CHAPTER 37

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Plea Bargaining and Guilty Pleas

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PART I: PLEA BARGAINING

§ 37.1 CONSTITUTIONALITY OF PLEA BARGAINING

Although in theory a panoply of rights exist to safeguard the trial of a criminal defendant, in practice the vast majority of defendants never go to trial. They instead engage in plea bargaining, an area with minimal court supervision or legal protection. The U.S. Supreme Court has found plea bargaining not only legitimate and constitutional,[1] but also "an essential component of the administration of justice" which is to be encouraged:[2]

> Properly administered, [plea bargains] can benefit all concerned. The defendant avoids extended pretrial anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from

[1] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 751–753 (1970).

[2] Santobello v. New York, 404 U.S. 257, 260 (1971).

risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.[3]

The mere possibility that a greater penalty will result from a jury trial than from a plea does not impermissibly burden the right to a jury trial.[4] If there is a factual basis for the plea, it is also constitutional for a defendant seeking to avoid the risk of greater punishment to plead guilty while asserting his innocence.[5]

Neither the defendant nor prosecutor have an absolute right to have a guilty plea accepted,[6] nor may the defendant force the prosecutor to engage in plea bargaining.[7]

§ 37.2 APPROPRIATE SUBJECTS FOR PLEA BARGAINING

Common subjects of a plea bargain are (1) charge reduction, (2) length of sentence, (3) jail versus probation, (4) alternative forms of custody, such as in-patient rehabilitation programs, (5) restitution and the timing of payment,[8] (6) conditions of pretrial or pre-plea recognizance (such as stay-away orders or promises concerning domicile),[9] (7) the defendant's promise to provide testimony and/or information relative to that or another case,[10] (8) disposition in other pending cases, or (9) as last resorts, an agreement "not to oppose" a defense recommendation, or an agreement that each side will make specific different recommendations. Rule 12(b)(1) provides a noninclusive list of potential subjects of agreement.

Additionally, certain cases may raise the following issues:

1. *Manner of presentation:* Both the content and tone of the prosecutor's recommendation may be important negotiating points.[11] Sometimes an agreement to

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[3] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[4] Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 619 (1982); Commonwealth v. LeRoy, 376 Mass. 243, 246 (1978) (citing Santobello v. New York, 404 U.S. 257 (1971), and Bordenkircher v. Hayes, 434 U.S. 377 (1978)); Brady v. United States, 397 U.S. 742, 751 (1970). However, in Commonwealth v. Colon-Cruz, 393 Mass. 150 (1984), it was held that because the statute permitted a death sentence only after a jury trial, the death penalty law unconstitutionally burdened the rights to a jury trial and against self-incrimination. *Id.* at 163.

[5] North Carolina v. Alford, 400 U.S. 25, 31-33 (1970).

[6] *See* Lynch v. Overholser, 369 U.S. 705, 719 (1962).

[7] Weatherford v. Bursey, 429 U.S. 545, 561 (1977); Commonwealth v. Coyne, 372 Mass. 599, 601 (1977); Commonwealth v. Smith, 384 Mass. 519, 522 (1981).

[8] *E.g.,* dismissal on payment of full restitution versus more formal probation supervision while payment proceeds over a period of time.

[9] *E.g.,* defendant's promise to live and stay out of county or out of state, which may or may not be ultimately enforceable by the court.

[10] On the perils of agreements to testify in accordance with particular prior statements, or to testify "truthfully," *see* Commonwealth v. Colon, 408 Mass. 419, 443–45 (1990); *supra* § 35.3G.

[11] *See, e.g.,* United States v. Benchimol, 471 U.S. 453, 455 (1985) (U.S. attorney did not make recommendation enthusiastically but had not promised to do so); United States v. Ramos, 810 F.2d 308, 313 (1st Cir. 1987); United States v. Riggs, 347 F.3d 17, 19 (1st Cir. 2003) (holding prosecutor's bargained-for joining of defense recommendation need not be enthusiastic, at least where such enthusiasm was not part of bargain).

present only a limited summary of facts may be warranted, especially where the defendant disagrees with certain allegations and the recitation will still establish the factual basis in a nonfraudulent way.[12]

2. *Procedural agreements:* Whether or not the case itself is resolved, it may be appropriate to bargain for procedural agreements. Any aspect of procedure might be negotiated; for example, counsel might seek:

- A guarantee of a probable-cause hearing.[13]

- A scheduling agreement: A plea agreement requires acceptance by a judge, so the scheduling of the plea may be important if it affects which judge might hear it.

3. *Third-party beneficiaries of a plea/conflicts of interest:* The client is permitted to sacrifice himself for others in a plea agreement. Thus it is proper for a prosecutor to agree to reduce charges against relatives or friends of the defendant in exchange for a plea as long as the plea is voluntary.[14]

However, the attorney must have no interests with regard to these beneficiaries. For example, it is absolutely improper for defense counsel to agree to persuade a client to agree to waive trial in order to gain a favorable resolution for another *client* of the attorney, an act that would violate the duty of undivided loyalty to a client.[15]

4. *Civil immunity for complainant or police:* The U.S. Supreme Court has upheld a dismissal of criminal charges conditioned on release of civil liability by the town and its police officers, rejecting a claim that such release-dismissal agreements are inherently coercive.[16] However, Massachusetts courts have found such agreements "improper" when not initially proposed by the defendant.[17]

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[12] If the defendant disputes the factual basis entirely, other options include the *Alford* plea, an admission to facts sufficient, and a stipulated trial. *See infra* § 37.10.

[13] Agreements of counsel "might entitle a defendant to further pursuit of a probable cause hearing which was in progress at the time an indictment was returned." Lataille v. District Court, 366 Mass. 525, 531 n.6 (1974) (citing Commonwealth v. Benton, 356 Mass. 447 (1969)).

[14] Commonwealth v. Balliro, 370 Mass. 585, 588-90 (1976) (murder plea upheld as voluntary where the agreement rested on codefendant being given more favorable treatment). *Compare* United States v. Lopez, 944 F.2d 33, 36 (1st Cir. 1991) (district court's refusal of plea proper because under Fed. R. Crim. P. 11(e), a plea agreement entailing lenity to a third party "imposes special responsibility on the district court to ascertain [the] plea's voluntariness" due to coercive potential).

[15] Mass R. Prof. C. 1.2(a), 1.3, 1.7 and former S.J.C. Rule 3:07, DR 5-105(A) and (C); DR 7-101; ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-6.2(d) (1993). *See also* Commonwealth v. Soffen, 377 Mass. 433, 436–37 (1979) (counsel must not have conflict of interest). *Cf.* Jones v. United States, 386 A.2d 308, 315–16 and n.7 (D.C. 1978), *cert. denied,* 444 U.S. 925 (1979) (may be improper for court and prosecution to accept guilty plea from three defendants with a stipulation that they would not testify on behalf of remaining codefendants). *See also* United States v. Rodriguez Rodriguez, 929 F.2d 747, 750-52 (1st Cir. 1991).

[16] Town of Newton v. Rumery, 480 U.S. 386, 393-94 (1987). The court emphasized the voluntariness of the criminal defendant's decision, pointing out that the accused was a "sophisticated businessman," not in custody, and represented by an experienced criminal lawyer.

[17] Prior to Town of Newton v. Rumery, 480 U.S. 386 (1987), the court termed such agreements "improper." Foley v. Lowell Div. of the Dist. Court, 398 Mass. 800, 804 (1986) (offered by trial judge); Enbinder v. Commonwealth, 368 Mass. 214, 220 (1975) (same). However, in Commonwealth v. Klein, 400 Mass. 309, 311-12 (1987), the court found no right to dismissal after a "c.w.o.f." that resulted from the defendant's own proposal, subsequently reneged, to refrain from civil suit against complainant store.

5. *Forfeiture or repayment:* Some cases, particularly drug distribution charges, may lead to agreements concerning collateral matters like civil forfeiture proceedings and repayment of funds expended by undercover agents.[18] Additionally, restitution to the victim is a common subject of plea bargaining;[19] in the case of misdemeanors, this may be accomplished using the statutory mechanism of an accord and satisfaction.[20]

§ 37.3 DISCUSSIONS WITH AND AUTHORIZATION BY THE CLIENT

The final decision whether to plead guilty or to engage in plea bargaining at all is the defendant's.[21] However, prior to any discussion with the defendant, a lawyer may ethically ask the prosecutor to state the Commonwealth's negotiating position for the purpose of advising the client, without implying guilt or client authorization for a plea bargain. Counsel must disclose to the client all such discussions or offers by the prosecution, even if counsel would herself reject them outright; as the Supreme Court held in 2012, failing to do so is generally a violation of counsel's 6th amendment duty to provide effective assistance of counsel.[22]

Beyond such preliminary discussions, however, any plea bargaining should occur with the client's full knowledge and consent. In the event that an informed client instructs the attorney to refrain from any plea bargaining the matter is ended, and counsel must work zealously for acquittal whatever the odds. However, she may still have a duty to make reasonable efforts to persuade the prosecution to terminate the case by dismissal or nolle prosequi.

To provide effective assistance, counsel must fully and competently advise the client during plea negotiations.[23] To ensure a fully informed decision, counsel should explain to the client:

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[18] *See, e.g.,* In re Arnett, 804 F.2d 1200, 1202 (11th Cir. 1986) (oral agreement by prosecutor to forego forfeiture proceedings against defendant's farm in exchange for plea and relinquishment of cash seized on arrest). *See also* Libretti v. United States, 516 U.S. 29, 51-52 (1995) (federal rule analogous to Mass. R. Crim. P. 12 does not require court, in plea colloquy, to establish factual basis for agreed-upon asset forfeiture).

[19] This is an appropriate consideration in sentencing. G.L. c. 258B, § 8; Commonwealth v. Nawn, 394 Mass. 1, 6 (1985). *See* discussion of restitution *infra* at § 39.9. Defendant's failure to pay restitution as agreed may result in incarceration even if the defendant lacks the ability to pay. Commonwealth v. Payne, 33 Mass. App. Ct. 553, 556–57 (1992).

[20] G.L. c. 276, § 55. *See* discussion of accord and satisfaction *infra* at § 39.5E.

[21] Jones v. Barnes, 463 U.S. 745, 751 (1983). *See* Commonwealth v. Hernandez, 63 Mass. App. Ct. 426, 431 (2005).

[22] *See* Missouri v. Frye, 566 U.S. --, -- (2012) (holding "that, as a general rule, defense counsel has the [Sixth Amendment] duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-6.2(a)(b) and Commentary (1993); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(a) (1999); Mass. R. Prof. C. 1.4 (a) (requiring that a lawyer "shall keep a client reasonably informed about the status of a matter").

[23] McMann v. Richardson, 397 U.S. 759, 770–71 (1970).

1. *The nature of plea bargaining:* Counsel should underscore that plea bargaining does not imply an admission of guilt and that conversations and disclosures by the client to defense counsel are fully confidential.[24]

2. The *maximum consequences* of a conviction, including where applicable:

a. The maximum sentence or fine permitted by the statute;

b. Any mandatory minimum;

c. Collateral consequences such as license revocation, deportation risks, or other civil disabilities;[25]

d. Enhanced penalties for recidivist convictions on similar offenses, including where applicable being subject to lifelong community parole supervision upon release from prison[26];

e. Potential liability, if any, under the Sexually Dangerous Person statute to civil commitment separate from any sentence imposed in the criminal proceeding[27];

f. Requirements, where applicable, under the Sex Registration and Reporting Law, including the nature and extent of those requirements[28];

g. Requirement, where applicable, that a DNA sample be provided for inclusion in the Massachusetts DNA database[29];

h. Parole considerations including eligibility for work release, furlough, and other correctional programs.

3. *The range of probable outcomes* from a trial and from a plea.

4. *Discussion/recommendation on plea bargain offers:* Counsel must discuss the content of any plea bargain offers,[30] and in some cases her recommendation. Where counsel believes a particular plea bargain is beneficial, she has a duty to attempt to demonstrate its wisdom to the client.[31] The following ground rules may help counsel walk the fine line between steering the client toward his "best interests" and honoring the client's right to make the decision:

a. Counsel must both be and appear to be ready to try the case regardless of counsel's belief as to the wiser course of action.

b. Counsel must communicate precisely the content of the plea offer and the fact that it still requires court approval. The prosecution cannot guarantee

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[24] Mass. R. Prof. C. 1.6(a).

[25] Collateral consequences might include prosecution by federal authorities for the same conduct underlying the state court conviction, *see* United States v. Campusano, 947 F.2d 1, 4-5 (1st Cir. 1991). *But see* Commonwealth v. Indelicato, 40 Mass. App. Ct. 944, 944-45 (1996) (counsel's misadvice that defendant's guilty plea to state misdemeanor would not expose him to federal charges as "felon" in possession of firearms did not constitute ineffective assistance of counsel; point of law was "little known" and concerns collateral consequence of plea). *See* Padilla v. Kentucky, 130 S.Ct. 1473 (2010) (Sixth Amendment right to counsel obligated defense counsel to advise the defendant that the contemplated guilty plea would expose the defendant to automatic deportation).

[26] G.L. c. 265, § 45.

[27] G.L. c. 123A, §§ 1-16.

[28] G.L. c. 6, §§ 178C – 178 P.

[29] G.L. c. 22E, § 3.

[30] Jones v. Barnes, 463 U.S. 745, 751 (1983). *See* ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-6.2(b) (1993).

[31] *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(b) (1999).

the outcome (unless the agreement involves a nolle prosequi or other concessions totally within the authority of the district attorney's office), although a judge may not impose a sentence that exceeds an agreed-upon recommendation without first allowing the defendant the opportunity to withdraw the plea.[32] A sound practice is to memorialize all plea bargain terms — and later, any client plea decisions — in letters to the client.

c. Counsel must not understate the terms of the offer nor overstate the risks of conviction after trial.[33]

d. Counsel must listen to the client. Often the client may have different values than counsel's "reasonable man"; for example, the defendant may be willing to risk jail to have his point of view aired through testimony.

§ 37.4 DISCUSSIONS WITH THE PROSECUTOR

The prosecutor has broad discretion in deciding whether to engage in plea bargaining and, if so, on what terms.[34] The defendant cannot compel the prosecutor to engage in plea bargaining,[35] or vice versa. Moreover, if the prosecutor withdraws an offer before the defendant detrimentally relies on it, it will not be enforced.[36]

§ 37.4A. ONE PROSECUTOR BINDS ANOTHER

If one prosecutor makes a promise to recommend a particular disposition of a case, then the office will be bound to follow it, whether or not the prosecutor who made the promise was acting within the scope of his authority.[37] Concomitantly, a second prosecutor is unlikely to alter the first's offer (and should not ethically be expected to). Thus it is important that serious plea discussions not take place unless counsel is fully

[32] Mass. R. Crim. P. 12(c)(2)(A), (c)(6), as amended, 399 Mass. 1215 (1987). In District Court, a judge may not impose a sentence exceeding a dispositional request made by the defendant as part of a guilty plea without first allowing the defendant to withdraw the plea, a so-called "defendant-capped" request. Mass. R. Crim. P. 12(c)(2)(B), as appearing in 442 Mass. 1511 (2004). *See* G.L. ch. 278, § 18.

[33] *See, however,* Commonwealth v. Facella, 42 Mass. App. Ct. 354, 358–60 (1996) (contingent fee agreement whereby counsel would receive fee contingent on negotiating satisfactory plea agreement, but that he would not act as trial counsel if negotiations failed, was unethical but did not constitute ineffective assistance; counsel informed court that another lawyer was ready to handle trial).

[34] *See* Commonwealth v. Latimore, 423 Mass. 129, 135–37 (1996) (prosecutor may consider impact on and desires of victim's family when deciding to support or oppose defendant's plea offer).

[35] Commonwealth v. Coyne, 372 Mass. 599, 601 (1977); Weatherford v. Bursey, 429 U.S. 545, 561 (1977); United States v. Rodriguez-Duran, 507 F.3d 749, 766 (1st Cir. 2007) (quoting *Weatherford*, *supra*). Prosecutorial cooperation has become all the more important since the S.J.C. held, in Commonwealth v. Gordon, 410 Mass. 498, 500-01 (1991), that the court cannot dismiss a charge and accept a plea to a lesser charge without either the prosecutor's consent or a legal basis for the dismissal. *See* Commonwealth v. Pelletier, 449 Mass. 392, 399 (2007) (in accepting a guilty plea, judge has no authority unilaterally to reduce the level of charge brought by prosecutor).

[36] *See infra* at § 37.6.

[37] Giglio v. United States, 405 U.S. 150, 154 (1972).

prepared to discuss his client's background, interests, needs, and capabilities, with the optimal adversary. (The two best sources of information about the policies and practices of a particular district attorney's office and/or assistant district attorney are public defenders and other criminal lawyers who practice regularly in the court.) Also, it is obviously important to settle all bargaining details directly with the prosecutor, rather than with police officials.[38]

§ 37.4B. DISCUSSIONS ARE PRIVILEGED

Statements "made in connection with, and relevant to" offers to plead guilty (i.e., plea bargaining) and withdrawn guilty pleas are not admissible in any civil or criminal proceedings against the person who made them, with the exception of perjury under oath on the record in the presence of counsel.[39]

§ 37.4C. COERCIVE TACTICS BY THE PROSECUTOR

If it chooses to negotiate, the Commonwealth essentially has a free hand, limited only by an elusive concept of "vindictiveness." It may withdraw and/or change any offer prior to the entry of the plea where there was no detrimental reliance by the defendant.[40] It may "threaten" the defendant with a more severe recommendation following a conviction at trial,[41] or the possibility of additional charges or recidivist sentencing if he refuses to plead as long as the additional charges are lawful and not

[38] Commonwealth v. Doe, 412 Mass. 815, 820-21 (1993) (cooperation in return for police promise of "credit" for productive information did not confer any specific, enforceable benefit on the defendant); Commonwealth v. Mr. M., 409 Mass. 538, 543 n.2 (1991) (leaving open whether State police officer had power to bind prosecutor in another county; "[a] defendant who wants assurances . . . should obtain [them] directly from the prosecutor, preferably with the involvement of counsel and in writing").

[39] Mass. R. Crim. P. 12(f). Commonwealth v. Wilson, 430 Mass. 440, 442–443 (1999) (defendant's statements made to any person, not just to government attorney, in course of plea negotiations must be excluded under rule 12(f)). *Contrast* Commonwealth v. Boyarsky, 452 Mass. 700, 709 (2008) (defendant's statements made to friend suggesting defendant's willingness to plead guilty held admissible). *See* Commonwealth v. Smiley, 431 Mass. 477, 482 n.3 (2000) (no "plea negotiations" within meaning of rule 12(f) when defendant's statement not in response to promises, commitments, or specific offers by Commonwealth); State v. Vargas, 618 P.2d 229, 230–31 (Ariz. 1980) (trial court erred in permitting the state to impeach defendant with document he had signed during plea discussions). However, the Supreme Court has construed the analogous federal provision, Fed. R. Crim. P. 11(e)(6), to allow a defendant to waive its protection by agreeing to use of his statements to impeach his inconsistent testimony at trial. United States v. Mezzanatto, 513 U.S. 196, 203-04 (1995) (waiver agreement enforceable absent affirmative indication that defendant's agreement was unknowing or involuntary).

[40] *See infra* § 37.6.

[41] Commonwealth v. Souza, 390 Mass. 813, 820–21 (1984) (citing Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973) ("confronting the defendant with the prospect of a more severe penalty if tried and convicted constitutes an inevitable and legitimate aspect of the plea bargaining process")); Commonwealth v. Tirrell, 382 Mass. 502, 508–10 (1981) (prospect of harsher sentence from trial was not vindictive or punitive; defendant may not withdraw plea because he was "free to accept or reject the offer").

arbitrary.[42] However, the Supreme Judicial Court has stated that it might find unlawful coercion if a prosecutor "upped the ante" during plea negotiations.[43]

§ 37.4D. STRATEGIC CONSIDERATIONS

The Commonwealth's responsiveness to a plea bargain proposal will often be a function of (1) The degree of additional effort and resources it might have to expend to exact additional punishment; (2) perceived weaknesses in the Commonwealth's case, which risk losing the certain objectives that an agreement can secure (the relative finality of a plea is often one of its most attractive aspects to both sides); and (3) closeness to trial; the only limit on when the plea bargaining process must end seems to be when the jury has returned with a verdict.[44]

These factors can usually be maximized in the defendant's favor by the following efforts:

A. Investigation and preparation are necessary to demonstrate defense strength. For example, filing pretrial motions may increase defense counsel's bargaining posture. Obviously, a favorable pretrial ruling that is not completely dispositive will still have the effect of exposing a weakness in the Commonwealth's case, but even adverse rulings lay a foundation for future appellate issues and may undermine the Commonwealth's confidence in the finality of a conviction.

Investigation is also important because there is no basis for plea bargaining until counsel has evaluated the risk of conviction in light of all *available* and *admissible* evidence in the case.[45] The client's own declaration of guilt to counsel is irrelevant to this initial assessment.[46]

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[42] *Compare* Bordenkircher v. Hayes, 434 U.S. 357, 358 & 364-65 (1978) (no vindictiveness when the prosecutor threatened a nonpleading defendant in an $88 forgery case with reindictment under a habitual offender statute, ultimately resulting in a life sentence after trial, rather than the five-year sentence offered for a plea) *with* North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969) (harsher sentence by judge after successful appeal overturned), *and* Blackledge v. Perry, 417 U.S. 21, 27-29 (1974) (prosecutor prohibited from seeking felony indictment following misdemeanant's appeal because "realistic likelihood of 'vindictiveness'" present). *See also* United States v. Goodwin, 457 U.S. 368, 380-83 (1982) (no presumption of vindictiveness where harsher charges filed after defendant claimed jury trial); Commonwealth v. McGovern, 397 Mass. 863, 865-67 (1986) (without adopting *Goodwin,* court finds no reasonable likelihood of vindictiveness when prosecutor indicted after defendant chose first-instance district court jury trial); *supra* § 24.2C (retaliation for exercising right to trial).

[43] Commonwealth v. Fanelli, 412 Mass. 497, 502–03 (1992) (citing Commonwealth v. Benton, 356 Mass. 447, 449 (1969) ("a practice of constantly raising the Commonwealth's recommendation in the course of plea discussions is coercive, and 'a dishonorable course' ")). *Compare* Commonwealth v. Tirrell, 382 Mass. 502, 512 (1981) (guilty plea valid where no detrimental reliance on prosecutor's original, "firm" offer to recommend same sentence whether defendant pleaded guilty, or sought trial; *but see* Justice Kaplan's dissenting view, that "the Commonwealth [must] take care to behave itself" 382 Mass. at 513).

[44] *Cf.* Commonwealth v. Souza, 390 Mass. 813, 820 (1984) (defendant tried to plead guilty after Commonwealth had rested and failed only because he repeatedly maintained his innocence).

[45] ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-6.1(b) (1993). *See* Commonwealth v. Caban, 48 Mass. App. Ct. 179, 182 n.2 (1999) (defense counsel must fully investigate case even if plea of guilty is contemplated).

[46] ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-4.1 and Commentary (1993).

B. Counsel should be aware of such key areas as direct and collateral penal consequences, particularly including mandatory minimums, parole eligibility, recidivist statutes, and immigration consequences; lesser included offenses to which the charge might be reduced, and other less serious offenses that might also fit the facts of the case;[47] the defendant's prior criminal record; interest the state might have in cooperation by the defendant; the proclivities of the different judges and district attorneys who might be involved; and the availability of alternative sentences.

C. Discussions should focus on meaningful, realistic objectives and avoid gamesmanship and personal confrontation.[48] It is almost always advantageous to have the prosecutor not view the case as one deserving special attention in a contest of wills.

D. Counsel should never directly involve the client in the plea bargaining or let the client be present during the plea bargaining process. The absence of the defendant makes the discussion more open and allows the attorney to establish rapport with the prosecutor in a way that leads to dispute settlement.[49]

E. If at a formalized pretrial conference or other early stage the prosecutor does not seem to be concerned with some of the complexities that might appear at trial, it is usually a good idea to avoid substantial concessions and remain in a trial posture; most prosecutors become naturally more open when they find themselves faced with the full preparation of trial. Moreover, when the offer seems too high, defense counsel can maximize flexibility by stressing the preliminary nature of the discussions, and that the client has the final word. Although the prosecutor too has the option of stiffening at the next meeting, if the prosecution's concession was based on its interests, it will usually continue to be available unless circumstances have dramatically changed.

F. It is prudent to memorialize the agreement in writing in a form acceptable to both the prosecution and the defense. At its most informal it might simply be noted on the respective folders of the prosecutor and attorney. If the case is more complex or the parties more unfamiliar with each other a confirming memorandum or formal written agreement is advisable. Whenever the agreement is conditioned on a future act or acts beyond the guilty plea itself — such as the defendant's cooperation with the state — it is critical that there be a written document specifically listing the obligations of both the defendant and the Commonwealth and signed by all parties.[50]

§ 37.5 THE JUDGE'S ROLE IN PLEA BARGAINING

§ 37.5A. JUDICIAL INVOLVEMENT GENERALLY

[47] Commonwealth v. Bennett, 52 Mass. App. Ct. 905, 906 (2001) (defendant pleading guilty and acknowledging that other charges arising out of same incident may be brought against him waives Double Jeopardy claim with respect to those charges).

[48] See AMSTERDAM, TRIAL MANUAL, § 212 (5th ed. 1988).

[49] *See e.g.,* FISHER & URY, GETTING TO YES (1986). In Commonwealth v. Fanelli, 412 Mass. 497, 500–01 (1992), the defendant argued that his exclusion from a plea bargaining lobby conference attended by defense counsel, the prosecutor, and the judge violated his constitutional right to be present and Mass. R. Crim. P. 18. Avoiding that issue, the S.J.C. indicated that the "better practice" is to record lobby conferences and to provide a copy of the recording to the defendant on request.

[50] Commonwealth v. Mr. M., 409 Mass. 538, 543 n.2 (1991) ("[a] defendant who wants assurances . . . should obtain [them] directly from the prosecutor, preferably with the involvement of counsel and in writing").

Rule 12 of the Massachusetts Rules of Criminal Procedure does not explicitly prohibit judicial involvement in plea bargaining as does its federal counterpart.[51] Indeed, the district court contingent plea procedure, under which a defendant may withdraw an admission or plea if the judge indicates he would exceed the *defendant's* proposed disposition,[52] encourages a form of plea negotiation from the bench. Nevertheless, the judge's role in *out-of-court* negotiations is limited. Massachusetts Superior Court Department Standing Order No. 2-86 gives the assignment judge "the responsibility to foster plea negotiations within constitutional parameters," while the Reporter's Notes interpret Rule 12's language to proscribe a judge's participation "'as active negotiators in pleas bargaining discussions.'"[53] The Supreme Judicial Court has affirmed that "[p]articipation by a trial judge in plea bargaining, although not proscribed in Massachusetts [as it is by Fed. R. Crim. P. 11] is discouraged."[54]

The judge's role in plea bargaining is far more restricted than the prosecutor's, chiefly because of their different roles in the criminal process. Thus, the principle of separation of powers bars the judge from allowing a defendant to plead guilty to a lesser included offense over the prosecutor's objection, unless there is sufficient legal basis for the reduction.[55] Other reasons for restricting the judge's role include:

1. While the prosecutor and the defense counsel have roughly equivalent adversarial postures, the judge controls both the actual sentencing and the conduct of trial, and the defendant may justifiably believe that his refusal to accept the judge's proposal will result in an unfair trial and an unduly harsh sentence if convicted.[56]

2. An important judicial function is to evaluate the voluntariness and factual basis of the plea, and participation in the negotiations detracts from objectivity.[57]

3. To the extent the judge makes a promise prior to the finalization of the presentence investigation report or to the complete presentation of facts, she undermines other legitimate components of the sentencing process.

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[51] *Compare* Mass. R. Crim P. 12(b) *with* Fed. R. Crim. P. 11(c).

[52] G.L. c. 278, § 18; Mass. R. Crim. P. 12(b)(2)(B). *See also supra* § 3.6, addressing district court pleas and admissions.

[53] Reporter's Notes to Mass. R. Crim. P. 12(b (quoting the SJC in Commonwealth v. Gordon, 410 Mass. 498, 501 n.3 (1991).

[54] Commonwealth v. Ravenell, 415 Mass. 191, 193 & n.1 (1993) (quoting Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 750 (1989), *habeas corpus denied sub nom.* Johnson v. Vose, 927 F.2d 10 (1st Cir. 1991), citing Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618–19 & n.7 (1982)); Commonwealth v. Bowen, 63 Mass. App. Ct. 579, 585-86 & n.5 (2005).

[55] Commonwealth v. Gordon, 410 Mass. 498, 500-01 & n.3 (1991) (judge's acceptance of plea in face of sufficient evidence warranting submission of greater charge to jury violates separation of powers under art. 30 of the Declaration of Rights; dangers of judicial participation in plea negotiations). *Compare* Commonwealth v. Pyles, 423 Mass. 717, 723-28 (1996) (judge's power to grant a continuance without a finding over the objection of the Commonwealth pursuant to defense-capped plea procedures of G.L. c. 278, § 18 does not violate separation of powers).

[56] *See* ROSSMAN, 2 CRIMINAL LAW ADVOCACY § 2.05 (1995); United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254–55 (S.D.N.Y. 1966).

[57] *See* United States v. Werker, 535 F.2d 198, 203 (2d Cir. 1976), *cert. denied,* 429 U.S. 926 (danger of judge becoming advocate for resolution he has suggested). *Cf.* Commonwealth v. DelVerde, 398 Mass. 288, 299–300 (1986) ("substituted judgment" procedure for incompetent defendant rejected in plea bargaining context, because judge cannot evaluate plea from both defense and public interest points of view).

4. Finally, judicial involvement in pretrial discussion of facts and sentences probably undercuts the "finality" goal of guilty pleas by encouraging motions for recusal and collateral attacks on the voluntariness of the plea.[58]

However, because the defendant's primary concern in any plea bargain is whether the judge will accept it, judges should be permitted at least to review and conditionally approve the agreement, if they are so inclined, *before* the defendant is compelled to go on the record with a waiver of his right to trial, jury, confrontation, and self incrimination by making an admission of guilt.[59] Although Rule 12(c)(6) permits withdrawal *following* entry of a plea when the judge will not follow the recommendation, and both G.L. c. 278, § 18 and Rule 12(c)(6) permit withdrawal of a district court admission or plea if the judge will exceed the *defense* request,[60] an earlier indication by the judge would obviate the ultimately futile formal hearing and waivers.

§ 37.5B. JUDICIAL PROMISES OR THREATS

A judge clearly oversteps proper bounds by explicitly indicating an intention to impose a more severe punishment after trial. This threatened punishment for exercises of the rights to trial and against self incrimination provides a sound basis for attacking a subsequent plea as involuntary or, if the defendant goes to trial anyway and loses, for overturning the sentence.[61] However, if the judge indicates an intention to be lenient on

[58] United States v. Werker, 535 F.2d 198, 204–05 (2d Cir.), *cert. denied,* 429 U.S. 926 (1976).

[59] Brown v. Peyton, 435 F.2d 1352, 1356 (4th Cir. 1970) (judicial participation gave the defendant "important and relevant information" to assist in plea decision).

[60] Mass. R. Crim. P. 12(c)(6), as appearing in 442 Mass. 1511 (2004). *See* Commonwealth v. Jackson, 45 Mass. App. Ct. 666, 669-70 (1998) (defendant may condition district court plea on receipt of continuance without finding, under G.L. c. 278, § 18).

[61] *See* Commonwealth v. Bowen, 63 Mass. App. Ct. 579, 584 (2005) (recognizing that plea induced by judge's stated intent to impose a specific, substantially increased sentence following conviction at trial would be "void" as coerced, citing Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618 (1982), quoting Letters v. Commonwealth, 346 Mass. 403, 405-06 (1963), but remanding for factual findings concerning the alleged judicial threat); Commonwealth v. Carter, 50 Mass. App. Ct. 902, 903 (2000) (judge may inform defendant of his options with respect to pleading guilty or going to trial, but judge's participation in plea negotiations by advising defendant he will be sentenced more harshly if convicted after trial is coercive and renders plea involuntary); United States v. Bierd, 217 F.3d 15, 20 (1st Cir. 2000) (improper under Fed. R. Crim. P. 11 for judge to threaten longer sentence if trial); Commonwealth v. Souza, 390 Mass. 813, 821–22 n.6 (1984) (dictum that due process violated if judicial threat of retaliation for going to trial); Longval v. Meachum, 693 F.2d 236, 237 (1st Cir. 1982), *cert. denied,* 460 U.S. 1098 (1983) (remanded for resentencing by different judge since first judge said if no plea he "might be disposed to impose a substantial prison sentence"); Letters v. Commonwealth, 346 Mass. 403, 404-05 (1963) (defendant entered guilty plea after judge threatened consecutive life sentences after trial but single life sentence on a plea because rape victim would not have to testify). *But see* Commonwealth v. Morse, 402 Mass. 735, 738–40 (1988) (at de novo trial after government rested, judge offered defendant bench trial sentence if he dismissed appeal, then sentenced to harsher terms although jury acquitted on three of four charges; no vindictiveness found).

See also Commonwealth v. Colon-Cruz, 393 Mass. 150, 163–172 (1984) (statute allowing death penalty only after jury verdict violates art. 12 of Declaration of Rights by burdening right to trial by jury and privilege against self-incrimination).

a guilty plea but stops short of saying what he would do after trial,[62] or if he indicates a greater posttrial sentence but in a way that can be construed as promising to reward the defendant's plea with leniency rather than to punish a choice to go to trial,[63] the courts are inclined to uphold pleas and sentences against challenges to the voluntariness or vindictiveness of the process.

§ 37.6 ENFORCEABILITY OF THE PLEA AGREEMENT

If the court accepts a plea conditioned on an agreed sentence recommendation, it is not bound to impose the recommended sentence. While Rule 12 permits the defendant to withdraw his or her plea if the court decides to impose a sentence that exceeds the agreed recommendation,[64] the Commonwealth has no similar opportunity to withdraw its agreement and seek vacation of the plea if the sentence is more lenient than that recommended.[65] This is so even if as part of the agreed recommendation the prosecution dismisses particular charges against the defendant.[66] Finally, because agreed sentence recommendations do not bind the judge at sentencing, the judge is free under Rule 29(a) to reduce a jointly recommended sentence if on further reflection the judge decides that the sentence was unjustly harsh.[67] However, while the court is not bound by a plea agreement, once the court accepts a plea conditioned on an agreement, the parties are.

The plea bargain has often been compared to an enforceable contract.[68] In the leading case of *Santobello v. New York,*[69] the prosecutor reneged on his promise to

[62] *See* Commonwealth v. White, 53 Mass. App. Ct. 142, 145 (2001); Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 749–52 (1989); Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 619-20 (1982); United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 313-14 (2d Cir. 1963) (although judge praised prosecutor's recommendation and said he might, after trial, have to send the defendant away for the rest of his life, defendant's plea held voluntary because judge's comments were fair description "essential" to an informed decision by the defendant).

[63] *See* Commonwealth v. Ravenell, 415 Mass. 191, 194–95 (1993) (where judge promised before trial to impose 8–10 years on guilty plea and 12–20 after trial, posttrial sentence of 12–20 years was not vindictive; absent evidence that judge expressed interest in avoiding trial or was displeased with defendant's decision to go to trial, his statement was as consistent with offer of leniency for pleading as with threat of punishment for going to trial, and no presumption of vindictiveness arose); Commonwealth v. Ford, 35 Mass. App. Ct. 752, 757–58 (1994) (rejecting presumption of vindictiveness in light of relevant factors: whether evidence of pressure on defendant to accept plea or of judge's displeasure in defendant's refusal; whether sentence severe in relation to authorized maximum, and severity in relation to Commonwealth's recommended sentence).

[64] *See* Mass. R. Crim. P. 12 (c)(6); § 37.7E, *infra*.

[65] *See* Commonwealth v. Dean-Ganek, 461 Mass. 305, 308-09 (2012); Commonwealth v. Rodriguez, 461 Mass. 256, 258-59 (2012). In *Dean-Ganek*, the S.J.C. made clear that even if the Commonwealth could force vacation of an accepted plea because the court intended to impose a sentence more lenient than that jointly recommended, further prosecution would be barred by double jeopardy. Dean-Ganek, 461 Mass. at 312-13.

[66] Dean-Ganek, 461 Mass. at 305-06.

[67] Rodriguez, *supra*, at 461 Mass. at 260.

[68] *See, e.g.,* Commonwealth v. Johnson, 447 Mass. 1018, 1021 (2006) (rescript opinion) (rejecting claim to enforce withdrawn plea offer for want of detrimental reliance);

offer no recommendation on a plea to a lesser included offense. The Supreme Court remanded the case with instructions that the lower court either (1) grant specific performance of the agreement with resentencing by a different judge or (2) allow the defendant to withdraw his plea and proceed to trial, stating, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[70]

In Massachusetts a plea bargain has been termed a pledge of public faith that must be enforced;[71] if a plea rests to a significant degree on a prosecutor's promise, specific performance may be the judicially preferred remedy, rather than vacating the plea.[72] The promise of one prosecutor binds the office, even if she was acting outside the scope of her authority.[73] And even if no "contract" is found, the defendant has a right to enforce prosecutorial promises where fundamental fairness requires it.[74]

Requirement of detrimental reliance: In Massachusetts courts will enforce lawful promises made by the prosecutor as long as there has been detrimental reliance by the defendant,[75] often in the form of the guilty plea itself. If the prosecutor claims to have withdrawn a plea offer *before* a guilty plea, the defendant often finds that the

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Commonwealth v. Cruz, 62 Mass. App. Ct. 610, 611 (2004); United States v. Giorgi, 840 F.2d 1022, 1025–1026 (1st Cir. 1988); United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985); Commonwealth v. Tirrell, 382 Mass. 502, 512 (1981).

[69] 404 U.S. 257 (1971).

[70] Santobello v. New York, 404 U.S. 257, 262 (1971). *See also* Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973) ("the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining").

[71] Reporter's Notes to Rule 12(b)(l); Commonwealth v. Harris, 364 Mass. 236, 238 (1973); Commonwealth v. Cruz, 62 Mass. App. Ct. 610, 612 (2004). Obviously, however, a breach by the defendant releases the prosecutor from the plea bargain. United States v. Gonzalez-Sanchez, 825 F.2d 572, 578 (1st Cir. 1987). This case also notes that where a breach by the defendant is alleged and disputed, there must be an evidentiary hearing, and the burden is on the government. *Gonzales-Sanchez, supra. See* United States v. Bermudez, 407 F.3d 536, 540-41 (1st. Cir. 2005) (same).

[72] Commonwealth v. Parzyck, 41 Mass. App. Ct. 195, 199 (1996) (where, in reliance on prosecutor's promise to recommend concurrent sentence in pending district court cases, defendant pleaded guilty in superior court, remedy for breach was specific enforcement of agreement in resentencing before different district court judge, rather than vacating superior court plea and conviction) (citing Blaikie v. District Attorney for the Suffolk Dist., 375 Mass. 613, 618 (1978)). As noted in *Parzyck,* the First Circuit favors the remedy of specific performance. *Parzyck, supra* (citing United States v. Clark, 55 F.3d 9, 14 (1st Cir. 1995)).

[73] Giglio v. United States, 405 U.S. 150, 154 (1972).

[74] *See* Commonwealth v. Mr. M., 409 Mass. 538, 542–44 (1991) (even absent enforceable "contract," if prosecution representatives "*permitted* the defendant *reasonably to believe* that his . . . cooperation . . . would lead to [leniency]" and if the defendant reasonably relied to his detriment, then fairness obliges the Commonwealth to comply) (emphases supplied); Commonwealth v. Smith, 384 Mass. 519, 522 (1981).

[75] Commonwealth v. O'Brien, 35 Mass. App. Ct. 827, 830-31 (1994) (defense must have reasonably relied on promise and have been "materially embarrassed by the promise or its breach in defending against the ultimate charges"); Commonwealth v. Benton, 356 Mass. 447, 449 (1969). But where the plea agreement was based on an erroneous probation record, a court's resentencing to comply with a second offender statute was upheld in Commonwealth v. Dunbrack, 398 Mass. 502, 505-06 (1986). *See also* Correale v. United States, 479 F.2d 944, 950 (1st Cir. 1973).

bargain is unenforceable; the courts are predisposed to find no detrimental reliance in light of the "adequate remedy of having a trial."[76] But in unusual circumstances detrimental reliance can occur before the entry of a guilty plea.[77]

Any argument to compel specific performance of a prosecutor's "agreement" that was dishonored before the guilty plea should demonstrate prejudice to the defendant and cite those cases that have recognized that the defendant can be prejudiced in such areas as trial preparation[78] or a changed position between the time of agreement and plea.[79] The argument should also rely on article 12 of the Massachusetts Constitution Declaration of Rights, because the U.S. Supreme Court virtually closed off any federal avenue of attack in *Mabry v. Johnson.*[80] Calling a plea bargain standing alone a "mere executory agreement" that is "without constitutional significance,"[81] the court refused to enforce a plea agreement that had been withdrawn by the prosecutor only *after* the defendant had communicated his acceptance of it. "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of liberty."[82]

Defendant's reasonable interpretation of terms controls: "The test as to whether there was an enforceable promise is 'whether the defendant had reasonable grounds for assuming his interpretation of the bargain' . . . and whether he relied on that interpretation to his detriment. The prosecutor's own view of his promise to the

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[76] Commonwealth v. Smith, 384 Mass. 519, 522 (1981) (no claim for specific performance because no detrimental reliance on the original offer, withdrawn by the prosecutor before contingencies fulfilled); Commonwealth v. Johnson, 447 Mass. 1018, 1021 (2006) (rescript opinion)(same); Commonwealth v. Reddy, 74 Mass. App. Ct. 304, 307 (2009) (same). *See also* Blaikie v. District Attorney for the Suffolk Dist., 375 Mass. 613, 617-18 (1978) (court rejects civil action for specific performance of alleged plea bargain, noting defense had rejected offer previously and was not adversely affected at trial); Commonwealth v. Eaton, 11 Mass. App. Ct. 732, 736 (1981) (court finds no specific promise by Commonwealth and no material change in position by defendant, because de novo trial not only expunged any errors at bench level but also gave defendant a chance to put in case); United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650, 653–54 (2d Cir. 1975), *cert denied,* 425 U.S. 951 (1976) (specific performance not mandated where no guilty plea entered, and defendant's position not adversely affected).

[77] *See* Commonwealth v. O'Brien, 35 Mass. App. Ct. 827, 829-31 (1994) (promise to keep charges within district court jurisdiction in exchange for agreement not to request clerk's hearing, but no prejudice shown); Doe v. District Attorney for the Plymouth Dist., 29 Mass. App. Ct. 671, 673–74 (1991) (government would be bound by promises of leniency if, in reliance, drug defendants had helped authorities make cases against others).

[78] Commonwealth v. Benton, 356 Mass. 447, 448-49 (1969). *See also* Cooper v. United States, 594 F.2d 12, 16-17 (4th Cir. 1979) (court on grounds of fairness may enforce plea bargain withdrawn by prosecutor even where defendant is convicted after trial) (overruled by Supreme Court in *Mabry v. Johnson*, *infra* notes 81-82 & text).

[79] Commonwealth v. Tirrell, 382 Mass. 502, 512 (1981). If the defendant has taken steps he would otherwise have avoided, such as turning state's evidence, this should also establish reliance. *Cf.* United States v. Gonzalez-Sanchez, 825 F.2d 572, 578 (1st Cir. 1987) (prosecution released from plea bargain conditioned on defendant testifying in another case because defendant's testimony not what was indicated).

[80] 467 U.S. 504 (1984).

[81] Mabry v. Johnson, 467 U.S. 504, 507 (1984).

[82] Mabry v. Johnson, 467 U.S. 504, 511 (1984). *See also* United States v. Papaleo, 853 F.2d 16, 18-19 (1st Cir. 1988).

defendant is irrelevant."[83] The government must shoulder a greater degree of responsibility for lack of clarity in a plea agreement.[84]

As noted *supra,* it is prudent to memorialize the agreement in writing.

Enforcement procedure: According to the Appeals Court, enforcement of a plea bargain must be sought as part of the underlying criminal proceeding, rather than in a separate civil action such as mandamus. In *Doe v. District Attorney for the Plymouth District,*[85] the Court described procedures for enforcing an agreement before a defendant has pleaded guilty. If the defendant has detrimentally relied on government promises which are dishonored at the pleading stage, he may seek judicial enforcement under Mass. R. Crim. P. 12 by tendering a plea in accordance with the bargain; if the government has defaulted on an agreement to reduce charges, defendant may tender the plea to reduced charges. Alternatively, defendant may move to dismiss the original charges on the ground that they violate the plea bargain. In either case, the court will hold an evidentiary hearing to determine whether the accused had reasonable grounds to rely on a bargain, and whether he relied on it to his detriment. In recognition of "the essentially contractual rights" at stake, the court may authorize civil-type discovery, including "the use of interrogatories, notices to produce documents, and depositions."[86] If the court finds that there was an agreement, the government has the burden to show that the defendant has not performed.[87] If the court finds that there was no plea bargain, or that it is unenforceable, the accused should have an opportunity to withdraw his guilty plea and go to trial.[88]

PART II: GUILTY PLEAS

§ 37.7 REQUIREMENTS FOR A GUILTY PLEA

[83] Commonwealth v. Smith, 384 Mass. 519, 522–23 (1981) (citing Blaikie v. District Attorney for the Suffolk Dist., 375 Mass. 613, 616 n.2 (1978)); Commonwealth v. Parzyck, 41 Mass. App. Ct. 195, 199 (1996); Commonwealth v. Johnson, 447 Mass. 1018, 1020 (2006) (rescript opinion); Commonwealth v. Ewe, 43 Mass. App. Ct. 901, 902 (1997) (where language of plea agreement left to prosecutors' good faith discretion the determination of whether defendant had provided substantial assistance to police, and if so, what appropriate charge reduction would be, "good faith" measured by comparison with charge concessions in similar cases and by manner in which prosecutors were able to justify decision; conviction upheld). *See also* Commonwealth v. Doe, 412 Mass. 815, 820-21 (1993) (no reasonable reliance); Commonwealth v. Mr. M., 409 Mass. 538, 542-44 (1991) (no reasonable grounds to believe that the *prosecutor*, as opposed to the State police officer, would recommend "street" sentence, but remand to determine whether fundamental fairness requires same recommendation); Doe v. District Attorney for the Plymouth Dist., 29 Mass. App. Ct. 671, 673 (1991); Commonwealth v. Reddy, 74 Mass. App. Ct. 304, 363 (2009) (no prosecutorial promise on which to rely); Commonwealth v. Alvarado, 442 Pa. 516, 522 (1971).

[84] United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988); United States v. Isom, 580 F.3d 43, 51 (1st Cir. 2009) (citing contract principles in construing terms of ambiguous plea agreement against the government).

[85] 29 Mass. App. Ct. 671 (1991).

[86] Doe v. District Attorney for Plymouth Dist., 29 Mass. App. Ct. 671, 678 (1991).

[87] Doe v. District Attorney for Plymouth Dist., 29 Mass. App. Ct. 671, 677 (1991). But these discovery methods will be "more constrained" than in civil cases, and subject to protective limits to safeguard the identity of undercover sources. *Doe, supra* at 678.

[88] Doe v. District Attorney for Plymouth Dist., 29 Mass. App. Ct. 671, 677 n.6 (1991).

(*See also supra* § 3.6, addressing district court pleas, including pleas contingent on acceptance of defendant's "request for disposition.")

Both Rule 12(a)(2) and constitutional due process require that a guilty plea be made voluntarily, with an understanding of the nature of the charge and an awareness of the consequences of the plea. Because substantial constitutional rights are being waived — the right to a jury trial, the right to confront witnesses, the privilege against self-incrimination, and the right to be convicted only by proof beyond a reasonable doubt — the court must (1) make a detailed inquiry of the defendant in open court on the record and (2) find that the defendant has made a voluntary, knowing, and intelligent waiver of these rights before a plea can be accepted.[89]

Explicit inquiries and waivers are also required for nolo contendere pleas[90] and certain admissions to sufficient facts that are equivalent to guilty pleas in their finality.[91]

§ 37.7A. RIGHT TO COUNSEL

A guilty plea is a "critical stage" that requires counsel or a valid waiver of counsel.[92] Under G.L. c. 278, § 29B, the defendant is entitled to withdraw her guilty plea before sentencing if it was entered without counsel.[93] Ineffective assistance of counsel is a frequent ground for motions seeking withdrawal of a guilty plea and is not waived by the plea.[94]

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[89] Mass. R. Crim. P. 12(a)(2), 12(c)(5) (judge must conduct hearing to determine voluntariness of plea); Commonwealth v. Furr, 454 Mass. 101, 106, 110 (2009); Commonwealth v. Foster, 368 Mass. 100, 107-08 (1975) (same); Boykin v. Alabama, 395 U.S. 238, 242 (1969) (voluntariness must be demonstrated on the record).

[90] Mass. R. Crim. P. 12(c).

[91] Mass. R. Crim. P. 12 (a)(2), as appearing in 442 Mass. 1511 (2004). *See also* Commonwealth v. Furr, 454 Mass. 101, 101 n.1 (2009) (admission to sufficient facts); Commonwealth v. Duquette, 386 Mass. 834, 841 (1982) (same); Commonwealth v. Brown, 55 Mass. App. Ct. 440, 448-49 (2002) (plea bargain via stipulated trial); Commonwealth v. Lewis, 399 Mass. 761, 762–64 (1987) (de facto guilty plea); Commonwealth v. Mahadeo, 397 Mass. 314 (1986); Commonwealth v. Mele, 20 Mass. App. Ct. 958, 959 (1985) (rescript). *But see* Commonwealth v. Babcock, 25 Mass. App. Ct. 688, 689-91 (1988) (jury waiver and stipulated evidence did not constitute de facto guilty plea on "peculiar facts" of rape case where trial on paper evidence was tactical choice). *See* full discussion *supra* § 3.6.

[92] Iowa v. Tovar, 541 U.S. 77, 81 (2004); Commonwealth v. Mahar, 442 Mass. 11, 14 (2004); Commonwealth v. Cepulonis, 9 Mass. App. Ct. 302, 304 (1980); Commonwealth v. Soffen, 377 Mass. 433, 436–37 (1979); White v. State of Maryland, 373 U.S. 59, 60 (1963). To provide effective assistance, counsel must fully and competently advise the client during plea negotiations. Missouri v. Frye, 566 U.S. --, -- (2012) (holding under Sixth Amendment that defense counsel has a duty to communicate to the defendant a formal plea offer the terms and conditions of which may be favorable to defendant); Padilla v. Kentucky, 130 S. Ct. 1473, 1481-83 (2010) (holding that at least when the deportation consequence of a conviction is "truly clear," counsel has a duty so to advise his client who is considering a guilty plea); McMann v. Richardson, 397 U.S. 759, 770–71 (1970).

[93] The Reporter's Notes to Mass. R. Crim. P. 12(c)(6) presume that this is true even if counsel had been properly waived.

[94] *See infra* § 44.4H(2)(a). *See also* Commonwealth v. Perry, 389 Mass. 464, 468 (1983). Ineffective assistance may be shown by a failure of counsel to properly consider relevant defenses, Commonwealth v. Cepulonis, 9 Mass. App. Ct. 302, 304–308 (1980); counsel's failure to communicate a formal plea offer which by its terms expires at a particular

§ 37.7B. WARNINGS AND COLLOQUY

The court must warn the defendant of the implications of a plea, conduct an inquiry of the defendant, and make certain findings. The colloquy portion of the hearing consists of a series of questions to the defendant, who is placed under oath,[95] in open court.[96]

Under Rule 12 and relevant case law, as specified herein, the judge must

1. *Inquire of the defendant or counsel whether there are agreements contingent on the plea.* The court is also to be informed of the substance of any agreement.[97]

2. *Inform the defendant of his right to withdraw the plea if the court intends to exceed the sentence recommendation.*[98] This subject, including the differences in Superior Court and District Court procedures, is covered *infra* at § 37.7E.

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time, Missouri v. Frye, 566 U.S. --, -- (2012); counsel's misadvice to reject a plea because the prosecution would be unable to prove its case, Lafler v. Cooper, 566 U.S. --, -- (2012); counsel's miscommunication of the terms of the prosecutor's proposed recommendation, McAleney v. United States, 539 F.2d 282 (1st Cir. 1976); or other misrepresentations by counsel, United States v. Ciardino, 797 F.2d 30, 32 (1st Cir. 1986); Commonwealth v. DiPietro, 35 Mass. App. Ct. 638, 640 (1993) (defendant's reliance on counsel's misrepresentation that motion to suppress had been filed and denied had no material effect on his plea decision because motion would have been denied as matter of law), *distinguishing* Commonwealth v. Chetwynde, 31 Mass. App. Ct. 8, 14 (1991) (on similar facts, plea may be withdrawn if defendant so misled by counsel that he prematurely waived rights, regardless whether motion to suppress would have been allowed). While counsel's misadvice on parole eligibility or immigration consequences has been labeled "collateral" and held not to invalidate a plea, in Padilla v. Kentucky, 130 S.Ct. 1473, 1481-83 (2010), the Supreme Court held that, at least when the deportation consequence of a conviction is "truly clear," defense counsel had a Sixth Amendment duty so to advise his client during plea negotiations, and that counsel's misadvice in that regard was "constitutionally deficient" under the first prong of *Strickland*'s ineffective-assistance standard. For further discussion of immigration misadvice, *see infra* § 42.6C and with regard to parole eligibility, Hill v. Lockhart, 474 U.S. 52, 60 (1985); *Perry, supra.* And, in Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983), the First Circuit left open the possibility that a plea based on misinformation concerning parole eligibility might be invalid.

The defendant must show a reasonable probability that the errors led to a plea. Premo v. Moore, 131 S. Ct. 733, 743 (2011) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). *See also* Commonwealth v. Indelicato, 40 Mass. App. Ct. 944, 944-45 (1996) (misadvice that guilty plea to state misdemeanor would not expose defendant to federal charges as "felon" did not constitute ineffective assistance of counsel). Similarly, if the ineffectiveness complained of is the failure to communicate a plea offer that has since lapsed or misadvice that caused the defendant to forego a favorable opportunity to plead, defendant must demonstrate a reasonable probability that he would have accepted the plea had it been communicated or had he been properly advised, that the plea would not have been withdrawn by the prosecution or rejected by the court, and that the resulting sentence would have been less severe than that imposed after trial or subsequent plea. Missouri v. Frye, 566 U.S. --,-- (2012); Lafler v. Cooper, 566 U.S. --, -- (2012).

[95] Commonwealth v. Morrow, 363 Mass. 601, 603-03 (1973). *See also* K. Smith, *Criminal Practice and Procedure,* 30 MASS. PRAC., §§ 23.55 – 23.57 (3d ed. 2007 & Supp. 2011), for a list of suitable questions.

[96] Mass. R. Crim. P. 12(a)(1), as appearing in 442 Mass. 1511 (2004). The omission of a colloquy requires that the plea be vacated. Jackson v. Commonwealth, 430 Mass. 260, 265 (1999).

[97] Mass. R. Crim. P. 12(c)(1), as amended, 399 Mass. 1215 (1987).

3. *Inform the defendant that his plea waives trial rights,* including the right to trial either with or without a jury, the right to confront witnesses, and the privilege against self-incrimination.[99]

4. *Inform the defendant of certain penal and/or immigration consequences.* "Where appropriate," the judge must inform the defendant of the maximum sentence,[100] any mandatory minimum, enhanced sentencing possibilities for second offenders, the potential for subsequent "sexually dangerous person" proceedings,[101] and the possibility of consecutive sentences.[102] Further, under the Sex Offender Registry statute,[103] prior to accepting a guilty plea to a sex offense (including a nolo plea and an admission to facts sufficient), the judge must inform the defendant (and the defendant must acknowledge in writing) that the plea or admission may result in the defendant being required to register as a sex offender.[104] However, the judge's failure to inform the defendant of this sex-offender registration or the parole consequences of his plea is not a ground for vacating it at a later time.[105]

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[98] Mass. R. Crim. P. 12(c)(2), *supra*.

[99] Mass R. Crim. P. 12(c)(3)(A), *supra*; Commonwealth v. Hubbard, 457 Mass. 24, 25 (2010) (written waiver not necessary where record affirmatively reflected defendant's knowing and voluntary waiver of his rights to jury trial, to confront one's accusers and to invoke the privilege against self-incrimination); Commonwealth v. Dawson, 19 Mass. App. Ct. 221, 224 (1985); Commonwealth v. Hill, 20 Mass. App. Ct. 130, 132 n.3 (1985); Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984); Commonwealth v. Duquette, 386 Mass. 834, 842-43 (1982); Commonwealth v. Morrow, 363 Mass. 601, 603-05 (1973); Huot v. Commonwealth, 363 Mass. 91, 101 (1973). If the defendant does not acknowledge all the elements, the judge should advise him that by pleading guilty he is waiving right to be presumed innocent until proven guilty beyond a reasonable doubt. Commonwealth v. Earl, 393 Mass. 738, 741 (1985). *Compare* Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 500 (1985) (failure to inform defendant that he was waiving confrontation and self-incrimination privilege did not entitle him to withdraw plea in absence of "plausible showing of the materiality to him of the failure to mention the intra-trial rights") *with* Commonwealth v. Lewis, 399 Mass. 761, 764 (1987) (failure to inform defendant of privilege against self- incrimination invalidates stipulated jury-waived trial that is functional equivalent of a guilty plea). *See also* Commonwealth v. Quinones, 414 Mass. 423, 435 (1993) (loss of right to appeal denial of pretrial motions to suppress need not be discussed in plea colloquy).

[100] Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 577-78 & 581-82 (2001) (defendant pleading guilty must be informed by judge as to maximum sentence and any mandatory minimum sentence under M.R.Cr.P 12(c) (3), even though straight probation is to be imposed, but R. 12 violation does not necessarily render defendant's plea involuntary); Commonwealth v. Murphy, 73 Mass. App. Ct. 57, 65-67 (2008) (same, citing *Rodriguez*).

Failure to inform the defendant of the maximum possible sentence may result in a finding that the guilty plea was involuntary. *See* Reporter's Notes to Mass. R. Crim. P. 12(c)(3)(B) and citations therein. *But see* Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 581-84 (2001) (where defendant enters into plea bargain for less than maximum sentence, he cannot complain about not being advised of maximum sentence for offense).

[101] *See infra* § 39.10C.

[102] Mass. R. Crim. P. 12(c)(3)(B), as amended, 399 Mass. 1215 (1987).

[103] G.L. c. 6, § 178E(d).

[104] *Id. See* Commonwealth v. Shindell, 63 Mass. App. 503, 504-05 (2005) (noting this requirement but holding that under the statute failure so to advise the defendant is not a basis to invalidate the plea).

[105] *Id.*; Commonwealth v. Santiago, 394 Mass. 25, 30 (1985); Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 578 (2001); Commonwealth v. Thurston, 53 Mass. App. Ct.

In every case, the defendant must be informed that if he is not a U.S. citizen the conviction may have immigration consequences, including deportation, exclusion, or denial of naturalization.[106] The subject of immigration consequences of criminal cases, including the duties of court and counsel to advise of such consequences, is more fully addressed *infra* ch. 42.

548, 548-50 (2002) (defendant's plea of guilty for 20-year Concord sentence not rendered invalid by defendant's failure to obtain parole despite judge's assumption that defendant would serve only two years); Commonwealth v. Stanton, 2 Mass. App. Ct. 614, 621–22 (1974). *Cf.* Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983) (federal rule contrary to Mass, rule but still requires defendant to prove the parole information was material to decision to plead guilty); Commonwealth v. Brown, 6 Mass. App. Ct. 844, 844 (1978) (rescript) (good time deductions are indefinite collateral consequences which need not be detailed in colloquy). *But see* ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 14-1.4(a)(ii) (1999), (court should not accept guilty plea unless defendant understands minimum amount of time he must serve). The defendant need not be warned of the possibility of subsequent federal prosecution for the same conduct, *see* United States v. Campusano, 947 F.2d 1, 4–5 (1st Cir. 1991).

[106] G.L. c. 278, § 29D; Commonwealth v. Hilaire, 437 Mass. 809, 814-15 (2002) (to be valid, the alien warning must include all three potential immigration consequences required by Section 29D: (1) deportation, (2) exclusion of admission to the United States, and (3) denial of naturalization); Commonwealth v. Ciampa, 51 Mass. App. Ct. 459, 462 (2001); Commonwealth v. Desorbo, 49 Mass. App. Ct. 910, 910 (2000) (on defendant's plea of guilty, judge should recite text of "alien warnings" statute, G.L. c. 278, §29D verbatim; but where defendant's plea caused no incremental harm in his immigration status, judge's failure to give warnings does not require vacating plea).

The statute prohibits inquiry into the defendant's immigration status. A final conviction that follows an admission to sufficient facts has been held to be the functional equivalent of a guilty plea and requires the same statutory notice. Commonwealth v. Jones, 417 Mass. 661, 664-65 (1994) (on claim that judge failed to inform him of deportation risk, alien allowed to withdraw admission to sufficient facts made 11 years earlier; despite delay and destruction of tapes, Commonwealth has burden to prove notice); Commonwealth v. Berthold, 441 Mass. 183, 184 n.2 (2004). *But see* Commonwealth v. Rzepphiewski, 431 Mass. 48, 52–55 (2000) (when record of plea proceeding no longer exists, it may be reconstructed to include judge's declaration of his customary practice of giving "alien warning" in compliance with statute); Commonwealth v. Diaz, 75 Mass. App. Ct. 347, 351-52 (2009) (citing Commonwealth v. Ciampa, 51 Mass. App. Ct. 459, 463-64 (2001) (four-part test for adequacy to satisfy immigration warnings requirement of G.L. c. 278, §27D, of reconstructed plea record on basis of plea judge's written statement of past practice and acceptable supplementations of inadequately reconstructed record)); Commonwealth v. Pryce, 429 Mass. 556, 557–558 (1999) (motion judge's finding of court's general practice of giving "alien warning" at plea hearing satisfied statute); Commonwealth v. Podoprigora, 46 Mass. App. Ct. 928, 929 (1999) (notation in docket sheets that defendant admitting to sufficient facts was "[a]dvised of alien rights" satisfied statute). *Cf.* Commonwealth v. Agbogun, 58 Mass. App. Ct. 206, 208 (2003) (withdrawal of guilty plea only permitted when actually face an immigration consequence of which not warned); Commonwealth v. Hason, 27 Mass. App. Ct. 840, 843-44 (1989) (notice adequate in absence of special circumstances); Commonwealth v. Lamrini, 27 Mass. App. Ct. 662, 666–67 (1989) (notice adequate). The judge has no obligation beyond the requirements of G.L. c.278, § 29D, to warn the defendant of immigration consequences of his plea. Commonwealth v. Fraire, 55 Mass. App. Ct. 916, 917 (2002). However, the statute does require that the judge affirmatively advise the defendant of all three immigration consequences which it specifies. Commonwealth v. Hilaire, 437 Mass. 809, 814-15 (2002).*See also* ch. 42 (immigration consequences of cirminal convictions).

5. *Ensure that the defendant understands the elements of each charge to which he is pleading guilty.*[107] In *Henderson v. Morgan,*[108] the U.S. Supreme Court held that a plea is involuntary unless the defendant has received "real notice of the true nature of the charge against him."[109] The Massachusetts courts have found that this burden can be satisfied in any one of at least three ways: (1) an explanation of the essential elements by the judge at the guilty plea hearing; (2) a representation that counsel has explained to the defendant the elements he admits by his plea; or (3) defendant's statements admitting to facts constituting the unexplained element or stipulation to such facts.[110] When a defendant pleads after the trial has begun the appellate courts will look to evidence adduced at trial to cover factual defects in the plea colloquy.[111]

6. *Receive the tender of the plea*.[112] This should be articulated by the defendant personally.[113]

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[107] Commonwealth v. Hubbard, 457 Mass. 24, 26 (2010); Commonwealth v. McGuirk, 376 Mass. 338, 343–44 (1978) (elements must be explained by either judge or counsel, or judge must be satisfied the defendant has admitted any unexplained elements).

[108] 426 U.S. 637 (1976).

[109] *Id*. at 646. In *Henderson* the Court vacated a plea by a retarded defendant who had not been informed that second-degree murder contains the element of intent to kill.

[110] Commonwealth v. Travernier, 76 Mass. App. Ct. 351, 353-58 (2010) (plea colloquy sufficient concerning two offenses as to which defendant admitted to facts which constituted sufficient evidence of those two offenses; colloquy deficient as to other offenses as to which the defendant neither admitted facts constituting sufficient evidence of the offenses to which he was pleading guilty nor was otherwise informed of the elements of those charges); Commonwealth v. Correa, 43 Mass. App. Ct. 714, 719–20 (1997) (plea colloquy fatally deficient where, in colloquy, defendant did not receive notice of the nature of the charges against him in any one of the three ways described in text) (citing Commonwealth v. McGuirk, 376 Mass. 338, 343–44, 347 (1978) (defendant's admission to protracted beating overcomes his disclaimers of malice aforethought)). Commonwealth v. Nikas, 431 Mass. 453, 456–459 (2000) (plea colloquy fatally deficient where, in colloquy, defendant did not receive notice of the nature of the charges against him in any one of the three ways described in text); Commonwealth v. Argueta, 73 Mass. App. Ct. 564, 566-68 (2009) (same); Commonwealth v. DeCologero, 49 Mass. App. Ct. 93, 97–98 (2000) (same); Commonwealth v. Pixley, 48 Mass. App. Ct. 917, 918 (2000) (same); *See also* Commonwealth v. Baker, 46 Mass. App. Ct. 915, 915 (1999) (defendant admitted to facts constituting offense which prosecutor recited); Commonwealth v. Dozier, 24 Mass. App. Ct. 961, 962 (1987) (rescript) (element of "dwelling house" satisfied by "logical inference" from prosecutor's "ambiguous" description of building's layout that victim would not have called police unless the footsteps he heard were from stairs under his exclusive control); Commonwealth v. Colantoni, 396 Mass. 672, 679-81 (1986); Commonwealth v. Furr, 454 Mass. 101, 108-09 (2009); Commonwealth v. Begin, 394 Mass. 192, 198 (1985) (malice supplied by defendant's admission that he fired a rifle at victim and that defendant's attorney said he had discussed nature of charge); Commonwealth v. Sullivan, 385 Mass. 497, 506-08 (1982) (failure to explain malice overcome by defendant's admission to killing "unlawfully" and no evidence of excuse or mitigation to manslaughter despite exculpatory responses to colloquy).

[111] *See, e.g.,* Commonwealth v. Osborne, 14 Mass. App. Ct. 987, 988 (1982) (rescript). Indeed, where the trial facts show grounds to convict of a more serious crime, the S.J.C. has indicated it may *presume* that a defendant pleading to a lesser included offense admits sufficient facts to establish the factual basis required under *Henderson.* Porter v. Superintendent, 383 Mass. 111, 117–18 (1981).

[112] Mass. R. Crim. P. 12(c)(4).

[113] Commonwealth v. Tavernier, 76 Mass. App. Ct. 351, 357-58 (2010) (although defendant did not say the word "guilty," his responses during the plea colloquy made it sufficiently clear that (1) it was his intent to plead guilty and (2) he understood by admitting to

7. *Make inquiries and findings regarding the factual basis for the plea*. The guilty plea record must demonstrate a factual basis for the plea.[114] Usually this is accomplished by the recitation of either the grand jury minutes or police reports, but defendant's admissions during the plea,[115] or trial evidence,[116] can also support the factual basis. An uncorroborated confession is not a sufficient factual basis.[117]

The court may (but is not required to) accept a plea for which there is a factual basis even if the defendant does not personally admit to it.[118] The U.S. Supreme Court has found that a rational defendant could acknowledge the strength of the case against him and voluntarily plead guilty even though he did not admit participation in the crime charged.[119]

8. *Make inquiries and findings regarding voluntariness.* The court must determine that the plea is entered voluntarily.[120] The determination must include inquiry into the defendant's consultation and satisfaction with counsel,[121] and whether the defendant has been subjected to threats or inducements,[122] although fear of a greater punishment following a trial does not invalidate a plea unless the judge threatened it.[123]

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facts constituting the offenses in question he was pleading guilty); Commonwealth v. Cavanaugh, 12 Mass. App. Ct. 543, 545 (1981).

[114] Mass. R. Crim. P. 12(c)(5)(A), as amended, 399 Mass. 1215 (1987); Henderson v. Morgan, 426 U.S. 637, 646 (1976) (plea vacated because defendant was not informed of the element of intent and no facts were acknowledged to cover it); Commonwealth v. Hunt, 73 Mass. App. Ct. 616, 621-22 (2009) (plea not valid where judge failed sufficiently to probe defendant's understanding of the elements of the crime).

[115] *See, e.g.,* Commonwealth v. Begin, 394 Mass. 192, 197-98 (1985); Commonwealth v. McGuirk, 376 Mass. 338, 347 (1979).

[116] *See, e.g.,* Commonwealth v. Sullivan, 385 Mass. 497, 508 (1982).

[117] Commonwealth v. Forde, 392 Mass. 453, 457–58 (1984) (must be corroboration of "corpus delicti"); Commonwealth v. Hubbard, 69 Mass. App. Ct. 232, 234-35 (2007) (noting the corroboration requirement but holding there was sufficient corroboration of defendant's confession that he possessed a firearm).

[118] Mass. R. Crim. P. 12(c)(5)(A), as amended, 399 Mass. 1215 (1987) ("failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea"). A defendant who does not admit to all elements should be specially warned that a guilty plea waives the right to be presumed innocent until proved guilty beyond a reasonable doubt. Commonwealth v. Earl, 393 Mass. 738, 742 (1985).

[119] North Carolina v. Alford, 400 U.S. 25, 37-38 (1970). *See* full discussion *infra* at § 37.10.

[120] Mass R. Crim. P. 12(c)(5), as amended, 399 Mass. 1215 (1987); Commonwealth v. Foster, 368 Mass. 100, 103 (1975). The Supreme Court has long held that the state bears a heavy burden of demonstrating a voluntary and knowing waiver of constitutional rights. Boykin v. Alabama, 395, U.S. 238, 243 n.5 (1969) *(Zerbst* standard applies to guilty pleas); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Huot v. Commonwealth, 363 Mass. 91, 99–101 (1973) (on appeal Commonwealth bears burden of proving plea was voluntary); Brady v. United States, 397 U.S. 742, 750 (1970) (if defendant so fearful he cannot rationally weigh decision, plea is involuntary).

[121] Commonwealth v. Fernandes, 390 Mass. 714, 718 (1984).

[122] Commonwealth v. Fernandes, 390 Mass. 714, 718 (1984).

[123] Commonwealth v. Bowen, 63 Mass. App. Ct. 579, 584-86 (2005) (suggesting that defendant, who pled guilty and was sentenced to the recommended sentence of 8 to 10 years, would have a potentially viable claim that his guilty plea was involuntary if, as he asserted, the judge threatened, thorough counsel, to impose a 25 to 30 years if defendant was convicted at

Involuntariness may result from failure to comply with the colloquy requirements above, coercive tactics,[124] plea bargains that would benefit police or third parties,[125] limited education, and a host of other factors. One major ground of involuntariness is the defendant's mental state, generally or at the time of the plea, which is discussed *infra* at § 37.7D.

9. *Accept or reject plea*; sentencing. Following the hearing, the court may accept or reject the plea, in its discretion.[126] If the court accepts the plea, it may proceed with sentencing.[127] At the tender of the plea, either party may move in writing for inspection of the presentence report.[128] In practice, both the criminal record and presentence report should be examined by counsel before the procedure.

§ 37.7C. OMISSIONS IN THE RECORD COLLOQUY

Boykin v. Alabama[129] held that due process requires an affirmative showing *on the record* that a guilty plea has been entered voluntarily. The Massachusetts courts have resisted any per se rule that "technical defects" in the colloquy invalidate the plea,[130] although omission of explicit inquiry regarding enumerated subjects has triggered successful challenges.[131] As a general rule, omissions in the colloquy relating

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trial, and remanding for fact findings as to what, if anything, the judge told counsel in that regard); Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618–19 (1982)); Letters v. Commonwealth, 346 Mass. 403, 408 (1963). See *also* Brady v. United States, 397 U.S. 742, 751 (1970).

[124] *See supra* §§ 37.4C (by prosecution), 37.5B (by judge).

[125] *See supra* § 37.2 paragraphs 3, 4.

[126] Mass. R. Crim. P. 12(c)(5)(B), as amended, 399 Mass. 1215 (1987); Commonwealth v. Kelleher, 28 Mass. App. Ct. 915, 915 (1989) (rescript); Commonwealth v. Watson, 393 Mass. 297, 301 (1984) (acceptance discretionary); Commonwealth v. Gendraw, 55 Mass. App. Ct. 677, 684 (2002) (no right to judicial acceptance of an *Alford* plea); Commonwealth v. Dilone, 385 Mass. 281, 285 (1982) *(*same, *Alford* plea); Commonwealth v. Tirrell, 382 Mass. 502 (1981).

[127] Mass. R. Crim. P. 12(c)(5)(C), as amended, 399 Mass. 1215 (1987).

[128] Mass. R. Crim. P. 12(e), as appearing in 442 Mass. 1511 (2004). The Rule further provides that the judge may excise portions in extraordinary cases, but such portions may not be relied on in sentencing. *See also* Mass. R. Crim. P. 28(d), as appearing in 442 Mass. 1511 (2004) (criminal record and presentence report available for inspection before sentencing).

[129] 395 U.S. 238, 242 (1969).

[130] *See* Commonwealth v. Agbogun, 58 Mass. App. Ct. 206, 208 (2003) (plea upheld even though judge did not warn of all three immigration consequences where defendant was warned of the consequence, deportation, that he faced); Commonwealth v. Lamrini, 27 Mass. App. Ct. 662, 664-65 (1989) (plea upheld despite omission of waivers of self-incrimination and confrontation); Commonwealth v. Earl, 393 Mass. 738, 740-41 (1985) (judge not required to notify defendant that guilty plea waives his right to be presumed innocent but "better practice" to do so when defendant does not acknowledge all the factual elements); Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 497 (1985) (failure to advise defendant that plea waived right to confront witnesses and privilege against self-incrimination not fatal); Commonwealth v. Morrow, 363 Mass. 601, 605-06 (1973) (judge's failure to warn defendant pleading to rape of statute governing care, treatment, and rehabilitation of sexually dangerous persons did not invalidate plea).

[131] Commonwealth v. Dawson, 19 Mass. App. Ct. 221, 223-25 (1985) (leave to withdraw plea was proper because defendant was of "minimal intelligence and education," not

to the defendant's waiver of his "intratrial rights," such as confrontation and the privilege against self-incrimination, will not invalidate the plea[132] unless the defendant can "show with some plausibility" that the omissions were "material." "Materiality" means that a proper colloquy would have made a difference in the defendant's decision to plead guilty.[133] However, the plea[134] will be invalidated without any showing of materiality if the court failed to inquire into the voluntariness of the plea, or to ascertain that the defendant had knowledge of the elements of the charges against him.[135]

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informed of right to confront witnesses or his privilege against self-incrimination, and not asked about threats, inducements, or contingent agreements); Commonwealth v. Nydam, 21 Mass. App. Ct. 66, 68-69 (1985) (failure to advise re appellate waiver); Commonwealth v. Fernandes, 390 Mass. 714, 718 (1984) (no inquiry whether defendant had discussed options with attorney or whether threats or inducements had been made, and inadequate colloquy relative to the privilege against self-incrimination).

Where admissions or stipulated trials have finality, convictions have also been overturned for failure to provide full and explicit colloquies. Commonwealth v. Duquette, 386 Mass. 834, 841-42 (1982) (defendant not informed at time of admission that he was waiving right to jury trial, confrontation, and privilege against self-incrimination). *See also* Commonwealth v. Garrett, 26 Mass. App. Ct. 964, 965 (1988) (record did not show defendant personally agreed to terminate trial and accept a resolution arrived at in the judge's lobby); Commonwealth v. Lewis, 399 Mass. 761, 764 (1987) (reversing conviction based on stipulation at trial to Commonwealth's evidence because of failure to advise about privilege against self-incrimination); Commonwealth v. Mahadeo, 397 Mass. 314, 316-17 (1986) (admission accompanied by waiver of appeal de novo is equivalent to guilty plea and requires notice of immigration consequences); Commonwealth v. Grannum, 457 Mass. 128, 133-38 (2010) (admitting facts sufficient requires immigration warnings, the giving of which cannot be presumed even twelve years after the fact, but to invalidate the plea, the defendant must demonstrate more than a hypothetical possibility that he will suffer one of the enumerated consequences); Commonwealth v. Hill, 20 Mass. App. Ct. 130, 132-33 (1985) (jury-waived trial on a stipulation to prosecution evidence was a de facto guilty plea and must be invalidated for lack of colloquy on right of confrontation, privilege against self-incrimination and voluntariness in general).

[132] However, if all three of the intra-trial rights are omitted from the colloquy, the defendant's plea will be rendered involuntary. *See* Commonwealth v. Dummer, 47 Mass. App. Ct. 926, 927 (1999).

[133] Commonwealth v. DeCologero, 49 Mass. App. Ct. 93, 95 (2000); Commonwealth v. Correa, 43 Mass. App. Ct. 714, 718 (1997) (citing Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 500 (1985), Commonwealth v. Nolan, 16 Mass. App. Ct. 994, 995 (1983)). In federal court this requirement applies generally to collateral attacks on the plea, *see* Cepulonis v. Ponte, 699 F.2d 573, 577–78 (1st Cir. 1983). *See also* Commonwealth v. Russell, 37 Mass. App. Ct. 152, 156-57 n.4 (1994), *cert. denied,* 115 S. Ct. 759 (1995) (explicit waiver requirements of *Duquette* and Commonwealth v. Mele, 20 Mass. App. Ct. 958 (1985), denied retroactive effect; Rule 30 motion properly denied where, in circumstances of plea, no plausible showing that colloquy would have made a difference in defendant's plea decision).

[134] Commonwealth v. Fernandes, 390 Mass. 714, 718 (1984). *But see* Commonwealth v. DeCologero, 49 Mass. App. Ct. 93, 94-95 (2000) (voluntariness of defendant's plea may be inferred from extensive discussion at plea hearing of favorable consequences of plea to defendant).

[135] Commonwealth v. Colon, 439 Mass. 519, 528-29 (2003) (plea colloquy fatally deficient where, in colloquy, defendant did not receive notice of the nature of the charges against him in one of the three ways described *supra* § 37.7B paragraph 5); Commonwealth v. Argueta, 73 Mass. App. Ct. 564, 566-68 (2009) (same); Commonwealth v. Nikas, 431 Mass. 453, 456–459 (2000) (same); Commonwealth v. DeCologero, 49 Mass. App. Ct. 93, 97–98

The record must also contain affirmative findings as to the factual basis and voluntariness of the plea.[136]

§ 37.7D. INCOMPETENCY OR INVOLUNTARINESS BASED ON THE DEFENDANT'S MENTAL CONDITION

1. Incompetency

In Massachusetts the test of competence to enter a guilty plea is the same as that to stand trial.[137] The test is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."[138] An incompetent defendant may not plead guilty via a "substituted judgment" procedure even if doing so is arguably in his best interest.[139]

2. Mental Incapacity to Plead Voluntarily

Even if the court finds competence, mental incapacity may still impact directly on the voluntariness of the guilty plea. The Supreme Judicial Court has required that "special care" be given to the Rule 12 colloquy when the defendant is of limited intelligence.[140] On the other hand, the courts will more likely overlook apparent defects in the plea proceeding if the defendant is above average in intelligence or education.[141]

(2000) (same); Commonweatlh v. Jones, 60 Mass. App. Ct. 88, 91-92 (2003) (same); Commonwealth v. Correa, 43 Mass. App. Ct. 714, 719–20 (1997) (same).

[136] Commonwealth v. Furr, 454 Mass. 101, 106-07 (2009); Commonwealth v. Foster, 368 Mass. 100, 159-60 (1975).

[137] Commonwealth v. Robbins, 431 Mass. 442, 445 (2000); Commonwealth v. Russin, 420 Mass. 309, 316 (1995) (citing Commonwealth v. Morrow, 363 Mass. 601, 607 (1973)); Commonwealth v. Blackstone, 19 Mass. App. Ct. 209, 210-11 (1985); Commonwealth v. Leate, 367 Mass. 689, 696 (1975). In *Leate* the court required a "similar" standard, reasoning that to "lay down more exacting requirements in respect to accepting a defendant's plea than in permitting a defendant to stand trial might indeed visit odd and harsh consequences upon him by forcing him to unreasonable risks of going to trial and receiving sterner punishment in the end." *See also* Commonwealth v. Hubbard, 371 Mass. 160, 170-71 (1976) (amnesia alone would not require finding of lack of competence to stand trial or plead guilty); Godinez v. Moran, 509 U.S. 389, 399 (1993) (under federal due process clause identical competence tests to enter guilty plea and stand trial).

[138] Commonwealth v. Goodreau, 442 Mass. 341, 350 n. 5 (2004); Commonwealth v. Conaghan, 433 Mass. 105, 109 (2000) (defendant must be competent to consult rationally with defense counsel for defendant's guilty plea to be constitutionally voluntary); Commonwealth v. Robbins, 43l Mass. 442, 445 (2000); Commonwealth v. Hunt, 73 Mass. App. Ct. 616, 619 (2009); Commonwealth v. Blackstone, 19 Mass. App. Ct. 209, 210 n.1 (1985) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). *See* full discussion of competence to stand trial *supra* at ch. 10.

[139] In Commonwealth v. DelVerde, 398 Mass. 288, 289 & n.1 (1986), defense counsel and guardian both unsuccessfully sought to have a retarded rape-murder defendant plead to manslaughter.

[140] Commonwealth v. Colantoni, 396 Mass. 672, 678 n.3 (1986) (plea by retarded defendant upheld after finding judge exercised "patient care" for plea proceedings involving defendants with limited education or mental resources, as suggested in Ciummei v. Commonwealth, 378 Mass. 504, 515 (1979)); Commonwealth v. Dawson, 19 Mass. App. Ct.

3. Mental Disability at Time of Plea

Factors that affect the defendant's mental state at the time of the plea may create a voluntariness issue. A defendant who could prove that he was under the influence of either drugs or alcohol during the plea would have a solid claim that his plea was involuntary.[142] This should be rare because in addition to verbal inquiry[143] the judge is responsible for observing the defendant's demeanor during the plea.

Similarly, the onset of mental illness or the discontinuance of chemotherapy before the plea may invalidate it. However, attempts to use "emotional stress" at the time of the plea have not been successful because the courts have found that stress is an occupational hazard of defendants facing serious charges.[144]

§ 37.7E. RIGHT TO WITHDRAW CONTINGENT PLEA

In superior court, although the judge is not bound by either side's recommendation, if the judge would exceed the prosecutor's recommendation, she must

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221, 223-25 (1985) (plea vacated where defendant with "minimal intelligence and education" was not informed of right to confrontation or privilege against self-incrimination); Henderson v. Morgan, 426 U.S. 637, 641-42 & 645-46 (1976) (low-IQ defendant's plea vacated as involuntary because no record evidence that defendant ever given adequate notice that second degree required an intent to kill).

[141] *E.g.,* Commonwealth v. Osborne, 14 Mass. App. Ct. 987, 988 (1982) (rescript) (facts at trial sufficient to notify man of defendant's intelligence of requirement of proof of malice, which was not explicitly mentioned during plea); Commonwealth v. Sullivan, 385 Mass. 497, 505 (1982) (defendant's above average intelligence helped court find midtrial plea valid where defendant had been advised before trial rather than at time of plea of all the elements of the crime).

[142] *Cf.* Commonwealth v. Perry, 389 Mass. 464, 468 (1983) (defendant had taken antidepressant medication at night but was not under its influence at time of plea); Commonwealth v. Meehan, 377 Mass. 552, 560–68 (1979) (confession found involuntary in part because young defendant under influence of valium and alcohol when questioned); Commonwealth v. Hosey, 368 Mass. 571, 578-79 (1975) (statements of defendant found involuntary because of intoxication). However, as the Appeals Court has observed, "[t]he mere fact that the defendant 'had any drugs or alcohol in his system' does not render the defendant incompetent or his plea involuntary. What is important is whether the defendant's understanding is so impaired by alcohol, drugs or medication as to render him incapable of rational judgment." Commonwealth v. Estrada, 69 Mass. App.Ct. 514, 518 n. 7 (2007) (citing and quoting Ciummei v. Commonwealth, 378 Mass. 504, 509-510 (1979).

[143] *See* Smith, *Criminal Practice and Procedure,* 30 MASS. PRACTICE § 23.55 (3d ed. 2007 & Supp. 2011) (model plea colloquy including inquiry into use of alcohol or medication); Commonwealth v. Estrada, 69 Mass. App. Ct. 514, 518 (2007) (judge's observations of defendant are "much more probative" than questions from the judge); Commonwealth v. Facella, 42 Mass. App. Ct. 354, 360–61 (1996) (on motion for new trial, judge entitled to credit defendant's statement made in colloquy that he was not under the influence of any drug that affected his judgment, rather than defendant's later, self-serving affidavit).

[144] *See, e.g.,* Commonwealth v. Sullivan, 385 Mass. 497, 506 (1982) (reinstating guilty plea previously vacated on "emotional stress" ground); Huot v. Commonwealth, 363 Mass. 91, 96 n.5 (1973); Commonwealth v. Williams, 71 Mass. App. Ct. 348, 354 (2008).

permit the defendant to withdraw his guilty plea.[145] In addition to indicating her intention to exceed the recommendation, the judge may indicate what sentence she would impose.[146] *In district court,* under the single-trial legislation the defendant has the additional right to make his plea contingent on his own, unagreed-to "dispositional request."[147] The defendant should tender the plea prior to his decision on jury waiver because if the judge would exceed the defendant's proposal, the defendant may withdraw his plea but not necessarily withdraw a prior jury waiver. A further difference is that in district court, the defendant may use an "admission to sufficient facts" rather than a change of plea.[148] District court contingent pleas and admissions are addressed in greater detail *supra* at § 3.6.

To safeguard the right to withdraw the plea, counsel must: (1) inform the court before the plea that it is contingent on an agreement with the prosecutor, even if the "agreement" consists of nothing more than the right of the defense to ask for a lower sentence,[149] or in the district court where no agreement was reached, on a defense "request for disposition"; and (2) spell out all terms on the record. For example, if the plea agreement contemplates parole eligibility at a certain time, the record should show the parties' intentions. This will later benefit the client in two additional ways. *First*, if the parties' expectations prove to be mistaken, the plea can be successfully attacked on the basis that the terms of the plea bargain have not been kept.[150] *Second*, the parole board may accord deference to the court's wishes when they are clearly spelled out in the record and brought to its attention. This is especially helpful in drug distribution or child abuse cases where the parole board has a reluctance to grant liberty on first consideration.

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[145] *But see* Commonwealth v. Clerico, 35 Mass. App. Ct. 407, 413-14 (1993) (no right to withdraw plea where judge directly informed defendant, prior to colloquy, that she would likely exceed the joint recommendation).

On a federal defendant's right to withdraw a guilty plea after it has been accepted by the court, but before the court rules on whether to accept the plea agreement, *see* United States v. Hyde, 520 U.S. 670, 671 & 675-76 (1997) (defendant seeking to withdraw plea must show fair and just reason in accordance with Fed. R. Crim. P. 32(e); if, thereafter, court rejects plea agreement, defendant may withdraw plea for any reason under Rule 11.); United States v. Muriel, 111 F.3d 975, 978 (1997).

[146] Mass. R. Crim. P. 12(c)(6).

[147] G.L. c. 278, § 18. The constitutionality of this statute was upheld against a claim based on separation of powers. *See* Commonwealth v. Pyles, 423 Mass. 717, 722-23 (1996).

[148] Under the single-trial legislation, G.L. c. 278, § 18, an admission is to be deemed a tender of a plea of guilty "for the purposes of this section." Because admissions are final (*i.e.,* without recourse to a de novo trial), all the warning and colloquy safeguards of a guilty plea must be provided. Commonwealth v. Duquette, 386 Mass. 834, 842-43 (1982). While admissions are no longer useful in safeguarding de novo appeal rights, they may continue to have utility for a defendant who asserts his innocence. For more on admission, *see supra* § 3.6 (admissions in the single-trial and de novo systems).

[149] Commonwealth v. Johnson, 11 Mass. App. Ct. 835, 841 (1981).

[150] *Cf.* Commonwealth v. Santiago, 394 Mass. 25, 28 (1985), in which the defendant's mistaken assumption that he was eligible for one-third parole consideration did not render plea invalid because the judge was not informed this was a basis for the plea, and the defendant did not show that the mistake was truly "mutual." However, when a prosecutor enters into plea agreements that are relied on and accepted, "the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept."

Apart from the contingent plea situation, any other withdrawal of plea must be sought through a motion for a new trial.[151]

Following withdrawal of plea: A plea that has been withdrawn may not be introduced in a subsequent proceeding as an admission, except in a perjury prosecution.[152]

§ 37.8 PARTICULAR PROCEDURAL CONSEQUENCES OF A GUILTY PLEA

§37.8A. WAIVER OF APPELLATE RIGHTS

A guilty plea waives all but jurisdictional defects[153] and challenges to the plea itself.[154] Failure to warn of this consequence has resulted in reversals.[155]

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[151] *See infra* § 44.4H(2)(a). *See also* Commonwealth v. Clarke, 460 Mass. 30, 32-33 (2011); Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982); Commonwealth v. Pixley, 48 Mass. App. 917, 917 (2000); Commonwealth v. Nessolini, 19 Mass. App. Ct. 1016, 1016 (1985) (rescript).

[152] Mass. R. Crim. P. 12(f).

[153] Commonwealth v. Berrios, 447 Mass. 701, 715 (2006); Commonwealth v. Fanelli, 412 Mass. 497, 500 (1992); Commonwealth v. Snyder, 12 Mass. App. Ct. 960, 960 (1981) (rescript) (admission to sufficient facts would preclude defendant from appealing denial of pretrial motion to suppress, but remanded to give defendant, who misapprehended consequences of his admission, a chance to proceed to trial); Lefkowitz v. Newsome, 420 U.S. 283, 288 (1975); Tollett v. Henderson, 411 U.S. 258, 265-66 (1973); Commonwealth v. Zion, 359 Mass. 559, 563 (1971) (plea waived any mental defenses defendant may have wished to raised); Commonwealth v. Buckley, 76 Mass. App. Ct. 123, 130, *rev. denied*, 456 Mass. 1101 (2010).

Jurisdictional claims: In Commonwealth v. Clark, 379 Mass. 623, 626 (1980), the court found that an improper bind-over from juvenile court was a due process claim that was jurisdictional in nature because it would deprive the superior court of power to try the case, and could be litigated after a guilty plea.

Double-jeopardy claims: A guilty plea does not waive a double-jeopardy claim, because it goes to the power of the court to try the defendant. Commonwealth v. Greene, 400 Mass. 144, 145-46 (1987) (denial of right to initial bench trial is jurisdictional and appealable despite admission); Menna v. New York, 423 U.S. 61, 61-62 (1975). *Cf.* United States v. Broce, 488 U.S. 563, 575 (1989) (guilty plea to two conspiracy indictments barred later claim that conduct constituted only single conspiracy; double jeopardy not apparent from indictments and existing record, but requires taking of new evidence). *See also* Commonwealth v. Deeran, 20 Mass. App. Ct. 588, 590–91 n.2 (1985), for an extensive list of citations in many jurisdictions on the issue of when a plea may waive jeopardy claim.

Speedy-trial claims: Under Mass. R. Crim. P. 36(hj(2)(G), a guilty plea following a plea agreement constitutes waiver of a claim of a speedy-trial violation. *See also* Commonwealth v. L'Italien, 3 Mass. App. Ct. 763, 763 (1975) (rescript). For discussion of speedy trial generally, *see supra* ch. 23.

Effective assistance of counsel: Such claims are not waived by the plea. Commonwealth v. Perry, 389 Mass. 464, 467 (1983).

[154] This includes such issues as the voluntariness of the plea and the effective assistance of counsel. *See* Commonwealth v. Fanelli, 412 Mass. 497, 502 (1992) (voluntariness); Commonwealth v. Tirrell, 10 Mass. App. Ct. 125, 135-36 (1980), *rev. on other grounds*, 382 Mass. 502 (1981); Tollett v. Henderson, 411 U.S. 258, 266-67 (1973).

If a defendant wishes to preserve a pretrial motion or a challenge to the sufficiency of the evidence but does not wish a conventional trial, she must utilize a procedure to avoid waiver, such as a stipulated trial with explicit reservation.[156] One method is to waive a jury and then stipulate that a police report (or other written summary of the factual basis of the charge) could be considered as the evidence by the trial judge without stipulating to the *truth* of that evidence.[157]

§ 37.8B. WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

By pleading guilty, a defendant waives the privilege against self- incrimination only to the specific charge he is admitting to, and he cannot be compelled to furnish details that might expose him to other criminal charges.[158] Because in Massachusetts conspiracy does not merge with the underlying substantive charge,[159] the possibility of a future conspiracy prosecution, however unlikely, will often provide some protection against compelled testimony.

Under the Fifth Amendment a refusal by a witness to testify must be upheld unless it is "perfectly clear" that the answer cannot possibly have a tendency to incriminate[160] or furnish a "link in the chain" of evidence needed to prosecute.[161]

§ 37.8C. ATTACHMENT OF JEOPARDY

In Massachusetts double-jeopardy principles are rooted in the Fifth Amendment to the U.S. Constitution, G.L. c. 263, § 7,[162] and the common law.[163] When there is no

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[155] Commonwealth v. Nydam, 21 Mass. App. Ct. 66, 67-68 (1985); Commonwealth v. Snyder, 12 Mass. App. Ct. 960, 960 (1981) (rescript).

[156] *See* infra § 37.10D. Compare Commonwealth v. Snyder, 12 Mass. App. Ct. 960, 960 (1981) *and* Commonwealth v. Hill, 20 Mass. App. Ct. 130, 131-32 (1985) (defendant stipulating the *truth* of facts offered by Commonwealth tantamount to guilty plea) *with* Commonwealth v. Stevens, 379 Mass. 772, 774–76 (1980) (defendant testified at largely uncontested trial that he wished to preserve appellate rights on pretrial motions and issues) *and* Commonwealth v. Abrams, 44 Mass. App. Ct. 584, 585-88 (1998) (proceeding where defendant stipulated not to truth of the facts, but only that the Commonwealth witnesses would testify in manner asserted by prosecutor, was valid jury-waived trial rather than an admission to sufficient facts; therefore, no need to comply with colloquy safeguard under Commonwealth v. Lewis, discussed *infra*, at § 37.10D) (citing Commonwealth v. Garcia, 23 Mass. App. Ct. 259 (1986) (jury-waived trial with stipulation that Commonwealth witnesses would testify in manner asserted by prosecutor was not tantamount to a guilty plea and did preserve defendant's appellate rights on motion to suppress)).

[157] Commonwealth v. Neal, 392 Mass. 1, 4 (1984). *See also* Commonwealth v. Babcock, 25 Mass. App. Ct. 688, 689-91 (1988) (defendant's agreement to be tried on documentary evidence only did not constitute guilty plea, but court should engage in colloquy regarding waived rights before permitting it).

[158] *See* Commonwealth v. Francis, 375 Mass. 211, 216-17 (1978) (codefendant who had pled guilty could not be forced to answer questions at defendant's trial about presence of other persons or methods of operations).

[159] Mass. R. Crim. P. 9(e).

[160] Malloy v. Hogan, 378 U.S. 1, 11–12 (1964).

[161] Hoffman v. United States, 341 U.S. 479, 486 (1951). *See supra* § 33.5.

[162] The statute states that "a person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits."

trial, jeopardy attaches on the court's acceptance of a guilty plea.[164] In the felony-murder context, defendants who plead guilty to both the felony and second-degree murder may receive consecutive sentences, although such sentences are impermissible and duplicitous for defendants convicted by juries who have been charged according to felony-murder principles.[165] General principles of double jeopardy are addressed *supra* at ch. 21.

§ 37.8D. CIVIL CONSEQUENCES

A guilty plea and statements made in connection with it can be introduced in evidence as an admission in a subsequent trial, but unlike a conviction after trial, neither a guilty plea nor a nolo plea can have preclusive effect on any issue at a subsequent civil trial.[166] The general issue of the effect of a criminal conviction on a potential civil case is discussed *infra* at ch. 43; the issue of immigration consequences of criminal cases is addressed *infra* at ch. 42.

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[163] Commonwealth v. Dean-Ganek, 461 Mass. 305, 312 (2012); Commonwealth v. Goodwin, 458 Mass. 11, 20 (2010); Commonwealth v. Aldrich, 21 Mass. App. Ct. 221, 222 n.1 (1985); Aldoupolis v. Commonwealth, 386 Mass. 260, 271 n.14 (1982).

[164] Commonwealth v. Dean-Ganek, 461 Mass. 305, 312-13 (2012); Commonwealth v. Aldrich, 21 Mass. App. Ct. 221, 224–26 (1985) (reversed on double-jeopardy grounds where district court judge accepted guilty plea at bench level but then changed his mind and declined jurisdiction); Commonwealth v. Therrien, 359 Mass. 500, 503 (1971). In the case of an admission, the swearing of a witness will invoke jeopardy because it constitutes a trial. *Compare* Commonwealth v. Crosby, 6 Mass. App. Ct. 679, 683 (1978) (jeopardy attached) *with* Commonwealth v. DeFuria, 400 Mass. 487 (1987) (no double jeopardy). The defendant as the proponent of a double jeopardy claim has the burden of reconstructing district court plea proceedings to show the identity of the charges if a tape recording is no longer available. Commonwealth v. Rabb, 431 Mass. 123, 132-133 & 132 n. 9 (2000).

Federal courts have generally found that jeopardy attaches only after the plea has been accepted *and* sentence imposed. Brown v. Ohio, 432 U.S. 161, 169-70 (1977) (jeopardy attached); Ohio v. Johnson, 467 U.S. 493, 500-01 (1984) (no double-jeopardy bar to murder prosecution after acceptance of plea to involuntary manslaughter since more serious charges had already been brought so no danger of prosecutorial abuse); United States v. Santiago Soto, 825 F.2d 616, 620 (1st Cir. 1987) ("mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence"). *But see* United States v. Cruz, 709 F.2d 111, 112 & 114-15 (1st Cir. 1983) (federal judge accepted plea to misdemeanor pursuant to plea agreement but vacated plea after reading the presentence report; held, under federal rules court cannot vacate plea because of information in presentence report short of fraud, and jeopardy attached to the misdemeanor plea).

[165] Porter v. Superintendent, 383 Mass. 111, 117-18 (1981); Commonwealth v. Wilson, 381 Mass. 90, 124 (1980) (when *possibility* exists that a jury might have based murder conviction on felony-murder theory, then a consecutive sentence may not be imposed for the underlying felony). *See also* Richard v. Commonwealth, 382 Mass. 300, 308 n.11 (1981) (defendants pleading to consecutive sentences in the felony-murder context should be advised of *Wilson* principle); Commonwealth v. Osborne, 14 Mass. App. Ct. 987, 988 (1982) (defendant who pleads guilty does not necessarily get the benefit of the doubt as to basis for murder conviction as would the defendant found guilty by jury).

[166] Aetna Casualty & Surety Co. v. Niziolek, 395 Mass. 737, 747 (1985).

§ 37.9 ATTACKING THE GUILTY PLEA

After a plea has been accepted and sentence imposed the only proper means to attack the validity of the plea is a motion for a new trial under Mass. R. Crim. P. 30(b).[167] Rule 30 requires that such motions be in writing and supported by affidavits, but there is no time limit on bringing them. Adequate notice must be given to the district attorney.[168] Denial of the motion will not be reversed for abuse of discretion unless it is manifestly unjust, or unless the plea colloquy was infected with prejudicial constitutional error.[169]

Attacks on the validity of a guilty plea have their constitutional roots in *Boykin v. Alabama,*[170] where the Supreme Court held that an intelligent and voluntary waiver had to be affirmatively demonstrated on the record. *(See supra* § 37.7, detailing the requirements for a voluntary guilty plea.) When the contemporaneous record of the plea reveals the defect, the defendant may rely on that alone,[171] and the Commonwealth, which has the burden to prove that the plea was entered understandingly and voluntarily,[172] is not permitted to introduce evidence to supplement the record.[173]

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[167] Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982) (error for judge to allow withdrawal of plea one week after sentencing in the absence of a showing that justice had not been done). In *DeMarco,* the S.J.C. indicated that the plea judge has much broader discretion under Rule 12 to allow withdrawal of a plea before sentencing or *immediately* after plea and sentencing, because the judge may conclude that the expeditious motion indicates a lack of voluntariness or a failure to understand the consequences of the plea. 387 Mass. at 484. *See also* Commonwealth v. Nessolini, 19 Mass. App. Ct. 1016 (1985) (rescript) (Rule 29 motion has distinct requirements and cannot serve as vehicle for motion to withdraw guilty plea in place of Rule 30 motion); Commonwealth v. Jones, 417 Mass. 661 (1994) (alien allowed to withdraw admission to sufficient facts made eleven years before, on claim under G.L. c. 278, § 29D, that judge failed to inform him of deportation risk). *See supra* § 37.7B, paragraph 4; discussion of new trial motions generally *infra* at § 44.4.

[168] Commonwealth v. DeMarco, 387 Mass. 481, 485 n.10 (1982).

[169]Commonwealth v. Correa, 43 Mass. App. Ct. 714, 716 (1997); Commonwealth v. Hunt, 73 Mass. App. Ct. 616, 619 (2009) (holding denial of motion to vacate guilty plea was an abuse of discretion where the contemporaneous record of the plea hearing did not provide a basis to find that the defendant understood the elements of the crime to which she was pleading guilty and thus that her plea was intelligent).

[170] 395 U.S. 238, 242 (1969).

[171] *Cf*. Commonwealth v. Hunt, 73 Mass. App. Ct. 616, 619 (2009) (relying on contemporaneous record of plea hearing, Appeals Court determined that guilty plea not intelligent and that trial court's denial of motion to vacate was an abuse of discretion). The S.J.C. has indicated that an indigent defendant is entitled to a free transcript of the plea proceedings for his first challenge to the validity of the plea. *See* Morales v. Appeals Court, 427 Mass. 1009, 1011 (1998).

[172] Commonwealth v. Correa, 43 Mass. App. Ct. 714, 716 (1997); Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 581 (2001) (defendant's guilty plea must be vacated unless record of plea proceedings demonstrates defendant made it knowingly and voluntarily). But, as discussed *infra*, if the contemporaneous record is not available through no fault of the Commonwealth, the defendant bears an initial burden to rebut the presumption of regularity. Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 14-15, rev. denied, 447 Mass. 1110 (2006); Commonwealth v. Ciampa, 51 Mass. App. Ct. 459, 460 (2001) (transcript of plea hearing destroyed after six years under SJC Rule 1.12).

[173] Commonwealth v. Foster, 368 Mass. 100, 108 n.7 (1975). If the defendant did not seek to preserve the tape recording containing the plea proceedings and the tapes have been

Alternatively, the defendant may choose to go beyond the record to present evidence of involuntariness, but in that event the Commonwealth may also present extrinsic evidence.[174]

The decision whether to stand on the record is fraught with peril because not every omission in the record colloquy will automatically invalidate the plea.[175] Although counsel might be opening the door to additional evidence by the Commonwealth, there is a residual advantage to producing additional evidence beyond the record in a Rule 30 attack on a guilty plea because the motion judge has discretion to find that justice "may not have been done" even if the formal colloquy itself satisfies the appellate courts.[176]

Although the burden to prove compliance with *Boykin* normally falls on the Commonwealth, a special rule governs if the defendant has delayed attacking the plea until contemporaneous records no longer exist. In such cases, the defendant bears an initial burden to present "sufficient credible and reliable evidence to rebut a presumption that the prior conviction was valid."[177] Once the defendant has done so,

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destroyed, the Commonwealth may meet its burden of proving voluntariness through reconstruction of the proceedings by witnesses. Commonwealth v. Duquette, 386 Mass. 834, 842 (1982). *See also* Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 47 n.9 (1997) (dicta suggesting that might not violate *Foster* principle to consider defendant's postplea motion to revise and revoke, brought three weeks after plea hearing, "a single . . . circumstance, so close in time to the plea itself as arguably to be essentially contemporaneous"); Commonwealth v. Quinones, 414 Mass. 423, 432–34 (1993) (judge may reconstruct unavailable record on his memory and on his customary practice in taking guilty pleas, and need not necessarily do so in testimonial form); Commonwealth v. Shea, 46 Mass. App. Ct. 196, 200-201 (1999) (record of plea proceedings may be reconstructed by use of unofficial transcript); Commonwealth v. Duest, 26 Mass. App. Ct. 137, 145–47 & n.8 (1988). *But see* Commonwealth v. Lopez, 426 Mass. 657, 660-62 (1998) and text accompanying notes 174–75, *infra*.

[174] Commonwealth v. Sherman, 68 Mass. App. Ct. 797, 800 (2007), *aff'd*., 451 Mass. 332 (2008); Commonwealth v. Glines, 40 Mass. App. Ct. 95, 100 (1996); Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 492 (1985); Commonwealth v. Swift, 382 Mass. 78, 84 (1980) (defendant's claim to be standing on the record rejected, allowing acceptance of extrinsic testimony). *See also* Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 170–71 (1985) (postconviction hearing on waiver of conflict-free counsel issue).

Dicta in Commonwealth v. DeMarco, 387 Mass. 481, 486 & n.10 (1982), suggest that the Commonwealth must be permitted to present evidence of prejudice before a motion judge allows a motion for new trial and invalidates a guilty plea. Clearly this language is only relevant to the *discretionary* power of the trial judge to grant a new trial for reasons other than voluntariness of the plea, because an involuntary plea must be reversed without regard to consequences to the Commonwealth. *See* Commonwealth v. Lewis, 399 Mass. 761, 764 (1987); Commonwealth v. Cook, 380 Mass. 314, 321 n.12 (1980) (if original "trial" infected with prejudicial constitutional error, no discretion to deny motion for new trial).

[175] *See supra* § 37.7C; Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 581 (2001) (defendant has burden of showing special circumstances relating to his plea of guilty demonstrating his right to withdraw it).

[176] *See, e.g.,* Commonwealth v. Dawson, 19 Mass. App. Ct. 221, 222–23 nn.5 & 6 (1985) (although colloquy was facially valid, judge could conclude from evidence at motion hearing that defendant's minimal intelligence and illiteracy invalidated plea).

[177] Commonwealth v. Lopez, 426 Mass. 657, 662 & 664–65 (1998) ("presumption of regularity" casts initial burden on defendant who attacks plea in context of federal court sentence enhancement, after colloquy record destroyed under court rule; burden not met by defendant's "self-serving affidavit") (citing Parke v. Raley, 506 U.S. 20 (1992) (state's presumption of regularity does not deny due process)). *See also* Commonwealth v. Grant, 426

the burden shifts to the Commonwealth to show that the plea was entered understandingly and voluntarily.[178]

Additionally, where the involuntariness of the plea is based on the failure of counsel to provide necessary information, advice, or investigation and pretrial preparation, only an evidentiary hearing may demonstrate the necessary facts. Unfortunately, the federal rule now requires that the defendant show not only that counsel's assistance was incompetent, but that there is a "reasonable probability" that the defendant would not have pleaded guilty but for counsel's incompetence.[179]

§ 37.10 SUBSTITUTES FOR THE GUILTY PLEA

§ 37.10A. THE *ALFORD* PLEA: PLEADING GUILTY WHILE ASSERTING INNOCENCE

1. The *Alford* Plea

While there is no constitutional right to have a plea of guilty accepted by the judge,[180] the court has the power to accept an *Alford* plea, in which the defendant pleads guilty to a crime while denying participation in it.[181] Rule 12 requires that no plea shall be accepted unless there is a factual basis for the charge, but states that the

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Mass. 667, 673 n.5 (1998) (in situation similar to *Lopez,* considering defendant's prior experience and representation by counsel in plea bargain, defendant's affidavit fails to meet burden); Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 54 (1997) (in situation similar to *Lopez,* motion judge upheld in rejecting affidavits of defendant and close relative as incredible, and in refusing to grant evidentiary hearing; discussion of numerous factors relevant to exercise of motion judge's discretionary determination, which will not be reversed unless it is manifestly unjust).

[178] Commonwealth v. Lopez, 426 Mass. 657, 660 (1998).

[179] Hill v. Lockhart, 474 U.S. 52, 57-58 (1985) (applying *Strickland* test to guilty plea challenges based on ineffectiveness claims; *see supra* § 8.1C). *Contrast* McMann v. Richardson, 397 U.S. 759, 770-71 (1970) (guilty plea invalid if representation not within range of competence demanded of criminal defense attorneys); Commonwealth v. Mederios, 48 Mass. App. Ct. 374, 376 n.3 (1999) (counsel's misinformation to defendant as to consequences of guilty plea might be so significant as to undermine validity of plea).

[180] *See* Commonwealth v. Gendraw, 55 Mass. App. Ct. 677, 684, *rev. denied*, 438 Mass. 1101 (2002) (holding that neither the refusal to accept an *Alford* plea unless defendant has no memory of the pertinent events nor the refusal to accept an *Alford* plea for other reasons raise an appellate issue); *See also* Commonwealth v. Dilone, 385 Mass. 281, 284–285 (1982); Commonwealth v. Souza, 390 Mass. 813, 820 (1984).

[181] North Carolina v. Alford, 400 U.S. 25, 37 (1970); Commonwealth v. Nikas, 431 Mass. 453, 455 (2000); Commonwealth v. Giberti, 51 Mass. App. Ct. 907, 908 (2001) (defendant by Alford plea does not admit any wrongdoing); Commonwealth v. Green, 52 Mass. App. Ct. 98, 100 (2001) (defendant's Alford plea admits only that Commonwealth can prove offense beyond a reasonable doubt); Commonwealth v. Desrosier, 56 Mass. App. Ct. 348, 352 n.3 (2002), *rev. denied*, 438 Mass. 1104 (2003). Most of the Massachusetts cases that refer to *Alford* other than *Nikas* have, like *Alford* itself, done so in the context of upholding a plea in the face of a defendant seeking to undo it. *See, e.g.,* Commonwealth v. Sullivan, 385 Mass. 497, 508 (1982); Commonwealth v. Hubbard, 371 Mass. 160, 171-72 (1976); Huot v. Commonwealth, 363 Mass. 91, 98-99 (1973); Commonwealth v. Jenner, 24 Mass. App. Ct. 763, 775-76 (1987).

"failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea."[182] If an *Alford* plea is offered, defense counsel should announce this in advance and conduct the questioning of the defendant at the hearing itself.[183]

2. Alternatives to the *Alford* Guilty Plea

The *Alford* plea is a tool for a defendant who maintains innocence but does not want to risk the greater sentence a trial might bring. If the case cannot be brought before a judge who accepts *Alford* pleas, counsel has several alternative strategies:

1. If the court will accept it, an *admission to sufficient facts* in district court,[184] a jury-waived *stipulated trial,*[185] or a *nolo contendere* plea,[186] may provide the basis for a plea bargain without requiring an admission of guilt.

2. *Counseling the defendant to admit guilt where warranted.* One commentator believes that the vast majority of these situations can be resolved simply by discussing the evidence critically with the client and subjecting him to cross-examination, thereby encouraging a private admission of guilt.[187] Alternatively, counsel might explain carefully and dispassionately the questions that will be put to the client by the judge and the likely consequences that will flow from a failure to admit the factual basis.

3. *Creating a record where Alford plea is rejected.* Finally, counsel should consider as a last resort setting up the *Alford* plea in such a way that its rejection by the judge is appealable, notwithstanding prior case law,[188] and Rule 12's language only states that failure to admit the elements does not "preclude" the judge from accepting the plea. For example, at some point it may be viewed as unfair to deny an *Alford* plea to a defendant who, for example, was at the scene but because of amnesia or prior

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[182] Mass. R. Crim. P. 12(c)(5)(A). Some courts interpret *Alford* to require a "strong" factual basis when the defendant refuses to admit conduct constituting the crime, or actively asserts innocence. *See* Commonwealth v. Giberti, 51 Mass. App. Ct. 907, 907 n.1 (2001) (when defendant offers Alford plea, judge should ascertain that (1) defendant intelligently concludes his interests require admission to sufficient facts or entry of plea of guilty and (2) record contains strong evidence of guilt); Commonwealth v. Pixley, 48 Mass. App. Ct. 917, 918 (2000). But *see* United States v. Tunning, 69 F.3d 107, 111 & 116 (6th Cir. 1995) (no difference in "factual basis" requirements of Fed. R. Crim. P. 11(f) for *Alford* plea, but if government undertakes to show factual basis by reciting facts it would have proven at trial, it must identify specific evidence that constitutes the proof). *See also* Commonwealth v. Nikas, 431 Mass. 453, 456, 459 (2000) (strength of Commonwealth's case against defendant not alone sufficient to support *Alford* plea).

[183] Reporter's Notes to Mass. R. Crim. P. 12(a). *See also* Commonwealth v. Hubbard, 371 Mass. 160, 164 (1976).

[184] *See* detailed discussion *supra* at § 3.6.

[185] *See supra* § 37.8A, notes 144, 145.

[186] *See* discussion *infra* § 37.10B.

[187] AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 215 (5th ed. 1988).

[188] Commonwealth v. Lawrence, 404 Mass. 378, 388–89 (1989) (defendant never explicitly asked to plead guilty while asserting innocence, and no right to have plea accepted in any event); Commonwealth v. Dilone, 385 Mass. 281, 284–85 (1982) (rejection of plea was "wholly discretionary with the judge").

intoxication cannot recall the crime sufficient to admit it.[189] At the least, counsel should insist that rejection of a plea offer on this basis creates a right to expect no harsher treatment after conviction at trial.[190]

The more sharply that counsel can narrow the issue to the defendant's unwillingness or inability to admit guilt the better chance of convincing the trial or appellate courts that the defendant should not be prejudiced if the guilty plea was reasonable otherwise.[191] This would entail preparing the client to address without hesitation the court's questions with regard to elements, penalties, waiver of constitutional trial rights, and voluntariness; having the defendant assert strongly that while he does not admit personally to the acts charged he fully acknowledges the government's evidence on each element is sufficient to convict him beyond a reasonable doubt and wants to avail himself of the benefits of the plea agreement;[192] and asking the judge to put on record whether the plea is being rejected because of the defendant's failure to admit guilt or because of some other reason that could be remedied.

§ 37.10B. PLEA OF NOLO CONTENDERE

The plea of nolo contendere may only be entered with the approval of the court,[193] which is not routinely given.[194]

Although a nolo contendere plea is generally equivalent to a guilty plea,[195] there are significant differences. The chief advantage is that the plea and any statements made "in connection with, and relevant to" it cannot be used against the defendant in

[189] *Cf.* Commonwealth v. Hubbard, 371 Mass. 160, 169 (1976) (even if defendant had amnesia he could still be competent to stand trial or to plead guilty).

[190] Appellate courts may be reluctant to overturn the ultimate outcome because the defendant has already had the "advantage" of seeing how the trial would turn out. One way to avoid this posture is to seek an extraordinary writ of superintendence under G.L. c. 211, § 3 when the plea is rejected and argue that the loss of the plea bargain would be irreparable once the trial was completed. *See* Hadfield v. Commonwealth, 387 Mass. 252, 255 n.2 (1982) (writ used sparingly to prevent irreparable loss of significant rights or to resolve recurring issues in administration of justice).

[191] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 14-1.6 (1997) (recommending that defendant's offer to plead "not be refused solely because the defendant refuses to admit culpability"); ROSSMAN, CRIMINAL LAW ADVOCACY: GUILTY PLEAS § 9.02 (1987) *(Alford* pleas foster respect for individual dignity and the attorney-client relationship without sacrificing judicial integrity).

[192] *Cf.* Commonwealth v. Lawrence, 404 Mass. 378, 388–89 (1989) (defendant never explicitly asked to plead guilty while asserting innocence); Commonwealth v. Souza, 390 Mass. 813, 820 (1984) (after prosecution rested, defendant offered to change plea but "repeatedly maintained his innocence"; judge acted within discretion in rejecting *Alford* plea).

[193] Mass. R. Crim. P. 12(a)(1), (3).

[194] *See* Standards for Sentencing and Disposition, Standard 9:01 (1984) ("absent special circumstances" court should not accept nolo plea).

Nolo pleas are seldom accepted in practice where jail sentences are involved. *But see* Hudson v. United States, 272 U.S. 451, 457 (1926) (prison sentence after a nolo plea not barred by Constitution).

[195] Reporter's Notes to Mass. R. Crim. P. 12(a)(1); Commonwealth v. Marino, 254 Mass. 533, 535 (1926); Commonwealth v. Pike, 53 Mass. App. Ct. 757, 762 n.7, *rev. denied*, 436 Mass. 1105 (2002).

any other civil or criminal proceeding,[196] except a perjury charge under certain circumstances.[197] A second difference is that since the defendant is accepting a conviction but not admitting his guilt, unlike a guilty plea the judge need not be satisfied that there is a factual basis for the conviction.[198]

§ 37.10C. ADMISSION TO SUFFICIENT FACTS

An admission to sufficient facts was originally used in district court to waive trial while maintaining de novo appeal rights from the first tier. Although de novo appeal has been abolished for cases commencing January 1, 1994, or after, the single-trial legislation provides that "for its purposes" an admission is the equivalent of a guilty plea.[199] Therefore (1) a defendant in district court may tender an admission contingent on the judge's acceptance of the defense dispositional request, and (2) all the warning and colloquy safeguards of a guilty plea must be provided even if the defendant is tendering an admission.[200] Although no longer significant as a way of safeguarding de novo appeal, admissions may continue to have utility for a defendant who asserts his innocence.[201] For more on admissions in the single-trial and de novo systems, *see supra* § 3.6.

§ 37.10D. JURY-WAIVED STIPULATED TRIAL

A jury-waived trial with stipulated evidence can sometimes be used as the functional equivalent of a guilty plea in circumstances where an *Alford* plea would not be accepted by the court.[202] The defendant would not be required to answer the colloquy questions relating to his guilt, although a colloquy must still occur that demonstrates a knowing and voluntary waiver of rights, including the defendant's

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[196] *See also* Commonwealth v. Tilton, 49 Mass. (8 Metcalf) 232, 233 (1844) (nolo plea "not to be used as admission elsewhere"). Olszewski v. Goldberg, 223 Mass. 27, 28 (1916) (equivalent to a guilty plea only for the purpose of disposition in the case at issue, not for subsequent proceeding).

A guilty plea and statements made in connection with it can be introduced in evidence as an admission in a subsequent trial, but unlike a conviction after trial, neither a guilty plea nor a nolo plea can have preclusive effect on any issue at a subsequent civil trial. Aetna Casualty & Sur. Co. v. Niziolek, 395 Mass. 737, 748-50 (1985). *See* discussion of civil consequences of criminal cases *infra* at ch. 43.

[197] The circumstances are that the defendant's statements must be (1) under oath, (2) on the record, and (3) with counsel present. Mass. R. Crim. P. 12(f).

[198] Reporter's Notes to Rule 12. *See also* Mass. R. Crim. P. 12(a)(3) (understanding and voluntary nolo plea required).

[199] G.L. c. 278, § 18. *See* Mass. R. Crim. P. 12 (a)(2) (permitting a defendant in District Court to admit to sufficient facts).

[200] Mass. R. Crim. P. 12 (c)(3)-(6). This was already the case under the de novo system for admissions in which de novo appeal was waived. Commonwealth v. Duquette, 386 Mass. 834, 844-46 (1982).

[201] On the defendant's admission to sufficient facts, the judge may order the case continued without a finding on probationary terms and conditions, and ultimately dismiss the charge when the defendant satisfactorily completes the probation period. Burns v. Commonwealth, 430 Mass. 444, 447 (1999) (construing G.L. c.278, §18).

[202] *See, e.g.,* Commonwealth v. Lewis, 399 Mass. 761, 762-63 (1987).

awareness of the virtual certainty of a conviction.[203] However, the distinction between a valid bench trial using stipulated evidence, which does not require conduct of a colloquy, and using stipulated evidence as the functional equivalent of a guilty plea, which does, can be problematic. As a result, some courts may be unwilling to allow this procedure.[204]

If the defendant explicitly reserves appeal, a stipulated trial also provides a means to plea bargain while preserving review on a disputed issue, such as denial of a motion to suppress.[205]

Since Rule 12's provision allowing withdrawal of a guilty plea if the judge would not follow the sentencing recommendation does not apply, counsel considering this route should seek an indication from the judge before the stipulated trial that the recommendation is acceptable.

[203] Commonwealth v. Hill, 20 Mass. App. Ct. 130, 131-33 (1985). Because a stipulated trial may be used as the functional equivalent of a guilty plea, and may be equally final, the same protections apply. *See also* Commonwealth v. Ramsey, 79 Mass. App. Ct. 724, 730 n.9 (2011) (observing that given preclusive effect of stipulation, trial judge must conduct a colloquy concerning constitutional rights waived, particularly when defendant stipulates to facts conclusive of guilt); Commonwealth v. Babcock, 25 Mass. App. Ct. 688, 691 (1988) (defendant's agreement to be tried on documentary evidence only did not constitute guilty plea, but court should engage in colloquy regarding waived rights before permitting it); Commonwealth v. Lewis, 399 Mass. 761 (1987); Commonwealth v. Feaster, 25 Mass. App. Ct. 909, 909 (1987); Commonwealth v. Castillo, 66 Mass. App. Ct. 34, 37 (2006); Commonwealth v. Brown, 55 Mass. App. Ct. 440, 448-49 (2002).

[204] *See* Commonwealth v. Abrams, 44 Mass. App. Ct. 584, 589 (1998) (proceeding where defendant stipulated not to truth of the facts, but only that the Commonwealth witnesses would testify in manner asserted by prosecutor, was valid jury-waived trial rather than an admission to sufficient facts; procedure " 'invites appeals of the most hairsplitting sort' and should, therefore, be avoided," quoting Commonwealth v. Babcock, 25 Mass. App. Ct. 688, 691 (1988)).

[205] *See supra* § 37.8A.