsel's advocacy is critical to efforts toward minimizing

immigration consequences. Defense counsel thus serves a particularly vital role for noncitizen defendants in criminal cases.

In the years following *Padilla*, this Court decided a catalogue of cases related to a defense counsel's duties to provide immigration advice and assistance to noncitizen defendants. See *Commonwealth v. Clarke*, 460 Mass. 30 (2011), abrogated in part by *Chaidez v. United States*, 568 U.S. 342 (2013) (establishing a framework for applying *Padilla* in Massachusetts); *Sylvain (I)*, 466 Mass. at 435-436 (holding that the duty of defense counsel to advise noncitizen clients about the immigration consequences of their criminal cases could be given broader retroactive effect than under federal law and existed independently under art. 12); *Lavrinenko*, 473 Mass. at 43, 62-63 (holding that constitutionally effective representation requires a criminal defense attorney to make a "reasonable inquiry" into the immigration status of clients, and to provide specific advice about the possibility that a conviction could result in losing an opportunity for discretionary relief from deportation); *DeJesus*, 468 Mass. at 181-182 (recognizing that defendants are entitled to more than generalized warnings about immigration consequences); *Marinho*, 464 Mass. at 124-128 (duty of defense counsel to advise about immigration consequences required whether defendant pleads guilty or goes to trial; duty includes negotiating with prosecutor and advocating at sentencing for disposition that minimizes immigration consequences).

These cases demonstrate this Court's recognition of the importance of immigration consequences stemming from criminal cases and the critical need for noncitizen defendants to be specifically and accurately advised by defense counsel of such potential consequences.

B. A noncitizen defendant cannot understand the seriousness of the charge or the disadvantages of self-representation without being informed of their right to immigration advice and assistance by defense counsel.

As discussed above, a knowing and voluntary waiver of counsel requires a defendant to understand the seriousness of the charges and the disadvantages of self-representation. See *Commonwealth v. Means*, 454 Mass. 81, 89 (2009), quoting *Lee*, 394 Mass. at 217 ("the judge must ensure . . . that the waiver is made with a sense of the magnitude of the undertaking and the disadvantages of self-representation."); see also *Martin*, 425 Mass. at 720, quoting *Jackson*, 376 Mass. at 795 ("We must be confident that the defendant was 'adequately aware of the seriousness of the charges.'"). But a noncitizen defendant cannot comprehend the disadvantages of self-representation or the seriousness of the charges faced without being advised of the immigration consequences of a conviction. For noncitizens, awareness of the seriousness of a charge requires knowledge not only of the possible criminal penalties but also another, possibly more severe penalty: deportation.

A criminal conviction, whether the result of a plea or guilty disposition after trial, may be the sole cause of a noncitizen's deportation or ineligibility to obtain lawful immigration status. For many noncitizen defendants, the immigration consequences of a conviction or admission will be the most significant consequences. See *Padilla,* 559 U.S. at 368 (avoiding deportation may be more important than potential jail sentence for noncitizen defendant); see also *Commonwealth v. Sylvester*, 476 Mass. 1, 7 (2016) ("deportation is not collateral to the criminal justice process because of the court's deep appreciation of the seriousness of deportation for noncitizen defendants") (quotation omitted); *Marinho*, 464 Mass. at 124, quoting *Padilla*, 559 U.S. at 364 ("'deportation is an integral part—indeed, sometimes the most important part'—of the criminal process"). Deportation, as this Court has acknowledged in prior case law, is not merely relocation of the defendant to their

native country. Deportation results in family separation, uprooting entire households. It may surrender individuals to persecution and suffering. In the most severe circumstances, it can result in death. *Lavrinenko*, 473 Mass. at 53, citing *Padilla*, 559 U.S. at 370 n.11 (deportation can lead to persecution or death).

As noted, counsel has an art. 12 duty to make a reasonable inquiry about a defendant's immigration status and then provide specific, individualized advice about the potential immigration consequences of a pending case. *Lavrinenko*, 473 Mass. at 53-54. However, an unrepresented defendant will be deprived of the expert advice that could later prove to be lifesaving. It is easy to imagine that an uncounseled defendant could, in an effort to resolve a case or avoid jail time, plead guilty to, or admit to sufficient facts on, a criminal charge, without knowing that doing so will trigger deportation. Without an appropriate judicial warning that informs defendants of what advice and assistance they are waiving, and without the protection of counsel, a noncitizen defendant may unwittingly expose themselves to the potential dangers of deportation.

C. This Court should hold that art. 12's robust protections require that a judge inform every defendant that a waiver of counsel includes waiver of the right to counsel's specific immigration advice and advocacy.

In order to effectuate the two art. 12 rights just discussed—the right of noncitizen defendants to specific immigration advice and advocacy by their criminal defense counsel, and the right of every defendant to have the assistance of counsel unless they knowingly and voluntarily waive it—every defendant should be advised of the right to immigration advice prior to waiving counsel. This warning need not be extensive, and no precise words need be prescribed; a judge could effectively convey in a mere sentence that, if the defendant is not a citizen, their right to counsel includes a right to specific immigration advice and advocacy. It

thus would impose a minimal burden on our courts. But this advice must be shared with every defendant seeking to waive counsel, as judges may not ask a defendant to disclose their immigration status. G.L. c. 278, § 29D.[6]

As this Court has recognized, the possibility of deportation is an incredibly important aspect of a criminal prosecution. A defendant who is unaware that a criminal defense attorney could provide advice on whether deportation is a potential consequence and how it might be avoided cannot understand the seriousness of the charges or the disadvantages of self-representation, and as a result, cannot knowingly and intelligently waive counsel. For this reason, art. 12 requires a judge to inform a defendant seeking to waive counsel of the right to expert immigration advice and assistance, regardless of whether a case ultimately goes to trial or is resolved by a plea.

Conclusion

For the foregoing reasons, amici urge this Court to hold that art. 12 does not permit a waiver of the right to counsel by a defendant making the critically important decision to tender an admission or plea of guilty unless it is clear that the defendant understands the seriousness of that act and the disadvantages of self-representation. And this Court should also hold that defendants cannot validly waive the right to counsel before a trial or tender of plea unless advised that, for noncitizens, waiver includes a surrender of the right to an attorney's specific advice and advocacy about the immigration consequences of a criminal case.

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[6] The lack of colloquy is not remedied by the judicial warning required by G.L. c. 278, § 29D. That warning is not specific and individualized, and is only provided when a defendant tenders a plea or admission, which is entirely ineffective for a *pro se* trial defendant, and too late for the defendant tendering a plea to have received advice and assistance deciding whether to plead or go to trial. Additionally, a warning at the pleading stage does not inform a defendant of their right to assistance by counsel in negotiating a safer disposition for immigration purposes.

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Certificate of Compliance

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in 14-point Athelas font and contains 6,241 non-excluded words, as counted by the word-processing system used to prepare it.

/s/ Rebecca Kiley
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Certificate of Service

I hereby certify that I have today made service of this amicus brief by directing copies through the electronic filing service provider to Assistant District Attorney Alysia V. Sanchez of the Bristol County District Attorney's Office and to Attorney Edward Crane, counsel for Mr. Barros.

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