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A Practice Advisory: *Commonwealth v. Petit-Homme*
MGL ch. 287 § 29D Immigration Warnings
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In *Commonwealth v. Petit-Homme*, SJC-12636, 2019 WL 3683526 (Aug. 7, 2019), the defendant argued that he should be allowed to withdraw his plea based on the court's failure to provide the required immigration warning under M.G.L. ch. 278 § 29D.[1] The Commonwealth took the position that although Mr. Petit-Homme had not received these specific warnings, he had been warned under Massachusetts Rule of Criminal Procedure 12 (c)(3)(A)(iii)(b) ("rule (b)") and that this warning was sufficient to advise the defendant as required by 29D.[2]

In its decision, the Supreme Judicial Court began its analysis by acknowledging that 29D mandates that the immigration warning be given exactly as the legislature provided. They further explained that under the statute, if the defendant is not warned of the specific consequences in this way, and is actually subject to one of the unwarned consequences, the plea must be vacated.

Because the Commonwealth conceded that Mr. Petite-Homme was in fact facing deportation, the Court turned to the question of whether the rule (b) warning provided at the colloquy fulfilled the requirements of 29D. The Court recognized that rule (b) was added to the required plea colloquy to address a narrower category of offenses, known as aggravated felonies in the immigration context, and as such, rule (b) is confusing to defendants and "is neither equivalent to, nor an adequate substitute for, the more general advisory that G.L. c. 278, § 29D, entitles every criminal defendant to receive." *Petit-Homme* at *1.The Court went on to say that "a determination whether the rule 12 warning applies to an admission

[1] The language of MGL ch 278 § 29D is as follows: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

[2] MRCP 12(c)(3)(A)(iii)(a) ("rule (a)") mirrors the language in G.L. c. 278, § 29D. Rule (b) requires the judge to inform the defendant that "if the offense to which the defendant is pleading guilty, nolo contendere, or admitting to sufficient facts is under federal law one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States." Both (a) and (b) warnings are required to be provided to a defendant during a plea colloquy.

or guilty plea to a particular offense requires a careful, thorough review of Federal immigration law and often the criminal and immigration history of the particular defendant. Without the general statutory warning, the rule (b) warning is therefore too technical, legalistic and complex in its application to be particularly informative." *Id* at *8.

Because of the complicated and ultimately confusing nature of rule (b), the Court reminded all judges to ensure that the statutory immigration warning be read precisely as quoted in 278 §29D. The Court recognized that rule (b) may need to be revised or eliminated, and asked the Court's Standing Advisory Committee on the Rules of Criminal Procedure to review it. In the meantime, the opinion instructs judges to read BOTH the statutory immigration warning from 278 § 29D and the rule (b) warnings during plea colloquies.

Practice Tip: When analyzing the viability of post-conviction motions, it is critical to review (when available) the recording of the plea colloquy to ensure that the language of G.L. c. 278, § 29D was provided correctly and completely as set forth in the statute.