

No. _____

IN THE
Supreme Court of the United States

Richard Felton,
Petitioner-Appellant

v.

Massachusetts
Respondent-Appellee

**On Petition for Writ of Certiorari to the
Massachusetts Appeals Court**

PETITION FOR WRIT OF CERTIORARI

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April 17, 2020

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QUESTION PRESENTED

Did the Massachusetts Appeals Court deny a defendant due process of law in violation of the Fourteenth Amendment, when it retroactively applied two decisions that abolished the state's previously "expressed" and widely relied upon "common law" rule prohibiting application of the procedural waiver doctrine when addressing a specific type of structural error, *Rogers v. Tennessee*, 532 U.S. 451, 461-462 (2001)?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Richard Felton respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

OPINIONS BELOW

The January 16, 2020 opinion of the Massachusetts Appeals Court affirming the denial of Mr. Felton's fifth post-conviction motion for new trial is reported at 96 Mass. App. Ct. 1117, and attached as Appendix A. The August 6, 2018 Massachusetts Superior Court memorandum and order denying Mr. Felton's fifth post-conviction motion for new trial is unreported and attached as Appendix B. The March 12, 2020 opinion of the Massachusetts Supreme Judicial Court denying Mr. Felton's application for further appellate review from the Massachusetts Appeals Court order affirming denial of his fifth post-conviction motion for new trial is unreported and attached as Appendix C. The July 2, 2015 opinion of the Massachusetts Appeals Court reversing the allowance of Mr. Felton's second post-conviction motion for new trial is reported at 33 N.E.3d 1267, and attached as Appendix D.

JURISDICTION

The Massachusetts Appeals Court entered its judgment on January 16, 2020. Subsequently, petitioner's request for discretionary further appellate review in the Massachusetts Supreme Judicial Court was then denied on March 12, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Fourteenth Amendment.

The Fourteenth Amendment provides in relevant part:

. . . nor shall any State deprive any person
of life, liberty, or property, without due
process of law.

STATEMENT OF THE CASE

A. Introduction¹

When this petitioner's convictions were overturned in 2012 for the violation of his Sixth Amendment right to public trial, it meant nothing procedurally in Massachusetts that he had belatedly raised that claim of error. That was because for fourteen years, the Massachusetts Appeals Court had both not applied and expressly refused to apply the common law procedural waiver doctrine in the public trial context -- effectively deeming it inapplicable. *See e.g.*, *Commonwealth v. Edward*, 74 Mass. App. Ct. 162, 173, 912 N.E.2d 515 (2009) (refusing to apply the procedural waiver doctrine to a defendant's unobjection-to public trial claim that had been untimely raised by almost two

¹ There is no procedural barrier preventing this Court's review of the due process claim at issue here. The state court addressed that claim on its merits, with no statement – neither implicit or explicit – regarding any reliance on state court procedural waiver. (Appendix A). See also *Harris v. Reed*, 489 U.S. 255, 263 (1989) ("[U]nless the state court clearly expressed its reliance on an adequate and independent state law-ground, this Court may address a federal issue considered by the state court.") (internal citations omitted).

decades.). Two years after the reversal of petitioner's convictions, however, that more than fourteen yearlong practice of non-application of common law procedural waiver in the public trial context, was abrogated. It is the retroactive application of that change in common law that gives rise to the due process claim at issue here.

Specifically, the Massachusetts Supreme Judicial Court (SJC), for the first time, announced in *Commonwealth v. Wall*, 469 Mass. 652, 15 N.E.3d 708 (2014) (*Wall*), and *Commonwealth v. LaChance*, 469 Mass. 854, 17 N.E.3d 1107 (2014), *cert. denied*, 136 S. Ct. 317 (2015) (*LaChance*), that "the right to a public trial may be procedurally waived whenever a litigant fails to make a timely objection to [the offending] error." *Wall*, 469 Mass at 672-73; *LaChance*, 469 Mass. at 857 (same). This was the exact change in law that the state prosecutor in this case openly admits both it, and the judge that granted petitioner a new trial, had "perfervidly hoped" for. (Appendix E at 3). *Wall* and *LaChance* had effectively abrogated 14 years' worth of previously expressed and widely relied upon Massachusetts Appeals Court case law. That abrogation finally made it possible for the prosecution to make an argument (as shown below and supported by SJC authority) to the Massachusetts Appeal Court to apply the new procedural rule at issue, retroactively in this case:

RECENT DECISIONS BY THE SUPREME
JUDICIAL COURT CONSISTENT WITH ARGUMENTS
MADE IN THE COMMONWEALTH'S INITIAL BRIEF
REQUIRE DETERMINATION[] THAT THE
[DEFENDANT'S] COURTROOM CLOSURE CLAIM
WAS PROCEDURALLY WAIVED

(Appendix E at 3). In 2015, the Massachusetts Appeals Court agreed with the prosecution. It determined that "this case is controlled in all material respects by *Commonwealth v. Wall*, [supra], and *Commonwealth v. LaChance*, [supra]," and then it proceeded to retroactively apply those *ex post facto* decisions to petitioner's case. See *Commonwealth v. Felton*, 87 Mass. App. Ct. 1134 *1, 33 N.E.3d 1267 (Unpub. Decision) (2015). In so doing, it violated a cardinal rule of law.

Nearly two decades ago this Court issued the clear directive that any "judicial alteration of a common law doctrine of criminal law . . . must not be given retroactive effect, where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 461-462 (2001) (internal quotation marks and citations omitted). In the case at hand, there is no doubt that the *Wall* and *LaChance* decisions constitute the type of "judicial alteration of a common law doctrine of criminal law" that should "not" have been "given retroactive effect." *Id.* Those two decisions effectively abrogated *fourteen years* worth of non-application of procedural waiver in the public trial context. (emphasis added). Nonetheless, the Massachusetts Appeals Court (despite being squarely confronted with the Court's holding in *Rogers*) acted as if that mandate never existed, and retroactively applied both *Wall* and *LaChance* anyway. (Appendix A).

In doing that, the court below whimsically sidestepped the due process

principles upon which the reasoning in *Rogers* rested. Indeed, it outright disregarded that the right to fair warning is inalienable – intricately embedded in the most rudimentary notions of the Due Process Clause of the Fourteenth Amendment. The need for this Honorable Court to grant this writ, and straightforwardly condemn what has happened here, cannot be overstated. Massachusetts is treating the Fourteenth Amendment *right* to notice and fair warning as a mere *privilege* that courts may choose arbitrarily to honor or not. (emphasis added). It is that blatant abridgement – the degradation of a constitutional guarantee – that must be discontinued.

B. State Trial Proceedings

Petitioner's jury trial started on March 5, 2008 in the Superior Court of Massachusetts ("Superior Court" or "state court"), for the charges of rape and kidnapping. (Appendix F). On March 10, 2008, petitioner was convicted, and on March 11, 2008, was sentenced to serve six-to-eleven years in state prison, with five years of probation to serve from and after that sentence. (Appendix F).

C. State Post-Conviction Proceedings

1. Mr. Felton's First Motion For New Trial

Petitioner's first motion for new trial was filed on September 22, 2009 by appellate counsel retained by his family. (Appendix F, at 9). In that motion he asserted that trial counsel's failure to confront the complainant with substantial inconsistencies in her rape allegation, as well as contradictions in

her medical records, provided ineffective assistance of counsel. Petitioner did not raise a Sixth Amendment public trial violation in this first motion for new trial. On January 22, 2010, that motion was denied without a hearing. (Appendix F, at 9).

2. Mr. Felton's Direct Appeal

In March of 2010, petitioner filed, with counsel, his direct appeal in the Massachusetts Appeals Court (MAC). That direct appeal was consolidated with the appeal from the denial of his first motion for new trial. See *Commonwealth v. Felton*, Massachusetts Appeals Court No. 2009-P-1137. Petitioner did not raise a Sixth Amendment public trial violation in this direct appeal. On January 4, 2011, petitioner's direct appeal was denied, and petitioner did not seek further appellate review to the Supreme Judicial Court of Massachusetts (SJC). See *Commonwealth v. Felton*, 78 Mass. App. Ct. 1118, 939 N.E.2d 135 (2011).

3. Mr. Felton's Second Motion For New Trial

On March 23, 2011, petitioner, acting *pro se*, filed in the state court his second motion for new trial asserting, for the first time, that his Sixth Amendment right to public trial was violated when courtroom doors were ordered closed to the public for the entirety of jury selection. (Appendix F). Ultimately, the state court determined that the courtroom was indeed ordered closed by a state court officer for all of petitioner's jury selection, and that petitioner's mother, father and girlfriend were all excluded as a result of the

closure and ordered a new trial. (Appendix F).

a. The state prosecutor's appeal to the MAC

Following the reversal of petitioner's convictions by the Superior Court, the prosecution appealed the order of reversal to the MAC. In that appeal, the prosecution's sole objective was to get the MAC to retroactively apply the procedural waiver doctrine against petitioner's public trial claim. This argument by the prosecution was made despite the fact that it was asking the MAC to retroactively invoke a doctrine of law that, in the past, the MAC was uniformly not applying and refusing to apply in cases alleging public trial violation. See *Commonwealth v. Alebord*, 80 Mass. App. Ct. 432, 953 N.E.2d 744 (2011) (refusing to apply procedural waiver in the public trial context). Nonetheless, as the prosecution's appeal from reversal of petitioner's convictions was pending in the MAC, the procedural law as it applied in public trial cases changed in Massachusetts. Specifically, in 2014, the SJC released decisions in two public trial cases holding that the procedural waiver doctrine for a failure to timely object was now applicable in the public trial context. See *Commonwealth v. Wall*, 469 Mass. 652, 15 N.E.3d 708 (2014), and *Commonwealth v. LaChance*, 469 Mass. 854, 17 N.E.3d 1101 (2014).

Ultimately, after determining that petitioner's "case is controlled in all material respects by *Commonwealth v. Wall*, [supra], and *Commonwealth v. LaChance*, [supra]," and retroactively applying those two decisions to petitioner's case, the MAC reversed the 2012 order for new trial issued by the

Superior Court. *Commonwealth v. Felton*, 87 Mass. App. Ct. 1134, 33 N.E.3d 1267 (Unpub. Decision) (2015) (*Felton II*).

4. Mr. Felton's Third & Fourth Motions for New Trial

On January 26, 2016, Petitioner filed his third motion for new trial, and filed his fourth motion for new trial on May 1, 2017. Both motions raised (with supporting affidavit from trial counsel) variations of the claim that trial counsel failed to argue alibi evidence that proved petitioner and the complainant were in the first floor common hallway of the complainant's two-family home, at the same exact time that the complainant alleged that petitioner was supposedly assaulting her in her second floor apartment bedroom. In addition, both motions also asserted the claim the trial counsel's advice to petitioner not to testify, in light of the fact that both forensic and physical evidence substantiated the account he gave to police, was ineffective assistance of counsel. On May 2, 2016, petitioner's third motion for new trial was denied without a hearing. (Appendix F). On June 6, 2017, petitioner's fourth motion for new trial was also denied without a hearing. (Appendix F). The petitioner filed a timely notice of appeal in both instances, and both appeals were eventually consolidated on appeal to the Massachusetts Appeals Court. On December 30, 2019, the MAC without a hearing affirmed the denial of petitioner's third and fourth motions for new trial. *Commonwealth v. Felton*, *Commonwealth v. Felton*, 96 Mass. App. Ct. 1114, 2019 Mass. App. Unpub. LEXIS 866 (2019). The petitioner timely appealed by way of an application for

further appellate review to the Massachusetts Supreme Judicial Court, and on February 21, 2020, that application was denied.

5. Mr. Felton's Fifth Motion for New Trial

On May 29, 2018, petitioner filed his fifth motion for new trial. (Appendix F). In that motion petitioner raised issue with the retroactive application of a judicially altered common law procedural rule newly announced in *Commonwealth v. Wall, supra*, and *Commonwealth v. LaChance, supra*. The retroactive application at issue took place when the MAC rendered its 2015 decision in this case, reversing the allowance of petitioner's second motion for new trial. (Appendix D). Specifically, the petitioner claimed that the MAC violated his right to due process, as well as this Court's directive in *Rogers v. Tennessee*, 532 U.S. 451, 461-462 (2001), when it retroactively applied the *Wall* and *LaChance* decisions that announced a new procedural rule that abrogated fourteen years' worth of prior state law widely relied upon in state court decisions. On August 6, 2018, petitioner's fifth motion for new trial was denied without a hearing. (Appendix F). The petitioner timely appealed (Appendix G), and on January 16, 2020, his appeal to the MAC was denied without a hearing. (Appendix A). Again, the petitioner timely appealed by way of an application for further appellate review to the Massachusetts Supreme Judicial Court, and on March 12, 2020, that application was denied without a hearing. (Appendix C).

REASONS FOR GRANTING THE WRIT

This Court's opinion in *Rogers v. Tennessee, supra*, which justly spoke of the intrinsic value that fair warning brings to the criminal justice system, and made clear the prohibition against the type of retroactive application that has taken place in this case, has been stripped of its power in Massachusetts courts. Indeed, this is a petition that confronts a Massachusetts Appeals Court decision gone rogue – overlooking and disregarding *Rogers* and the principles of fair warning that its logic was based upon. The state appellate court decision at issue in this case should not be allowed to stand. It not only transgresses the most well-settled principles of due process of law, it leaves that transgression in place to persevere for all courts to follow in Massachusetts without consequence. Respectfully, this Honorable Court should grant the writ.

I. THE MASSACHUSETTS APPEALS COURT DISREGARDED THE EXPLICIT DIRECTIVE THIS COURT ISSUED IN ROGERS V. TENNESSEE

What happened in this case is exactly "the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Rogers v. Tennessee*, 532 U.S. 451, 467 (2001). Unlike the Supreme Court of Tennessee in *Rogers*, the Massachusetts Appeals Court (MAC) here did not retroactively apply a judicial decision that merely laid "to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported [] case." *Id.* at 467. To the contrary, the MAC, in this petitioner's case,

retroactively applied two state appellate court decisions that effectively abrogated fourteen years' worth of prior state law. Prior state law that had been widely relied upon in many cases both before and after the conduct at issue here; and at one point in the post-conviction process, had even been relied upon by the Superior Court in this case in overturning petitioner's convictions.

See *Commonwealth v. Felton*, 87 Mass. App. Ct. 1134 *1, 33 N.E.3d 1267 (Unpub. Decision) (2015) (*Felton II*) ("the motion judge reluctantly allowed the defendant's second motion for new trial based on the state of the law in 2012.").

Specifically, the petitioner's convictions were reversed in April of 2012 for the violation of his Sixth Amendment right to public trial (Appendix D).² At that time, the fact that there had been no contemporaneous objection to the courtroom closure at trial, or any claim of error raised in petitioner's first post-conviction motion for new trial or on direct appeal, was irrelevant in terms of state procedure.³ Indeed, the prevailing law in Massachusetts at the time had both not applied and squarely forbade any inquiry into procedural waiver in the public trial context for a mere failure to timely raise the claim. *See e.g.*, *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 475-76, 722 N.E.2d 979 (2000) (reversing a defendant's convictions for the violation of his public trial right

² Petitioner was then released on bail pending the prosecution's appeal. (Appendix F).

³ Petitioner's purported procedural waivers took place at trial in 2008, in his first motion for new trial in 2009, and on direct appeal in 2010. (Appendix G).

is present in the instant case. *Bradley*, 416 U.S. at 716 (internal quotation marks and citations omitted). Specifically, *Bradley's* third exception condemned the application of rules that create "new and unanticipated obligations" "imposed upon a party without notice." *Id.* at 720. The Court in *Bradley* reasoned that the application of such a rule promoted the "working of an injustice." *Id.* at 717. Hence, intervening or not, the new procedural rule announced in the 2014 *Wall* and *LaChance* decisions, should have never been applied retrospectively in petitioner's case. The retroactive application of those two decisions effectively "imposed" upon the petitioner the "new and unanticipated obligation[]" to timely object to his public trial violation or suffer procedural waiver, and imposed that unexpected obligation "without notice." *Id.* at 720. Indeed, the SJC's newly imposed obligation to timely object to public trial violations was established in Massachusetts in 2014; long after the 2008, 2009 and 2010 purported procedural waivers occurred in this case. The MAC simply decided to give greater precedence to the general rule of applying the law currently in place, over its obligation to protect petitioner's right to notice and fair warning.

Even outside the *Rogers* context, this Court has condemned the kind of arbitrary and capricious judicial action that has occurred in this case. For example, in *Bouie v. Columbia*, 378 U.S. 347 (1964) -- the retroactivity case that helped lay the foundation for this Court's subsequent holding in *Rogers*, *supra* at 461 -- the Court condemned a state's "unforeseeable judicial

Ct. at 173. These are the factors that give rise to the *Rogers* claim at issue here. *Wall* and *LaChance* announced "a judicial alteration of a common law doctrine of criminal law," that should not have been "given retroactive effect" in this case. *Rogers*, 532 U.S. at 461-62. In so doing, the Massachusetts Appeals Court "violate[d] the principle of fair warning," *id.*, and deprived this petitioner of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petitioner beseeches this Honorable Court to grant the writ in this case, and abrogate the unconstitutional practice of retroactive application of *Wall* and *LaChance* currently persisting in Massachusetts.

Respectfully Submitted,
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