SJC-13506

COMMONWEALTH vs. NELSON BARROS.

Bristol. February 7, 2024. - June 3, 2024.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, & Dewar, JJ.

Constitutional Law, Plea, Assistance of counsel, Retroactivity of judicial holding. Practice, Criminal, Plea, Assistance of counsel, Waiver, Retroactivity of judicial holding. Waiver. Alien. Retroactivity of Judicial Holding.

Complaint received and sworn to in the Fall River Division of the District Court Department on December 15, 2017.

A motion to withdraw an admission to sufficient facts, filed on March 9, 2023, was considered by Kevin J. Finnerty, J.

The Supreme Judicial Court granted an application for direct appellate review.

Edward Crane for the defendant.

Alysia V. Sanchez, Assistant District Attorney, for the Commonwealth.

Rebecca Kiley & Wendy S. Wayne, Committee for Public Counsel Services, Hannah L. Kilson, & Chauncey Wood, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

DEWAR, J. Under art. 12 of the Massachusetts Declaration of Rights, a criminal defendant's waiver of the right to counsel must be made knowingly and intelligently, with "adequate[] aware[ness] of [(1)] the seriousness of the charges, [(2)] the magnitude of [the] undertaking, [(3)] the availability of advisory counsel, and [(4)] the disadvantages of self-representation." Commonwealth v. Martin, 425 Mass. 718, 720 (1997), quoting Commonwealth v. Jackson, 376 Mass. 790, 795 (1978). Today we confirm that, whenever a defendant elects to waive the right to counsel -- whether at arraignment or at a plea hearing -- a trial court judge bears the "serious and weighty responsibility" of ascertaining whether that waiver is made knowingly and intelligently. Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976), quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938). As we have long held, the inquiry required will depend on the individual defendant and the circumstances of the case, but the judge should ascertain that each element of the standard for a knowing and intelligent waiver is met. Because it bears on our assessment of the waiver of counsel in this case, today we also recognize that the significant disadvantages of self-representation pertinent to the fourth element of this standard include, for a noncitizen defendant, forgoing counsel's advice about the immigration consequences of a disposition. A trial court judge therefore should ensure a

defendant seeking to waive counsel is aware of this disadvantage of proceeding without counsel.

Applying these principles as well as the applicable standard of review, we affirm the judgment below on alternate grounds. We conclude that the defendant's waiver of counsel was invalid, in violation of his art. 12 right to counsel. While the judge alerted the defendant to the existence of the right to counsel and confirmed that the defendant wished to represent himself, the judge conducted no further inquiry to determine whether the defendant's waiver of counsel was made knowingly and intelligently at either his arraignment or his plea hearing, and nothing else in the record before us establishes that the defendant's waiver was sufficiently informed to comport with art. 12. The defendant did not, however, challenge this waiver of counsel in his first motion to withdraw his admission to sufficient facts, on which he was represented by counsel. The defendant therefore must establish a substantial risk of a miscarriage of justice in order to prevail on appeal from the trial court's denial of his second motion to withdraw his admission. Applying that standard to the record before us, we conclude that the defendant has not raised a serious doubt that

the result of the proceeding might have been different had his waiver of counsel been adequately informed.[1]

1. Background. The defendant, Nelson Barros, was born in Angola in 1973 and, amidst the civil war that began there in 1975, moved with his parents to Portugal in 1977. He subsequently moved to the United States in 2015 to reside with his now-wife and became a lawful permanent resident in 2016. In 2017, the defendant was arrested and charged with one count of assault and battery on a household member in violation of G. L. c. 265, § 13M (a), on an allegation that he punched his wife in the face.

At the defendant's arraignment the next day, the judge asked the defendant if he wished to have an attorney represent him. The following exchange between the judge and the defendant took place:

> The judge: "So do you intend to hire a lawyer, or are you asking the Court to appoint[] an attorney for you?"
>
> The defendant: "Sorry, excuse me?"
>
> The judge: "Excuse me?"
>
> The defendant: "I didn't understand."
>
> The judge: "Do you have any trouble speaking and understanding --"
>
> The defendant: "No, I understand English."

[1] We acknowledge the amicus brief of the Committee for Public Counsel Services, Boston Bar Association, and Massachusetts Association of Criminal Defense Attorneys.

> The judge: "All right. You have an option to hire an attorney on this case if you'd like.
>
> "The Court would consider appointing a lawyer for you if you cannot afford one on your own, or you can handle the case yourself without an attorney, and that's your choice."
>
> The defendant: "Myself."

The defendant then signed a form, pursuant to S.J.C. Rule 3:10, as appearing in 475 Mass. 1301 (2016), acknowledging he had waived his right to counsel. The defendant proceeded to speak to the prosecutor. After recalling the case later that day, the judge again asked the defendant if he intended to proceed without counsel. The defendant responded affirmatively, and the judge informed him that he could change his mind at any time.

At the next pretrial hearing, the prosecutor made an offer to the defendant to admit to sufficient facts in exchange for one year of probation. Once the case had been called, the judge again inquired whether the defendant was representing himself, and the defendant stated he was. Another hearing was scheduled to give the defendant time to consider the Commonwealth's offer.

At his subsequent court appearance, the defendant admitted to sufficient facts to warrant finding him guilty and was placed on one year of probation. At the start of the hearing, the judge again asked the defendant if he understood that he had a right to have an attorney, asked the defendant to confirm that he signed the waiver of counsel form, and asked the defendant

whether he still wished to "handle this without an attorney." The defendant gave brief affirmative responses to each question.

The judge then confirmed with the defendant that he understood he was giving up the right to a jury trial, outlined the rights the defendant would be forgoing by admitting to sufficient facts, and confirmed the defendant felt he had had enough time to think about his plea and "underst[oo]d the charge." At the conclusion of the colloquy leading up to the defendant's admission, the trial court judge provided the defendant with the following warning about potential immigration consequences:

> "If you're not a citizen of the United States you're hereby advised of the acceptance by this Court of your admission of sufficient facts or plea of guilty may have the consequences of deportation and exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States and that the offenses would have presumptively mandate [sic] removal from the U.S., and [F]ederal officials sought your removal [sic], it is practically inevitable that this plea would result in your deportation, exclusion from admission, or denial of naturalization."

The defendant responded that he understood the warning. The judge accepted the defendant's admission, and the case was continued without a finding. One year later, the defendant completed his probation, and the charge was dismissed.

In 2022, the defendant was detained by Immigration and Customs Enforcement officers upon his return to the United States from a trip to visit his mother in Portugal. A notice

from the United States Department of Homeland Security declared the defendant removable for a "crime of domestic violence" under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i), due to his admission to sufficient facts to find him guilty of assault and battery on a household member.

While awaiting his hearing before the Immigration Court, the defendant, now represented by counsel, filed a motion to withdraw his plea pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The defendant argued in part that his plea was not made knowingly and voluntarily, stating in an affidavit that he "did not understand that by taking this plea, [he] would be in danger of deportation." After a hearing, the motion judge, who was not the plea judge, denied the defendant's motion to withdraw his plea.

Represented by new counsel, the defendant then filed a second motion to withdraw his plea. The second motion alleged that the defendant did not validly waive his right to counsel before his admission to sufficient facts because the judge failed to conduct a colloquy to ensure the defendant understood the consequences of forgoing representation by counsel. The motion judge denied the motion, finding that the defendant's waiver of the right to counsel was knowing and voluntary. The defendant timely appealed, and we granted his application for direct appellate review.

2. Discussion. a. Waiver of the right to counsel. "There is no question that the right to counsel in a criminal prosecution is a fundamental constitutional right" under both art. 12 of the Massachusetts Declaration of Rights and the Sixth Amendment to the United States Constitution. Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 234 (2004). This right "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson, 304 U.S. at 462-463. At the same time, criminal defendants also have a constitutional right to represent themselves. Commonwealth v. Means, 454 Mass. 81, 89 (2009), citing Faretta v. California, 422 U.S. 806, 821, 834 (1975). A defendant may therefore voluntarily elect to waive the right to counsel. Means, supra.

Because a defendant's waiver of counsel "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel," the defendant "must 'knowingly and intelligently' forgo those relinquished benefits." Faretta, 422 U.S. at 835, quoting Johnson, 304 U.S. at 464-465. While a knowing and intelligent choice to waive counsel does not require having "the skill and experience of a

lawyer," the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, supra, quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). A judge thus bears a "serious and weighty responsibility" to ensure a waiver of counsel is knowing and intelligent before accepting it. Cavanaugh, 371 Mass. at 53, quoting Johnson, supra at 465. And the United States Supreme Court has confirmed that, under the Sixth Amendment, a waiver of counsel must always be knowing and intelligent, even if the self-represented defendant ultimately enters a guilty plea rather than going to trial without the assistance of counsel. Iowa v. Tovar, 541 U.S. 77, 81 (2004).

In cases where defendants did ultimately represent themselves at a trial, we have long held that our review of a defendant's waiver must give us confidence "that the defendant was 'adequately aware of [(1)] the seriousness of the charges, [(2)] the magnitude of [the] undertaking, [(3)] the availability of advisory counsel, and [(4)] the disadvantages of self-representation.'" Martin, 425 Mass. at 720, quoting Jackson, 376 Mass. at 795. And we have recognized that meeting this standard requires a judge to conduct an appropriate inquiry before accepting a defendant's waiver of the right to counsel. Means, 454 Mass. at 89-90. We have not, however, "prescribed

the questions that a judge must pose . . . nor is there any 'particular piece of information that is essential to an effective waiver of counsel.'" Martin, supra at 719-720, quoting Commonwealth v. Barnes, 399 Mass. 385, 390 (1987). Rather, the nature and extent of the inquiry required "depends on the particular facts and circumstances of each case," including the "background, experience and conduct" of the individual defendant (citation omitted). Barnes, supra at 390-391. A defendant "should be made aware" of the consequences of choosing self-representation, if not evidently already aware. Commonwealth v. Francis, 485 Mass. 86, 95 n.4 (2020), cert. denied, 141 S. Ct. 2762 (2021), quoting Faretta, 422 U.S. at 835. On review, our "focus . . . is the defendant's subjective understanding of his decision and its consequences." Martin, supra at 720, quoting Barnes, supra at 391.

Here, we are asked whether a judge must conduct this inquiry into the defendant's understanding when a defendant seeks to waive the right to counsel at an arraignment or plea hearing, rather than on the eve of a trial.[2] We confirm that

[2] Rather than entering a guilty plea, the self-represented defendant in this case received an offer from the prosecutor for a continuation without a finding and chose to admit to sufficient facts to find him guilty. We discern no relevance to the distinction between the two ultimate dispositions for purposes of deciding whether a trial court judge may forgo ascertaining that a defendant's waiver of counsel is knowing and intelligent. For simplicity's sake, we follow the parties in

art. 12 always requires this inquiry to ensure that a defendant's waiver of counsel is knowing and intelligent, at any stage of a case.

The "right to trial counsel under art. 12 attaches at least by the time of arraignment." Lavallee, 442 Mass. at 234-235. Before a trial ever takes place, counsel provides "myriad" benefits to a defendant. Id. at 235. Counsel will investigate the case, including interviewing witnesses, reviewing and developing evidence, and identifying potential defenses and strategies. Id. See Commonwealth v. Baker, 440 Mass. 519, 529 (2003). Counsel will also conduct legal research and file motions, including those seeking to suppress evidence obtained illegally. See Commonwealth v. Comita, 441 Mass. 86, 90 (2004). Indeed, when a defendant is represented by counsel, counsel's failure to perform these tasks may amount to ineffective assistance in violation of art. 12 and the Sixth Amendment. See Lavallee, supra at 236; Comita, supra at 90-91.

A defendant is also constitutionally entitled to the effective assistance of counsel in negotiating and entering a

---

referring to a "plea" in framing the question. See E.B. Cypher, Criminal Practice and Procedure § 24:17 (4th ed. 2014) (noting that admission to sufficient facts, although "technically not called a plea" and not conviction under Massachusetts law, is "treated as a guilty plea," both with respect to colloquy judge must perform before accepting admission and under Federal immigration law).

plea if the defendant chooses not to proceed to trial. See Missouri v. Frye, 566 U.S. 134, 140 (2012); Commonwealth v. Mahar, 442 Mass. 11, 14-15 (2004). "It is standard practice that 'the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.'" Commonwealth v. Marinho, 464 Mass. 115, 127 (2013), quoting Committee for Public Counsel Services, Assigned Counsel Manual c. 4, at 46 (rev. June 2011). Depending on the particular facts and circumstances of a case, deficient performance by counsel in advising the defendant regarding a potential plea may rise to the level of a constitutional violation, including through "incorrect advice pertinent to the plea" or "the course of legal representation that preceded it with respect to other potential pleas and plea offers." Frye, supra at 141-142. See Marinho, supra at 126-127; Mahar, supra.

And, whether a defendant chooses to enter a plea or go to trial, counsel is obliged to inquire into the defendant's immigration status and to inform a noncitizen defendant of any immigration consequences that may result from a conviction, plea, or admission to sufficient facts. Marinho, 464 Mass. at 125-126. See Commonwealth v. Clarke, 460 Mass. 30, 46 (2011), abrogated in part by Chaidez v. United States, 568 U.S. 342 (2013). As we acknowledged in Clarke, Congress's 1996

amendments to our Federal immigration laws created a system in which deportation became a "near-mandatory consequence of many convictions." Clarke, supra at 41, citing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (effective Apr. 1, 1997). Consequently, we recognized, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." Clarke, supra, quoting Padilla v. Kentucky, 559 U.S. 356, 364 (2010). Potential deportation is "an integral part -- indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants." Clarke, supra, quoting Padilla, supra. We therefore require counsel to provide adequately detailed warnings to a defendant about the potential immigration consequences of a conviction, plea, or admission to sufficient facts. See Commonwealth v. DeJesus, 468 Mass. 174, 181-182 (2014) (counsel's warning that defendant was "eligible for" and would "face deportation" insufficient where guilty plea gave defendant "virtually no avenue for discretionary relief" from removal).

A defendant's waiver of the right to counsel relinquishes these benefits of effective representation by counsel even if the defendant ultimately decides to enter a plea rather than go to trial. Moreover, just as in cases that go to trial, an average defendant who intends to enter a plea may be unlikely to

know "the disadvantages of self-representation." Martin, 425 Mass. at 720, quoting Jackson, 376 Mass. at 795. For example, a defendant may be unaware that counsel could advise the defendant regarding potential favorable alternative dispositions. See, e.g., Charbonneau v. Presiding Justice of the Holyoke Div. of the Dist. Court Dep't, 473 Mass. 515, 518-519, 522 (2016) (describing procedure for defendant-capped pleas as "an essential part of the fairness calculus in the guilty plea process"). Or, as relevant here, a noncitizen defendant may be unaware that counsel would be obliged to provide the defendant with advice regarding the immigration consequences of a particular conviction or admission. See Clarke, 460 Mass. at 45-46.

Thus, a trial court judge may not forgo ascertaining that a defendant's waiver of counsel is made knowingly and intelligently at any stage of a case -- even if a defendant expresses an intent to enter a plea as opposed to going to trial. See Tovar, 541 U.S. at 81 (recognizing, in case where defendant pleaded guilty, that "[w]aiver of the right to counsel . . . must be a knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances" [quotation and citation omitted]). Whenever a defendant wishes to waive the right to counsel, a judge must ascertain that the defendant is "adequately aware of [(1)] the seriousness of the charges, [(2)]

the magnitude of [the] undertaking, [(3)] the availability of advisory counsel, and [(4)] the disadvantages of self-representation." Martin, 425 Mass. at 720, quoting Jackson, 376 Mass. at 795. The judge should therefore inquire into the defendant's understanding in each of these respects. And, as to the fourth -- that the defendant understand the significant disadvantages of proceeding without counsel -- the judge should ensure the defendant is aware that a waiver means forgoing counsel's advice concerning immigration consequences.[3]

As ever, the trial court's inquiry into whether a particular defendant's voluntary waiver of counsel is knowing and intelligent remains a fact-specific inquiry particular to the "background, experience and conduct" of the individual defendant and the circumstances of the case (citation omitted). Barnes, 399 Mass. at 391. Accordingly, for example, when a defendant waives the right to counsel and states an intention to enter a plea, it may be less pertinent for a trial court judge to ascertain at that juncture that the defendant understands "the magnitude of [the] undertaking" entailed in self-

[3] We note that, as with warnings under G. L. c. 278, § 29D, trial courts should undertake to ensure that all defendants are aware of this disadvantage, without requiring the defendant to disclose the defendant's immigration status. See id. ("The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States").

representation at a jury trial in particular. Martin, 425 Mass. at 720, quoting Barnes, supra. It will be necessary, however, for the trial court judge to ascertain that the defendant understands the "disadvantages of self-representation" in the early stages of a case and in pleading guilty or admitting to sufficient facts. Martin, supra, quoting Barnes, supra. And, on review, our focus remains "the defendant's subjective understanding of his decision and its consequences" in the particular case at hand. Martin, supra, quoting Barnes, supra.

In defending the adequacy of the waiver in this case, discussed in further detail below, the Commonwealth relies heavily on the Supreme Court's decision in Tovar, 541 U.S. at 90. Tovar presented what the Supreme Court itself characterized as a "narrow[]" question: whether the Sixth Amendment requires a judge to issue "a rigid and detailed admonishment" to all pro se defendants entering a plea that their waiver of the right to counsel involves a risk both that "a viable defense will be overlooked" and that the defendant will forfeit an attorney's independent advice about the wisdom of the plea (citation omitted). Id. at 91-92. The court rejected the argument that the Sixth Amendment requires these particular admonitions in all instances. Id. at 92, 94. And, examining the facts and circumstances of the defendant's waiver of counsel, the Supreme Court concluded that he had failed to meet his burden to show he

had not intelligently waived his right to counsel. Id. at 92-93.[4]

We are not asked to adopt in this case, nor do we adopt, the uniform specific admonitions that the Supreme Court rejected under the Sixth Amendment in Tovar. Rather, we simply confirm that art. 12 always requires a judge to ascertain, before accepting a defendant's waiver of counsel, that the defendant is "adequately aware of [(1)] the seriousness of the charges, [(2)] the magnitude of [the] undertaking, [(3)] the availability of advisory counsel, and [(4)] the disadvantages of self-representation" -- whether a defendant ultimately enters a plea

[4] The Commonwealth also relies on the Supreme Court's observation in the course of these holdings in Tovar that the Sixth Amendment "require[s] less rigorous warnings" before accepting a waiver of counsel pretrial, "not because pretrial proceedings are 'less important' than trial, but because," in the court's view, "at that stage, 'the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial.'" Tovar, 541 U.S. at 90, quoting Patterson v. Illinois, 487 U.S. 285, 299 (1988). While there are disadvantages of self-representation that are distinct to the trial stage, the disadvantages in pretrial proceedings are certainly not insubstantial, and it is not apparent to us that the pretrial disadvantages are "more obvious" to an average defendant. In any case, for our art. 12 purposes, it is immaterial precisely how substantial or obvious the disadvantages may be on average, as we agree that the inquiry whether a defendant's waiver was sufficiently informed "will 'depend, in each case, upon the particular facts and circumstances surrounding that case,'" including what the record shows the defendant understood. Tovar, supra at 92, quoting Johnson, 304 U.S. at 464. Accord Martin, 425 Mass. at 720; Barnes, 399 Mass. at 390-391.

or goes to trial. Martin, 425 Mass. at 720, quoting Jackson, 376 Mass. at 795. We reiterate that the extent of the required inquiry of the defendant will depend on the particular circumstances of the defendant and the case at hand. As relevant here, for example, the judge should ensure the defendant understands that giving up the advice of counsel on immigration consequences may be a significant disadvantage of self-representation on the charges at issue. Ultimately, if the record does not demonstrate that the defendant's waiver of the right to counsel was adequately informed, we must conclude that the waiver violated the defendant's art. 12 right to counsel. See Means, 454 Mass. at 88-89.

b. Retroactivity. Having confirmed that art. 12 requires that a defendant's voluntary waiver of counsel be made knowingly and intelligently before a defendant enters a plea, we must next determine whether this holding applies retroactively to cases such as the defendant's.[5] We conclude that it does.

Under the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (2013), and its progeny, "new constitutional rules of criminal procedure will not be applicable to those cases which

[5] This issue was not raised by either party's briefing, but at oral argument we asked the parties to clarify their positions on retroactivity. After argument, the parties each submitted postargument letters, the substance of each of which is addressed infra.

have become final before the new rules are announced," while "old rule[s] appl[y] both on direct and collateral review" (citations omitted). Commonwealth v. Sylvain, 466 Mass. 422, 428 (2013), S.C., 473 Mass. 832 (2016). We have stated that, under our State Constitution, a rule will be new only "when the result is 'not dictated by precedent.'" Id. at 434, quoting Teague, supra at 301.

We agree with the defendant that the requirement we describe today is not a new rule because it is dictated by our precedent. While the Commonwealth's postargument submission argues that we would be announcing a new rule if we were to hold that art. 12 requires particular admonishments like those rejected under the Sixth Amendment in Tovar, we make no such rule today. Indeed, the Commonwealth's principal brief to this court itself recited, as applying here, the familiar waiver standard we reaffirm today, including our case law's long-standing requirement that the judge ensure that a defendant understand the disadvantages of self-representation before waiving the right to counsel. See, e.g., Commonwealth v. Najjar, 96 Mass. App. Ct. 569, 581 (2019) (likewise assessing waiver of counsel before defendant entered plea under this standard).

Because the rule we articulate is not a new rule, it applies retroactively, including to the defendant's case.

c. The defendant's case. A motion to withdraw a plea is treated as a motion for a new trial under Mass. R. Crim. P. 30 (b). Commonwealth v. Sylvester, 476 Mass. 1, 5 (2016). We "review the denial of a motion to withdraw a guilty plea to determine whether there has been a significant error of law or other abuse of discretion" (quotation and citation omitted). Id. "When, as here, the motion judge did not preside at [the plea], . . . we regard ourselves in as good a position as the motion judge to assess the . . . record." Commonwealth v. Grace, 397 Mass. 303, 307 (1986). For the reasons that follow, while we disagree with the motion judge's assessment that the record shows a constitutionally adequate waiver of counsel, we affirm the denial of the defendant's second motion for a new trial, because the defendant has failed to establish a substantial risk of a miscarriage of justice on the record before us.

The record does not leave us "confident" that this defendant knowingly and intelligently waived his constitutional right to assistance of counsel. Martin, 425 Mass. at 720. At the defendant's arraignment, the judge conducted no inquiry into the defendant's understanding of the responsibilities of representing himself or the disadvantages of forgoing an attorney. The judge did not inquire of the defendant regarding what he understood about the charge against him; what self-

representation would entail; or the advantages of the assistance of counsel, including advice regarding the immigration consequences of a disposition. Instead, the judge simply informed the defendant of the existence of the right to counsel, including appointed counsel if necessary, and, when the defendant succinctly stated he would represent himself, had him read and sign the S.J.C. Rule 3:10 waiver of counsel form without further question.[6] Similarly, at the plea hearing, the judge confirmed that the defendant knew of the existence of the right to counsel and still wished to waive counsel as stated in the form he had signed, without further discussion of the waiver. Although the judge at the conclusion of the plea colloquy provided the defendant with a warning that, while seemingly garbled on the record before us, may have alerted the defendant that his plea could carry immigration consequences, the defendant was not informed that, by waiving his right to counsel, he was forgoing the immigration advice of counsel.

Moreover, and no doubt related to the judge's failure to make inquiries to ascertain that the defendant was "mak[ing] the choice 'with eyes open,'" nothing else in the record otherwise

---

[6] The defendant's signature on the standard S.J.C. Rule 3:10 waiver of counsel form accurately attested that he had been told of the right to counsel and that the court would appoint counsel for him if he could not afford to hire his own lawyer.

suggests that the defendant waived his right to counsel knowingly and intelligently. Martin, 425 Mass. at 721. For example, the defendant did not say anything to demonstrate that he understood the advantages of counsel he was forgoing. Contrast, e.g., id. at 719-721 (finding waiver adequate where judge engaged in colloquy with defendant in which defendant stated he had thought carefully about decision, was aware of "technical rules governing the conduct of a trial," and understood he was facing serious charges and potentially lengthy prison sentence). And this defendant had no history with the criminal justice system. Contrast, e.g., Barnes, 399 Mass. at 387, 391-392 (finding waiver adequate based in part on defendant's prior experiences with criminal justice system, as well as judge's colloquy regarding disadvantages of self-representation, defendant's representation by counsel in pretrial proceedings, and availability of standby counsel at trial).

The motion judge below therefore erred in concluding that, because this defendant had not gone to trial, the record here sufficed to establish a knowing and intelligent waiver. In all cases, a judge faced with a defendant requesting to waive the right to counsel bears a "serious and weighty responsibility" to ascertain whether the waiver is knowing and intelligent. Cavanaugh, 371 Mass. at 53, quoting Johnson, 304 U.S. at 465.

Simply informing the defendant of the existence of the right to counsel without further elaboration falls far short of ensuring that the defendant is "adequately aware of [(1)] the seriousness of the charges, [(2)] the magnitude of [the] undertaking, [(3)] the availability of advisory counsel, and [(4)] the disadvantages of self-representation." Martin, 425 Mass. at 720, quoting Jackson, 376 Mass. at 795. In the absence of a record establishing that this defendant's waiver of counsel was knowing and intelligent, we conclude that the waiver was not valid under art. 12.

Ordinarily, if the record reveals a waiver of counsel was not knowing and intelligent, vacatur of the plea will be required for structural error. See Means, 454 Mass. at 88-89 (violations of right to counsel are not subject to harmless error analysis). Here, however, all parties agree that the defendant failed to raise this claim in his first motion for a new trial and thereby waived the claim. See Mass. R. Crim. P. 30 (c) (2). The defendant therefore bears the burden of establishing a substantial risk of a miscarriage of justice in order to obtain relief. See Francis, 485 Mass. at 106. In reviewing for a substantial risk of a miscarriage of justice, we determine "if we have a serious doubt whether the result . . . might have been different had the error not been made." Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass.

72 (2005), quoting Commonwealth v. LeFave, 430 Mass. 169, 174 (1999).[7]

The record in this case is insufficient to establish a substantial risk of a miscarriage of justice. The defendant has not shown how the result of this proceeding "might have been different" if the judge had taken steps to ensure his waiver of counsel was knowing and intelligent, with adequate awareness of the disadvantages of proceeding without counsel. See Azar, 435 Mass. at 687. Importantly, neither of the affidavits submitted with the defendant's two motions to withdraw his plea states that he would have actually elected to be represented by counsel if he had more fully understood the consequences of waiving his right to counsel. Nor does the defendant state that he would have rejected the Commonwealth's plea offer if he had had the benefit of counsel, including counsel's immigration-related advice regarding potential deportation to Portugal. The

[7] For the same reasons that we consider an invalid waiver of counsel to be structural error, reviewing for a substantial risk of a miscarriage of justice in this context is necessarily "a speculative inquiry into what might have occurred in an alternate universe" in which the defendant may have elected to proceed with counsel. Francis, 485 Mass. at 101, quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006). While we have not previously elaborated on how to apply the standard in circumstances like these, we need not do so here, because the defendant has plainly failed to raise "a serious doubt whether the result . . . might have been different had the error not been made." Azar, 435 Mass. at 687, quoting LeFave, 430 Mass. at 174.

defendant was charged with assault and battery on a household member, in violation of G. L. c. 265, § 13M (a), after he allegedly punched his wife in the face, and, through his negotiations with the Commonwealth, he was able to obtain an offer of a continuance without a finding with one year of probation. While the defendant now assertedly regrets the potential immigration consequences of his plea,[8] the continuance without a finding was in other respects a beneficial disposition that allowed him to avoid a conviction, and he has not presented anything to suggest that he could have obtained a more favorable result with the benefit of representation by counsel. We therefore conclude that the defendant has not met his burden to show a substantial risk of a miscarriage of justice. Because we agree that the defendant is not entitled to relief, we affirm the motion judge's denial of the defendant's second motion to withdraw his admission to sufficient facts.

3. Conclusion. Before accepting a defendant's voluntary waiver of the right to counsel at any stage of a case, art. 12 requires a judge to ascertain that the defendant is "adequately

---

[8] While the defendant's appeal in this case was pending, a Federal Immigration Court judge terminated the removal proceedings against him, after concluding that the crime of assault and battery on a household member does not categorically qualify as a crime of domestic violence under the governing Federal statute because it can be committed via an offensive touching.

aware of [(1)] the seriousness of the charges, [(2)] the magnitude of [the] undertaking, [(3)] the availability of advisory counsel, and [(4)] the disadvantages of self-representation." Martin, 425 Mass. at 720, quoting Jackson, 376 Mass. at 795. The nature and extent of the required inquiry depends on the individual defendant and all the circumstances of the case. For noncitizen defendants, the disadvantages of self-representation include forgoing counsel's advice about the immigration consequences of a disposition, and a judge should therefore ensure that a defendant is aware of this disadvantage where a defendant seeks to waive the right to counsel.

In this case, the record does not demonstrate a knowing and intelligent waiver of counsel consistent with art. 12. However, the defendant failed to challenge the validity of his waiver of counsel in his first motion to withdraw his admission to sufficient facts and therefore bears the burden of showing a substantial risk of a miscarriage of justice in order to obtain relief upon his second such motion. Because he did not meet this burden, on this alternate ground we affirm the denial of the defendant's second motion to withdraw his admission to sufficient facts.

So ordered.