Petition Appendix

SJC-12683

COMMONWEALTH vs. KEVIN FRANCIS.

Suffolk. November 4, 2019. - June 24, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Constitutional Law, Assistance of counsel, Fair trial, Waiver of constitutional rights. Due Process of Law, Assistance of counsel, Fair trial. Fair Trial. Practice, Criminal, Assistance of counsel, Fair trial, Waiver, Postconviction relief.

Indictment found and returned in the Superior Court Department on December 17, 1981.

Following review by this court, 391 Mass. 369 (1984), a motion for a new trial, filed on September 29, 2015, was heard by Mitchell H. Kaplan, J.

A request for leave to appeal was allowed by Gants, C.J., in the Supreme Judicial Court for the county of Suffolk.

Amy M. Belger (Ira L. Gant, Committee for Public Counsel Services, also present) for the defendant.

Dara Z. Kesselheim, Assistant District Attorney (Craig Iannini, Assistant District Attorney, also present) for the Commonwealth.

KAFKER, J. The defendant, Kevin Francis, was convicted of murder in the first degree in 1982. This is the defendant's appeal, pursuant to G. L. c. 278, § 33E, from the denial of his second motion for a new trial. The victim, who was the defendant's former girlfriend, had been stabbed multiple times in the chest and skull. The defendant had previously threatened her and had been identified by an eyewitness chasing the victim with a knife.

At the time of his arraignment, the defendant was nineteen years old, indigent, and entitled to court-appointed counsel. Stephen Hrones, an experienced criminal defense lawyer, appeared at the defendant's arraignment to try to represent him at trial. Hrones was not on a list of attorneys who were approved by the court to serve as assigned counsel in murder cases, but it was his practice to be on the lookout for such cases. In a sidebar discussion with the judge and prosecutor that excluded the defendant, Hrones asked if he had been added to the approved list of appointed counsel and informed the judge that he would represent the defendant privately pro bono if he could not be appointed by the court. The court informed Hrones that he was not on the approved list but allowed Hrones to serve as private counsel so long as he would not be paid with any public funds. The judge did not seek the defendant's approval of the arrangement or inform the defendant in a colloquy or otherwise

that he was entitled to court-appointed, State-funded counsel. Hrones also did not explain the arrangement or secure his appointment as private counsel through any prior or subsequent discussions with the defendant. Hrones nonetheless represented the defendant at trial and in his direct appeal.

After this court affirmed his conviction, the defendant represented himself when filing his first motion for a new trial in May 1991. At that time, he had in his possession his trial and arraignment transcripts, including the arraignment judge's summary of the sidebar discussion that took place during the arraignment, which stated that Hrones was private counsel and not appointed public counsel. The defendant's case was also screened by the Committee for Public Counsel Services (CPCS) in 1992-1993 and again in 2000 without the issue being raised in any motion. It was not until his second motion for a new trial, filed in 2015, that a claim was raised that Hrones's appointment violated the defendant's rights under the Sixth Amendment to the United States Constitution or art. 12 of the Massachusetts Declaration of Rights. This is the sole issue presented here. There is no suggestion that Hrones's representation at trial was ineffective apart from the appointment itself, as no ineffective assistance of counsel claims are made here by appellate counsel in the second motion for a new trial. Nor were any identified

in our G. L. c. 278, § 33E, review in 1984. See Commonwealth v. Francis, 391 Mass. 369 (1984).

The first dispositive question at issue is whether the defendant's Sixth Amendment and art. 12 rights were violated when he was deprived of the opportunity to choose between paid, court-appointed counsel and the representation offered by Hrones and, relatedly, whether excluding the defendant from the sidebar discussion that established this arrangement violated the defendant's right to be present at a critical stage of his criminal proceedings. Second, if the defendant's rights were violated, we must determine whether they warrant a new trial more than thirty-seven years after the defendant's conviction. We conclude that the defendant's right to choice of private counsel and right to be present during a critical stage of the proceedings under both the Federal and State Constitutions were violated. Although a novel question, we also conclude that these violations of his constitutional rights are structural errors requiring automatic reversal absent waiver, as the choice of private counsel is a fundamental right to be made by the defendant -- not by the court and counsel and without the defendant's consent. Nonetheless, the delay of more than thirty years in bringing these claims in these circumstances, where the claim was not first brought until 2015, but the transcript clearly depicting the constitutional violations was available

for the defendant in 1991 and for the public defense counsel screening his claims in 1992-1993 and 2000, waives the claims under State and Federal constitutional law. We also conclude that there was no substantial risk of a miscarriage of justice,[1] as the defendant was capably represented at trial by an experienced criminal defense counsel, and no errors in the quality of that representation have been identified -- the only error identified is the appointment itself.

1. Background. The conviction of murder in the first degree underlying this appeal was reviewed by this court in Francis, 391 Mass. 369. We summarize the relevant facts. On September 19, 1981, an eyewitness, Terrence Smith, was driving along Blue Hill Avenue toward Mattapan Square in Boston at approximately 7 P.M. Id. at 370. Smith saw a young woman on the sidewalk running toward him, and saw that she was carrying a stick and wearing a "rain or shine" jacket, new boots, and dungarees. Id. Smith then saw a man running about forty or fifty yards behind the woman. Id. As the man got closer, the

[1] Because we are not currently reviewing the defendant's conviction of murder in the first degree under G. L. c. 278, § 33E, we do not review whether the claimed errors caused a substantial likelihood of a miscarriage of justice, the standard uniquely designated for § 33E review. See Commonwealth v. Randolph, 438 Mass. 290, 296 (2002). Instead, we review the claimed errors under a slightly more stringent standard designated for all other unpreserved claims on appeal, namely whether the errors created a substantial risk of a miscarriage of justice. Id.

eyewitness saw he was carrying a knife. Id. Smith testified that the man came within fifteen feet of him and that he saw "a very good side view" of the man. Id. At 7:15 P.M. that evening, the police received a call to report to the Franklin Field area, and upon arrival they discovered the body of the victim, Vanessa Marson, who was the defendant's former girlfriend. Id. at 370-371. The medical examiner testified that the victim died of multiple stab wounds to her chest and skull. Id. at 370. Smith identified the defendant from an array of ten or twelve photographs as the man he saw the evening of the murder and identified by means of a photograph the victim as the woman he saw running. Id. He later identified the defendant at trial. Id. at 370-371. The evidence also showed that the defendant had threatened the victim two months before the murder occurred. Id. at 371.

The defendant was charged with murder in the first degree and arraigned on January 8, 1982. At the time of the arraignment, the defendant was nineteen years old and indigent. Attorney Hrones appeared at the defendant's arraignment on his own initiative.

Hrones had been a member of the bar since 1972. He had represented defendants pro bono in murder cases on four or five occasions before representing the defendant, and had tried numerous serious felony cases. Nevertheless, neither the

defendant nor his family had any contact with Hrones before the arraignment or had otherwise arranged to retain Hrones's services. The defendant met Hrones for the first time at the arraignment.

At the time of the arraignment, there was a Superior Court rule in effect that provided that "[n]o person shall be assigned as counsel in a murder case unless he is included in the official Standing List of Counsel established by a majority vote of the justices." Rule 53(1) of the Rules of the Superior Court (1982). Hrones was not included in the official Standing List of Counsel at the time of the defendant's arraignment in 1982, and was reminded of this fact at the arraignment during a sidebar discussion with the judge. The court conducted this sidebar discussion in court with the prosecutor and Hrones, out of the presence and earshot of the defendant. The judge explained the substance of that sidebar discussion, as reflected in the record:

> "I would like the record to show that when the case of Kevin Francis was called for arraignment, Mr. Rhones [sic] stepped up and asked if he and the assistant district attorney could approach the bench. I allowed them to do so.
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> "Mr. Rhones said to me that he would represent the young man for no pay if he could not be appointed, and asked me if his appointment to the list of attorneys who may represent indigents accused of murder had been approved at the last meeting of the judges. I told him it had not.

> "As chairman of the committee involved I know that Mr. Rhones has applied three or four times and been turned down each time.
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> "This in itself does not prevent him from private representation, and I am allowing him to represent the defendant privately.
>
> "I just want the record to show that at no time throughout the trial should any judge consider paying him out of public funds."

After the sidebar discussion, in open court, the judge asked Hrones if he was going to file an appearance for the defendant as private counsel. Hrones answered in the affirmative.

The judge knew at the arraignment that the defendant was entitled to counsel who met the requirements to be court-appointed counsel in murder cases, at no charge to the defendant, and that Hrones was not on the list of attorneys who satisfied these requirements. Yet at no point during the arraignment did the judge conduct a colloquy with the defendant to ensure that the arrangement was acceptable to him. Nor did the judge ensure that Hrones had conferred with the defendant regarding his representation. He only ensured that the record reflected that Hrones was to receive no public funds in compensation for his representation.

After a jury trial, the defendant was convicted of murder in the first degree on September 21, 1982, and sentenced to life imprisonment. After the trial, Hrones was appointed by the court as public counsel to represent the defendant on appeal on

May 6, 1983, and received public funds for doing so. This court conducted plenary review pursuant to G. L. c. 278, § 33E, and affirmed the defendant's conviction. Francis, 391 Mass. at 376. Seven years later, the defendant filed a pro se motion for a new trial on May 24, 1991. In that motion, the defendant raised an ineffective assistance of counsel claim. He also argued that the trial judge gave improper instructions to the jury. At the time the defendant filed the motion, he had transcripts of the trial and the arraignment in his possession -- including a transcript with the trial judge's summary of the sidebar conference discussed supra. Nowhere in the defendant's motion or its accompanying memorandum of law did the defendant raise a Sixth Amendment or art. 12 claim based on his right to choose counsel. The motion was denied without a hearing by the trial judge on September 23, 1993.

An attorney for CPCS screened the defendant's case in 1992-1993. As part of that process, the attorney wrote to the defendant and asked him to provide copies of all police reports and other documents or information in the defendant's possession. The defendant did so, yet neither the defendant nor CPCS raised the Sixth Amendment or art. 12 issue in the trial court. Although it is not clear whether the attorney had the transcripts, he certainly could have requested them.

On August 18, 1999, the defendant wrote a letter to a second attorney at CPCS requesting an assignment of postconviction screening counsel. In response to an earlier inquiry from CPCS regarding whether the defendant's trial counsel was hired by him or court appointed, the defendant responded: "Court appointed." At the time, CPCS was reviewing the defendant's request for postconviction screening counsel. CPCS assigned counsel to screen the defendant's case on February 17, 2000. Counsel did not file an appearance on the defendant's behalf until 2013.

Twenty-two years after the defendant's first postconviction motion was denied, the defendant, through counsel, filed a motion for dismissal of the indictment pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), or in the alternative for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The defendant argued in his motion that he was denied his right to counsel under the Sixth Amendment and art. 12 when he made no knowing and intelligent waiver of his right to a court-appointed lawyer approved to try murder cases.[2] On September 29, 2016, a judge in

[2] The other arguments raised by the defendant -- i.e., that the Commonwealth withheld exculpatory evidence; that the defendant was convicted with inadmissible and prejudicial testimony admitted solely for the purpose of impeachment; that the trial judge failed to give proper jury instructions related to the reliability of eyewitness identifications; and that the

the Superior Court (motion judge)[3] allowed the defendant's request for an evidentiary hearing on the motion. The hearing was held in January 2018.

At the evidentiary hearing, Attorney Hrones testified that the substance of the sidebar discussion with the arraignment judge in 1982 was never shared with the defendant. Hrones testified that he did not remember whether he discussed with the defendant that Hrones was not court appointed. However, Hrones also testified that he did not want the defendant to know he was trying the case for free because he did not want the defendant to fire him. Hrones testified that it was his practice to find arraignments in cases of murder in the first degree so that he could offer his services as counsel to defendants.

The defendant also testified at the evidentiary hearing. He testified that he first met Hrones at the arraignment, and it was his understanding that Hrones was court appointed. The defendant testified that he would not have agreed to proceed to trial with Hrones if he had known that Hrones was not getting paid and was not on the list of counsel qualified for appointment in murder cases. The defendant explained:

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prosecutor improperly vouched for the innocence of the victim's boyfriend -- were rejected by the motion judge and are not the subject of this appeal.

[3] The motion judge was not the trial judge, who had long since retired.

> "I wanted to win . . . I woulda took the paid attorney. It's just . . . to me, it just makes sense. I just think he would -- no disrespect to anybody, but I just think he probably would have been more qualified."

The defendant also testified that he did not know about the sidebar discussion with the arraignment judge -- nor had he been present for it. The defendant further testified that he first understood what pro bono representation means after his current counsel explained it to him over a decade after the defendant's pro se motion for a new trial had been denied, and years after the defendant responded that his attorney had been "Court appointed" in his 1999 letter to CPCS.

Following the evidentiary hearing, the motion judge denied the defendant's motion on February 22, 2018, finding "no constitutional right to court appointed counsel that the defendant has unwittingly waived." The defendant then filed an application for leave to appeal from this ruling under G. L. c. 278, § 33E. Following a hearing on the matter before a single justice, the matter was remanded to the motion judge for certain factual findings. The questions to be resolved on remand were the following:

> "1. On or about January 8, 1982, when Mr. Hrones filed an appearance to represent the defendant as his private attorney, had he been retained by the defendant or any member of his family?
>
> "2. Did the defendant believe at the time of the arraignment that the court had appointed Mr. Hrones to represent him as his attorney? If so, when and how did the

> defendant learn that the court had not appointed Mr. Hrones?
>
> "3. Did the defendant believe at the time of arraignment that Mr. Hrones was being paid by the court to represent him? If so, when and how did the defendant learn that Mr. Hrones was representing him pro bono?"

After remand, the motion judge offered both parties the option of another evidentiary hearing to put forward additional evidence on the questions of fact presented by the single justice, but both parties declined the opportunity. The judge found in response to the first question that "at or about the time that Mr. Hrones filed his notice of appearance in this case he had not been retained by the defendant or a member of his family." The judge credited Hrones's testimony at the January 2018 hearing that "it was his practice to be on the look-out for arraignments in first degree murder cases so that he could offer his services as counsel to the accused." The judge concluded that there was "no discussion with the defendant in which either the defendant or his family 'retained' Mr. Hrones as the defendant's attorney in this case."

In response to the second and third questions, the motion judge found that "the defendant [had] not proved that, at or about the time of his arraignment, he was unaware that the court had not appointed Mr. Hrones to represent him or that Mr. Hrones was not being paid by the Commonwealth." The judge stated that Hrones's concession that he did not remember whether he had ever

told the defendant that he had not been appointed by the court was "inadequate to meet the defendant's burden of proof" on his second motion for a new trial. The judge did not credit the defendant's testimony that "he did not know that Mr. Hrones was representing him pro bono as opposed to as court appointed counsel until relatively recently and had never discussed it with [Hrones]." The judge did not find that the defendant was intentionally misrepresenting what he remembered; rather, the judge did not credit the defendant's testimony because he found that "this issue would not have been a noteworthy matter to the defendant in 1982." That is because, the judge explained, "the defendant was totally unaware of the significance of the distinction between being represented by a court appointed lawyer or a private attorney appearing pro bono, until his present post-conviction counsel developed the Sixth Amendment argument presented in the pending motion and explained it to him." The defendant thus would not have found the sidebar exchange between the arraignment judge and Hrones significant, which is why, the motion judge reasoned, he failed to mention it in his first motion for a new trial.

Following remand, the single justice granted the defendant's application for leave to appeal from the denial of his second motion for a new trial, concluding that the issues

raised in the defendant's application were both new and substantial within the meaning of G. L. c. 278, § 33E.

2. Discussion. a. Standard of review. "We review the disposition of a motion for a new trial for a significant error of law or other abuse of discretion" (quotation and citation omitted). Commonwealth v. Robinson, 480 Mass. 146, 149 (2018). "When . . . the motion judge did not preside at trial, we defer to that judge's assessment of the credibility of witnesses at the [evidentiary] hearing on the new trial motion, but we regard ourselves in as good a position as the motion judge to assess the trial record" (citation omitted). Commonwealth v. Drayton, 479 Mass. 479, 486 (2018). Furthermore, "we make an independent determination as to the correctness of the judge's application of constitutional principles to the facts as found" (quotation and citation omitted). Id.

b. The right to counsel and the right to choose counsel. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The United States Supreme Court has interpreted the Sixth Amendment to mean that "counsel must be provided for defendants unable to employ

counsel unless the right is competently and intelligently waived." Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963).[4]

The Sixth Amendment right to counsel also encompasses the right to private counsel of one's choice, subject to certain restrictions. See United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 625-626 (1989) (Caplin & Drysdale); Wheat v. United States, 486 U.S. 153, 162-164 (1988). In Gonzalez-Lopez, supra at 142, the defendant hired a California attorney to represent him on a Federal drug charge in Missouri. The District Court twice denied the California attorney's application for admission pro hac vice. Id. at 142-143. The defendant appealed from his conviction, arguing that denial of his attorney's pro hac vice motions was erroneous and violated his Sixth Amendment right to paid counsel of his choosing. Id. at 143-144. The Court agreed. It began by rejecting the government's argument that the defendant's right to choose

[4] The court may not "forc[e] a lawyer upon an unwilling defendant," as this would be "contrary to his basic right to defend himself if he truly wants to do so." Faretta v. California, 422 U.S. 806, 817 (1975). As such, the Sixth Amendment right to counsel can be waived, but such waiver must be knowing and intelligent: "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open" (quotation and citation omitted). Id. at 835.

counsel was satisfied so long as the counsel with whom he was left was competent and the over-all trial was fair. The Court held that the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided -- to wit, that the accused be defended by counsel he believes to be best." Id. at 146. As a result, "[d]eprivation of the right [to private counsel of one's choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." Id. at 148. Arguing otherwise "confuse[s] the right to counsel of choice -- which is the right to a particular lawyer regardless of comparative effectiveness -- with the right to effective counsel -- which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." Id. As such, "[a] choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." Id. at 150.[5]

[5] In a dissent joined by three other justices, Justice Alito wrote: "I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received." United States v. Gonzalez-Lopez, 548 U.S. 140, 155 (2006) (Alito, J., dissenting). This would require the defendant to "show an identifiable difference in the quality of representation," and also prejudice resulting from the disqualification, even in cases involving the erroneous interference with choice of counsel (quotation omitted). Id. at 156. See Wheat v. United States, 486 U.S. 153, 159 (1988) ("Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective

The Court did, however, stress that the right to choose one's counsel is not absolute: for example, it "does not extend to defendants who require counsel to be appointed for them. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation" (citations omitted). Id. at 151-152. See Wheat, 486 U.S. at 162-164. The court need not unduly delay trial to provide the defendant with counsel of his choice. See Burton v. Renico, 391 F.3d 764, 771 (6th Cir. 2004), cert. denied, 546 U.S. 821 (2005).

We have similarly defined and limited the right to choice of counsel under art. 12. Article 12 provides that, in criminal proceedings, "every subject shall have a right . . . to be fully heard in his defense by himself, or his council at his election." This court has held that, "as a general rule, a defendant should be afforded a fair opportunity to secure counsel of his own choice" (quotation and citation omitted).

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advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"). Justice Alito also concurred in a later structural error case involving the right to public trial to further emphasize that prejudice is ordinarily "based on the reliability of the underlying proceeding," and that challenging a conviction "means that the defendant must show a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt" (quotation and citation omitted). Weaver v. Massachusetts, 137 S. Ct. 1899, 1915 (2017) (Alito, J., concurring).

Commonwealth v. Pena, 462 Mass. 183, 191 (2012). However, this right "is not an absolute right, and in some circumstances, it may be subordinate to the proper administration of justice," and, "[w]ith regard to an indigent defendant, the right to an attorney does not guarantee the right to any particular court-appointed counsel" (quotations and citations omitted). Id.

Although indigent defendants do not have the right to choose who is appointed for them, they nevertheless have "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." Gonzalez-Lopez, 548 U.S. at 144, quoting Caplin & Drysdale, 491 U.S. at 624-625. This establishes a choice, even for an indigent defendant: the defendant can choose between appointed counsel and one who offers his or her services for free at the time counsel must be selected, or at least for an amount that the defendant can afford. See Gonzalez-Lopez, supra; Caplin & Drysdale, supra.

Here, the defendant was indigent, and thus qualified for court-appointed counsel at the time of his arraignment. Although the defendant did not have the right to choose between court-appointed attorneys, he did have the right to choose between an appointed attorney and counsel who had offered his services for free. In making this selection, the defendant

could have weighed which attorney he believed was best qualified to represent him. See Gonzalez-Lopez, 548 U.S. at 140. In this instance, the defendant was entitled to be informed of and to consider his choice between a court-appointed attorney -- who would have to have been approved by the court to represent indigent defendants in murder cases, and would have been compensated for his or her work, see Rule 53 of the Rules of the Superior Court[6] -- and Hrones, who volunteered his services for free, but was not on the list of approved counsel.

The defendant did not hire Hrones as private counsel. He was not given the opportunity to exercise his choice between appointed counsel and Hrones, the attorney offering services for free. Instead, the arraignment judge, without consulting the defendant, essentially appointed Hrones as the defendant's "private" counsel without pay. The judge's decision to "allow[] [Hrones] to represent the defendant privately" without inquiring whether the defendant approved of the arrangement, or understood that he was entitled to court-approved, court-appointed counsel at no cost, interfered with the defendant's Sixth Amendment and art. 12 rights to choose private counsel. The selection of

[6] This rule no longer governs how counsel is assigned to indigent defendants. Instead, the Committee for Public Counsel Services has established and currently supervises and maintains "a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature." G. L. c. 211D, § 5.

private counsel is for the defendant, not the court. The court cannot appoint private counsel, and that is what the court did here.

At a minimum, in these circumstances, the arraignment judge should have conducted a colloquy with the defendant explaining that he had a right to appointed counsel from a list of qualified attorneys who would be paid for their services, or the right to choose Hrones as his private counsel, who was offering his services for free. Such a colloquy would have ensured that the defendant made an informed exercise of his constitutional rights regarding counsel. The judge did not, however, educate the defendant regarding this choice, and thus deprived the defendant of his rights under the Sixth Amendment and art. 12.[7]

[7] Such a colloquy occurred in 1974 in another case where Hrones represented a defendant charged with murder in the first degree. In Commonwealth vs. Lacy, Mass. Super. Ct., No. 7484CR79994 (Suffolk County), a transcript of an evidentiary hearing shows that the judge conducted a colloquy with the defendant, Leonard Lacy, who forwent appointed public counsel to be represented by Hrones. The court ensured that Lacy understood his right to appointed public counsel: "Nor, do I say . . . that you cannot have counsel of your own choosing and if Mr. Hrones is counsel of your own choosing, you certainly can have him, provided, of course, that . . . Mr. Hrones as counsel . . . is thoroughly aware that he will defend you with the complete understanding that this Court is not appointing him as counsel under the terms of Rule 53. Therefore, he will not be compensated by the Commonwealth of Massachusetts. . . . [S]ince you indicate to me that you are indigent, . . . you are entitled, therefore, to have competent counsel appointed for you." We also note that this court now has rules requiring a judge to inform an indigent party that he has the right to be represented by counsel at public expense. S.J.C. Rule 3:10,

c. Right to be present. Rule 18 of the Massachusetts Rules of Criminal Procedure, 378 Mass. 887 (1979), provides that criminal defendants shall have the right to be present "at all critical stages of [court] proceedings." "This right to be present derives from the confrontation clause of the Sixth Amendment . . . , the due process clause of the Fourteenth Amendment to the United States Constitution, and art. 12 . . . ." Robinson v. Commonwealth, 445 Mass. 280, 285 (2005). Although rule 18 does not identify what stages of court proceedings are "critical," "fairness demands that the defendant be present when his substantial rights are at stake." Id., quoting Reporters' Notes to Mass. R. Crim. P. 18 (a), Mass. Ann. Laws Court Rules, Rules of Criminal Procedure, at 1429 (LexisNexis 2005).

As we have recently held, "[c]ounsel's presence at sidebar and intention to relay information to a defendant does not substitute for the defendant's presence" during a critical stage of the proceedings. Commonwealth v. Colon, 482 Mass. 162, 172-173 (2019). This holding is on all fours with the present case, where excluding the defendant from the sidebar discussion among

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§ 2, as appearing in 475 Mass. 1301 (2016) ("If any party to a proceeding appears in court without counsel where the party has a right to be represented by counsel under the law of the Commonwealth, the judge shall advise the party . . . that . . . the party may be entitled to the appointment of counsel at public expense . . .").

the judge, Hrones, and the prosecutor at the arraignment denied the defendant his right to be present at a critical stage of the proceeding, and effectively usurped his constitutional right to choose which counsel he believed would be best suited to represent him. Moreover, his presence was particularly important where Hrones later admitted at the evidentiary hearing in 2018 his reticence in telling the defendant he was not court appointed in 1982 because he did not want the defendant to fire him, and therefore had no intention or incentive to relay full and accurate information to the defendant.

As discussed supra, because Hrones, who was not on the list of approved counsel for murder cases, had volunteered to represent the defendant without pay in his murder case, the defendant had a choice of counsel. Where a defendant has such a choice of counsel, it is critical that the defendant be present and informed of that choice. The defendant's rule 18 and constitutional rights to be present were therefore violated when he was excluded from the sidebar discussion and no subsequent colloquy was conducted explaining his rights.

d. Structural error. Because we hold that the defendant's constitutional right to choice of counsel and to be present at a critical stage in the proceeding were violated, we must next assess whether these constitutional violations amount to structural error warranting automatic reversal absent waiver.

Generally, there are "two classes" of constitutional error. First, there are "trial errors," which can be "quantitatively assessed in the context of other evidence," and which comprise "most constitutional errors." Gonzalez-Lopez, 548 U.S. at 148, quoting Arizona v. Fulminante, 499 U.S. 279, 306-308 (1991). These errors are assessed for whether they are harmless beyond a reasonable doubt. Gonzalez-Lopez, supra.

Second, there is a "very limited class of cases" presenting structural errors that require automatic reversal absent waiver (citation omitted). Neder v. United States, 527 U.S. 1, 8 (1999). See Gonzalez-Lopez, 548 U.S. at 148-149. Such errors include the denial of counsel or the right to public trial, the omission of an instruction on the standard of beyond a reasonable doubt, racial discrimination in the selection of a jury, or trial before a biased judge. See Gonzalez- Lopez, supra at 149; Neder, supra. These errors contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder, supra, quoting Fulminante, 499 U.S. at 310. They are "constitutional error[s] of the first magnitude." See Commonwealth v. Valentin, 470 Mass. 186, 196 (2014), quoting United States v. Cronic, 466 U.S. 648, 659 (1984).

Most structural errors "deprive defendants of 'basic protections'" that are essential for a criminal trial to

"reliably serve its function as a vehicle for determination of guilt or innocence" and ensure that a "criminal punishment may be regarded as fundamentally fair." Neder, 527 U.S. at 8-9, quoting Rose v. Clark, 478 U.S. 570, 577-578 (1986). See Valentin, 470 Mass. at 196. There are, however, structural errors with more subtle effects. In these, the structural problem is fundamental, but the effect on the trial is much more difficult to evaluate. Gonzalez-Lopez, 548 U.S. at 149 n.4. The Supreme Court has emphasized that this is true in choice-of-counsel cases. See Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017); Gonzalez-Lopez, supra at 150. Regardless, structural errors tend to pervade "the entire trial process" and thus "defy analysis by 'harmless-error' standards" (citations omitted). Neder, supra at 7-8. Reversal may therefore be required even when there is overwhelming evidence of the defendant's guilt. Tumey v. Ohio, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against [the defendant], he had the right to have an impartial judge").

We conclude that the violations of the defendant's Sixth Amendment and art. 12 rights here constitute structural error. For guidance we turn first to Gonzalez-Lopez, 548 U.S. at 152, where the Supreme Court concluded that depriving a defendant of his or her choice of private counsel is structural error requiring reversal. In that case, counsel was fully qualified,

but the court declined to admit him pro hac vice and failed to give any explanation as to why. Id. at 142. The court also declined to allow him to be present at counsel's table during the trial or contact the defendant during the proceedings. Id. at 143.

The Supreme Court ruled that "erroneous denial of [private] counsel [of choice] bears directly on the 'framework within which the trial proceeds.'" Id. at 150, quoting Fulminante, 499 U.S. at 310. For no reason whatsoever, the defendant was deprived of the lawyer he chose to pay to represent him. The person he felt would best protect him was prevented in an arbitrary fashion from doing so. See id. at 146, 149. As the court in Gonzalez-Lopez further explained:

> "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of [private] counsel [of choice] bears directly on the framework within which the trial proceeds -- or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. . . . Harmless-error analysis in such a context would be a speculative inquiry into what

> might have occurred in an alternate universe." (Quotations and citations omitted.)

Id. at 150.

We recognize that this is not a classic private counsel case like Gonzalez-Lopez, where the defendant was improperly and arbitrarily denied the right to the private counsel he had chosen. As explained supra, the defendant was indigent. Had Hrones not volunteered, the defendant would have had no choice of counsel. However, once Hrones did volunteer, the defendant did have a choice, albeit a limited one. See Gonzalez-Lopez, 548 U.S. at 150 ("A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied"). Because the defendant had "the right to be represented by an otherwise qualified attorney whom [the] defendant [could] afford to hire, or who [was] willing to represent the defendant even though he [was] without funds," id. at 144, quoting Caplin & Drysdale, 491 U.S. at 624-625, the defendant could have picked Hrones as his private counsel, or have had the court appoint a lawyer from the list of counsel qualified to defend defendants in murder cases. When the court, in collaboration with Hrones, removed that choice and appointed Hrones as private counsel without the defendant's knowledge or consent, it committed constitutional error that affected the framework of the trial.

Although the error here affected the framework within which the trial proceeds, and was therefore structural, it was not one of those structural errors that "necessarily render[ed] [the] trial . . . an unreliable vehicle for determining guilt or innocence." Neder, 527 U.S. at 9. See Valentin, 470 Mass. at 196. Indeed, as explained infra, Hrones was competent counsel, and there is no argument to the effect that his representation at trial was ineffective. Rather, the error here fell into the category of structural error with subtle, widespread effects. It is thus structural for the reasons quoted at length supra in Gonzalez-Lopez. Any comparison of Hrones's performance and that of counsel on the list qualified to try murder cases would be speculative. See Gonzalez-Lopez, 548 U.S. at 151. Compare Valentin, supra at 188, 197 (no structural error where substitute counsel, who was law partner of counsel, only served for short period of time during jury deliberations and preserved all prior objections to jury instructions, thus providing firm basis for determining that brief substitution would have made no difference in representation). As Hrones represented the defendant at every step of the trial and on his direct appeal, his improper appointment had a pervasive effect. See Neder, supra at 7-8.

We therefore conclude that the constitutional error here was the type of structural error identified in Gonzalez-Lopez,

even though it did not render the trial itself an unreliable vehicle for determining guilt or innocence. It therefore constituted a structural error in violation of the Sixth Amendment and art. 12.[8]

e. Waiver of the right to choose counsel. Even though the error here was structural, we must determine whether it was waived and, if so, whether the error created a substantial risk of a miscarriage of justice. Robinson, 480 Mass. at 154-155. Commonwealth v. Randolph, 438 Mass. 290, 296 (2002). See Commonwealth v. Smith, 460 Mass. 385, 396 (2011) ("An error creates a substantial risk of a miscarriage of justice unless we are persuaded that it did not materially influence[] the guilty

[8] We note that Gonzalez-Lopez was a five-to-four decision with a vigorous dissent. That being said, we interpret art. 12 to provide protection just as great as, if not greater than, the Sixth Amendment. See Commonwealth v. Amirault, 424 Mass. 618, 624 (1997). Should the Supreme Court standard change, and we make no projections whatsoever in that regard, as that is not our prerogative, see Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam) ("[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents"), we would still interpret art. 12 as providing a separate, adequate, and independent basis for determining that the arraignment judge's improper blurring and crossing of the lines between public and private counsel -- which resulted in his denial of the defendant's right to qualified appointed counsel and instead his selection of a lawyer for the defendant as private counsel, all without the defendant's knowledge or consent -- is structural error. Cf. Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision").

verdict" [quotation and citation omitted]). We conclude that the defendant waived his right to counsel of choice by failing to raise this right until thirty-three years after the violation took place. See Robinson, supra at 152; Commonwealth v. Jackson, 471 Mass. 262, 268-269 (2015), cert. denied, 136 S. Ct. 1158 (2016). See also Weaver, 137 S. Ct. at 1911-1912. We also conclude that there was no substantial risk of a miscarriage of justice arising out of the waiver, as the defendant was competently represented by experienced counsel: no errors arising out of Hrones's representation have been claimed here apart from the appointment itself or identified in the court's previous G. L. c. 278, § 33E, review. See Robinson, supra; Randolph, supra at 294-295.

We do not fault the defendant for failing to raise the issue at the arraignment -- where he was excluded from the sidebar discussion -- or in his direct appeal, because Hrones was representing the defendant at the time and appears, based on his testimony and the motion judge's supplementary findings, to have kept the defendant in the dark. This issue could and should have been raised and resolved with the defendant at trial, but the fault here was defense counsel's and the court's, and not the defendant's.

We do consider, however, that the defendant did not raise this issue in his first motion for a new trial even though he

could have done so, as he had the transcript documenting the constitutional violation. As the motion judge found, "[c]ertainly, in or about 1989, when the defendant reviewed a copy of the transcript of the proceedings in the Superior Court in connection with his pro se motion for a new trial, he would have read the transcript of the sidebar colloquy in which the court specifically stated that Mr. Hrones could represent the defendant pro bono but would not be appointed and could not apply for funds."[9] The transcript would have also indicated to the defendant that Hrones was not on the list of counsel approved to be appointed to try murder cases, but had still been allowed to represent the defendant in such a case.

We also consider that public counsel screened this case in 1992-1993 and 2000 without bringing a motion for a new trial, and did not bring such a motion until 2015. All throughout this time period, the transcript was available. As the motion judge found, the transcript was also in the defendant's possession, and it was available to CPCS.

Although it may not have been clear in 1991 that this was structural error, as Gonzalez-Lopez was not decided until 2006, it was obvious that it was error. It was an abuse of the

[9] However, the motion judge also found that "this issue would not have been a noteworthy matter to the defendant in 1982" because he did not understand the difference between pro bono private counsel and appointed public counsel.

appointment process because Hrones was not on the list of approved counsel. See Rule 53(1) of the Rules of the Superior Court. It was a violation of the defendant's right to choose between appointed counsel and a lawyer who had offered his services for free, Caplin & Drysdale, 491 U.S. at 624-625; Wheat, 486 U.S. at 162-164, and a violation of the defendant's right to be informed of his choice. One need not have been clairvoyant in 1991, as Justice Lenk's opinion concurring in part and dissenting in part suggests, to recognize this was error.[10] It may not have been obvious that it was structural error, but it was obviously improper. At a minimum, the transcript should have raised questions for public counsel regarding how Hrones could have been appointed when he had not been on the list of attorneys approved to be appointed in murder cases, without at least a colloquy with the defendant.[11]

"[I]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the

[10] As we discuss infra, this case does not warrant application of the clairvoyance exception, as the error here was identifiable, and the right to choose counsel one believes to be best was already established when the defendant reviewed his arraignment transcript and filed his first motion for a new trial in 1991. See, e.g., Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-625 (1989) (Caplin & Drysdale).

[11] As noted supra, such colloquy occurred in 1974 when Hrones did the same thing in another case, Commonwealth vs. Lacy. The judge in that case clearly and correctly identified the problem.

defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" Weaver, 137 S. Ct. at 1910, quoting Neder, 527 U.S. at 7. Notwithstanding the importance of the rights preserved, however, structural rights can be procedurally waived. Robinson, 480 Mass. at 150; Jackson, 471 Mass. at 269; Commonwealth v. Wall, 469 Mass. 652, 673 (2014).

In a series of structural error cases involving public trial violations, we have found that those errors were waived when the issue was not raised at trial, on direct appeal, or in the first motion for a new trial. See Robinson, 480 Mass. at 150; Commonwealth v. Celester, 473 Mass. 553, 577-578 (2016); Jackson, 471 Mass. at 269; Wall, 469 Mass. at 673. See also Weaver, 137 S. Ct. at 1907, 1913 (no reversal despite structural error later raised in motion for new trial claiming ineffective assistance of counsel, where defendant failed to demonstrate prejudice). We stressed the importance of the passage of time in these cases. See Robinson, supra at 152 ("Cases noting that a defendant . . . failed to raise the claim in his or her first motion for a new trial or on direct appeal only serve to emphasize the egregiousness of the defendant's delay in raising the claim -- like here, where the defendant first raised the issue approximately thirteen years after his convictions"). See also Weaver, supra at 1912 ("if a new trial is ordered on direct

review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate"). We have also found these errors waived even where the defendant was not aware of the violation at trial. See Robinson, supra at 152-153; Jackson, supra at 269; Wall, supra at 672-673.

In the instant case, we conclude that there was a waiver. Between 1982, when the case was tried, and 2015, when the second motion for a new trial was filed, this issue was not raised by the defendant or defense counsel despite the available transcript. As demonstrated by the fine work done on the second motion for a new trial in 2015, the issue could and should have been identified and raised more than two or three decades earlier. As demonstrated by a 1974 arraignment in another case -- Commonwealth vs. Lacy, see note 7, supra -- the need at least for a colloquy in these circumstances was clear in that era as well as ours.

This great passage of time has huge consequences. Even if witnesses have not died or disappeared, their memories have certainly dissipated. See Weaver, 137 S. Ct. at 1912 (when appellate courts adjudicate preserved errors raised on direct appeal, "the systemic costs of remedying the error are diminished to some extent . . . because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still

to be accurate and physical evidence not to be lost"). When the documentation for challenging a conviction is in the hands of the defendant or the defense team for decades, but no claim is brought, important concerns about judicial efficiency, the finality of judgments, public confidence in the judicial system, and the renewal of trauma for victims are implicated. See Commonwealth v. Morganti, 467 Mass. 96, 102-103, cert. denied, 574 U.S. 933 (2014). "To conclude otherwise would tear the fabric of our well-established waiver jurisprudence that 'a defendant must raise a claim of error at the first available opportunity.'" Id., quoting Randolph, 438 Mass. at 294. See Commonwealth v. LaChance, 469 Mass. 854, 858 (2014), cert. denied, 136 S. Ct. 317 (2015) (discussing need to raise claims as soon as possible to serve "the core purposes of the waiver doctrine: to protect society's interest in the finality of its judicial decisions, and to promote judicial efficiency"). In sum, in these circumstances, the defendant waived his right to raise these claims. The claim of error here was certainly not raised at the first available opportunity.

Given this waiver, we review the defendant's constitutional claims for a substantial risk of a miscarriage of justice. See Robinson, 480 Mass. at 147 & n.3. We have interpreted this standard, as we must, to be no less protective than the United States Supreme Court standard of review in Weaver. See

Robinson, supra at 147 n.3. See also Weaver, 137 S. Ct. at 1913 ("In sum, petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object, and he has not shown that counsel's shortcomings led to a fundamentally unfair trial"); Smith, 460 Mass. at 396 (in determining whether there is substantial risk of miscarriage of justice, "we consider the strength of the Commonwealth's case against the defendant . . . , the nature of the error, [and] whether the error is sufficiently significant in the context of the trial to make plausible an inference that the [jury's] result might have been otherwise but for the error" [quotation and citation omitted]); Randolph, 438 Mass. at 297-298 ("In analyzing a claim under the substantial risk standard, '[w]e review the evidence and the case as a whole,' and ask a series of four questions: [1] Was there error? [2] Was the defendant prejudiced by the error? [3] Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? [4] May we infer from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision? Only if the answer to all four questions is 'yes' may we grant relief" [citations omitted]).

In the instant case, it was not reasonable to conclude that the error materially influenced the verdict or that a

fundamentally unfair trial took place. See Weaver, 137 S. Ct. at 1913; Randolph, 438 Mass. at 297-298. Hrones, an experienced criminal defense lawyer who had previously tried four or five cases of murder in the first degree pro bono, performed capably: no issue of ineffective assistance of counsel has been raised in this appeal, and none has previously been identified by this court pursuant to its original G. L. c. 278, § 33E, review. Most importantly, as this court stated in 1984, "[t]he identification by the eyewitness Smith of the defendant as the victim's pursuer, when coupled with the evidence of the defendant's and the victim's prior relationship, its subsequent dissolution, and the threats made by the defendant to the victim prior to her death, amply supports the jury's conclusion that the defendant was guilty of murder in the first degree." Francis, 391 Mass. at 375-376. We therefore discern no substantial risk of a miscarriage of justice under our case law, nor a probability of a different outcome or fundamental unfairness as defined by the Supreme Court.

f. Issues raised in the opinions concurring in part and dissenting in part. Chief Justice Gants's opinion concurring in part and dissenting in part mistakenly concludes that the issue is not waived here. To do so, it mischaracterizes the motion judge's findings and this court's analysis; ignores this court's landmark decision in Randolph, 438 Mass. 290, which clarifies

that a waiver is not an all-or-nothing proposition, but rather one that shifts the focus to a substantial risk of a miscarriage of justice; and turns the logic of our public trial cases on its head, including our most recent pronouncement of the law in Robinson, 480 Mass. 146.

Similarly, the opinion by Justice Lenk mistakenly reasons that the "clairvoyance exception" applies, thus foreclosing waiver of the defendant's structural error claim. The error here was obvious at the time of the defendant's arraignment, even if it was not clear that the error was structural until the Supreme Court issued its opinion in Gonzalez-Lopez.[12] Her opinion also ignores clear precedent establishing that structural errors can be procedurally waived just like any other constitutional error, and that "the term 'structural error'

[12] The opinion by Justice Lenk also claims that there is no case law that identifies a choice of counsel for indigent defendants, or that even identified the right to counsel of choice as a constitutional right before the Supreme Court's opinion in Gonzalez-Lopez. However, the Court in Gonzalez-Lopez drew upon prior case law that identified such a right, even if that right has been circumscribed. See Gonzalez-Lopez, 548 U.S. at 144; Caplin & Drysdale, 491 U.S. at 624-625; Wheat, 486 U.S. at 159. Further, the Court in Caplin & Drysdale identified the defendant's right to counsel he can afford to hire, including pro bono counsel offering services for free, clearly establishing a defendant's right to choice of counsel before the defendant filed his first motion for a new trial in 1991. See Caplin & Drysdale, supra ("the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds").

carries with it no talismanic significance as a doctrinal matter." Weaver, 137 S. Ct. at 1910. By so doing, her opinion collapses the categories of structural error identified in Weaver, and assumes there will always be a presumption of prejudice when a structural error is raised, even when subsequent motions have failed to raise the issue over the course of more than thirty years since the error took place.

We will address these errors in turn. The first is the argument that the judge exercised his discretion to resurrect the waived argument, which is flawed factually and legally. To begin with, it relies on cases predating Randolph. Before Randolph, there was a great need to resurrect waived claims to avoid a substantial risk of a miscarriage of justice, as waived claims were essentially unappealable. Commonwealth v. Layne, 386 Mass. 291, 297 (1982) (by declining to permit defendant to assert waived claims, judge "effectively den[ies] the defendant appellate review of the merits of those claims"). Thus, to avoid a substantial risk of a miscarriage of justice, a motion judge would need to resurrect the claim. Id. In Randolph, however, we made clear that we always review even waived claims for a substantial risk of a miscarriage of justice. See Randolph, 438 Mass. at 294-295. See also Robinson, 480 Mass. at 147.

Even without this necessary context, Chief Justice Gants's analysis of pre-Randolph resurrection law is incorrectly applied here. The conclusion that the motion judge resurrected the claim is wrong both as a matter of fact and law. For a judge to permit a waived claim in a subsequent motion, he or she must "indicate in some affirmative manner that [he or she] is permitting the argument to be raised." Layne, 386 Mass. at 297 (finding judge below did not permit waived argument to be raised even though he listened and responded to argument on merits at motion hearing). There was, however, no affirmative indication by the motion judge that he was permitting the waived argument to be resurrected in this case.

Instead, the motion judge found that the defendant did not have any constitutional right to waive in the first place. More specifically, the judge stated: "the court does not find that a failure to conduct . . . a colloquy results in some manner of structural error as the defendant suggests, since the court finds no constitutional right to court appointed counsel that the defendant has unwittingly waived" (emphasis added). If the judge made any finding whatsoever about waiver, it was that there was an unwitting waiver. He certainly did not affirmatively state that he was resurrecting a waived claim.

Even more confusing is the Chief Justice's analysis of our decision and our more recent case law. This case law has, as

explained supra, emphasized the purpose and importance of raising a claim as soon as possible in any context so it can be corrected at the earliest possible moment. See Robinson, 480 Mass. at 150-151. See also LaChance, 469 Mass. at 856-858 (holding defendant procedurally waived his Sixth Amendment public trial claim by not raising it at trial, but reviewing error in postconviction context of claim of ineffective assistance of counsel); Wall, 469 Mass. at 672-673 (upholding finding of waiver where defendant first raised violation of right to public trial in second motion for new trial); Randolph, 438 Mass. at 294 (requirement for defendant to raise claim of error at first available opportunity "serves a dual purpose: it protects society's interest in the finality of its judicial decisions, and promotes judicial efficiency" [citations omitted]).

The passage of time necessarily affects this interest, particularly when the result would be a new trial requiring accurate witness memories and intact physical evidence. See Weaver, 137 S. Ct. at 1912; Robinson, 480 Mass. at 151-152. We have stressed the importance of contemporaneous objections in the public trial cases discussed supra, even as we recognize that the defendant and counsel may not be at fault or have even known the error took place at all, but have nevertheless waived their claims. See, e.g., Robinson, supra at 146-147; Jackson,

471 Mass. at 268-269. In these cases, we found waiver absent a contemporaneous objection at trial, even when court personnel were at fault and the defendant and defense counsel were unaware of the closure.

In this case, the defendant had the opportunity to review the arraignment transcripts -- yet did not raise the present issue in his first motion for a new trial. It was at that point that the error could and should have been first raised so that it could have been quickly addressed and corrected if the defendant had wanted different counsel. As the issue would not have been waived at this point, it likely would have culminated in a relatively timely new trial. Even if we spare the defendant the rigors of the requirements of the case law that hold him to the same standards as counsel, see Maza v. Commonwealth, 423 Mass. 1006, 1006 (1996); Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985), his failure to raise the issue in his first motion for a new trial is important to consider in our waiver analysis, and is not irrelevant, as it resulted in the passage of more time and made retrial more difficult. We have made that point repeatedly in the public trial context, even where the waivers occur inadvertently.

Of course, we do not rely on the defendant's conduct alone in finding a waiver. We also consider the case's long history with CPCS, and the availability of the transcript revealing the

problem with Hrones's appointment for decades. This is not, we emphasize, a case where the prosecution concealed evidence from the defendant, see Commonwealth v. Healy, 438 Mass. 672, 677-678 (2003) (relied on by Chief Justice Gants's opinion, post at), or where the evidence was unavailable. The evidence establishing the constitutional violation was in the hands of the defendant and available to defense counsel for decades.

Although CPCS screening is different from CPCS review once CPCS has accepted a case, it is not irrelevant or unreasonable to consider those screenings in the over-all calculation whether a waiver has occurred, as the opinions concurring in part and dissenting in part suggest. CPCS is not the equivalent of private counsel. Rather, it alone controls the public counsel appointment process, and ultimately decides whether a case will be taken and, as a result, whether an issue will then be raised for the court. Deputy Chief Counsel for the Pub. Defender Div. of the Comm. for Pub. Counsel Servs. v. Acting First Justice of the Lowell Div. of the Dist. Court Dep't, 477 Mass. 178, 179 (2017) ("CPCS has the sole authority under G. L. c. 211D for the assignment of counsel to indigent criminal defendants . . ."). This is a significant responsibility that entails the identification of legal issues during the screening process, and is not comparable to private counsel's decision to take a case. Additionally, CPCS screening contributes to delay, and delay is

a significant factor as it makes it more and more difficult to retry the case with each passing year. As explained supra, CPCS did not raise the present claim until 2015. Given the existence and availability of the transcript throughout the time period at issue of more than thirty years, and the failure of the defendant or CPCS to raise the issue at any point in that time, we consider it appropriate to conclude that the choice-of-counsel issue has been waived. It was certainly not raised at the first available opportunity as our cases emphasize and require. Morganti, 467 Mass. at 102-103.

Our public trial waiver case law clearly compels that result. The attempts by Chief Justice Gants and Justice Lenk to distinguish that case law are unavailing. They ignore the core logic of a long line of our decisions stressing the importance of bringing an error to the attention of the court as soon as possible to correct the problem. See, e.g., Robinson, 480 Mass. at 150-151; LaChance, 469 Mass. at 858; Morganti, 467 Mass. at 102-103. They also turn the logic of our public trial jurisprudence on its head. There, as discussed supra, we stressed the need for a contemporaneous objection, even when the fault is the court's alone, and not the fault of the defendant or defense counsel, who were unaware of the violation. Chief Justice Gants's and Justice Lenk's opinions both rest on the assumption that the current situation is different and that

these cases are completely inapplicable because the defendant was unaware of the violation at arraignment and could not have made a contemporaneous objection. In both this context and in our public trial cases, we still apply our waiver analysis and emphasize the need to raise the issue as soon as possible, even where the defendant was unaware of the problem at trial and not at fault. See, e.g., Robinson, supra at 146-147; Jackson, 471 Mass. at 268-269.

Recognizing the stringency of that case law, in the instant case, we have not relied simply on the defendant's failure to raise the issue at trial or in his first motion for a new trial, but have also considered the multiple opportunities counsel had to correct the problem before deciding there was a waiver. We have relied in particular on the availability of the evidence to the defendant and defense counsel for decades prior to any motion being filed to correct the error.

Nor is the defendant saved by the clairvoyance exception to our waiver doctrine. Under the clairvoyance exception, if a constitutional theory on which the defendant relies was not sufficiently developed at the time the defendant should have raised it at trial or on appeal, the defendant did not have a genuine opportunity to raise the claim, and the reviewing court must treat that claim as if it has been properly preserved. See Randolph, 438 Mass. at 295; Commonwealth v. Rembiszewski, 391

Mass. 123, 126 (1984). However, this theory applies in cases where constitutional rights have not yet been defined or clarified. See, e.g., Rembiszewski, supra at 126-128 (allowing challenge to reasonable doubt instruction where case was argued at time when there was no foreshadowing of governing rule prohibiting examples of events from jurors' lives); DeJoinville v. Commonwealth, 381 Mass. 246, 247, 248-251 (1980) (jury instruction that every man is presumed to have intended natural or probable consequences of his voluntary acts and in absence of evidence to contrary he intended such consequences was not yet deemed unconstitutional at time it had been given, and could be reviewed on appeal as if properly preserved).

The case before us does not warrant application of the clairvoyance exception. In 1991, there was no unsettled law that later created or clarified a new constitutional right for the defendant; instead, the error here was identifiable and could have been brought at least as a matter of ineffective assistance. Supreme Court precedent identified a right to choose counsel well before the Court issued Gonzalez-Lopez, and the Court drew upon that precedent when characterizing a violation of the right to choose counsel as a structural error in Gonzalez-Lopez. In Wheat, 486 U.S. 153, the Supreme Court emphasized the Sixth Amendment presumption in favor of counsel of choice that may only be overcome by a showing of a serious

potential for a conflict of interest. Id. at 164 (concluding there was serious potential for conflict of interest that rebutted presumption in favor of counsel of choice). In Caplin & Drysdale, 491 U.S. 617, the Supreme Court emphasized that, pursuant to the Sixth Amendment, the defendant has the right to be represented by an attorney he or she can afford to hire, including counsel, like Hrones, offering his services for free, thus establishing the right of the defendant to choose the counsel he considers best. Id. at 624-625. See Gonzalez-Lopez, 548 U.S. at 144, 146. Both of these cases were decided before 1991.

Even without this governing case law, the inequity of the court's error here was obvious to anyone who reviewed the arraignment transcript. The defendant himself testified that he would not have agreed to proceed to trial with Hrones if he had known Hrones was not getting paid and was not on the list of counsel qualified to be court-appointed attorneys in murder cases. This is not the type of unclear error that implicates the clairvoyance exception, as Justice Lenk argues in her opinion, but is one that could have reasonably been uncovered upon a review of the arraignment transcript.[13] Just because the

[13] A review of the arraignment transcript would also have at least alerted the reader to the fact that the defendant was not privy to important information concerning his case, which violated his well-established right to be present during

consequences of the particular error were not clear, i.e., that it automatically warranted a new trial because it was structural error, does not mean that the error itself was too obscure to recognize and raise in a motion for a new trial in a timely fashion.

Further, the opinion authored by Justice Lenk ignores that structural errors can be procedurally waived just like any other constitutional error. It confuses the Court's holding in Weaver, which appreciated the difficulty of gauging the effects of structural errors while also stating that, once waived, only a structural error that results in fundamental unfairness will create a presumption of prejudice if brought as an ineffective assistance of counsel claim. Weaver, 137 S. Ct. at 1908-1910. Justice Lenk's opinion ignores Weaver's holding that only a structural error that results in fundamental unfairness creates a presumption of prejudice, and instead essentially adopts the approach set out in Justice Breyer's dissenting opinion in Weaver. See id. at 1917 (Breyer, J., dissenting).

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critical stages of the proceedings. See Commonwealth v. Colon, 482 Mass. 162, 172-173 (2019) ("[c]ounsel's presence at sidebar and intention to relay information to a defendant does not substitute for the defendant's presence" during critical stage of proceedings); Commonwealth v. Robichaud, 358 Mass. 300, 303 (1970) (presence of counsel insufficient to remedy absence of defendant during critical stage of proceedings). This issue was not raised until the defendant filed his second motion for a new trial.

The majority in Weaver clearly rejected this approach. Id. at 1910-1913 (distinguishing between different types of structural errors and recognizing that there is category of structural error that, once waived, is not presumed to be prejudicial and requires "show[ing] a reasonable probability of a different outcome but for" error or that error "led to a fundamentally unfair trial").

In sum, in deciding that there is waiver here, we cannot ignore that the defendant had the transcript depicting the error and that the issue was not raised for more than thirty years. We recognize, as does the Supreme Court, that the passage of time, particularly the great passage of time, matters. See Weaver, 137 S. Ct. at 1912; Robinson, 480 Mass. at 152. Of course, we still review to determine whether there is a substantial risk of a miscarriage of justice, but there is none in the instant case. The defendant was capably represented at trial with no error being identified apart from the appointment of Hrones himself. This kind of structural error, as explained supra, is a peculiar type with subtle effects. Those subtle effects, as we have explained, do not amount to a substantial risk of a miscarriage of justice, and they certainly do not require the retrial and release of this defendant where the evidence, as this court previously found, proved beyond a

reasonable doubt that he chased down and killed his ex-girlfriend in a premeditated act of vengeance.

3. Conclusion. The trial court violated the defendant's right to choice of counsel and to be present for a critical stage in his proceeding. However, these errors, although structural, were waived by the defendant in this case. In reviewing the waived claims, we also discern neither a substantial risk of a miscarriage of justice nor a probability of a different outcome or fundamental unfairness. The denial of the second motion for a new trial is therefore affirmed.

So ordered.

GANTS, C.J. (concurring in part and dissenting in part, with whom Budd, J., joins). I agree with the court that "the defendant's right to choice of private counsel and right to be present during a critical stage of the proceedings under both the Federal and State Constitutions were violated," in this case, and that "these violations of his constitutional rights are structural errors requiring automatic reversal absent waiver." Ante at . I dissent because, in my view, the court errs in holding that the defendant waived the violations of these essential rights by not presenting them sooner than he did.

The court refers on multiple occasions to the passage of a significant amount of time from the defendant's arraignment in January 1982, when attorney Stephen Hrones began representing him, until September 2015 when, in a motion for a new trial, the defendant first raised his challenge to Hrones's representation. The passage of so much time appears to be a primary concern for the court and its principal reason for finding a waiver. The mere passage of time, however, even a lengthy period of time, does not amount to a waiver. As the court noted in Commonwealth v. Francis, 411 Mass. 579, 585 (1992), where the defendant brought a motion for a new trial twenty years after we affirmed his conviction of murder in the first degree, Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), "provides that a

trial judge may grant a defendant's postconviction motion for a new trial 'at any time.'" The court added:

> "Furthermore, the history of rule 30 (b) also suggests that delay does not constitute a waiver of the right to bring a new trial motion. Rule 30 (b) is derived directly from the former G. L. c. 278, § 29. Prior to 1964, G. L. c. 278, § 29, expressly imposed a one year time limitation after which a Superior Court judge could not grant a defendant's request for a new trial. In 1964, the Legislature repealed this time limitation, amending § 29 to allow new trial motions to be granted 'at any time, upon motion in writing of the defendant.'" (Citations omitted.)

Id. at 585-586. The court definitively declared, "[i]n light of the history and language of rule 30 (a), (b), we conclude that a defendant's delay in bringing a rule 30 motion does not in itself constitute waiver." Id. at 586.

Here, as in Francis, supra, there is no evidence that the defendant intentionally delayed in bringing his claim in order to gain some strategic advantage, so we need not consider what would happen if that were so; indeed, the Commonwealth does not even press such an argument here.

I agree, of course, that a defendant can waive a claim, even a claim of structural error, if he fails to object to the error at or before trial despite having an opportunity to do so, or by not including the claim in a motion for a new trial when, at the time he files his motion, the claim is reasonably available to him. I therefore turn to these specific points to examine whether a waiver occurred on the facts of this case.

The court acknowledges that the defendant did not waive the structural errors in this case by failing to object to Hrones's representation of him at the time of arraignment or before trial. See ante at . I agree. As the court notes, the defendant was not present at the sidebar discussion where the arraignment judge allowed Hrones to represent him pro bono without his knowledge or consent. Moreover, Hrones represented the defendant throughout the trial, so it would not be realistic to expect Hrones, on the defendant's behalf, to object at trial to his own conduct. Therefore, this is not among the type of cases where we have found that a defendant waived a structural error by failing to make a contemporaneous objection when the error occurred, thereby depriving the judge of an opportunity to correct the error or to explain the judge's reasons for so ruling. See, e.g., Commonwealth v. Robinson, 480 Mass. 146, 151 (2018), quoting Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2017) ("A contemporaneous objection [to closure of a court room] is indispensable for purposes of preserving the claimed error on appeal because when the alleged error is raised contemporaneously with the closure, 'the trial court can either order the court room opened or explain the reasons for keeping it closed'").

The court also correctly recognizes that the defendant did not waive these structural errors by failing to raise them in

his direct appeal, because, again, Hrones was his attorney for the appeal. It is not reasonable to expect Hrones to have argued on appeal that his own conduct was error, especially automatically reversible structural error. Compare Commonwealth v. Azar, 435 Mass. 675, 686 (2002) ("In cases like this, where the same attorney represents a defendant both at trial and on appeal, a claim of ineffective assistance of counsel is not waived when it is raised for the first time in a postappeal new trial motion"); Commonwealth v. Lanoue, 409 Mass. 1, 3-4 (1990) ("It would be unrealistic to expect Lanoue's first attorney to have raised a claim calling his own competence into question").

I disagree with the court that the defendant waived his claim of structural error when staff attorneys at the Committee for Public Counsel Services (CPCS), in deciding whether to assign counsel to represent him to seek a new trial in 1992-1993 and 2000, apparently failed to identify this issue and did not cause CPCS to file an appearance on his behalf at those times. This clearly cannot constitute a basis to find waiver. CPCS staff counsel, when screening the defendant's case in 1992-1993 and 2000, were deciding whether CPCS would represent him; they did not represent him at the time they conducted the screening, and their failure to spot and raise this issue cannot reasonably be held against him. It would be unreasonable to have, and highly impractical to administer, a rule saying that a defendant

waives a claim because an attorney reviewed the file in his case but ultimately decided not to represent him. It would be equally unreasonable and impractical to, as the court suggests, invent a new and distinct ground for waiver applicable to CPCS alone. By concluding that CPCS's failure to spot a constitutional issue during its screening process may result in a waiver of that constitutional issue, the court imposes on CPCS an unjustified and profound dilemma in deploying its limited screening resources -- either conduct a comprehensive screening review or risk waiver of an issue its screeners failed to spot. And this case illustrates just how comprehensive that screening review would need to be, because this error would not have been spotted even if the screeners read every page of the trial transcript. It would be spotted only if they read the transcript of the arraignment.[1] In short, we have never rested a finding of waiver on this ground, the court cites no authority for doing so, and it would be wholly unreasonable to do so here.

[1] Moreover, the court's holding that the defendant's rights under the Sixth Amendment to the United States Constitution were violated here leans heavily on United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006), where the Supreme Court declared that "[d]eprivation of the right [to private counsel of one's choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." The constitutional error found here might not have been as obvious before the decision in Gonzalez-Lopez.

Finally, I consider the defendant's failure to raise his claim of structural error in the first motion for a new trial that he filed pro se in 1991. The court attributes significance to this failure, but after careful analysis, I conclude that a finding of waiver on this ground would be unwarranted and unjust given the second motion judge's decision in 2018 not to find waiver and the facts of this case as found by that motion judge.

Rule 30 (c) (2) of the Massachusetts Rules of Criminal Procedure, as appearing in 435 Mass. 1501 (2001), provides that a defendant must assert all grounds for relief in the "original or amended motion" that he files under rule 30 (b). "Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion." Id. Here, both of the "unless" alternatives are satisfied.

The judge who decided the defendant's second motion for a new trial found that four of the defendant's claims had been waived under rule 30 (c) (2) because "all of these claims could and should have been raised on direct appeal to the Supreme Judicial Court, or in his previous motion for post-conviction relief." Significantly, the judge did not find that the defendant's claim of structural error, at issue in this appeal, had been waived. Instead, the judge conducted an evidentiary

hearing regarding this claim and decided it on the merits, with written findings of fact and rulings of law. Therefore, in the exercise of discretion, he permitted the structural error claim to be raised in the defendant's second motion for a new trial.

Moreover, the second motion judge's findings demonstrate that the defendant could not reasonably have been expected to raise these issues in his first motion for a new trial. See, e.g., Commonwealth v. Healy, 438 Mass. 672, 677-678 (2003) (no waiver where issue was not known at time of appeal or prior motions for new trial); Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 169-170 (1985) (no waiver where issue could not reasonably have been raised in first motion). When the defendant brought his first motion for a new trial in 1991, he had no right to have counsel appointed to assist him, because his direct appeal had already been decided and his conviction had been affirmed by this court. See Commonwealth v. Conceicao, 388 Mass. 255, 261-264 (1983). He therefore filed and pursued this first motion pro se.

The motion judge on the second motion for a new trial found that the defendant had received a transcript of the proceedings in the Superior Court in or about 1989, which included the sidebar discussion between the arraignment judge and Hrones (but not the defendant) where the arraignment judge allowed Hrones to represent the defendant pro bono. The motion judge found,

however, that the defendant would not have attached any significance to the sidebar discussion between the arraignment judge and Hrones, because "the defendant was totally unaware of the significance of the distinction between being represented by a court appointed lawyer or a private attorney appearing pro bono, until his present post-conviction counsel developed the Sixth Amendment argument presented in the pending motion and explained it to him."

Given these findings, it was neither an abuse of discretion nor an error of law for the second motion judge to conclude that the defendant did not waive his claim of structural error by failing to recognize and assert this novel, fairly subtle constitutional issue in his first motion for a new trial. Indeed, it is perfectly understandable and reasonable to conclude that the defendant, without the benefit of counsel and with no apparent legal training, could not at that time have perceived, much less appreciated the significance of, an issue such as this that eluded the trained attorneys at CPCS who later reviewed the case and who initially decided not to assign CPCS counsel to represent the defendant. I therefore agree with the motion judge that any waiver in failing to raise the issue in the first motion for a new trial should be excused.[2]

[2] The court contends that this analysis rests on the now-abandoned analysis of resurrection of a waived claim. It does

The court appears to rest its finding of waiver on the numerous cases where we concluded that a defendant waived a structural error arising from the closure of a trial court room during jury selection by failing to object, even where the defendant and his counsel were not aware of the court room closure. See, e.g., Robinson, 480 Mass. at 153 ("[A] defendant procedurally waives a court room closure claim by failing to contemporaneously object to the closure, regardless of whether the defendant or counsel was factually aware that the court room was closed"); Commonwealth v. Jackson, 471 Mass. 262, 269 (2015), cert. denied, 136 S. Ct. 1158 (2016) (waiver occurs regardless of defendant's or counsel's knowledge of court room closure); Commonwealth v. Wall, 469 Mass. 652, 672-673 (2014) (waiver can occur even where failure to timely object is inadvertent). Some of these cases noted that the defendants had failed in their earlier motions for a new trial to raise the claim that they were denied their right to public trial. See, e.g., Commonwealth v. Celester, 473 Mass. 553, 577 (2016) ("In his second motion for a new trial, the defendant argued for the

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not. Rather, it rests on the current language of Mass. R. Crim. P. 30 (c) (2), as appearing in 435 Mass. 1501 (2001), which declares that any grounds for relief not raised in the original or amended motion for a new trial "are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion." As noted supra, both these grounds were satisfied in this case.

first time that his Sixth Amendment right to a public trial was violated . . ."); Jackson, supra ("The issue also was not raised in his first motion for a new trial that preceded sentencing"); Wall, supra at 673 ("[T]he defendant failed to raise the claim in his first motion for new trial").

We made clear in the closed court room cases that the determination whether a claim of structural error is preserved or waived depends solely on whether the defendant raised a contemporaneous objection at trial. See Robinson, 480 Mass. at 151 ("[O]nly where a defendant raises a contemporaneous objection to an improper court room closure at trial has this court held that the defendant's claimed Sixth Amendment public trial violation was preserved"). The importance of contemporaneous objection, the court posited, is that it allows for "the trial court . . . [to] either order the court room opened or explain the reasons for keeping it closed." Id., quoting Weaver, 137 S. Ct. at 1912.

"Absent a contemporaneous objection, it is immaterial when or in what form the defendant later raises the claim in postconviction proceedings." Robinson, 480 Mass. at 152. See Commonwealth v. Kolenovic, 478 Mass. 189, 203 n.13 (2017) ("[T]he important distinction is not whether the claim was made in the direct appeal or in the motion for new trial, but rather whether the court room closure issue was preserved at trial").

As we explained in Robinson, supra, "[c]ases noting that a defendant also failed to raise the claim in his or her first motion for a new trial or on direct appeal only serve to emphasize the egregiousness of the defendant's delay in raising the claim." Where, as here, the court accepts that the defendant's failure contemporaneously to object at the arraignment or at trial does not permit a finding of waiver, these precedents do not compel a finding of waiver.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." Weaver, 137 S. Ct. at 1907. A finding of structural error is highly significant and has great consequence; it means that "the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" Id. at 1910, quoting Chapman v. California, 386 U.S. 18, 24 (1967). Where we apply our waiver doctrine to avoid that consequence, we must do so judiciously, lest we undercut the very purpose of the structural error doctrine.

It is appropriate to find waiver where a defendant failed to make a contemporaneous objection at trial that could have prevented the error. But in my view, it is not appropriate to find waiver, as the court does here, where the defendant could not have prevented the error at the arraignment, at trial, or in

his direct appeal; where the defendant, without the right to or benefit of counsel, failed to recognize this rather unique constitutional claim, and therefore failed to raise it when he filed his first motion for a new trial; where the claim was, for all practical purposes, raised at the first opportunity, i.e., in the second motion for a new trial; where the second motion judge himself did not find a waiver, but instead addressed the defendant's claim at the time it was raised on the merits; and where the second motion judge found that "the defendant was totally unaware of the significance of the distinction between being represented by a court appointed lawyer or a private attorney appearing pro bono, until his present post-conviction counsel developed the Sixth Amendment argument presented in the pending motion and explained it to him." Because I conclude that the motion judge did not abuse his discretion or make an error of law in deciding that the defendant did not waive the structural error in this case, and because a finding of waiver here would be unfair, would diminish the importance of the structural error doctrine, and would unjustly allow a conviction to stand that was tainted by structural error, I dissent.

LENK, J. (concurring in part and dissenting in part). I agree with the court that the defendant's rights to choice of counsel and to be present at critical stages of his trial were violated in this case, and that these violations constituted structural error. See ante at . I also agree that a defendant may waive a claim of structural error, like any other claim, by failing diligently to pursue it. I write separately because I disagree with the court's conclusion that this defendant procedurally waived his particular claims of structural error. Further, the court's analysis of waived structural errors fails to capture the competing interests that must be balanced when assessing constitutional violations that undermine the fundamental fairness of a trial.

Like the court, I do not fault the defendant for failing to raise his claims of structural error either at trial or on direct appeal. See ante at . At both stages, he was represented by an attorney who had every incentive not to raise these errors or to draw a judge's attention to their existence. Nor is the defendant at fault for not having brought forward these issues in his first motion for a new trial in 1991. Although, ordinarily, a defendant waives a claim by failing to raise it at the "first available opportunity," we long have recognized exceptions to this general rule. See Commonwealth v. Randolph, 438 Mass. 290, 294 (2002). Relevant here is the

"clairvoyance exception," which "applies to errors of a constitutional dimension 'when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case'" (emphasis added). Id. at 295, quoting Commonwealth v. Rembiszewski, 391 Mass. 123, 126 (1984). While waiver does not require "a holding on an issue squarely on point," the state of the law must provide "sufficient guidance" that a defendant is "fairly on notice" that he or she has a live issue (citations omitted). See Commonwealth v. Amirault, 424 Mass. 618, 643-644 (1997).

The clairvoyance exception clearly applied to the defendant's first, pro se motion for a new trial. Prior to the court's decision today, we have never held that an indigent defendant has a constitutional right to choose between two options for appointed counsel: pro bono counsel and counsel paid by the Commonwealth. Cf. Commonwealth v. Drolet, 337 Mass. 396, 400-401 (1958) ("The choice of counsel for an indigent person is to be made by the court in its discretion"). Nor, for that matter, has any other court of which I am aware.[1] To

[1] The court maintains that, at the time of the defendant's trial, Superior Court judges were aware that defendants had a constitutional right to choose between appointed and pro bono counsel. In support of this assertion, the court points to

support the conclusion that such a right exists, the court relies primarily on the reasoning of a case decided by the United States Supreme Court fifteen years after the defendant filed his first motion for a new trial. See United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). In that decision, the United States Supreme Court clarified that a defendant has a right to choose counsel, independent of his or her right to a fair trial, and that the "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." Id. at 148. We should not expect a defendant to have had the clairvoyance to foresee this development of the law, nor the extension of that logic that the court makes today.

Commonwealth vs. Lacy, a case in which a judge conducted a colloquy with a defendant about his choice to proceed with a specific attorney (Stephen Hrones), rather than counsel appointed under the then-existing rules of criminal procedure. See ante at note 7 & . Of course, the mere fact that the judge felt it necessary to inform that defendant of his right to appointed counsel under the procedural rules does not mean that the judge recognized the constitutional dimension of the defendant's rights. A review of the transcript from that colloquy shows that the judge did not address the constitutional right we recognize today. Rather, as the judge who ruled on the defendant's second motion for a new trial noted, "it is apparent that the judge [in Commonwealth vs. Lacy] preferred that the defendant accept a court appointed lawyer that the judge recommended rather than Mr. Hrones, and the judge wanted the record to be clear concerning his preferences and that Mr. Hrones was not appointed and would not be paid."

Rather than alerting the defendant that he had a viable claim, the state of the law in 1991 suggested that the defendant had no claim at all. Where asserting an error at the time "would have been futile, . . . we review the constitutional error as though preserved." Commonwealth v. Vasquez, 456 Mass. 350, 352 (2010). This court's decisions at that time suggested that indigent defendants had no say in the matter of appointed counsel. See Commonwealth v. Moran, 388 Mass. 655, 659 (1983) ("A defendant has no constitutional right to any particular court-appointed counsel"); Drolet, 337 Mass. at 400–401 ("The defendant need not accept court appointed counsel, but the alternative is to be represented by himself, or such attorney as he can hire"); Commonwealth v. Smith, 1 Mass. App. Ct. 545, 547–548 (1973) ("an indigent defendant . . . is not entitled to his choice of counsel").

Moreover, contrary to the court's view, Federal decisions at the time were similarly discouraging. See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("Whatever the full extent of the . . . protection [under the Sixth Amendment to the United States Constitution] of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of . . . counsel"); Wheat v. United States, 486 U.S. 153, 159 (1988) ("a defendant may not insist on

representation by an attorney he cannot afford").[2] Faced with these precedents, it is not surprising that the defendant did not pursue a seemingly impossible argument.

The subsequent appellate history of this case further reflects the novelty of the constitutional right that the court correctly recognizes today. As the court notes, screening attorneys for the Committee for Public Counsel Services (CPCS) did not accept the defendant's case to press this issue through

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[2] The court suggests that, in both Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-625 (1989), and Wheat v. United States, 486 U.S. 153, 159 (1988), the United States Supreme Court recognized the constitutional right to choice of counsel that underlies the defendant's claim of structural error. It did not. In Caplin & Drysdale, Chartered, the Court acknowledged that a defendant has a constitutional right to be represented by qualified counsel who volunteers his or her services pro bono. See Caplin & Drysdale, Chartered, supra. The Court did not, however, recognize an indigent defendant's right to choose between volunteer counsel and counsel appointed by a judge. See id. Cf. ante at . Indeed, the Court suggested that no such right existed:

> "Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."

Caplin & Drysdale, Chartered, supra at 624. Similarly, in Wheat, the Court stated that a defendant has no right to an attorney he or she cannot afford; it said nothing about a defendant's right to a pro bono attorney. Wheat, supra.

an appeal when they initially reviewed the defendant's case in 1992 through 1993, and again in 2000. See ante at . If, as the court suggests, the constitutional dimension of this error had been apparent, it is seemingly inexplicable that CPCS did not pursue this claim of automatically reversible error. Moreover, when denying the defendant's second motion for a new trial in 2018, the motion judge remarked, "the question of whether an indigent defendant is entitled to a court appointed, government compensated attorney, when a competent lawyer has offered to represent the defendant without compensation is certainly novel." He went on to note that the defendant "cites no case in support of either formulation of his claim, and the court has not been able to find one." As recently as 2018, then, an experienced jurist treated the issue before us as previously unexplored territory.

The court claims that, by concluding there was waiver here, we merely would be holding the defendant to the same standards as an attorney. To the contrary, we would be holding the defendant to a higher standard than the judge who oversaw his arraignment, the screening attorneys at CPCS who twice reviewed his case, and the Superior Court judge who denied his second motion for a new trial. I would not impose this unreasonably high bar on any attorney, let alone a pro se defendant.

I further disagree with the court that the defendant waived his claim during the twenty-four years between his first and second motions for a new trial. The court focuses on the supposed inaction of both the defendant and CPCS during that time to justify its conclusion that a waiver occurred. Over those years, however, the defendant was not sitting idly on his hands; rather, he was seeking representation for his appeal. We should not fault a defendant for waiting to learn if he would receive the assistance of counsel, rather than forging ahead pro se, especially after he already had attempted unsuccessfully to do so. Nor can we hold the defendant responsible for CPCS's apparent decision not to raise this issue on appeal prior to 2015. CPCS was not representing the defendant before any court -- or indeed representing him at all -- until that time. In any event, it was not until the Gonzalez-Lopez decision in 2006, six years after CPCS's second screening process took place in 2000, that the legal foundation for the defendant's claim was laid.

In determining that this delay caused procedural waiver, the court also asserts that our "public trial waiver case law clearly compels that result." See ante at . Those decisions do not control our analysis here, however, because they concern a fundamentally different kind of constitutional error.

When a closure of a court room occurs at trial, this error is both easily recognized and easily remedied. A defendant need only look around and see that expected family or friends are absent to know that something has gone wrong. Moreover, for many years, it was an open secret that certain court rooms in the Commonwealth at least occasionally were closed during voir dire, and therefore defense counsel were effectively on notice that violation of the public trial right could occur. See Commonwealth v. Lang, 473 Mass. 1, 9 (2015) (Hines, J., concurring) ("experienced trial counsel was aware that the court room was routinely closed to spectators during the jury empanelment process and did not object at trial to the partial closure"); Commonwealth v. Alebord, 467 Mass. 106, 113, cert. denied, 573 U.S. 921 (2014) (accord). At the moment such a violation occurs, counsel has every incentive to bring the closure to the judge's attention, so that the judge may correct the issue or may make findings on the record as to why the closure was warranted.

Here, however, the violation of the defendant's right to choose counsel presents the opposite scenario. Where a defendant is excluded from a sidebar conversation at which the court appoints counsel, the defendant has no way of knowing that a critical stage of his or her trial is occurring. Neither counsel nor the judge, who are the architects of the error, have

any incentive to rectify it. As a result, a defendant is unlikely to learn that his or her constitutional rights have been violated until after the trial has concluded. Indeed, in this case, the very earliest that the defendant might have known that his right to choice of counsel had been violated was when he received the transcripts of his arraignment, while he was incarcerated and preparing his direct appeal.

Our waiver doctrine with respect to court room closures has developed to take account of both the obvious nature of that error and the ease with which it can be rectified at trial. It is for those reasons that we require defendants either to raise an objection contemporaneously or to waive it. See Commonwealth v. Robinson, 480 Mass. 146, 152 (2018) ("Absent a contemporaneous objection, it is immaterial when or in what form the defendant later raises the claim in postconviction proceedings"). By applying that analysis to the radically different structural error we confront today, the court ignores the distinct characteristics of violations of public trial rights that led us to develop that analysis in the first place.

"In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments." Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017). Granting the

defendant a new trial thirty-eight years after his conviction undoubtedly would burden very significantly the "limited legal and judicial resources" that our waiver doctrine is designed to preserve. See Commonwealth v. Pisa, 384 Mass. 362, 366 (1981). This long passage of time, however, although an important factor in our analysis, is not dispositive. We must balance the interest in finality against the "full realization of a defendant's rights." Amirault, 424 Mass. at 640-641. The defendant's rights were not fully recognized, let alone realized, prior to our decision today, and the deprivation of those rights pervaded his entire trial. Accordingly, I conclude that the defendant did not waive his claim of structural error.

Moreover, even where a claim of structural error is waived, we still must consider whether that caused a substantial likelihood of a miscarriage of justice. The court's analysis of prejudice stops short of assessing the full impact of the violation of the right to counsel on the fundamental fairness of the defendant's trial.

The court rightly acknowledges that, when considering waived claims of structural error, our substantial risk of a miscarriage of justice standard must "be no less protective than the United States Supreme Court standard of review in Weaver." See ante at . Under that standard, a defendant is entitled to a new trial if he or she can establish "a reasonable

probability of a different outcome" but for the structural error, or that the error resulted in "a fundamentally unfair trial." See Weaver, 137 S. Ct. at 1913.

While recognizing the importance of the United States Supreme Court's decision in Weaver, the court misapprehends its teaching. Although the court refers to the issue of fundamental unfairness, its analysis ultimately turns on the impact that the structural error had on the jury's verdict.

The problem with this approach is two-fold. First, by focusing solely on the impact of the error on the jury's verdict, it fails to consider the nature of the right that was violated. Such "preoccupation with the outputs of criminal processes stands in marked contrast with criminal procedure's broader ethical vision, which encompasses a diverse array of non-truth-furthering interests" (quotation and citation omitted). Murray, A Contextual Approach to Harmless Error Review, 130 Harv. L. Rev. 1791, 1795 (2017). Indeed, as the United States Supreme Court noted in Weaver, 137 S. Ct. at 1908, some errors, including deprivation of the right to choice of counsel, are deemed structural in part because "harm is irrelevant to the basis underlying the right." Id., citing Gonzalez-Lopez, 548 U.S. at 149 n.4.

Second, the court requires the defendant to demonstrate that the trial he received was somehow worse than a trial with a

different attorney that never happened. This kind of counterfactual analysis has been criticized as unworkable by the United States Supreme Court. See Gonzalez-Lopez, 548 U.S. at 150 ("Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe").

Applying this analysis leads to an untenable result here. The court concludes that "[t]his kind of structural error, as explained supra, is a peculiar type with subtle effects. Those subtle effects, as we have explained, do not amount to a substantial risk of a miscarriage of justice." See ante at . The court thereby carves out a class of structural errors which, for the very reason that they are considered structural, will never result in a new trial once waived. This truly "flips on its head" the structural error doctrine, and the presumption of prejudice that typically attaches to it.

Many structural errors could never meet the standard the court sets today. The right to conduct one's own defense, for example, "usually increases the likelihood of a trial outcome unfavorable to the defendant." See Weaver, 137 S. Ct. at 1908, quoting McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984). Therefore, a defendant could never show that a deprivation of this nonetheless essential right created a substantial risk of a miscarriage of justice.

To strike the proper balance that Weaver and our own decisions require, our analysis of waived claims of structural error must take into account not only the impact that the error had on the outcome of the trial, but also its impact on the administration of justice itself. Since the decision in Weaver, many courts have extended this analysis to a wide range of structural errors.[3] As those courts have discovered, giving due consideration to whether a trial was rendered fundamentally unfair does not require granting a new trial in every instance, or even most instances. See note 3, supra. Indeed, it is far from clear that this analysis would have required a new trial in this case. One thing, however, is clear: if we continue to ask

[3] See United States v. Thomas 750 Fed. Appx. 120, 128 (3d Cir. 2018), cert. denied, 139 S. Ct. 1218 (2019) (freezing assets pretrial such that right to put on defense was curtailed); Pirela v. Horn, 710 Fed. Appx. 66, 82-83 (3d Cir. 2017), cert. denied, 139 S. Ct. 107 (2018) (waiver of jury trial); United States vs. Resnick, U.S. Dist. Ct., No. 2:11 CR 68 (N.D. Ind. Dec. 19, 2019) (ineffective assistance of counsel in connection with plea agreement); Garcia vs. Davis, U.S. Dist. Ct., No. 7:16-CV-632 (S.D. Tex. Nov. 9, 2018) (right to choice of counsel); Durden v. State, 99 N.E.3d 645, 655-656 (Ind. 2018) (waiver of right to jury trial); Newton v. State, 455 Md. 341, 353-354, 361 (2017), cert. denied, 138 S. Ct. 665 (2018) (permitting alternate juror to attend deliberations); State v. Thaniel, 238 Md. App. 343, 367-368 (Ct. Spec. App. 2018), cert. denied, 139 S. Ct. 2027 (2019) (focusing analysis on specific harms that flowed from court room closure to determine whether they "pervade[d] the whole trial" [citation omitted]); Miller v. State, 548 S.W.3d 497, 500–501 (Tex. Crim. App. 2018) (noting effect of error on outcome not dispositive); Matter of the Personal Restraint of Salinas, 189 Wash. 2d 747, 763-765 (2018) (court room closure).

the wrong questions about waived claims of structural error, as the court does here, we inevitably will give the wrong answers.

Accordingly, I respectfully dissent.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
SUCR1981-037342

COMMONWEALTH

vs.

KEVIN FRANCIS

FINDINGS OF FACT IN RESPONSE TO THE ORDER OF REMAND FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

This case came before the court on "Defendant's Motion For Dismissal Of The Indictment Pursuant To Mass. R. Crim. P. 25(B)(2) Or In The Alternative A New Trial Pursuant To Mass. R. Crim. P. 30(B)." Following an evidentiary hearing, the court denied the motion in a Decision dated February 22, 2018. The defendant sought leave to appeal the Decision in the Supreme Judicial Court for Suffolk County. In response, the Single Justice entered the following Order:

> the defendant's gatekeeper petition in this matter is stayed, and the matter is remanded to the motion judge for factual findings to answer the following questions:
>
> 1. On or about January 8, 1982, when Mr. Hrones filed an appearance to represent the defendant as his private attorney, had he been retained by the defendant or any member of his family?
> 2. Did the defendant believe at the time of the arraignment that the court had appointed Mr. Hrones to represent him as his attorney: If so, when and how did the defendant learn that the court had not appointed Mr. Hrones?

11-8-18 filed

3. Did the defendant believe at the time of arraignment that Mr. Hrones was being paid by the court to represent him? If so, when and how did the defendant learn that Mr. Hrones was representing him pro bono?

After remand, the court convened a hearing in which it offered both parties the opportunity for another evidentiary hearing at which they could present additional testimony or exhibits with respect to these questions of fact, and all parties declined. Thereafter, both parties submitted additional proposed findings of fact referenced to the record previously made on the pending motion.

PRELIMINARY MATTERS

As the defendant has burden of showing that he is entitled to a new trial, he has the burden of proof with respect to these factual questions and must establish these facts by a preponderance of the evidence. See, e.g., *Commonwealth v. Grace*, 397 Mass. 303, 307 (1986) (holding that the defendant had the burden of establishing that evidence which was the predicate for his motion for a new trial motion was unknown to the defendant at the time of trial and not reasonably discoverable) and *Commonwealth v. Tucceri*, 412 Mass. 401, 404 n. 2 (1992) (finding that defendant had the burden of showing that he was prejudiced by nondisclosure of evidence). The question of which party carries the burden of proof on these questions of fact is material, as the questions require the court to make findings with respect to events that occurred almost 37 years ago. See *Commonwealth v. Rodriguez*, 364 Mass. 87, Appendix A (1973) ("In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases.")

The first question asks whether Mr. Hrones had been "retained" by the defendant or members of his family when he filed his appearance in the case in January, 1982. The word 'retained' is not specifically defined in Black's Law Dictionary (9th Ed., 2009). The word 'retainer,' a noun, is defined; one definition is: "a client's authorization for a lawyer to act in a case <the attorney needed an express retainer before making a settlement offer>." Webster's Ninth New Collegiate Dictionary provides as an alternative definition of 'retain:' "to keep in one's pay or service." American Heritage Dictionary II offers a similar definition. As used in the Single Justice's Order, the court interprets "retained" to mean that some manner of formal offer and acceptance of representation had been reached between Mr. Hrones and the defendant in which Mr. Hrones had offered to represent the defendant, albeit without compensation, in this case, and the defendant had responded that he accepted that offer. The court concludes that while this offer could be oral and the acceptance could be by express or implied by conduct, it required more than a tacit acquiescence by the defendant in permitting or not objecting to Mr. Hrones representing him in this case. For example, simply knowing that Mr. Hrones was not going to be paid for his services by the Commonwealth and offering no objection to Mr. Hrones serving as his lawyer, did not mean that the defendant had 'retained' Mr. Hrones to represent him.

FINDINGS OF FACT

In answer to question 1, the court finds that at or about the time that Mr. Hrones filed his notice of appearance in this case he had not been retained by the defendant or a member of his family.

Mr. Hrones has no memory of the events that occurred at or about the time he filed his appearance. The court credits his testimony that it was his practice to be on the look-out for

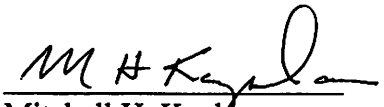
arraignments in first degree murder cases so that he could offer his services as counsel to the accused, as he was personally convinced that he would more effectively and diligently represent defendants in these cases than many attorneys on the "murder list." He offered no testimony suggesting that he would meet with a defendant or his family before approaching the first session judge concerning his appointment as counsel to ask them if they would like him to represent the defendant. Accordingly, the court finds that there was no discussion with the defendant in which either the defendant or his family "retained" Mr. Hrones as the defendant's attorney in this case.

In answer to questions 2 and 3, the court finds that the defendant has not proved that, at or about the time of his arraignment, he was unaware that the court had not appointed Mr. Hrones to represent him or that Mr. Hrones was not being paid by the Commonwealth.

Mr. Hrones conceded in response to leading questions asked by the defendant's counsel at the January 11, 2018 hearing on the pending motion that he might not have told the defendant that he was not appointed by the court or was proceeding *pro bono,* but the court finds that concession inadequate to meet the defendant's burden of proof. Moreover, in January, 1982, Mr. Hrones filed a motion with the court asking for compensation for an attorney to assist him in representing the defendant. In that motion Mr. Hrones expressly notes that he is working *pro bono* and none of this requested compensation will go to him. There is no credible evidence concerning whether or not the defendant saw or was told about that motion at or about the time it was filed or later.

At the January 11, 2018 hearing, the defendant testified that he did not know that Mr. Hrones was representing him *pro bono* as opposed to as court appointed counsel until relatively recently and had never discussed it with him. The court does not credit that testimony. This is not because the court finds that the defendant is intentionally misrepresenting what he

remembers from 1982. Rather, it is because the court finds that this issue would not have been a noteworthy matter to the defendant in 1982. Certainly, in or about 1989, when the defendant reviewed a copy of the transcript of the proceedings in the Superior Court in connection with his *pro se* motion for a new trial, he would have read the transcript of the sidebar colloquy in which the court specifically stated that Mr. Hrones could represent the defendant *pro bono* but would not be appointed and could not apply for funds. The defendant did not find this exchange between Mr. Hrones and the court significant because he made no reference to it in his first motion for a new trial. The fact that in 2018 the defendant did not remember discussing the circumstances of Mr. Hrones engagement with Mr. Hrones is not convincing evidence that it did not happen. Indeed, the court finds that the defendant was totally unaware of the significance of the distinction between being represented by a court appointed lawyer or a private attorney appearing *pro bono*, until his present post-conviction counsel developed the Sixth Amendment argument presented in the pending motion and explained it to him.



Mitchell H. Kaplan
Justice of the Superior Court

Dated: November 8, 2018

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
SUCR1981-037342

COMMONWEALTH

vs.

KEVIN FRANCIS

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON DEFENDANT'S MOTION FOR DISMISSAL OF THE INDICTMENT PURSUANT TO MASS. R. CRIM. P. 25(b)(2) OR IN THE ALTERNATIVE A NEW TRIAL PURSUANT TO MASS. R. CRIM. P. 30(b)

On September 21, 1982, a Suffolk County jury convicted the defendant, Kevin Francis, of first degree murder. On March 7, 1984, the Supreme Judicial Court affirmed the conviction. See *Commonwealth v. Francis*, 391 Mass. 369, 376 (1984) (*Francis*). On May 24, 1991, Francis filed a *pro se* motion for a new trial that the trial judge (Travers, J.) denied without a hearing.

Twenty-two years later, on September 29, 2015, Francis filed a "Motion for Dismissal of the Indictment Pursuant to Mass. R. Crim. P. 25(b)(2) or in the Alternative a New Trial Pursuant to Mass. R. Crim. P. 30(b)." On June 2, 2016, the Commonwealth filed a written opposition to the motion. The parties subsequently filed various reply and supplemental memoranda. On September 29, 2016, the court allowed the defendant's request for an evidentiary hearing on the motion.

That hearing was held on January 11, 2018. Four witnesses testified: Judge Mark Newman[1], who was the assistant district attorney who prosecuted the case on behalf of the Commonwealth; Attorney Stephen Hrones, who represented the defendant at trial and on direct

[1] Currently Chief Justice of the Essex County Juvenile Court

appeal; Yvonne Johnson, who befriended the defendant in 1997, while he was incarcerated; Robert Selevitch, a private investigator employed by CPCS who investigated certain aspects of the defendant's current contentions in 2015; and the defendant. Thirteen exhibits were admitted in evidence. In consideration of the parties' arguments, memoranda of law, supporting materials, and the evidence offered at the January 11, 2018 hearing, for the reasons that follow, Francis' motion is **DENIED.**

FINDINGS OF FACT

The material facts that could have been found by the jury based upon the evidence presented at trial were summarized by the Supreme Judicial Court in *Francis*:

> We summarize the relevant facts. On September 19, 1981, at approximately 7:00 P.M., Terrence Smith, the eyewitness, was driving along Blue Hill Avenue toward Mattapan Square, in Boston. It was drizzling slightly, but was starting to clear, and Smith was able to see by natural light. He saw a young woman on the sidewalk running toward him. Although his vehicle was moving at approximately fifteen to twenty miles per hour, he observed that the woman was carrying a stick and that she was wearing a "rain or shine" jacket, new boots, and dungarees. Smith then saw a man running about forty or fifty yards behind the woman. As the man drew closer, Smith noticed a knife in his hand. Upon observing this, he slowed down his car. Although there is some dispute over his precise actions at this point, Smith either stopped and opened the door of his automobile, placing one foot on the ground, or he slowed down to better observe the scene in front of him. The man then passed Smith, and continued to run along the sidewalk after the woman. At trial, Smith testified that the man came within fifteen feet of him, such that it was possible to get "a very good side view." Overall, Smith observed the man for a total of eight to ten seconds.
>
> About 7:15 P.M. that evening the police received a call summoning them to the Franklin Field area, and upon arrival they discovered the body of the victim, Vanessa Marson. At trial, the medical examiner testified that the victim had died of multiple stab wounds to her chest and skull.
>
> On September 30, 1981, from an array of ten or twelve photographs submitted to him by the police, Smith initially identified the defendant as being the man he observed on the evening in question. The next day, he identified (by means of a photograph) Vanessa Marson as "the girl that was running up the street." At trial, Smith again identified the defendant as the man he saw running along Blue Hill Avenue with a knife.

> The defendant was a former boyfriend of the victim, and the prosecution introduced evidence that he had threatened the victim (who was since dating someone else) two months before the murder occurred.
>
> The defendant alleges that the prosecutor misstated the testimony of a defense witness, James Stuckey, whose testimony was introduced to cast doubt on Smith's credibility as an eyewitness. Stuckey, who was a friend of Smith, testified that Smith and others were visiting him on September 20, 1981, the day after Smith had witnessed the events on Blue Hill Avenue. During this visit, Stuckey received a telephone call from his daughter. When he rejoined his guests, he told them that his daughter's girl friend had been killed on Blue Hill Avenue. Smith then recounted his observations of the prior evening.
>
> In Smith's various recollections of the incident, both during his initial interview by police and at trial, he maintained consistently that after seeing the pursuer's knife he stopped his car and placed one foot on the ground outside the vehicle to gain a view unrestricted by the interior of the car. He also stated that upon hearing about the murder from Stuckey he related the same set of events. Stuckey, however, after repeated questioning at trial, stated that Smith had told him that he only slowed down, but did not stop, his car.

Francis, 391 Mass. at 370-371.

Certain other evidence introduced at trial will be described below.

The factual dispute[2] on which the defendant's motion centers is whether a certain Boston Police Department report was produced to the defendant during discovery, and, if it was not, whether this substantially prejudiced the defendant. The report was dated September 21, 1981 and typed. It reads as follows:

> About 10:00 PM, Monday 21 Sept a male called the terret and reported that the man who killed the girl at Franklin field was one Greg Frazier (PS) Frazier was said to be from NY and he came here some time ago after being involved in an incident where a police officer was shot. The caller stated that Frazier works at Morgan Memorial.
> This caller gave the name Vincent Powell and the phone No. 267-4452 (no longer in service)
> ID has no record of any Greg Frazier (under any spelling), only one V. Powell that is Victor R. Powell of 497 Huntington Av., DOB 9-8-56
> Cadet Paul Oconner took the call
>
> S. Murphy

[2] The defendant also makes a purely legal argument on which factual findings are unnecessary.

The parties have referred to this report as the Murphy Report. The defendant contends that the Murphy Report was not turned over during discovery; the Commonwealth maintains that it was.

Judge Newman was an assistant DA in Suffolk County from 1975 to 1984 and prosecuted this case on behalf of the Commonwealth. He has some memory of the investigation of the case and the trial, but no memory of any specific reports. During the time that he prosecuted this matter, it was his practice to place all materials associated with cases to which he was assigned in brown accordion folders with flaps which he purchased himself for that purpose. Such an accordion folder was placed in evidence as Exhibit 1. The Commonwealth represented that this is the case file for the defendant's case recovered from storage. Judge Newman testified that this was the type of accordion file that he used, and it looked like the file for this case, but he could not actually identify it as such. The court finds that Exhibit 1 is the prosecution's file in this case, although it makes no finding concerning whether any documents were added or removed from the file over the past 35 or so years.

Judge Newman further testified that he usually received police reports in homicide cases from the homicide detective assigned to the investigation, but has no specific memory of what happened in this case. Four copies of the Murphy Report are contained in different subfolders in Exhibit 1.

Judge Newman explained that it was also his practice to present a list of the materials being turned over in discovery to defense counsel together with the discovery materials being delivered. He called these lists "Discovery Receipts." He would have defense counsel sign the Discovery Receipt to acknowledge receipt of the materials. The Francis file contains two such

Discovery Receipts dated March 29, 1982 and July 12, 1982, respectively, each signed by Attorney Hrones.

The first three items in the March 29, 1982 receipt are:

1. Report of Sgt. Detective Joe Kelley 9-21-81
2. Report of Dets. Spencer & McManus as to statement of William Twitty[3]
3. Report of Dets, Spencer & McManus as to Mar Clark's identification of deceased (9-21-81)

The tenth item in the July 12, 1982 receipt is:

10. Report typed 9-21-81

The Commonwealth points out that the three police reports specifically described in the March 29th report can be matched to reports in Exhibit 1. The only other typed 9-21-81 report is the Murphy Report. In consequence, unless item 10 in the July 12th receipt is a duplicate of a report turned over in March, and there is nothing to suggest that it is, item 10 refers to the Murphy Report.

Attorney Hrones testified that he could no longer remember whether he had received the Murphy Report during discovery. He, nonetheless, deduced that he had not because he did not cross-examine any of the police witnesses concerning it. However, it is undisputed that the Commonwealth turned over discovery regarding two other possible culprits identified by name and physical description in an anonymous call to the police: William Twitty and Trio. William Twitty was the deceased's boyfriend at the time of the murder, and Hrones' defense focused on Twitty as the more likely murderer.[4] Hrones called Twitty's boss as a witness at trial to attempt

[3] This report has a September 21, 1981 date on it.

[4] See, Hrones closing argument, e.g., "I suggest to you that Twitty should be the one in this chair, not the defendant." Trial Transcript VI, 24-30.

to establish that Twitty was geographically close enough to have gotten to the murder scene during his break (if he had a car), had been arguing with his girlfriend, and appeared nervous on the day of the murder. Hrones, however, made no reference to Trio or the anonymous tip regarding him and Twitty during the trial. In consequence, Hrones' failure to refer to the tip contained in the Murphy Report during trial, where the phone number provided by the tipster was out of service and the caller could not be identified, is unpersuasive evidence that the Murphy Report must not have been produced. As with the Trio tip, reference to the Greg Frazier tip would not have advanced the trial strategy that Hrones reasonably adopted.[5]

The history of Attorney Hrones' case file is somewhat muddled. At the time of the evidentiary hearing, he no longer had possession of it. As late as 1997, when the defendant was incarcerated at the Old Colony Correction Center, the defendant had a box of documents relating to his case. At that time, he asked Yvonne Johnson to take possession of all these documents. In 2012, when the defendant's current post-conviction counsel began to represent him, Ms. Johnson gave her all of the defendant's papers that she possessed. Whether the documents Ms. Johnson received from the defendant were all copies or included original documents from Attorney Hrones is uncertain. In 1989, while working on his *pro se* motion for a new trial, the defendant filed a *pro se* motion in the Superior Court asking for another copy of the transcript of his trial. In that motion, the defendant averred that he previously had a copy of the transcript but it "was lost by the Dept. of Correction with other property of the petitioner's during a transfer to another institution and has yet to be found or located."

[5] In 2015, Robert Selevitch, a CPCS investigator attempted to locate Vincent Powell and Greg Frazier. He found no records suggesting the existence of anyone by the name of Vincent Powell, anywhere. He found some evidence concerning a Greg Frazier born in 1961 who may have been a resident of a Veteran's Shelter in Boston off and on from 2009 to 2015.

Ms. Johnson befriended the defendant in 1997. After taking possession of his case file, she retained a private investigator with her own funds in an attempt to develop evidence in support of a post-conviction motion that might have led to the defendant's release. She spent $30,000 on this effort. The private investigator's invoice reflects the work he did on her behalf; it contains no reference to a search for either Vincent Powell or Greg Frazier. The court has no doubt that the investigator would have spent time in an effort to locate these individuals if the Murphy Report had been among the documents that Ms. Johnson had provided him. The court also credits the affidavit of the defendant's present counsel in which she attests that the Murphy Report was not among the documents that Ms. Johnson turned over to her.

Based upon the testimony provided at the hearing and a careful review of all of the documentary evidence, the court finds that the defendant has not carried his burden of proving that the Murphy Report was not produced to Attorney Hrones during the discovery phase of this case.

First, the Discovery Receipts are substantial evidence that it was produced, as there are four 9/21/81 reports listed in those receipts and four such reports in the accordion case file, including the Murphy Report. Therefore, another 9/21/81 report would have had to have been produced twice for the Murphy Report to have been withheld. Second, another anonymous tip report was produced during discovery suggesting that this type of report was not intentionally withheld. Third, the court credits Judge Newman's testimony that as a matter of practice, he turned over police reports to defense counsel after listing them in a Discovery Receipt. While, it is certainly possible that the Murphy Report was inadvertently omitted, it appears in four places in the accordion file that Judge Newman maintained in this case. Fourth, while Attorney Hrones did not make reference to the tip contained in the Murphy Report at trial, he also did not refer to

another anonymous tip contained in the discovery materials. Hrones also did not attempt to establish some manner of *Bowden* defense through other evidence produced to him concerning possible suspects to suggest that the police could have done more to investigate leads concerning other third-party culprits who might have committed the murder. Rather, he focused the jury on the deceased's current boyfriend—certainly a reasonable strategy. Under these circumstances, the fact that Hrones did not use the Murphy Report tip at trial is not compelling evidence that he did not receive the Murphy Report. Finally, while the court finds that the Murphy Report was not among the materials that Ms. Johnson received from the defendant in 1997, and eventually transferred to the defendant's present counsel, under these circumstances that is also not compelling evidence that Mr. Hrones never received it; rather it only establishes that by 1997, the defendant did not have it among his papers.

RULINGS OF LAW

This court may grant the defendant a new trial "at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). See *Commonwealth v. Lane*, 462 Mass. 591, 597 (2012). The standard under Mass. R. Crim. P. 30(b) is intentionally broad, and the disposition of the motion for a new trial is left to the discretion of the motion judge. *Commonwealth v. Schand*, 420 Mass. 783, 787 (1995); *Commonwealth v. Moore*, 408 Mass. 117, 125 (1990). "Judges are to apply the rule 30 (b) standard rigorously" and should grant a new trial motion "only if the defendant comes forward with a credible reason that outweighs the risk of prejudice to the Commonwealth." *Commonwealth v. Kolenovic*, 471 Mass. 664, 672 (2015).

The defendant makes two primary arguments in support of his motion. First, he argues that the indictment should be dismissed or he should be granted a new trial because (i) the Commonwealth withheld the Murphy Report and (ii) it constituted exculpatory evidence. The defendant claims that if the Commonwealth had turned over the Murphy Report in a timely fashion, an investigation could have led to his complete exoneration or, at a minimum, his attorney could have used the report to impeach the Commonwealth's witnesses at trial. The defendant's second argument is that his Sixth Amendment right to counsel was violated because he did not knowingly and intelligently waive his right to court-appointed counsel paid for by the Commonwealth before proceeding to trial with Attorney Hrones, who had agreed to represent him pro bono. Each argument is addressed below.

Disclosure or Non-Disclosure of Putative Exculpatory Evidence

Under appropriate circumstances, a failure to disclose exculpatory evidence is a well-established basis for ordering a new trial. See *Commonwealth v. Murray*, 461 Mass. 10, 19 (2011). "To secure a new trial on the basis of exculpatory evidence, the defendant must establish three elements." *Id.* "First, the evidence must have been in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control." *Id.*

"Next, the defendant must establish that the evidence is exculpatory. Exculpatory in this context is not a narrow term connoting alibi or other complete proof of innocence, . . . but rather comprehends all evidence which tends to negate the guilt of the accused . . . or, stated affirmatively, supporting the innocence of the defendant." *Id.* (citations and internal quotation marks omitted). "Due process of law requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges." *Commonwealth v. Tucceri*, 412 Mass. 401, 404-405 (1992), citing *Brady v.*

Maryland, 373 U.S. 83, 87 (1963). See *Commonwealth v. Daniels*, 445 Mass. 392, 401 (2005) (noting that "favorable evidence" need not be dispositive evidence).

Third, "after showing that the withheld evidence was potentially exculpatory, a defendant seeking a new trial must establish prejudice." *Commonwealth v. Murray*, 461 Mass. at 20-21. "Depending on the specificity of the defendant's [pretrial] request for exculpatory evidence, different standards of judicial review apply." *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 (1987). See *Commonwealth v. Wilson*, 381 Mass. 90, 108-109 (1980). When the prosecution has denied a defendant specifically requested exculpatory evidence, "a defendant need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure." *Commonwealth v. Daniels*, 445 Mass. at 404, quoting *Commonwealth v. Tucceri*, 412 Mass. at 412. See *Commonwealth v. Camacho*, 472 Mass. 587, 598 (2015) (recognizing that "where specifically requested favorable evidence is not disclosed the defendant need only demonstrate that a substantial basis exists for claiming prejudice") (citations omitted). In this case, the court will assume that this standard applies to the Murphy Report. [6]

As is evident, the court's first task is to determine whether the defendant has established that the Commonwealth failed to disclose the Murphy Report to Attorney Hrones prior to trial. See *Commonwealth v. Tucceri*, 412 Mass. at 404 n.2 ("It is . . . the defendant who has the burden of showing prejudice warranting or requiring a new trial order."). For the reasons explained

[6] In their memoranda, both the defendant and the Commonwealth seem to agree that Hrones made a specific request for the particular exculpatory evidence at issue and apply this standard to the analysis regarding prejudice. If, however, a defendant makes only a general request for exculpatory evidence prior to trial, the court looks to "whether there is a substantial chance that the jury might not have reached verdicts of guilty if the undisclosed evidence had been introduced in evidence." *Commonwealth v. Tucceri*, 412 Mass. at 413.

above, the court concludes that the defendant has not carried his burden of establishing non-disclosure.

Moreover, even if the court were to assume *arguendo* that the Commonwealth had either intentionally or inadvertently withheld the Murphy Report, the defendant would still not be entitled to dismissal of the indictment or a new trial based on a failure to disclose this *exculpatory* evidence. Relying on the principles of law discussed above, the court finds that while the defendant can establish the first two elements required to obtain a new trial based on a failure to disclose exculpatory evidence, he could not have established the third element. See *Commonwealth v. Murray*, 461 Mass. at 19.

First, the Murphy Report was in the possession, custody, or control of the prosecutor—at least four copies of the document were contained in Newman's original case file (Exhibit 1). Second, the Murphy Report is *potentially* exculpatory evidence. The Murphy Report suggests that someone identifying himself by a false name and out-of-service telephone number provided a tip concerning a possible suspect. While there is no evidence linking this putative suspect to Ms. Marson, it is possible that in 1981 or 1982, an investigator might have had greater success in finding Vincent Powell or Greg Frazier than Mr. Selevitch did in 2015. See n.5, *supra*.[7] It is also possible that the Murphy Report could have been used in cross examination of certain police witnesses at trial in an effort to weaken the Commonwealth's case and discredit the police investigation of Ms. Marson's murder—even though this tactic would have been inconsistent with Hrones' adopted trial strategy of pointing to Ms. Marson's current boyfriend as the likely murderer rather than someone with no prior relationship to her. It is true that the police investigation quickly focused on the defendant, but this might have been understandable given

[7] On the other hand, as Mr. Selevitch noted, the online databases that are available today to search for an individual did not exist in 1982.

the eyewitness identification, the defendant's prior threats to Ms. Marson, and the brutal nature of the attack, with no evidence that it was motivated by robbery or involved a sexual assault. Nonetheless, although the Murphy Report reflects some effort to search records for the caller (Vincent Powell), Powell's phone number (267-4452), and the named killer (Greg Frazier), there does not appear to be any evidence that suggests that the police did anything to determine whether Greg Frazier existed and actually worked at Morgan Memorial. Thus, the Murphy Report could be potentially exculpatory evidence.

The defendant, however, has not established the third element: prejudice. As noted above, when the prosecution has denied a defendant specifically requested exculpatory evidence, "a defendant need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure." *Commonwealth v. Daniels*, 445 Mass. at 404, quoting *Commonwealth v. Tucceri*, 412 Mass. at 412. The court finds that the Murphy Report contained only highly speculative information and was likely inadmissible[8] and of no substantial probative value at trial. See *Commonwealth v. Cinelli*, 389 Mass. 197, 214-215, cert. denied, 464 U.S. 860 (1983) (determining that new trial was not required based on Commonwealth's failure to provide defendants with file of anonymous tips compiled by police because tips would not have provided any significant aid to defendants). As explained above, at trial Hrones focused on establishing that Twitty was the murderer. Pretrial discovery included reference to other potential suspects: Ronald Freedman, the man who discovered Marson's body; Michael Diggs who had a criminal record, a relationship with Marson's cousin and may have once argued with Marson; and "Trio."

[8] See Mass. Guide to Evidence, Section 1105 "Third-Party Culprit Evidence" which provides as relevant here: "the court must make a preliminary finding . . . that there are other substantial connecting links between the crime charged and a third party or between the crime charged and another crime that could not have been committed by the defendant." See also *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 800-801 (2009).

Hrones reasonably appears to have concluded that the best strategy, given the grisly facts surrounding the murder, was to focus on someone who had a direct relationship with Marson. Another dubious tip concerning a person with no apparent relationship to Marson appears highly unlikely to have altered Hrones' strategic decisions. The suggestion that Hrones would have undertaken a more thorough investigation of the tip than the police and this would have generated admissible evidence is entirely speculative, especially considering the results of the 2015 search for Powell and Frazier using today's comprehensive and sophisticated databases. [9]

Sixth Amendment Right to Counsel

The defendant contends that his Sixth Amendment right to counsel was violated because he did not knowingly and intelligently waive his right to court-appointed counsel paid for by the Commonwealth before proceeding to trial represented by Hrones, who had agreed to represent him without any compensation (pro bono). Hrones was present when the defendant was arraigned in Superior Court. The record contains a one-page transcript from a sidebar conference that occurred at the time of his Superior Court arraignment.

> I would like the record to show that when this case was called for arraignment, Mr. Rhones [sic] stepped up and asked if he and the assistant district attorney could approach the bench. I allowed them to do so.
>
> Mr. Rhones said to me that he would represent the young man for no pay if he could not be appointed and asked me if his appointment to the list of attorneys who may represent indigents accused of murder had been approved at the last meeting of the judges. I told him it had not.

[9] Similarly, for generally the reasons stated in the Commonwealth's Opposition, a new trial is not warranted based on the defendant's argument that the Murphy Report and recent scientific findings regarding the unreliability of eyewitness identifications constitute newly discovered evidence that cast real doubt upon the justice of the conviction.

> As chairman of the committee involved, I know that Mr. Rhones has applied three or four times and had been turned down each time.
>
> This in itself does not prevent him from private representation, and I am allowing him to represent the defendant privately.
>
> I just want the record to show that at no time throughout the trial should any judge consider paying him out of public funds.

The judge ordered the sidebar conference transcribed and placed in the case file.[10]

The defendant argues that the arraignment judge and later the trial judge had a duty to protect his right to counsel. He contends that this includes his implicit right to an attorney who was on the approved counsel list and would be paid by the Commonwealth for his work on the case. The defendant maintains that he was not aware that Hrones was not actually appointed by the court and had worked without compensation while representing him prior to and during the trial until a few years ago when his present attorney brought this to his attention.[11] The Commonwealth responds that the defendant's Sixth Amendment right to counsel was not violated because Hrones, an experienced trial attorney, represented him, albeit pro bono, and the trial judge previously denied the defendant's first motion for a new trial in which he argued, among other things, ineffective assistance of counsel.

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[10] At the evidentiary hearing on the pending motion, Attorney Hrones testified that he had represented defendants, pro bono, in first degree murder cases on four or five occasions. Hrones explained that at that time, an attorney had to be a member of the Massachusetts bar for at least ten years to be included on the list of approved attorneys for first degree murder case appointments and he then did not meet this requirement. Nonetheless, he considered himself more competent and committed to his clients' defenses than many attorneys who were on this list.

[11] Attorney Hrones also testified that he could not recall if he had told the defendant that he was representing him pro bono, but it was certainly possible that he had not. This is because he was eager to defend the defendant and would not have said anything that might cause the defendant to fire him.

"There is no question that the right to counsel in a criminal prosecution is a fundamental constitutional right." *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 234 (2004). The Sixth Amendment to the U.S. Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Moreover, "[t]he United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him." *Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Supreme Judicial Court has recognized that:

> This constitutional guarantee of the assistance of counsel "cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The right to counsel means the right to effective assistance of counsel. See *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

Lavallee v. Justices in the Hampden Superior Court, 442 Mass. at 235. In Massachusetts, the Committee for Public Counsel Services provides legal representation for indigent criminal defendants. See G.L. c. 211D, § 5 ("Said committee shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel;

and, provided further, that such person is unable to obtain counsel by reason of his indigency.") (emphasis added).

The question of whether an indigent defendant is entitled to a court appointed, government compensated attorney, when a competent lawyer has offered to represent the defendant without compensation is certainly novel. The court finds that, in this case, at all relevant times, the defendant was represented by a competent attorney. The defendant is unable to point to anything in the record that suggests that he was ever dissatisfied with Hrones' legal representation while he was represented by him, and, as noted above, the judge who presided over the trial has already rejected the defendant's post hoc claim of ineffective assistance of counsel when he denied his first motion for a new trial without a hearing.

In a supplemental brief, the defendant asserts both that he (i) "was denied his right to conduct his own defense because he was denied his right to choose whether to proceed to trial with a court-appointed attorney compensated for his work or whether to proceed to trial with a volunteer;" and (ii) "was denied his right to select his own attorney because he had a right to court-appointed counsel paid by the government instead of a volunteer." He cites no case in support of either formulation of his claim, and the court has not been able to find one. Certainly, when an indigent defendant has counsel appointed for him, he is not given the right to choose that attorney. While the court agrees with the defendant that under similar circumstances, it might be better for the trial judge to conduct a colloquy to ensure that the defendant is fully informed of what is transpiring, the court does not find that a failure to conduct such a colloquy results in some manner of structural error as the defendant suggests, since the court finds no constitutional right to court appointed counsel that the defendant has unwittingly waived.[12] By

[12] At the hearing on this motion, the defendant introduced a transcript of a hearing that took place in 1974 in connection with another first degree murder case in which a trial judge

way of analogy, on a number of occasions, this judge has presided over cases in which family and friends of a defendant have pooled resources to retain a privately paid attorney when the defendant himself is indigent and would be entitled to court appointed counsel. The court does not conduct a colloquy to ensure that the defendant is aware of this.

Remaining Claims

Francis raises several other arguments in support of his new trial motion. More specifically, he contends that: (1) the prosecutor improperly called a witness solely to elicit a prior inconsistent statement; (2) the judge erroneously allowed a witness to express certainty as to his identification; (3) the judge erroneously instructed the jury as to memory and identification evidence; and (4) the prosecutor improperly vouched for Twitty in his closing argument. See Defendant's Memorandum at 69-81.

However, all of these claims could and should have been raised on direct appeal to the Supreme Judicial Court, or in his previous motion for post-conviction relief, and therefore have been waived. See Mass. R. Crim. P. 30(c)(2).[13] See also *Rodwell v. Commonwealth*, 432 Mass. 1016, 1018 (2000) (noting that "[i]f a defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for postconviction relief, the

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conducted a colloquy with the defendant and Mr. Hrones regarding his pro bono representation of the defendant. See Exhibit 6. However, when the entire transcript is reviewed, it is apparent that the judge preferred that the defendant accept a court appointed lawyer that the judge recommended rather than Mr. Hrones, and the judge wanted the record to be clear concerning his preferences and that Mr. Hrones was not appointed and would not be paid. Mr. Hrones, for his part, argued to the court that he should be appointed to represent the defendant notwithstanding the language of Superior Court Rule 53 then in effect. The transcript does not represent some settled practice of conducting a colloquy when an indigent defendant was going to be represented by an attorney who the court did not appoint.

[13] Under Mass. R. Crim. P. 30(c)(2): "All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion."

claim is waived"); *Commonwealth v. Randolph*, 438 Mass. 290, 293-296 (2002) (stating that waiver rule protects society's interest in the finality of its judicial decisions and promotes judicial efficiency and explaining exceptions to waiver rule); *Commonwealth v. Smith*, 460 Mass. 318, 320 (2011) ("It is not uncommon for a Superior Court judge considering a motion for a new trial in a capital case, after . . . [the Supreme Judicial Court] already has affirmed the defendant's conviction of murder in the first degree in the direct appeal, to reject summarily any basis for the motion that could have been raised in the direct appeal or considered on plenary review. Indeed that is a typical approach."). Moreover, having reviewed each of these additional claims, the court finds them to be without merit. In particular, with respect to the claims addressing alleged shortcomings in the instructions regarding eyewitness identification, the Supreme Judicial Court has made it clear that its reconstruction of these instructions in light of more recent scientific investigation is to have only prospective application. See *Commonwealth v. Gomes,* 470 Mass. 352, 376 (2015); *Commonwealth v. Navarro,* 474 Mass. 247, 252 n.5 (2016). The court properly instructed the jury concerning such identifications according to the law as it existed when this case was tried in 1982.

ORDER

For the foregoing reasons, Defendant Kevin Francis' "Motion for Dismissal of the Indictment Pursuant to Mass. R. Crim. P. 25(b)(2) or in the Alternative a New Trial Pursuant to Mass. R. Crim. P. 30(b)" (Paper Number 47) is **DENIED**.

Mitchell H. Kaplan
Justice of the Superior Court

Dated: February 22, 2018

From: Amy Belger
To: Smith, SJ; Salem, Rana
Subject: Fwd: SJC-12683 - Notice of Docket Entry
Date: Tuesday, December 8, 2020 2:16:11 PM

---------- Forwarded message ---------
From: <SJCCommClerk@sjc.state.ma.us>
Date: Thu, Aug 6, 2020 at 6:01 PM
Subject: SJC-12683 - Notice of Docket Entry
To: <appellatedefender@gmail.com>

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. SJC-12683

COMMONWEALTH
vs.
KEVIN FRANCIS

NOTICE OF DOCKET ENTRY

Please take note that the following entry was made on the docket of the above-referenced case:

August 6, 2020 - DENIAL of Motion for Reconsideration. (By the Court)

Francis V. Kenneally, Clerk

Dated: August 6, 2020

To:
Amy M. Belger, Esquire
Ira Gant, Esquire
Dara Kesselheim, A.D.A.
Craig Iannini, A.D.A.
Chauncey B. Wood, Esquire
Anthony J. Benedetti, Esquire
John M. Thompson, Esquire
Linda J. Thompson, Esquire

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. KEVIN FRANCIS
SJC-12683

CASE HEADER

Case Status	Decided, Rescript issued	**Status Date**	08/07/2020
Nature	Murder1 appeal - related	**Entry Date**	02/08/2019
Appellant	Defendant	**Case Type**	Civil
Brief Status		**Brief Due**	
Quorum	Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, Kafker, JJ.		
Argued Date	11/04/2019	**Decision Date**	06/24/2020
AC/SJ Number	SJ-2018-0129	**Citation**	485 Mass. 86
DAR/FAR Number		**Lower Ct Number**	8184CR37342
Lower Court	Suffolk Superior Court	**Lower Ct Judge**	Mitchell H. Kaplan, J.
Route to SJC	Direct Entry: Single Justice Allows Appeal 278/33E		

ADDITIONAL INFORMATION

Transcripts received: 2 volumes (on CD). Transcripts dates: 1/10/18 and 9/28/18. (Scanned)

INVOLVED PARTY	ATTORNEY APPEARANCE
Kevin Francis Petitioner/Appellant Blue br, app & reply br filed 1 Ext	Amy M. Belger, Esquire Ira Gant, Esquire
Commonwealth Respondent/Appellee Red brief & appendix filed 2 Exts, 119 Days	Dara Kesselheim, A.D.A. Craig Iannini, A.D.A.
The Cato Institute Amicus Amicus brief filed	Chauncey B. Wood, Esquire
The Massachusetts Assoication of Criminal Defense Lawyers Amicus On brief of another party	Chauncey B. Wood, Esquire
Committee for Public Counsel Services Amicus Awaiting green brief	Anthony J. Benedetti, Esquire
Thompson & Thompson, P.C. Amicus Awaiting green brief	John M. Thompson, Esquire Linda J. Thompson, Esquire

DOCUMENTS

Appellant Francis Brief
Amicus Cato Institute and MACDL Brief
Appellee Commonwealth Brief
Appellant Francis Reply Brief

DOCKET ENTRIES

Entry Date	Paper	Entry Text
02/08/2019	#1	Entered. Notice to counsel.
02/08/2019	#2	NOTICE OF AVAILABILITY OF ELECTRONIC FILING: The clerk's office will accept briefs, appendices, motions, status reports, and correspondence through eFileMA effective immediately. Please note that after review and docketing of e-filed briefs and appendices, the clerk will require a limited number of paper copies to be filed. Parties are free to file their briefs and record appendices under the revised rules of appellate procedure prior to their effective date, March 1, 2019.
03/01/2019	#3	ANNOUNCEMENT: The Justices are soliciting amicus briefs. Whether a new trial is required where the defendant, who was convicted of murder in the first degree, claims he was denied his right, as an indigent person, to be furnished with a court appointed, government-compensated attorney and, instead, was represented by an attorney who, without his knowledge and consent, was essentially a volunteer, purporting to represent him privately yet without being retained by him.

03/07/2019	#4	MOTION to extend to 07/31/2019 filing of brief of Kevin Francis by Amy M. Belger, Esquire. (ALLOWED, in part, the defendant's brief is due on or before May 31, 2019.)
05/23/2019	#5	Appendix Vol. 1 filed for Kevin Francis by Attorney Amy Belger.
05/23/2019	#6	Appellant brief filed for Kevin Francis by Attorney Amy Belger.
05/23/2019	#7	Appendix Vol 2 filed for Kevin Francis by Attorney Amy Belger.
05/23/2019		The clerk's office has received the appellant's brief and record appendices through e-fileMA. The brief has been accepted for filing and entered on the docket. The appellant shall file with the clerk 4 copies of the brief and 2 copies of each record appendix within 5 days. The clerk's office may require additional copies if necessary.
05/30/2019	#8	Additional 4 copies of appellant's brief and 2 copies of each record appendix volumes 1 to 3 filed by Kevin Francis. (Note: 2 copies of substitute corrected record appendix volume 3 received on June 4, 2019.)
06/04/2019	#9	MOTION to substitute corrected record appendix volume III, filed for Kevin Francis by Amy M. Belger, Esquire, Ira Gant, Esquire. (ALLOWED)
06/04/2019	#10	SERVICE of Substitute Corrected Record Appendix Volume III for Kevin Francis by Amy M. Belger, Esquire, Ira Gant, Esquire.
06/17/2019	#11	MOTION to extend to 10/11/2019 filing of brief of Commonwealth by Dara Kesselheim, A.D.A.. (ALLOWED to October 11, 2019.)
08/14/2019	#12	NOTICE of November argument sent.
08/30/2019	#13	ORDERED for argument on November 4. Notice sent.
10/15/2019	#14	Amicus brief filed for Cato Institute and MACDL by Attorney Chauncey B. Wood.
10/16/2019		The clerk's office has received the Amicus brief filed for Cato Institute and MACDL through e-fileMA. The brief has been accepted for filing and entered on the docket. Four copies of the brief shall be filed with the clerk's office within 5 days. The clerk's office may require additional copies if necessary.
10/16/2019	#15	Appellee brief filed for Commonwealth by Dara Kesselheim,A.D.A..
10/16/2019	#16	Appendix filed for Commonwealth by Dara Kesselheim, A.D.A..
10/16/2019	#17	Motion to file brief late filed for Commonwealth by Dara Kesselheim, A.D.A.. ALLOWED.
10/17/2019		The clerk's office has received the Appellee's brief and Appendix filed for the Commonwealth through e-fileMA. The brief has been accepted for filing and entered on the docket. Four copies of the brief shall be filed with the clerk's office within 5 days. The clerk's office may require additional copies if necessary.
10/18/2019	#18	Additional 4 copies of appellee's brief and 1 copy of record appendix filed by Commonwealth.
10/23/2019	#19	Reply brief filed for Kevin Francis by Attorney Amy Belger.
10/23/2019		The clerk's office has received the appellant's reply brief through e-fileMA. The brief has been accepted for filing and entered on the docket. The appellant shall file with the clerk 4 copies of the brief within 5 days. The clerk's office may require additional copies if necessary.
10/28/2019	#20	Additional 4 copies of appellant's reply brief filed by Kevin Francis.
11/04/2019		Oral argument held. (Gants, C.J., Lenk, J., Gaziano, J., Lowy, J., Budd, J., Cypher, J., Kafker, J.). View Webcast
11/27/2019	#21	Attested copy of docket sheets and CD transcripts of 1/10/18 and 9/28/18 received from Suffolk Superior Court.
03/19/2020	#22	ORDER waiving 130-Day rule.
06/24/2020	#23	RESCRIPT (Full Opinion): For the reasons set forth in the opinion, the denial of the defendant's second motion for a new trial is affirmed. By the Court)
06/25/2020	#24	Motion to extend time to file motion for modification filed for Kevin Francis by Attorney Amy Belger. (ALLOWED to August 17, 2020)
06/25/2020	#25	Certificate of service filed for Kevin Francis by Attorney Amy Belger.
07/02/2020	#26	Motion for Reconsideration or Modification filed for Kevin Francis by Attorney Amy Belger.
07/02/2020	#27	MOTION to exceed page limit filed for Kevin Francis by Attorney Amy Belger. (ALLOWED)
07/02/2020	#28	Certificate of service filed for Kevin Francis by Attorney Amy Belger.
07/16/2020	#29	ORDER: The Appellee is invited to reply to the motion for reconsideration or modification of the opinion. Any such reply shall be filed no later than July 28, 2020.
07/24/2020	#30	Amicus brief filed for Committee for Public Counsel Services by Attorney Anthony J. Benedetti.
07/24/2020	#31	Motion to File Amicus Brief filed for Committee for Public Counsel Services by Attorney Anthony J. Benedetti.
07/24/2020	#32	Anthony J. Benedetti.Certificate of service filed for Committee for Public Counsel Services by Attorney.
07/28/2020	#33	Amicus brief filed for Thompson & Thompson, P.C. by Attorney John Thompson, Linda Thompson.
07/28/2020	#34	Motion to File Amicus Brief filed for Thompson & Thompson, P.C. by Attorney John Thompson, Linda Thompson.
08/06/2020	#35	DENIAL of Motion for Reconsideration. (By the Court)
08/07/2020		RESCRIPT ISSUED to trial court.

As of 09/21/2020 10:20am

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, SS. NO. 12683

KEVIN FRANCIS

v.

COMMONWEALTH

MOTION FOR RECONSIDERATION OF DECISION

On Behalf of Kevin Francis:

Amy M. Belger
Law office of Amy M. Belger
841 Washington Street
Holliston, MA 01746
508-893-6031
BBO # 629694
appellatedefender@gmail.com

JULY 2020

MATTERS FOR RECONSIDERATION

The Court has applied waiver to structural errors caused by the government that deprived Francis of his fundamental constitutional rights. Francis did not have counsel to forward his appellate claims until 2012.[1] [2] This is because he was deprived of counsel by the Committee for Public Counsel Services (CPCS). Moreover, the Court has ruled the rights violated that gave rise to the structural errors were obvious to anyone reading the arraignment transcript. Yet, the sidebar transcript was intentionally made a prominent part of the record of this case by the arraignment judge. Accordingly, this Court deprived Francis of the §33E plenary review he was entitled to in 1984 when his direct appeal was decided.

I. FRANCIS WAS DENIED THE "EXACTING SCRUTINY" OF §33E PLENARY REVIEW WHEN THIS COURT FAILED TO DISCOVER THE "OBVIOUS ERROR" APPARENT FROM THE ARRAIGNMENT TRANSCRIPT. THIS DENIAL WAS A VIOLATION OF FRANCIS'S EQUAL PROTECTION RIGHT.

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[1] References to the appendix of this motion: "(R.__)"; Opening Brief: "(Br.__)";the record appendix volumes accompanying Opening Brief: "(R.[vol.#.].__)."

[2] Had it not taken two years of counsel insisting the Suffolk DA's Office comply with a public records request, it would not have taken three years for counsel to file Francis's new trial motion (R.I.115-127).

This Court is "empowered under G.L. c.278, §33E, to consider questions raised by the defendant for the first time on appeal, or even to address issues not raised by the parties, but discovered as a result of [its] *own independent review of the entire record*. . . . This *uniquely thorough review* of first-degree murder convictions is warranted by the infamy of the crime and the severity of its consequences." *Commonwealth v. Gunter*, 459 Mass. 480, 486 (2011) (emphasis added).

Unlike other defendants free to appeal from adverse decisions on postconviction motions, *see, e.g.,* Mass.R.Crim.P. 30(c)(8), a capital defendant whose "whole case" has already been reviewed by this Court pursuant to §33E must first seek and obtain leave from a single justice to appeal from an adverse decision on a postconviction motion. *Id.* at 487 *citing Dickerson v. Attorney Gen.*, 396 Mass. 740, 744-745 (1986)("since we have already reviewed the 'whole case' as required by … §33E, the capital defendant *justifiably* is required to obtain leave of a single justice before being allowed once again to appear before the full court")(emphasis added).

Francis was denied competent review of his "whole case" and "entire record" because the issue deemed waived by CPCS was "obvious" to anyone who read the arraignment transcript (R.31-32,38,47). Yet, this Court had the arraignment transcript prior to deciding the direct appeal. Not only did the arraignment judge order that the transcript remain part of the record (R.103), as he was invested in insuring that Hrones' representation of the indigent Francis go uncompensated, but the issue of Hrones getting paid for the direct appeal after the fact was determined by this Court, which required this Court to review that transcript for additional reasons (R.100,104-112).

Francis was denied "the exacting scrutiny of plenary review under §33E" that this Court guarantees. His right to such review was violated when this Court missed this "inequity" and did not see what "was obvious to anyone reviewing the arraignment transcript (R.9,47)."

Plenary review is the justification for blocking those convicted of first-degree murder from accessing our appellate courts unless they can satisfy the gatekeeper provision when a post-direct appeal new trial motion is denied. It sets this class of citizens apart from all other

citizens who have open access to our appellate courts to forward their appellate rights. Application of the gatekeeper provision denied Francis an opportunity to forward his actual innocence claim on appeal based upon a *Brady* violation committed by the Commonwealth (R.I.60-73). That claim had to be abandoned in the superior court because it did not meet the "new and substantial issue" requirement of §33E.

If the Court's analysis of the issues on the second new trial motion are correct, with proper and thorough plenary review, this Court would have identified and resolved Francis's structural error claims on direct appeal in 1984. Francis could not possibly have waived these claims, as he had no counsel on direct appeal that could raise them for him, and the government deprived him of counsel for more than thirty years thereafter. *See Commonwealth v. Zinser*, 446 Mass. 807, 808-809 (2006). He was denied counsel until 2012, when he at last was given counsel to screen the case and forward his meritorious appellate claims in the first instance (R.77-93,118,132). *Id. See Issue IV, infra.*

By failing to provide Francis with the "uniquely thorough review" of his conviction that allows §33E to pass the rational basis test for

restriction of access to appellate review, *see Dickerson,* 396 Mass. at 743-745, this Court violated Francis's rights pursuant to the Equal Protection Clause of the 14th Amendment and arts. 1, 6, and 7 of the Massachusetts Declaration of Rights.

II. THE COURT'S ANALYSIS OF THE DENIAL OF FRANCIS'S RIGHT TO BE PRESENT AT A CRITICAL STAGE OF HIS TRIAL PROCEEDINGS DOES NOT ACKNOWLEDGE OR ADDRESS THE STRUCTURAL ERROR DERIVING FROM THE VIOLATION OF FRANCIS'S 6TH AMENDMENT CONFRONTATION RIGHT AND 5TH AMENDMENT DUE PROCESS RIGHT AND FAILS TO EXPLAIN HOW WAIVER APPLIES TO A VIOLATION OF THESE RIGHTS.

The Court states "the sole issue" Francis brought before the Court in 2015 "was a claim that Hrones's appointment violated the 6th Amendment … and art. 12….(R.3)." That is not the case. The exclusion of Francis from a critical stage of his trial proceedings is a separate and distinct form of structural error. "The only error identified" was not "the appointment itself;" exclusion of Francis from a critical stage of his trial proceedings was a separately identified structural error (R.3-5;Br.31-38, 47-53).

The Court describes Francis's exclusion from the sidebar where the arraignment judge, the prosecutor and Hrones deprived him of his choice of counsel as an "interference" with Francis's "Sixth Amendment and art. 12 rights to choice of counsel (R.20)." That is not the argument Francis brought before the Court. What occurred was a denial of additional federal constitutional rights guaranteed by the Supreme Court. The exclusion at a critical stage of the proceedings is a separate and distinct denial of two additional fundamental rights: the 6th Amendment confrontation right and the 5th Amendment due process right, as extensively briefed and argued to this Court (Br.31-38, 47-53).

The Court spends extensive time analyzing this matter as a violation of Rule 18. While true, the analysis does not address the more significant and relevant problem (R.22-23). Nowhere does the majority address the Supreme Court's ruling in *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), reiterated in *Kentucky v. Stincer*, 482 U.S. 730, 745-

46 (1987) which serves as binding precedent with respect to this issue.[3] The Court provides no explanation for how the waiver doctrine applies to this claim, as this claim cannot be waived other than by colloquy (Br.31-38,47-53). This separate and significant violation of federal constitutional rights was never given meaningful plenary review at the time of the direct appeal, *see* §33E, and it remains unacknowledged by this Court.

III. *GONZALEZ-LOPEZ* PROHIBITS THE APPLICATION OF A WAIVER ANALYSIS TO DEFEAT FRANCIS'S CHOICE OF COUNSEL CLAIM.

The Court's ruling violates federal constitutional law as set forth in *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The waiver analysis the Court applies to Francis's choice of counsel claim is prohibited, as no such diminution of that right is authorized in light of the express language of the Supreme Court:

> [This Court's] argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details. It

[3] The nature of this separate constitutional violation was also addressed on page 14 of the MACDL/Cato *amicus* brief, which went unacknowledged in the Decision.

> is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. *Id.* at 145.

The waiver analysis invoked by the Court is misapplied to the violation in this case because that analysis disregards the directive of the Supreme Court to not excuse a violation of this nature for any reason, including that the trial was fair (R.32). Finality, or expediency, cannot justify the application of waiver to such a violation, especially where Francis himself waived nothing. The Court declared CPCS waived it for him, yet CPCS never represented him (R.31,42-43).[4] *See Issue IV, infra.* The Supreme Court could not be clearer in its intent to protect the rights of Francis, and prohibit the application of a waiver analysis that requires some showing of prejudice:

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[4] The majority is under the mistaken impression that CPCS and "defense counsel" are interchangeable terms (R.43). A screener is a private attorney who gets paid to advise CPCS as to whether or not to appoint counsel. A screening attorney is not obligated to represent a client whose case that attorney screened, even if the attorney advised CPCS to appoint counsel (R.81,87). Neither CPCS nor any screening attorney, other than undersigned counsel, was ever appointed as "defense counsel" for Francis. *See Issues IV and V supra.*

> …[T]he Sixth Amendment right to counsel of choice[] … commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland, supra,* at 684–685. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete." *Id.* at 146.

The Supreme Court prohibits the prejudice analysis that the Court engaged in. No prejudice analysis, justified by the application of waiver or otherwise, is permissible:

> The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. … It has been regarded as the root meaning of the constitutional guarantee. See *Wheat,* 486 U. S., at 159; *Andersen* v. *Treat*, 172 U. S. 24 (1898). See generally W. Beaney, The Right to Counsel in American Courts 18–24, 27–33 (1955). Cf. *Powell*, *supra,* at 53. ***Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.*** *Id.* at 148.

Weaver v. Massachusetts reiterates that choice of counsel violations are the type of structural errors that require automatic reversal (Br.48-53). 137 S.Ct. 1899, 1908 (2017). This week, Chief Justice Roberts instructively demonstrated the importance of *stare decisis* with his concurrence in *June Medical Services LLC v. Russo*, 591 U.S. ____ (June 29, 2020), notwithstanding his dissent in *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___ (2016).

IV. BECAUSE FRANCIS'S *PRO SE* NEW TRIAL MOTION WAS THE FIRST OPPORTUNITY FOR "ERROR CORRECTING REVIEW" OF HIS CONVICTION, HIS FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL WAS VIOLATED WHEN CPCS FOLLOWED A SCREENING ATTORNEY'S RECOMMENDATION THAT COUNSEL NOT BE ASSIGNED.

The U.S. Constitution imposes on the States no obligation to provide appellate review of criminal convictions. *McKane v. Durston*, 153 U. S. 684, 687 (1894). Having provided such an avenue, however, a State may not "bolt the door to equal justice" to indigent defendants. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) *citing Griffin v. Illinois*, 351 U. S. 12, 24 (1956) (Frankfurter, J., concurring in judgment)

("[W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons ... from securing such ... review.").

As trial counsel and as a culpable actor, Hrones was not in a position to raise either the right to counsel of one's choosing or the exclusion from a critical proceeding claim for Francis on direct appeal.[5] Francis was therefore deprived of counsel, in violation of the 14th Amendment, when CPCS refused to appoint him counsel in connection with his *pro se* filed first new trial motion (R.77-88). *See Halbert v.*

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[5] *See Commonwealth v. Downey (III)*, 65 Mass. App. Ct. 547, 553-555 (2006). Hrones's personal business interest in working his way onto the approved list for murder appointments required that he manage his representation of Francis in a way that kept his client ignorant of that competing interest (R.7-8,11). And the Court finds that he actually carried out this scheme (R.11-12). While this activity did not actually constitute the "waiver" that the Court has now discovered, it was a "but for" cause of it. That is, with independent, competent appellate counsel, Francis's present claim would have been adjudicated before any of the later activity that supposedly waived his rights ever occurred. Hrones's actual conflict of interest cost Francis the opportunity to present his claim on direct appeal.

Michigan, 545 U.S. 605, 619-624 (2005) (first chance for first-level appellate review by an error-correcting court).

It was due to his indigency that Francis was unable to access the assistance of counsel to pursue his appellate claims. The Court cannot conclude that Francis waived his right to counsel of choice by failing to raise this right until thirty-three years later, because thirty-three years later was the earliest opportunity he had to raise the claims at all (R.30). As the Court does not "fault" Francis for failing to raise these claims on direct appeal, *id.*, there is no basis for faulting Francis at any time thereafter, given the government deprived him of his right counsel from 1991-2012, which the Court concedes (R.30). If it was the fault of the trial court, and CPCS, that Francis was deprived of his right to counsel to pursue his appellate rights, then the blame for the passage of time it took to provide Francis with competent counsel lies with the government.[6]

[6] "The government" includes the trial court, CPCS, and the Supreme Judicial Court. *See* (R.31-32,38,47,77-93) & G. L. c. 278, § 33E.

Waiver cannot be applied when it was the government who is responsible for forfeiting Francis's claims. Francis sought counsel, and he was denied counsel (R.77). The majority's waiver finding violates the rule of *Johnson v. Zerbst*, 304 U.S. 458 (1938) that, to be valid, a waiver of the right to counsel must be knowing and voluntary:

> The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel. *Id.* at 463.

Francis could not waive his right to counsel without knowing of that right and intentionally giving it up. *Id.* at 464-465. Waiver is not presumed; every reasonable presumption against waiver must be drawn. *Boyd v. Dutton*, 405 U.S. 1, 2-3 (1972). The waiver must be on the record. *Commonwealth v. Cavanaugh*, 371 Mass 46, 53 (1976); *Faretta v. California*, 422 U.S. 806, 835 (1975).

The government is responsible for the thirty-three year delay in raising the structural error issues that occurred in this case.[7] The trial

[7] What occurred was not so much an error as it was a joint contrivance. It was not inadvertent (R.7-8,11-12,103).

court, as well as this Court, was never "deprived of the chance to cure the violation[s]," *see Weaver*, 137 S.Ct. at 1912; they both instead "failed to approach their duties with the neutrality and serious purpose that our system demands." *Id. See also* §33E.

> "Cases on appeal barriers encountered by persons unable to pay their own way, we have observed, 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' *M. L. B. v. S . L. J.,* 519 U. S. 102, 120 (1996) …. Our decisions in point reflect "both equal protection and due process concerns." … "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs," while "[t]he due process concern homes in on the essential fairness of the state-ordered proceedings."

Halbert, 545 U.S. at 610-611 (internal citations omitted).

Unlike most defendants pursuing a new trial motion, Francis had a right to appointed counsel because that was his first opportunity to raise his claims. He did not receive counsel, as the screening attorney assigned by CPCS to screen his case was not his lawyer (R.77-90). Attorney James Sultan was retained to advise CPCS as to whether or not to appoint counsel (R.79-88). Nor can CPCS be characterized as acting as counsel, because CPCS was at no time acting as Francis's

advocate. *Contrast Anders v. California*, 386 U. S. 738, 744 (1967) ("[I]f [appointed] counsel finds [the] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw," filing "a brief referring to anything in the record that might arguably support the appeal.")

Anders requires, in connection with federal appellate rights, that appointed counsel answer directly to the court, as an advocate for the defendant, even if counsel is unable to identify a nonfrivolous appellate issue. Given Hrones' malfeasance, Francis was never provided with appellate counsel of any kind until 2012. Until 2012, he was "forced to go without a champion on appeal." *Douglas v. California*, 372 U.S. 353, 356 (1963). CPCS, acting in a gatekeeper role, adopted the opinions of its hired advisors Sultan (in 1992) and Attorney Richard Shea (in 2000) and screened out Francis's case twice, thereby denying Francis access to counsel in violation of the 14th Amendment due to his indigency (R.84-93). *Douglas v. California*, 372 U. S. 353.

> The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps

> involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.

Penson v. Ohio, 488 U.S. 75, 85 (1988). With respect to his right to counsel claim, and his exclusion from a critical proceeding claim, Francis was left entirely without counsel on appeal. That is *per se* prejudicial. *Id.* at 85-89.

"[T]he State participated in the denial of a fundamental right protected by the Fourteenth Amendment. The right to counsel guaranteed by the Sixth Amendment is a fundamental right." *Cuyler v. Sullivan,* 446 U.S. 335, 343 (1980). "The Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel *prevents* the States from conducting trials [or direct appellate review], at which persons who face incarceration must defend themselves without adequate legal assistance." *Id.* at 344. (emphasis added)

"[T]here can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Douglas*, 372 U.S. at 355 *citing Griffin v. Illinois*, 351 U.S. 12, 19 (1956). "Any real chance he

may have had of showing that his appeal [had] hidden merit is deprived him when the [government decided] … that the assistance of counsel [was] not required." *Id.* at 356. The merits of the one and only appeal that the indigent Francis had as of right were denied without benefit of appellate counsel, given Hrones' fatally compromised ability to function as appellate counsel in this situation. *See id.* at 357. In the eyes of the Supreme Court, "an unconstitutional line has been drawn between rich and poor." *Douglas*, 372 U.S. at 357. "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Id.* at 358.

V. THE COURT RULED WERE THIS CLAIM RAISED IN 1992 BY SCREENING COUNSEL IT WOULD NOT HAVE BEEN WAIVED AND WOULD HAVE "CULMINATED IN A RELATIVELY TIMELY NEW TRIAL." THEREFORE, IF FRANCIS IS CONSIDERED TO HAVE BEEN PROVIDED WITH COUNSEL IN 1992, HE WAS PROVIDED WITH INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.[8]

[8] The documents at (R.77-93) are proffered on this motion for reconsideration to clarify for the Court what the role of CPCS screening counsel is. In the event that the majority maintains it position that Francis was provided "counsel" in 1992 to pursue his *pro se* new trial motion, this issue of ineffective assistance is necessary to raise and preserve on Francis's behalf.

The record on reconsideration elucidates why Francis strongly disputes the Court's finding that he received counsel, at any point prior to 2012, to forward his appellate rights (R.77-112).

On May 24, 1991 Francis filed a *pro se* new trial motion pursuant to Rule 30(b). That motion was accompanied by a motion asking the court to appoint counsel (R.101). Those motions were neglected by the superior court until March 5, 1992 when a superior court judge (Travers, J.) made a March 9, 1992 referral of the case to CPCS and requested that CPCS appoint counsel. The judge ordered within thirty days from the date counsel is assigned, all papers on the new trial motion must be submitted. He also ordered: "If the Court does not act, without a hearing, counsel must set the matter up for a hearing, without delay, after sixty days from the date counsel is assigned, by communicating with this Justice's Clerk (R.77-78, 101)."

That referral went neglected by CPCS until September 29, 1992 when CPCS appointed Sultan to screen this case. Sultan's role as

screening counsel was to advise CPCS, not to serve as an advocate or attorney for Francis (R.79-90).

On January 8, 1993 Sultan wrote to William Leahy, Chief Counsel of CPCS, and recommended that counsel not be appointed to Francis. Sultan reviewed the arraignment transcript during the course of his screening,[9] and he analyzed the structural error as follows:

> The Superior Court file reveals that defense counsel was not on the "murder list" at the time he entered his appearance. There is a transcript in the case file in which a Superior Court judge (Linscott, J.) indicates that he permitted Mr. Hrones to enter his appearance even though he was not on the murder list. The judge directed that Mr. Hrones should not be paid by the state for his work at trial. I do not believe that this circumstance would entitle Mr. Francis to any relief unless some shortcoming by Mr. Hrones could be demonstrated (R.83).

In recommending counsel not be appointed, Sultan noted:

> The defendant has steadfastly maintained his innocence in communications with us. In the absence of some colorable legal error, however, I cannot conclude that a court is likely to be convinced that a miscarriage of justice occurred (R.88).

---

[9] Shea, the second screening attorney appointed by CPCS in 2000, conducted a screening that did not extend beyond reading the *pro se* new trial motion and the trial transcripts. He therefore never provided CPCS with any analysis of the issues raised in 2015 (R.91-93).

Leahy, having the benefit of Sultan flagging the circumstances that give rise to the multiple structural errors that occurred, also failed to see there was a fundamental rights violation that likely would have entitled Francis to "a relatively timely new trial (R.42,82-88)."

Francis filed a *pro se* motion for an evidentiary hearing on July 12, 1993, because CPCS never provided him with counsel. Francis's motion for a new trial was denied without a hearing on September 23, 1993. Francis filed a *pro se* notice of appeal on October 12, 1993. On December 8, 1994 he motioned this Court to waive the entry costs and petitioned "for relief under 211 sect 1-4 (R.101)."

The Court found that it was at the point of filing the first new trial motion that the errors regarding denial of choice of counsel should have been raised (R.42).[10] "As the issue would not have been waived at this point, it likely would have culminated in a relatively timely new trial." *Id.* Accordingly, if this Court adheres to its position that CPCS acted as counsel for Francis in 1992, both prongs of *Strickland v. Washington*

[10] The 5th and 6th Amendment violations by exclusion from a critical proceeding also should have been raised. *See Issue II, supra.*

are satisfied: CPCS rendered deficient performance to Francis, and had it not, there is a reasonable probability the outcome would have been different. 466 U.S. 668 (1984).

While the issues raised in this motion for reconsideration may require further briefing and argument by the parties, the matter does not require remand to the lower court because this Court "is in as good a position as the motion judge to assess the trial record," *Commonwealth v. Drayton*, 479 Mass. 479, 486 (2018) and "can make an independent determination as to the correctness of the … application of constitutional principles to the facts as found (R.15)." *Id.*

CONCLUSION

For all of the foregoing reasons, this Court should reconsider its decision in this case and grant Kevin Francis a new trial.

Respectfully Submitted,
KEVIN FRANCIS
By his attorney,

Amy M. Belger

AMY M. BELGER

B.B.O. No. 629694
841 Washington Street
Holliston, MA 01746
508-893-6031
appellatedefender@gmail.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief will comply with the rules of the Court that pertain to the filing of briefs, including Mass. R.A.P. 16(a)(6) and (13), 16(e), 16(f), 18, 20 and 21, upon allowance of the motion to enlarge the word count filed contemporaneously with this motion. The length limit was ascertained by automated word count using Microsoft Word Version 16.38, and the word count totaled 3783.

Amy M. Belger

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
INDICTMENT
NO. 037342

COMMONWEALTH

vs.

KEVIN S. FRANCIS

ORDER

The defendant on May 24, 1991 filed a pro se motion (received by this Justice March 5, 1992) under Mass. R. Crim. P., Rule 30, together with a motion to appoint counsel. The Court this date ordered the Clerk to request the Office of Public Counsel to assign an attorney. The defendant and counsel are Ordered to complete all papers relating to the above motion within thirty (30) days from the date counsel is assigned. If the Court does not act, without a hearing, counsel must set up the matter for a hearing, without delay, after sixty (60) days from the date counsel is assigned, by communicating with this Justice's Clerk.

Herbert F. Travers, Jr.
Justice of the Superior Court

DATED: March 9, 1992.
[s.d.]

Denise

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT, FOR THE TRANSACTION OF CRIMINAL BUSINESS

March 23, 1992, ~~1991~~

TO: _____, Justice of the Superior Court Department of the Trial Court

TO: _____, Assistant District Attorney

TO: _____, Esquire

C O M M O N W E A L T H

VS.

Kevin Francis

On March 16, 1992

Order allowing defendant's motion for appointment of Counsel endorsed March 9, 1992. Travers, J.

(NOTIFIED WITH COPY)

No(s). 037342

rp

Daniel F. Pokaski
Clerk-Magistrate

The Commonwealth of Massachusetts
Committee for Public Counsel Services
80 Boylston Street, Suite 600, Boston 02116

WILLIAM J. LEAHY
Chief Counsel

TELEPHONE:
(617) 482-6212

TO: Justices of the Supreme Judicial Court, Appeals Court, Superior Court Department and District Court Department

FROM: William J. Leahy, Chief Counsel W.J.L.

DATE: January 23, 1992

RE: REVISED CPCS POLICY REGARDING ASSIGNMENT OF COUNSEL IN POST-CONVICTION COLLATERAL MATTERS

Until recently, it had been the practice of the Committee for Public Counsel Services to assign counsel in any indigent post-conviction collateral challenge where a judge had assigned the case to CPCS by issuing a Notice of Assignment of Counsel (NAC) form. While there is no right to counsel in such cases, some judges have assigned the Committee to provide counsel in all indigent defendant collateral challenges--often on the basis that inadequate judicial resources do not permit meaningful screening of such cases to separate the possibly meritorious from the frivolous. For its part, CPCS had, in practice, assigned counsel in every such case--also without review.

However, G.L. c.211D, §5 authorizes such unfettered assignments only when the "laws of the Commonwealth or the rules of the supreme judicial court" set forth a right to counsel. Since there is no right to counsel for Rule 30 and related collateral challenges, the only authority under which CPCS can properly assign counsel in such cases is the authorization vested in its chief counsel by §6(b)(iii) to appoint private counsel "in such proceedings as the chief counsel shall determine to be necessary." The former practice of automatic assignments did not provide any basis upon which such a finding could be made, and has proved in certain cases to be wasteful and costly.

Therefore, on December 4, 1991, the Committee for Public Counsel Services approved a new policy, described below, which we intend to implement beginning Monday, February 10, 1992. The new process begins as before, upon receipt by CPCS of a Notice of Assignment (NAC) form from a Court.* Instead of automatically assigning counsel for what may be a repetitious or meritless motion, CPCS will refer the matter to an experienced member of

* Please note that the new policy does not detract in any way from a judge's discretion not to assign counsel. Rather, the policy change applies only where a judge has, in the exercise of his or her discretion, assigned CPCS by completing a NAC form.

the CPCS post-conviction panel who will undertake a thorough review of the matter including obtaining docket entries, reviewing the motion and affidavit and, for first Rule 30 motions, reading the transcript. If the lawyer's review of the matter shows 1) a miscarriage of justice may have occurred or 2) the case contains meritorious issues not previously presented to a court or 3) the defendant has not had his/her direct appeal, the chief counsel will be advised that it appears counsel is necessary in the particular case and should be appointed pursuant to c.211D, §(6)(b)(iii). If counsel's review of the case does not indicate that any of the three criteria are met, the chief counsel will be so advised.

In either instance, the assigning judge will be informed of the chief counsel's decision. If a judge is notified that the chief counsel will not assign counsel but the judge still wishes to have counsel appointed, the judge will be requested to inform the chief counsel, upon the court's review of the record, of the grounds for his or her view that a lawyer should be appointed. Each defendant will be similarly notified of the chief counsel's decision. In any case, where the chief counsel decides not to appoint counsel, the defendant will be provided with information and form pleadings in the defendant's first language.

Attorneys appointed to review these cases will be chosen from a group of experienced post-conviction counsel who have agreed to perform the required analysis and make detailed recommendations to the chief counsel. Attorneys agreeing to be so appointed will be trained by CPCS and will have CPCS public division attorneys available as a resource.

This policy change is necessary in order to achieve full compliance with c.211D. It is intended also to conserve scarce fiscal resources; to enhance our ability to attract and retain the services of skilled private attorneys for meritorious indigent post-conviction cases; and to direct those services, to the extent feasible, toward the representation of those indigent prisoners whose convictions may be infected with injustices which are remediable. It should also benefit judicial efficiency, by reducing the amount of judge time spent on clearly nonmeritorious matters. We wish to thank those judges who have on occasion communicated to us the need for such a screening procedure.

Questions about this policy or its applicability to a particular case may be directed to me or to Attorney Leslie Walker, Director of Legal Resources and Support Services, at the above address or telephone number. Outside the Boston area, one may call toll-free (1-800-882-2095).

pd

The Commonwealth of Massachusetts
Committee for Public Counsel Services
80 Boylston Street, Suite 600 Boston, MA 02116
TEL: (617) 482-6212
FAX: (617) 695-0930

WILLIAM J. LEAHY
CHIEF COUNSEL

NANCY GIST
DEPUTY CHIEF COUNSEL
PRIVATE COUNSEL DIVISION

JAMES M. DOYLE
DEPUTY CHIEF COUNSEL
PUBLIC COUNSEL DIVISION

September 29, 1992

James Sultan, Esquire
Rankin & Sultan
One Commercail Wharf North, 2nd Floor
Boston, MA 02110

Re: Commonwealth v. Kevin Francis
Suffolk Superior Court No(s). 037342

Dear Attorney Sultan:

Thank you for agreeing to review the above-entitled matter. Your responsibilities are to determine whether 1) a miscarriage of justice may have occurred, 2) the case contains meritorious issues not previously presented to a court, or 3) the defendant has not had his/her direct appeal. After your review, please advise the chief counsel whether or not counsel should be appointed.

I am enclosing a copy of the Committee's policy regarding the post-conviction collateral matters for your convenience. Also enclosed is the Notice of Assignment of Counsel form for the above case (C0562681-0). Please use this number when submitting your bill.

If you have any questions, do not hesitate to contact me.

Sincerely,

Denise Simonini

Denise Simonini
Post-Conviction
Assignment Coordinator

:ds

Enclosure

RANKIN & SULTAN
ATTORNEYS AT LAW

CHARLES W. RANKIN
JAMES L. SULTAN
MARGARET H. CARTER

ONE COMMERCIAL WHARF NORTH
SECOND FLOOR
BOSTON, MASSACHUSETTS 02110
(617) 720-0011

FAX (617) 742-0701

January 8, 1993

William R. Leahy, Esq.
Chief Counsel
Committee for Public Counsel Services
80 Boylston Street
Boston, MA 02116

Re: **Commonwealth v. Kevin Francis**, Suffolk No. 037342

Dear Mr. Leahy:

[redacted]

[redacted]

The Superior Court file reveals that defense counsel was not on the "murder list" at the time he entered his appearance. There is a transcript in the case file in which a Superior Court judge (Linscott, J.) indicates that he permitted Mr. Hrones to enter his appearance even though he was not on the murder list. The judge directed that Mr. Hrones should not be paid by the state for his work at trial. I do not believe that this circumstance would entitle Mr. Francis to any relief unless some shortcoming by Mr. Hrones could be demonstrated.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Under the Committee's January 23, 1992 policy, I am supposed to evaluate the matter and recommend that counsel be appointed if 1) a miscarriage of justice may have occurred or 2) the case contains meritorious issues not previously presented to a court or 3) the defendant has not had his/her direct appeal.

With respect to the first criteria, I assume that the "miscarriage of justice" standard draws meaning from the standard employed by the SJC and the Appeals Court in reviewing cases. In Mr. Francis' case, the evidence was not overwhelming. The Commonwealth presented a key identifying witness who had a remote connection to the victim's family. The jury apparently found him to be credible. Reading the cold transcript leads me to believe that he came across in a credible manner. The Commonwealth presented evidence that the defendant had made some threatening remarks to the victim a couple of months earlier. That was about it. The defendant has steadfastly maintained his innocence in communications with us. In the absence of some colorable legal error, however, I cannot conclude that a court is likely to be convinced that a miscarriage of justice occurred.

With respect to the second criteria— meritorious issues— I do not think that any of the issues identified by Mr. Francis or discussed in this letter are likely to result in relief. I do think that the judge's charge on second degree murder was weak, though probably not in error. In any event, that issue faces a procedural default argument since it was not objected to at trial or raised on direct appeal. The *Benoit* issue is arguably error. Again, it was not objected to at trial or raised on direct appeal. If I were serving a first degree sentence, would I want the issue raised now? Certainly. Is it likely to lead to relief? Probably not. At this point I think that Mr. Francis does not have an evidentiary basis to go forward on the other issues. I think he is probably better off withdrawing the motion until such time as he can make a showing of what the alibi witnesses would have said, or describe the circumstances of his not testifying.

With respect to the third criteria, Mr. Francis has had his direct appeal.

I hope that this letter is responsive to our assignment. I am sending a copy to Mr. Francis so that he can have the benefit of my thinking. If you or members of your staff would like to discuss the case, I would be happy to do so.

Sincerely yours,

/s/

James L. Sultan

JLS:pcb

cc: Kevin Francis

The Commonwealth of Massachusetts
Committee for Public Counsel Services
470 Atlantic Avenue, Suite 700, Boston, MA 02210

WILLIAM J. LEAHY
CHIEF COUNSEL

TEL: (617) 482-6212
FAX: (617) 988-8495

PATRICIA A. WYNN
DEPUTY CHIEF COUNSEL
PRIVATE COUNSEL DIVISION

ANDREW SILVERMAN
DEPUTY CHIEF COUNSEL
PUBLIC DEFENDER DIVISION

WRITER'S DIRECT DIAL NUMBER

TO: Justices of the Supreme Judicial Court, Appeals Court, Superior Court Department and District Court Department

FROM: William J. Leahy, Chief Counsel

DATE: September 22, 1997

RE: Clarification of CPCS Policy Concerning Screening of Requests for Assignment of Counsel in Post-Conviction Proceedings

As stated in our memorandum dated January 23, 1992 (copy attached), it is CPCS policy pursuant to G.L. c. 211D, §5 to assign counsel in certain post-conviction matters in which there is no automatic right to counsel, such as Rule 30 motions for new trial, only after the request for counsel has been referred to an attorney on the CPCS Post-Conviction Screening Panel. That attorney is expected to conduct a thorough analysis of the request for counsel and make a recommendation to the Chief Counsel as to whether counsel should be assigned.

Since implementation of this screening policy, CPCS has referred all matters in which judges have allowed motions for appointment of counsel, but in which there is no automatic right to counsel, to our screening panel. In many such instances, the judge, in allowing the motion, has endorsed the Motion for Appointment of Counsel with language to the effect of "Refer to CPCS for screening" or "Allowed for screening only." In other instances, judges have allowed the motion with no such limiting language. In those instances, CPCS nonetheless has assigned the request for assignment of counsel to our screening panel.

It has come to my attention that in a few instances CPCS has referred matters to our screening panel even though the judge who allowed the motion for appointment of counsel had made a substantive determination that the pending Rule 30 motion or other post-conviction motion had sufficient merit to warrant assignment of counsel. In those instances, it is not in the interest of our clients, nor does it serve the interest of

judicial economy, to re-screen the matter once CPCS receives the Notice of Assignment of Counsel from the court.

In the unusual circumstance where the judge has decided that counsel should be assigned after the judge has reviewed the merits of the matter, CPCS requests that the judge endorse the motion for assignment of counsel with language to the effect of "Having considered the matter on the merits, the motion for appointment of counsel is allowed. Refer to CPCS for assignment of counsel and not for screening." Absent such language or similar indication that the judge has made a substantive determination that assignment of counsel is warranted, CPCS will assign the matter to its screening panel.

If you have any questions about this policy or its application, please contact me, Donald Bronstein, Supervising Appellate Counsel, or Leslie Walker, Director of Legal Resources and Support Services. Thank you for your cooperation.

Attorney Richard J. Shea
PMB 63
398 Columbus Avenue
Boston, MA 02118-6008
Tel. 617-283-6293

April 14, 2000

Attorney Donald Bronstein
Committee For Public Counsel Services
470 Atlantic Avenue
Boston, MA 02210

Re: Kevin Francis - Screening Assistnment

Dear Don:

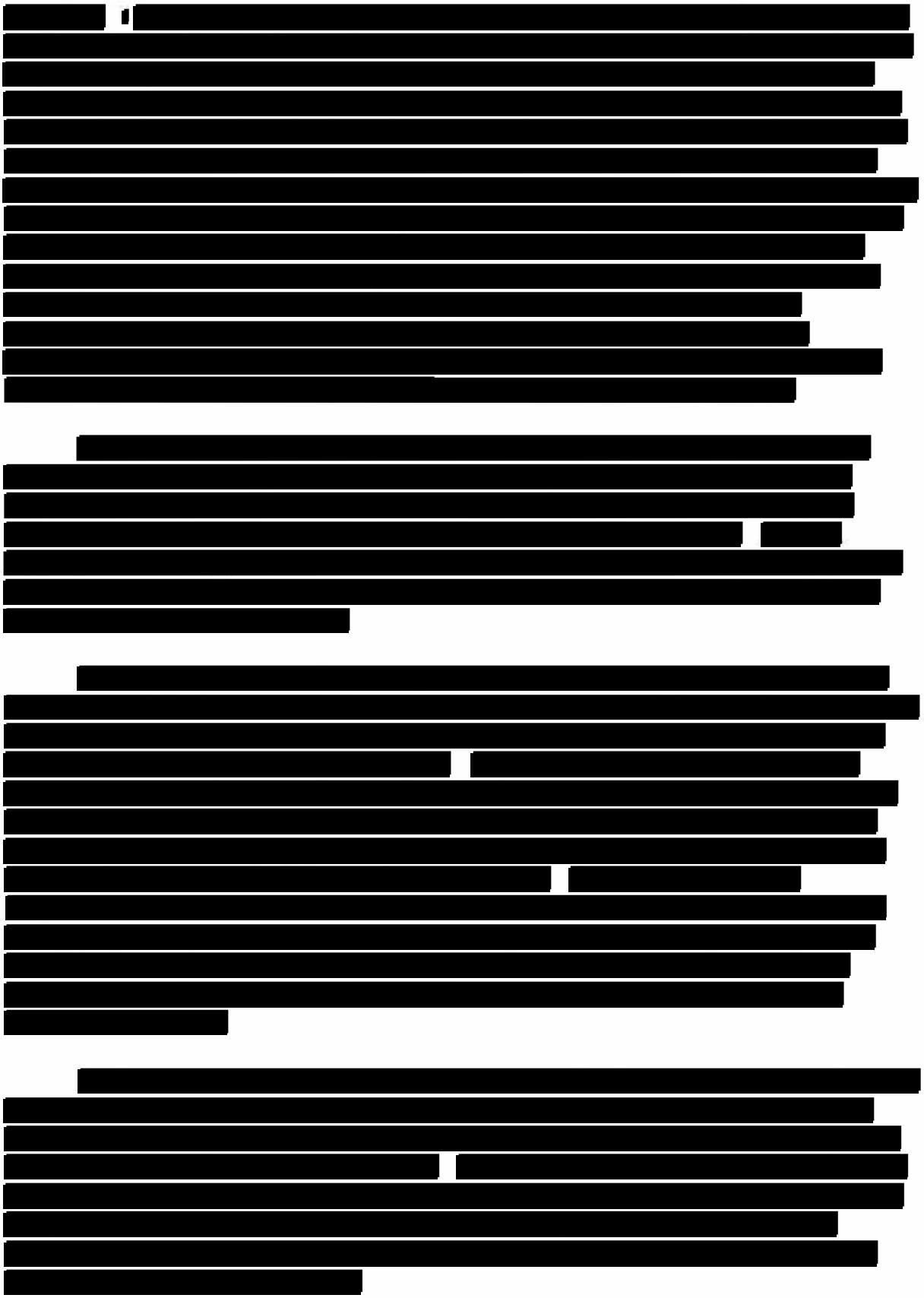
Kevin Francis has requested counsel be assigned to file a second new trial motion. Mr. Francis was convicted of first degree murder in the September 1981 stabbing death of his former girlfriend. The SJC affirmed his conviction. Commonwealth v. Francis, 391 Mass. 369 (1984). Mr. Francis filed a pro se new trial motion in 1991. The trial judge (Travers, J.) denied it in 1993 after CPCS private counsel screened it and the chief counsel of CPCS declined to appoint counsel. Mr. Francis apparently tried to notice an appeal but the Superior Court docket sheet leaves off with 1992.

[redacted]

[redacted]

[redacted]

[1] I have reviewed the pro se new trial motion and related pleadings. I agree that there was no meritorious issue deserving counsel. The most serious point was one line of the jury instructions which, in an apparent lapse, told the jury, if they found defendant guilty, to return a verdict of the highest degree of murder 'charged'. Later the judge correctly said to return a verdict of the highest degree 'proved'. The only contested issue in the case was identity. The circumstances of the killing point to premeditation and extreme atrocity or cruelty. There would not be a substantial risk of a miscarriage of justice since the evidence pointed only to first degree murder.



[redacted]

Because I have corresponded with Mr. Francis, I am sending a copy of this letter to him.

Very truly yours,

Richard J. Shea

cc: Mr. Kevin Francis

037342

Commonwealth vs. Kevin Francis NO.

Offense	Attorney
Murder First Degree (Dorchester District Ct.#33478)	Stephen Hrones

Paper No.	Date of Filing	
1	Dec. 17, 1981	Indictment returned.
	Dec. 18, 1981	Copy of indictment and notice of the finding of indictment sent to the Chief Justice and Attorney General.
		Copy of indictment with notice of finding of indictment and that it would be entered forthwith on docket of this Court sent by Clerk to Sheriff for services on defendant in Common Jail.
	Dec. 22, 1981	Order of notice without return of service on defendant received from Sheriff.
	Dec. 31,1981	Defendant not in Court - continued to January 8,1982 for arraignment.
		McGuire, J. - B. Dwyer, A.D.A. - H. McKenna, Court Reporter.
2	Jan. 8,1982	Brought into Court - Order of notice with return of service on defendant endorsed thereon by Sheriff filed.
		Indictment read.
		Pleads not guilty
		Prior bail orders revoked

over

Paper No.	Date of Filing	
	Jan. 8,1982	Defendant ordered to recognize in the sum of $50,000. with surety.
		Pre-Trial conference report ordered filed January 29,1982.
		Mittimus issued
		Linscott, J. - M. Newman, A.D.A. - E. Goldberg, Court Reporter - S. Hrones, attorney for defendant.
3	Jan. 22, 1982	Defendant files: Motion for investigative funds and :
4		Motion for the allowance of extra fees and costs in accordance with Mass. General Laws, Chapter 261, Section 27C.
5	Jan. 29, 1982	Pre-trial conference report filed.
		Trial date April 5, 1982 subject to approval of Chief Justice.
		Court allows 20 days for the filing of special motions, i.e. matters not agreed to as reported in Pre-trial conference report - this at request of defense counsel. Court allows Motion for Investigative Funds and, after hearing, takes Motion for Allowance of Extra Fees and Costs under advisement.
		A. Linscott, J. - M. Newman, ADA - E. Goldberg, Court Reporter - S. Hrones, attorney for defendant.
	Jan. 29, 1982	Motion for Investigative Funds denied.
		(S. Hrones, attorney notified)
6	June 23, 1982	Defendant not in Court - Defendant's Motion for Access to Criminal Records of Commonwealth Witnesses filed and allowed.

CONTINUED

Paper No.	Date of Filing	No. 037342
7	June 23, 1982	Defendant files: Motion for exculpatory evidence;
8		Motion to Suppress Statements of defendants;
9		Affidavit in support; and
10		Memorandum;
11		Motion to Suppress Identification of defendant by Witness Terrance Smith;
12		Affidavit and
13		Memorandum in support of same.
		Continued to July 12, 1982 for status.
		Kelley, J. - M. Newman, A.D.A. - G. Letoile, Court Reporter -
		S. Hrones, Attorney for the defendant
	July 14, 1982	Brought into Court - Neal Terrelonge, a witness, recognizes personally without surety in the sum of $100.
		Hearing Re: defendant's Motion to Suppress Statements of defendants and Motion to Suppress Identification of defendant by witness Terrance Smith. On oral motion of defendant, all witnesses sequestered.
	July 15, 1982	Brought into Court - Hearing on Motion resumed.
	July 15, 1982	Brought into Court - Hearing on Motion resumed.
	July 16, 1982	Brought into Court - Hearing on Motion resumed.
		After hearing, defendant's Motion for Exculpatory Evidence--Items #2,3,10, 14,15,18 and 19 each allowed by agreement. Items #49 and #21 allowed.

OVER

Paper No.	Date of Filing	
	July 16, 1982	Items #1,5,6,7,9,11,12,13,16,17,20,22, and 23 each denied - Item #8 denied without prejudice.
	July 19, 1982	Brought into Court - After further hearing on defendant's Motion to Suppress statements of defendants and Motion to Suppress identification of defendant by witness, Terrance Smith, each taken under advisement. Kelley, J. - G. Letoile, Court Reporter
14	Aug. 30, 1982	Kelley, J. Findings, Rulings, and Order of the Court on defendant's Motion to Suppress, filed and denied. (M. Newman, A.D.A. and S. Hrones, attorney each notified with copy)
15	Sept. 10, 1982	Defendants motion pursuant to General Laws, Chapter 277, section 66 filed by agreement, allowed as to item #1,2 and 4 - Process issued for September 10, 1982. Travers, J. - M. Newman, ADA - H. McKenna, court reporter- S. Hrones, attorney for defendant
	Sept. 13, 1982	Brought into Court - Court orders a jury of fourteen members impanelled.
	Sept. 14, 1982	Brought into Court - Jury impanelment continued- jury trial before Travers, J.
16		Commonwealths' motion for a view filed and allowed. Exhibits on the hearing re: motion to suppress returned to the District Attorney for appropriate action, by order of the Court - Receipt filed.
	Sept. 15, 1982	Brought into Court - trial resumed - On oral motion of the defendant, Commonwealth having no objections, all witnesses sequestered.

continued

Paper No.	Date of Filing	
	Sept. 16, 1982	Brought into Court - trial resumed
	Sept. 17, 1982	Brought into Court - trial resumed - at the conclusion of the Commonwealth's
17		evidence, Defendant's motion for directed verdict filed, after hearing, denied
		Trial continued.
	Sept. 20, 1982	Brought into Court - trial resumed - At the final submission of the case to
		the jury, the Court ordered the jury reduced to twelve in number and the
		names of Frederick V. Leyden (#291) and John E. Hill (#233) were drawn
		and designated alternate jurors.
	Sept. 21, 1982	Brought into Court - Jury deliberations continue.
		Verdict Guilty - Verdict Affirmed
18		Verdict slip filed
		Commonwealth moves for disposition.
		M.C.I., Walpole - life
		Defendant deemed to have served 194 days of said sentence.
		Defendant notified of right to appeal in accordance with rule 28, M.R.C.P.
		Mittimus issued
		Travers, J. - M. Newman, ADA - H. McKenna, court reporter
		S. Hrones, attorney for defendant.
19		Defendant's motion for the examination of prospective jurors received
		from Court and filed, allowed and denied in part - see Transcript, Travers, J.

(OVER)

Paper No.	Date of Filing	
20	Sept. 29, 1982	Defendant's Notice of Appeal filed.
	Sept. 29, 1982	Copy of notice of appeal mailed to Travers, J. and M. Newman, ADA.
		Letter sent to Court Reporters, Goldberg, Letoile, and McKenna, for preparatio of transcripts.
21		Certificate of Clerk - filed.
22	Nov. 23, 1982	Defendant's Pro Se Motion for a copy of free transcript filed.
		(Travers, J. notified with copy)
23	Dec. 1, 1982	Memorandum of Travers, J., Re: Defendant's motion for a copy of free transcript received and filed. (Defendant notified)
	Feb. 9, 1983	Notice sent to attorney Hrones, re: cost of transcripts.
	Feb. 9, 1983	Notice sent to M. Newman, A.D.A. that transcripts are available.
	Feb. 15, 1983	Letter sent to attorney Hrones re: transcript.
24	Mar. 2, 1983	Motion to withdraw as counsel filed.
	Mar.11, 1983	Defendant not in Court - After hearing, Court orders a copy of transcript turned over to Attorney Hrones without costs.
		Motion #24 denied.
		Dwyer, J. - B. Dwyer, ADA - J. Brown, Court Reporter -
		S. Hrones, attorney for defendant.
	Mar. 15, 1983	Notice sent to Attorney Hrones that transcripts are available.

continued

Paper No.	Date of Filing	
	Mar. 18, 1983	Notice sent to M. Newman, ADA that transcripts are available.
25		Certificate of delivery of transcript by Clerk - filed.
26	Mar. 24, 1983	Certificate of delivery of transcript by Clerk - filed.
	April 5, 1983	Notice of completion of assembly of record sent to Clerk of Supreme Judicial Court and attorneys for Commonwealth and defendant. Two certified copies of docket entries, original and copy of transcript, two copies of exhibit list and list of documents, each transmitted to Clerk of Appellate Court. Attorney Hrones and M. Newman, A.D.A. notified.
27	Apr. 5,1984	Rescript received from SJC "Judgement affirmed", filed. (S. Hrones, attorney for defendant and M.Newman,ADA each notified) (gs)
28	May 31, 1984	Attested copy of Supreme Judicial Court Order re: payment of $1400 to Stephen Hrones, Esquire, filed.
29		Attested copy of Supreme Judicial Court re; payment of $1,186.60 to Stephen Hrones, Esquire, filed. (gs)
	Sept. 5, 1989	Defendant files: Pro Se Motion for copy of transcripts and affidavit in support of. (Travers, J. notified with copy) (jv)
31	Sept. 8,1989	Defendant's Pro Se Motion for copy of his trial transcripts, allowed. Travers, J. (gs)

(OVER)

Paper No.	Date of Filing	
32	May 24,1991	Defendant files; Motion for a New Trial;
		Affidavit in Support thereof;
		Memorandum of Law in Support thereof;
33		Motion for the appointment of counsel;
		Affidavit in Support thereof;
		Statement of indigency.
		(Travers, J. notified with copies) (ys)
34	Mar.16,1992	Order allowing defendant's Motion for Appointment of counsel endorsed
		March 9,1992. Travers,J.
		(Office of Public Counsel notified with copy of Order of Travers, J.) (ys)
35	July 12, 1993	Defendant files Prose:
		Motion for an evidentiary hearing on pending rule 30(b) motion for a new trial, Mass Rules
		Criminal Procedure Rule 30.
		(Travers, J. notified with copy) (rp)
36	Sep. 23, 1993	Motion for a new trial is denied without a hearing, Travers, J., filed.
		(K. Francis, defendant notified with copy) (rp)
37	Oct. 12, 1993	Defendant files Prose: Notice of appeal. (rp)
38	Dec. 8, 1994	Defendant files: Motion with Supreme Judicial Court waiver entry cost;
39		Petition for relief under 211 sect 1-4 affidavit in support of.
		(Travers, J. notified with copies) (rp)

(CONTINUED)

Commonwealth vs. NO. 037342

Offense	Attorney

Paper No.	Date of Filing	
40	Nov. 18, 1996	Defendant files Prose: Motion to correct docket entries oversight. (Volterra, J. notified with copy) (rp)
	May 9, 1997	Paper #40 denied without a hearing. Volterra, RAJ. (rp)
41	Feb. 17,2000	notice received from CPCS that attorney Richard Shea has been assigned to screen the the case and report to cief counsel and advise chief counsel whether or not counsel should be appointed. (rp)
42	May 9, 2000	Notice received from CPCS that Attorney Richard Shea has been assigned to screen the the case for new trial and report to chief counsel and advise chief counsel whether or not counsel should be appointed. (defendant notified) (rp)

THIS CASE IS NOW ON FORECOURT
(AS OF 9/18/2013)

TO BE FILED IN DOCKET #037,342

RE: Suffolk #037,342 Com. vs. Kevin Francis

THE COURT. I would like the record to show that when this case was called for arraignment, Mr. Rhones stepped up and asked if he and the assitant district attorney could approach the bench. I allowed them to do so.

Mr. Rhones said to me that he would represent the young man for no pay if he could not be appointed and asked me if his appointment to the list of attorneys who may represent indigents accused of murder had been approved at the last meeting of the judges. I told him it had not.

As chairman of the committee involved, I know that Mr. Rhones has applied three or four times and been turned down each time.

This in itself does not prevent him from private representation, and I am allowing him to represent the defendant privately.

I just want the record to show that at no time throughout the trial should any judge consider paying him out of public funds.

This is to certify that I am an official court reporter in the Superior Court of Massachusetts and that the foregoing is a true and accurate transcription of an excerpted portion of my stenographic notes taken in the 1st Criminal Session, Boston, before Linscott, J on January 8, 1982, in the matter of Commonwealth vs. Francis, to the best of my skill, knowledge and ability.

Edward H. Goldberg,
Official Court Reporter

24

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO. 037342

COMMONWEALTH)
)
VS.) MOTION TO WITHDRAW
)
KEVIN FRANCIS)
(

Now comes the attorney for the defendant and moves to withdraw from representation of the defendant on the appeal of the above-cited case.

Stephen Hrones
5 Faneuil Hall Marketplace
Boston, Massachusetts 02109
617-523-7400

FOR [illegible] ESS
[illegible] Y

[illegible] 3

[illegible]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO. 037342

COMMONWEALTH	)	
	)	
VS.	)	AFFIDAVIT IN SUPPORT OF MOTION
	)	TO WITHDRAW
KEVIN FRANCIS	)	
	)	

Now comes Attorney Stephen Hrones and states as follows:

(1) I represented the defendant at his trial for first-degree murder on a pro-bono basis as he was and is indigent, and I am not on the list of attorneys who are eligible for appointment in first-degree murder cases.

(2) The clerk's office will not release the defendant's copy of the transcript without the payment of $67.60.

(3) The clerk's office has suggested that "appropriate steps be taken forthwith for the formal appointment of counsel."

Signed and sworn to under the pains and penalties of perjury this 1st day of March, 1982.

STEPHEN HRONES
5 Faneuil Hall Marketplace
Boston, Massachusetts 02109
617-523-7400

COMMONWEALTH OF MASSACHUSETTS 28

SUFFOLK, SS

SUPREME JUDICIAL COURT
NO. 3163 FULL BENCH

COMMONWEALTH OF MASSACHUSETTS

VS.

KEVIN FRANCIS

ORDER OF COURT ALLOWING COUNSEL FEES

This matter came before the Court on the Bill for Services of court appointed counsel on appeal in the above-entitled case.

Whereupon, upon consideration thereof, it is ORDERED that Stephen Hrones, Esquire, Karp and Hrones, 5 Faneuil Hall Marketplace, Boston, MA, 02109, be, and he hereby is compensated in the amount of $1400.00 for counsel fees, said amount to be paid by the Commonwealth of Massachusetts out of the budget of the Superior Court Department of the Trial Court for the County of Suffolk from the funds set aside for indigent defendants. (FY 1983)

By the Court (Lynch, J.)

/s/ John E. Powers

Entered: May 4, 1984

Clerk

A true copy.
Attest:
May 4, 1984

John E. Powers
Clerk

SUPERIOR COURT
FOR CRIMINAL BUSINESS
SUFFOLK COUNTY

MAY 31 1984

FILED
DANIEL F. POKASKI
CLERK/MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 3163

****
COMMONWEALTH OF MASSACHUSETTS

V.

KEVIN FRANCIS
****

BILL FOR SERVICES RENDERED

Attorney Stephen Hrones was appointed by Justice Wilkins to represent the respondent on May 6, 1983. The following bill for services rendered in the above-cited case is submitted.

In-Court Time

Date		Time
12/5/83	Oral argument	1 hour

Out-of-Court Time

Date		Time
5/9/83	Started reading transcripts	3 hours
5/13	Continued reading transcript	1 hr.
5/16	Beagan reading Vol.VI	.5 hr.
5/17	Continued reading transcript	1 hr.
5/23	Researched potential jury charge issue	.5 hr.
5/29	Reviewed cases on mugshot issue and instructions on first and second Degree murder	.5 hr.
6/20	Researched closing argument issue	5 hrs.
6/21	Continued research on closing argument issue	7 hrs.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPREME JUDICIAL COURT
NO. 3163 FULL BENCH

COMMONWEALTH OF MASSACHUSETTS

VS.

KEVIN FRANCIS

ORDER OF COURT ALLOWING COUNSEL FEES AND EXPENSES

This matter came before the Court on the Bill for Services of court appointed counsel on appeal in the above-entitled case.

Whereupon, upon consideration thereof, it is ORDERED that Stephen Hrones, Esquire, Karp and Hrones, 5 Faneuil Hall Marketplace, Boston, MA, 02109, be, and he hereby is compensated in the amount of 1186.60 for counsel fees and expenses, said amount to be paid by the Commonwealth of Massachusetts out of the budget of the Superior Court Department of the Trial Court for the County of Suffolk from the funds set aside for indigent defendants. (FY 1984)

By the Court (Lynch, J.)

/s/ John E. Powers

SUPERIOR COURT
FOR CRIMINAL BUSINESS
SUFFOLK COUNTY

Entered: May 4, 1984 Clerk

A true copy.
Attest:
May 4, 1984

MAY 31 1984

Clerk

FILED
DANIEL F. POKASKI
CLERK/MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 3163

****
COMMONWEALTH OF MASSACHUSETTS

V. BILL FOR SERVICES RENDERED

KEVIN FRANCIS
****

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5/29	Reviewed cases on mugshot issue and instructions on first and second Degree murder	.5 hr.
6/20	Researched closing argument issue	5 hrs.
6/21	Continued research on closing argument issue	7 hrs.

Out-of-Court Time (Continued)

Date		Time
6/22	Continued research	5 hours
6/23	Began writing brief on closing argument issue	5 hrs.
6/24	Continued writing	5 hrs.
6/27	Continued writing	5 hrs.
6/28	Re-wrote first draft	5.5 hrs.
6/29	Continued writing; began statement of facts section	7 hrs.
6/30	Continued on statement of facts and final argument issue; began research on mugshot issue	5 hrs.
7/1	Continued research on mugshot issue	6 hrs.
7/5	Worked on closing argument issue	7 hrs.
7/6	Worked on mugshot issue	7 hrs.
7/8	Continued research and writing	5 hrs.
7/11	Continued writing	4 hrs.
7/13	Continued writing	3 hrs.
7/14	Worked on final draft of brief	7 hrs.
7/18	Final proof-reading of brief; Did Statement of Case and Summary of Argument	4 hrs.
8/18	District Attorney calls	.25 hr.
9/21	Received Government brief and read	.5 hr.
9/21	Wrote letter to defendant	.25 hr.

TOTAL IN-COURT TIME = 1 hour ✓
at $35/hour) = $35.00

TOTAL OUT-OF-COURT TIME = 100 hours
at $25/hour) = $2500.00

EXPENSES

Xeroxing of Brief $51.60

TOTAL BILL = $2,586.60

I have not requested nor accepted any payment or promise of payment from any other source for representing the defendant.

Signed and sworn to under the pains and penalties of perjury this 7 day of March, 1984.

Stephen Hrones
KARP AND HRONES
5 Faneuil Hall Marketplace
Boston, MA 02109
(617) 523-7400

Approved and Ordered Paid in the amount of $2586.60 for counsel fees and expenses said amount to be paid by the Commonwealth of Massachusetts out of the budget of the Superior Court Department of the Trial Court for the County of Suffolk from the funds set aside for indigent defendants.

Justice, Supreme Judicial Court

Dated: May 4, 1984

-3-

A true copy.
Attest:
May 4, 1984
Clerk

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Roy "Sugar Bear" Hamilton

15

CUSTOMER Robert Wonder

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City Boston, Ma.

X Robert Wonder
SIGNATURE OF PERSON PLACING ORDER

DATE OF ORDER 7/26/83

DUE 7/26/83 DATE _____ TIME

PURCHASE ORDER # _____

523-7410
TELEPHONE

# OF SHEETS	QUANTITY	UP	OUT	SIDES	STOCK Size	STOCK Weight/Type	STOCK Color	BINDERY	PRICE	
			858	1	8½x11	20#	white		42	00
								binding	6	00
			Kevin Francis Case							

BINDERY

☐ CUTTING ☐ COLLATING ☐ DRILLING ☐ GATHERING ☐ PADDING

FOLDING ☐ Letter ☐ Accordion ☐ Booklet STAPLING ☐ Regular ☐ Saddle

NUMBERING From _____ To _____ PERFORATION ☐

SPECIAL INSTRUCTIONS _____

Printing	49	15
Typesetting		
SUBTOTAL	49	15
Sales Tax	2	15
TOTAL	51	60
Deposit	51	60
BALANCE	0	-

TYPESETTING: ☐ Approval ☐ Waiver of Proofreading

RELEASE OF LIABILITY: I hereby acknowledge that I have *proofread and approve,* or have *waived my right to proofread* the artwork/typesetting, and that all costs for printing are my responsibility, as well as any costs for reprinting if I find any error after the job has been printed. I understand that Speedy Printing is not responsible for any proofreading of content.

X _____
CUSTOMER SIGNATURE DATE

PAYMENT:

☐ Cash ☐ MC/VISA
☐ Check (No. 1626)

7/26/83
DATE PAID

AS
ACCEPTED BY

APPROVED CHARGE (Net 15 Days):

X Robert Wonder
CUSTOMER SIGNATURE (ORDER RECEIVED)

7/26/83
DATE

PLEASE
PAY FROM THIS INVOICE

NO STATEMENT
WILL BE RENDERED

Thank you! We appreciate your business!

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CRIMINAL ACTION
NO.: 1981-037342

COMMONWEALTH	)
v.	)
KEVIN FRANCIS	)

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION OF SJC RULE 3.7(a)(3) TO ALLOW DEFENSE COUNSEL TO TESTIFY AS A WITNESS ON BEHALF OF THE DEFENDANT AT AN EVIDENTIARY HEARING AS TO FACTS RELEVANT TO CHAIN OF CUSTODY OF FILE DOCUMENTS AND THE DEFENDANT'S REACTION TO THE MURPHY REPORT SHOULD THIS COURT ALLOW ORAL EXAMINATION OF THE CONTENTS OF COUNSEL'S AFFIDAVIT.

INTRODUCTION

On September 29, 2016 the Court ordered an evidentiary hearing in this case on the defendant's new trial motion. {Kaplan, J.) The judge ordered the parties to work together on scheduling, a list of witnesses who would testify, and on various issues related to evidence to be presented at the evidentiary hearing. The judge asked the parties to communicate with the Clerk of the Court during January or February as to scheduling for a hearing. The parties have been working on scheduling, discovery issues and a witness list periodically since December 2016.

Undersigned counsel is informed by the Commonwealth that the Commonwealth objects to this Court accepting for consideration the contents of counsel's affidavit filed in support of the defendant, Kevin Francis's, new trial motion in this case. The Commonwealth seeks an opportunity to cross-examine counsel as to the chain of custody of file documents and Francis's reaction to receiving a copy of The Murphy Report. Further, the Commonwealth takes the position that because undersigned counsel would testify as a witness as to these topics at its insistence, counsel can no longer serve as Francis's attorney, counsel must be disqualified, and Francis must accept another attorney as a replacement.

The evidence the Commonwealth wishes to challenge in counsel's affidavit is essential evidence Francis needs before the Court on his Rule 30 motion: the evidence relates to the chain of custody of documents and Francis's reaction to seeing The Murphy Report, a document not produced in pre-trial discovery, for the first time. If this Court is not going to consider that evidence without granting the Commonwealth an

opportunity to cross-examine on it, counsel must testify as a witness. Without the evidence, Francis's factual showing on his motion, as to The Murphy Report withholding claim, is eviscerated.

It is Francis's position that, were this Court not inclined to simply consider counsel's affidavit as evidence on the new trial motion without permitting cross-examination, in accordance with Rule of Professional Conduct 3.7 - Lawyer as Witness - his attorney should be permitted to remain as his attorney and become a witness solely in order to provide the Commonwealth with an opportunity to cross-examine her as to certain topics addressed in her affidavit. Attorney Ira Gant, who has a notice of appearance on file as co-counsel on behalf of Francis in order to assist at the evidentiary hearing, can handle a direct examination and any issues that occur during cross-examination of undersigned counsel at the evidentiary hearing on this matter.

RELEVANT FACTS

The circumstances under which counsel came to represent the defendant in this case are unique and

extraordinary. Those facts, supported by affidavits accompanying this memorandum, are recounted here as an offer of proof as to why Francis would suffer a substantial hardship were counsel to be disqualified from his case.

In 2010, undersigned counsel represented a defendant named Terrance Reeve in connection with the Commonwealth's appeal of a Superior Court justice's grant of Reeve's motion to revise and revoke his sentence. (*Commonwealth v. Terrance R. Reeve*, 10-P-924, December 8, 2010). Throughout the course of counsel's representation of Reeve, Reeve implored counsel to investigate the conviction in this case, as Reeve had known Francis for more than ten years and Reeve had come to believe over those years that Francis was innocent. Counsel developed a strong attorney-client relationship with Reeve, whose case had virtually no chance of success at all in the appellate courts, but was nonetheless hard fought.

Counsel informed Reeve through 2010 and 2011 that she was too busy to investigate this case, and recommended Reeve advise Francis to write to the CPCS

Innocence Program and ask that a screening attorney be assigned from the list of available murder screeners. Francis refused to take that advice, as he decided he wanted undersigned counsel as his attorney, and no one else, based upon Reeve's commentary and recommendation to him.

Throughout the latter part of 2010 and 2011, Reeve persisted in his efforts to convince undersigned counsel to investigate Francis's case. Counsel repeatedly refused, explaining her workload was such that she could not accept new clients.

In early 2012, Reeve was released from prison. In March, he contacted undersigned counsel to set up a lunch meeting. At the meeting, Reeve explained he had obtained a good paying job, and had steady employment. He offered to hire undersigned counsel privately to screen Francis's case and pay her with his own money. It was at that point undersigned counsel agreed to accept appointment from CPCS to screen Francis's case, as Francis was indigent and eligible for court-appointed counsel, provided Francis was willing to wait several months until counsel had time to begin

work. Francis agreed to wait, and in July 2012 counsel was appointed by CPCS to screen Francis's case. That screening resulted in the filing of the new trial motion currently pending.

It is Francis's position, based upon his prior experience with lawyers, that had undersigned counsel not agreed to screen his case, he would not have pursued post-conviction relief with any other lawyer. It would therefore work a substantial hardship on him were this Court to disqualify undersigned counsel as his attorney at the Commonwealth's request. If the Court exercises its discretion to allow examination of counsel on her affidavit, Francis asks that this Court permit counsel to testify pursuant to SJC Rule 3.7(a)(3) based upon a finding that disqualification would result in substantial hardship to him.

ARGUMENT

Pursuant to Mass. R. Crim. Pro. 30(c)(3), this Court has the discretion to accept the evidence contained in undersigned counsel's affidavit in this case and consider it without oral testimony from counsel at all. ("The judge may rule on the issue or

issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.") The Commonwealth seeks examination of counsel on her affidavit, and takes the position that its request should result in disqualification of counsel in this case. It is counsel's position that were this Court to grant the Commonwealth's request for cross-examination, this Court should allow counsel to remain as Francis's attorney, for to disqualify counsel would work a substantial hardship on Francis.

SJC Rule of Professional Conduct 3.7 - Lawyer as Witness - provides as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> ***
>
> (3) disqualification of the lawyer would work a substantial hardship on the client.

The Comments to the Rule state:

> [1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between lawyer and client.
>
> [2] The trier of fact may be confused or misled by a lawyer serving as both advocate and witness.
>
> ***

> [4] ... [P]aragraph (a) (3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

It is Francis's position that disqualification of undersigned counsel would work a substantial hardship on him for the reasons set forth in his affidavit accompanying this memorandum. Affidavits are also submitted from Reeve and from undersigned counsel relative to this argument.

In balancing the interests at issue here, counsel notes there is no risk that the motion judge, unlike a trial jury, could be confused or misled by counsel serving as both advocate and witness for a brief period of time. The Commonwealth has requested cross-examination on chain of custody and facts related to the defendant’s reaction to seeing The Murphy Report

for the first time. Should this Court be inclined to grant that request, such examination can be accommodated without confusion to the motion judge. The motion judge would not be misled by any such arrangement.

Were counsel to serve as both attorney and witness in this case for this limited purpose, the Commonwealth would suffer no prejudice. The testimony counsel would give relates to chain of custody of documents and observations of the defendant that are detailed in counsel's affidavit submitted in support of the new trial motion, which the Commonwealth has had for almost a year and a half. These facts are the type of facts that are typically part of affidavits of counsel in post-conviction cases. For this reason, it was unforeseeable that counsel would end up as a witness in this matter, as such affidavits are routinely accepted as a matter of course without examination, and even were it foreseeable, it would have been unavoidable.

Counsel, a solo practitioner, was the only person in a position to investigate and review the file

documents collected and retrieved in this 35+ year old case. Counsel was the only person present when the defendant saw The Murphy Report for the first time, as that event took place during an attorney visit at MCI-Norfolk. Attorneys do not routinely meet with clients with witnesses present, as the attorney-client privilege applies only to confidential communications. In addition, unless a law practice is structured in a manner that has multiple members of the practice reviewing and working on the same issues in a case contemporaneously, there is never a witness to a chain of custody-type document review like the one that took place in this case.

As set forth in the affidavits accompanying this memorandum, disqualification of counsel would work a substantial hardship on the defendant. At the same time, counsel's evidence as to certain facts is essential to forward the defendant's claim. This Court should not force the defendant to choose between his attorney and his evidence.

CONCLUSION

For all of the foregoing reasons, if this Court decides to afford the Commonwealth an opportunity to cross-examine counsel on her affidavit submitted on the new trial motion, Kevin Francis requests that this Court allow his attorney to serve as both lawyer and witness in this case for that narrow and limited purpose, and not disqualify her as his attorney.

RESPECTFULLY SUBMITTED,
On behalf of the Defendant
Kevin Francis,
By his attorney,

AMY M. BELGER
B.B.O. No. 629694
841 Washington Street
Holliston, MA 01746
508-893-6031
appellatedefender@gmail.com

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CRIMINAL ACTION
NO.: 1981-037342

MONDAY FEBRUARY 20, 2017

COMMONWEALTH

v.

KEVIN FRANCIS

AFFIDAVIT OF KEVIN FRANCIS

I, Kevin Francis, hereby depose and state:
That I met Attorney Amy Belger, through a friend of mine by the name of Mr. Terrence Reeve. Mr. Reeve was a client of Attorney Belger at the time.

Mr. Reeve and I were incarcerated together for about 10(ten) years. It was during the time that Attorney Belger was assigned represent Mr. Reeve for his "Revise and Revoke" that I first became aware of her.

It was over the next few years, through numerous conversations with Mr. Reeve in which he continuously reiterated the level of expertise and effort Attorney Belger was putting forth to obtain justice for him. On several occasions I openly wondered how I might be able to get Attorney Belger to represent me in my quest for justice. After some time, and many more "in-depth" conversations with Mr. Reeve it became clear that I needed Attorney Belger.

Over the past 35½ years, I've had to deal with numerous attorneys with regards to my case. All to no avail. I've

always known, in my heart, that they really didn't care about the truth or justice. They all seemed to be more concerned with their own reputation as opposed to doing their due diligence on my behalf. With this being my history with attorneys I had basically come to the conclusion that I would never be able to receive justice. That no attorney would ever put forth the effort required to uncover the injustices in a 35½ year old case... That is until I met Attorney Belger.

I decided that would turn my case (and life) over to Attorney Belger. In 2011 I wrote to The Committee For Public Counsel Services requesting that Attorney Belger (specifically) be assigned to screen my case. If I couldn't have Attorney Belger assigned to my case then I would've continued to bide my time until she became available.

If Attorney Belger is removed from my claim because of her being required to testify I would opt to drop my "Murphy Report" claim and try to proceed without it just so that I might be able to keep my attorney of record, and I steadfastly refuse to proceed without Attorney Belger.

As anyone can see, the effort that Attorney Belger has put forth on this 35½ year old case exceeds extraordinary. At no time during my quest for justice has **ANY** attorney been able to uncover "The Murphy Report" or any of the other violations that Attorney Belger has uncovered. Because no other attorney is Attorney Belger.

Attorney Belger has been more involved with this case than any attorney. Ever.

The loss of My Attorney, Attornrey Amy M. Belger, would cause irreparable harm to my legal defense. A defense which

has been constructed by Attorney Belger, through years of tireless research and dogged determination. The removal of Attorney Belger from my case, a case in which her intimate knowledge of the entire case file is un-equaled is unheard of. It is tantamount to or even more egregious than a grave miscarriage of justice...

I just don't see how something like this can be called "justice".

SIGNED UNDER THE PAINS
AND PENALTIES OF PURJURY
ON THIS 21 DAY OF February,
2017.

Kevin S. Francis

Mr. Kevin S. Francis
W-39186
M.C.I. Norfolk
P.O. Box # 43
Norfolk, MA 02056

Commonwealth vs. Kevin Francis

Torrance Reeve affidavit Feb. 18 2017

I'm writing on behalf of my best friend Kevin Francis. I recently learned of the scary possibility that his attorney Amy Belger may no longer be allowed to represent him.

Kevin was wrongfully convicted. And now 35 years later, Amy is the only person capable of ensuring that she continues to fight to prove his innocence.

I met Kevin in 2001 while we were being housed in the same unit at Old Colony correctional center. the first thing I noticed about him was how well liked he was by both the staff and inmate population.

I got to know him over sports talk and my interest in music. Kevin is a very gifted musician. He taught me music theory and how to play Bass guitar. Over the next ten years, I came to trust him as a great and reliable friend. He helped me get through the hardest time of my life.

We spoke about his case a lot over the years. They were always tough conversations. He was already twenty-something years into a life sentence. Although he never wavered about his innocence, he seemed to have lost hope of ever getting the help he needed to continue to fight his case.

In 2010 Amy represented me on the Commonwealth's appeal of a revise and revoke ruling. It was an uncommon case that required a ton of research and an atypical approach. Amy did an amazing job. She fought for me like it was her most important case.

I knew back then that Kevin needed her help. I told him about her, and how impressed I was by her. He was non-receptive. He was so discouraged due to his lack of success with past representation. He wanted nothing to do with it.

I mentioned his case to Amy. at that time she was too busy to review it. I essentially gave up on the idea for the time being. Over the next year, I periodically mentioned her to him hoping that he'd change his mind about fighting his case.

He was released in 2011. Shortly after that I got a decent paying job doing architectural glass engineering. I contacted Amy and asked if I could hire her to look at his case. She didn't take any pay but agreed to look into it.

She went and visited him after the visit he finally relented and was inspired to continue to fight his case. However, he wouldn't let me pay his legal fees. He wrote to CPCS and specifically requested Amy. They assigned her the case and she's been representing him ever since.

She has been working on his appeal for five years now. If not for his total faith in her, he certainly would have given up along the way. He's told me countless times that "Amy is my last chance, no other lawyer could get me to go through such an emotional ordeal."

If Amy Belger is removed from representing him, I think he'll suffer to a degree of distress and hardships that will cause him to abandon his appeal.

Signed under the penalties of perjury on this 26th day of February, 2017.

Terrance Reeve

Terrance Reeve

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CRIMINAL ACTION
NO.: 1981-037342

COMMONWEALTH

v.

KEVIN FRANCIS

AFFIDAVIT OF ATTORNEY AMY M. BELGER IN SUPPORT OF APPLICATION OF RULE 3.7(a)(3)

I, Amy M. Belger, hereby depose and state:

1) I accepted assignment from the Committee for Public Counsel Services as post-conviction screening counsel in this case at the specific request of the defendant, who wanted me to screen his case based upon what he learned about me from his friend, Terrance Reeve. Mr. Reeve is a former client of mine.

2) Mr. Francis waited a long time for me to become available to screen his case. Beginning in 2010, I encouraged him, through Mr. Reeve, to work with another

attorney, who would be available sooner, to screen his case. Mr. Francis refused to do so.

3) In March 2012, I finally agreed to screen this case for Mr. Francis when Mr. Reeve tried to hire me privately to do so. I explained to Mr. Reeve it was not lack of money, but competing demands on my time, which repeatedly led me to urge another attorney on Mr. Francis. I did, however, understand at that point the level of desire Mr. Reeve had to have me screen this case, as he explained to me that he was unable to fully enjoy his freedom while Mr. Francis remained in prison without an attorney Mr. Reeve trusted to help him. As a criminal defense attorney, it is difficult to say no to a client you represented, who finally has gained his freedom, who says he cannot fully enjoy it without your assistance.

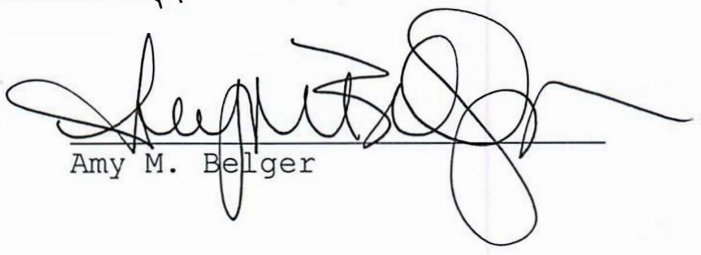
4) When I was notified by the Commonwealth that they would move to disqualify me as Mr. Francis's attorney if I needed to testify as a witness, I contacted Mr. Reeve and I explained to him the status of the case. I received a handwritten affidavit in support of this memorandum in the mail from Mr. Reeve on February 25,

2017, and I have included it with this filing. The last page of what I received on February 25 was not signed. I contacted Mr. Reeve and explained that such submissions to a court need to be signed under oath. I sent a scanned copy of the affidavit back to Mr. Reeve on February 26, 2017. I asked him to read it over again, and if it was accurate, to add his signature to the last page indicating he was signing under the penalties of perjury, and fax it back to me. He did so. I recognize Mr. Reeves' handwriting and his signature. The original of the signed page is on its way to me in the mail.

5) Over the years since July 2012, when I began work on this case, I have developed a strong attorney-client relationship with Mr. Francis. He has expressed to me many times the sentiments he sets forth in his affidavit accompanying this memorandum about how he views his work with me. In light of those sentiments, I ask that this Court not disqualify me as his attorney if it allows the Commonwealth to examine me as to the contents of my affidavit submitted on the new trial motion. Based on what Mr. Francis has stated with respect to this matter, I do believe it would work a substantial hardship on Mr. Francis were this Court to disqualify me, and I

therefore believe the standard under Rule 3.7(a)(3) is satisfied.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 26th DAY OF February, 2017



Amy M. Belger

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, SS. NO. 12683

KEVIN FRANCIS
Petitioner/Appellant
v.
COMMONWEALTH
Respondent/Appellee

ON APPEAL FROM A JUDGMENT AND DENIAL OF
A NEW TRIAL MOTION IN
THE SUFFOLK SUPERIOR COURT
PURSUANT TO G.L. CHAPTER 278, §33E

BRIEF
OF THE PETITIONER/APPELLANT

FOR THE PETITIONER:

AMY M. BELGER
LAW OFFICE OF AMY M. BELGER
841 Washington Street
Holliston, MA 01746
508-893-6031
BBO # 629694
appellatedefender@gmail.com

IRA L. GANT
INNOCENCE PROGRAM
COMMITTEE FOR PUBLIC
COUNSEL SERVICES
21 McGrath Highway
Somerville, MA 02143
617-607-5771
BBO # 678706
igant@publiccounsel.net

MAY 2019

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ISSUE

Does the Sixth Amendment require: 1) that an indigent nineteen-year-old defendant, charged with murder in the first degree, be present at a critical stage of the trial proceedings where a volunteer lawyer is substituted for court-appointed counsel; and 2) a knowing and voluntary waiver of the indigent defendant's right to court-appointed counsel, before the court allows a volunteer, who the defendant did not retain, to represent the defendant for free?

INTRODUCTION

The victim in this case was viciously stabbed multiple times. [1],[2] Her body was found in Dorchester's Franklin Field on September 19, 1981. (T.3/15-16,21) Over the more than thirty-six years that have passed since Mr. Francis was convicted of first-degree murder, he has steadfastly maintained his innocence. Among the many trial errors enumerated in Mr. Francis's new trial motion (*see Issue IV infra*), following the trial court's denial of the motion, only the claim presented

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[1] References: record appendix of this brief "(R.[Vol.#]. [page#])"; addendum "(A.[page#])" (although included herein and continuously paginated with this brief, references to it will be cited as noted); jury trial transcripts "(T. [Vol.#/page#])"; evidentiary hearing transcript "(H. [page#])".

[2] The victim was Mr. Francis's former girlfriend. Their romantic relationship ended approximately two years prior to her death, when Mr. Francis was seventeen years old. (T.4/57;R.I.111)

in this appeal provides grounds for reversal. The issue raised by this appeal was not identified until 2014. (R.I.140-141)

In our criminal justice system, judges are mandated to appoint an attorney to represent an indigent defendant facing possible imprisonment, or conduct a colloquy with the defendant about his desire to represent himself. Where counsel is appointed, defendants do not choose specific attorneys to represent them unless they hire and pay them, or otherwise retain their services. "[J]udges are better able to choose an attorney than the indigent defendant 'because they know the abilities of the available local counsel.'" 3 *Wayne R. LaFave et al., Criminal Procedure* §11.4(a) at 550 (2d Ed. 1999). When a defendant does not retain his own lawyer, the court must choose a lawyer experienced enough to handle the case - and compensate that lawyer accordingly.

Attorney Stephen Hrones, who was not retained by the defendant, volunteered to try this case for free so as to gain experience in murder trials and further his career. At a sidebar conference attended by the arraignment judge, the prosecutor,

and Hrones, the judge specifically found that Hrones was not qualified for court appointment, and remarked that Hrones's application to receive appointments in murder cases had been rejected three times. Consequently, he ordered that Hrones not be paid with public funds for his representation of Mr. Francis.

Such representation is only in accord with the Sixth Amendment if the defendant ***knows*** this is the situation, ***agrees*** to have an attorney represent him under such circumstances, and ***the Court ensures*** the defendant ***fully understands*** the right to the certified, court-appointed counsel he is foregoing.

Mr. Francis was excluded from the sidebar discussion where it was decided that Hrones would try his murder case for free. The court then allowed the case to move forward without conducting any colloquy, or informing Mr. Francis of the possibility that he could have counsel, certified to handle murder trials, appointed. As a result, Mr. Francis never knew such a critical decision, impacting his fundamental right to counsel of his own choosing, was made at that sidebar.

This Court has never ruled on the issue raised by this appeal, and as far as counsel is aware, no appellate court has ever ruled on it. This case has an unusual set of facts. Hrones's practice of trying murder cases for free to gain experience was unique to him. He engaged in this practice decades ago, in only a handful of cases. (A.14, n.10)

The facts here raise an issue of significant constitutional dimension in an unexpected context. While the arraignment judge in this case did not recognize the nature of the rights at stake, three of his colleagues on the bench did, as far back as 1974, in the case of *Commonwealth v. Leonard Lacy*. *See* (R.III.186-214) Faced with an identical situation, three Superior Court judges saw the clear need to engage in a colloquy with defendant Lacy, to make sure he understood the rights he was giving up by going to trial with an unpaid Hrones, instead of appointed counsel, certified to handle his murder trial.

Mr. Francis had a right to be present for the discussions regarding whether to allow a volunteer to try his murder case. He was owed the same information and colloquy given to Lacy. *See* (R.III.186-214) This

choice of counsel decision was his alone to make.

If informed of the proposed arrangement, Mr. Francis would not have agreed to be represented by Hrones. Unlike Lacy, Mr. Francis had no prior relationship with Hrones.[3] *Contrast* (R.III.201-206) Mr. Francis's decision would have been based on concerns about the quality of the representation to be provided by an uncertified, unpaid attorney. (H.81-82) By stripping Mr. Francis of his right to make that critical decision, the court violated his fundamental constitutional rights.

STATEMENT OF THE CASE

Nineteen-year-old Kevin Francis was arraigned December 17, 1981 and charged with first-degree murder. He was convicted after trial. (R.I.7-12) Although indigent at the time of arraignment and trial, Mr. Francis was not appointed counsel by the court because, unknown to Mr. Francis, trial counsel, who Mr. Francis did not retain, took on his case *pro bono*. (R.I.168-169)

[3] Whereas Mr. Francis first met Hrones at his arraignment, Lacy had a longstanding relationship with him, having been in front of three judges with Hrones as counsel: Tamburello, Roy, and then Sullivan. (R.III.197-198)

Mr. Francis filed a *pro se* Rule 30(b) motion in 1991, which was denied by the trial judge without a hearing in 1993. (R.II.87-106)

The errors complained of herein were raised by a motion for a new trial filed in September 2015. An evidentiary hearing was held on January 10, 2018 and the motion was denied on February 22, 2018. (A.1-19)

On March 23, 2018, a G.L. c. 278, §33E petition was filed with a single justice of the Supreme Judicial Court. (Gants, J.) (R.III.153-214) A hearing was held in the single justice session on August 28, 2018, after which the matter was remanded back to the motion judge for further findings of fact. (A.20-27) Following the submission of further factfinding, the single justice allowed the §33E petition on February 5, 2019. The case was docketed for hearing and decision by the full bench.

STATEMENT OF FACTS

Mr. Francis was arraigned on January 8, 1982.[4] He met Attorney Hrones, who he did not retain, for the first time at his arraignment. He neither asked Hrones to represent him, nor did he specifically seek out

[4] The arraignment transcript can be found at (R.I.317-321).

his services. Hrones volunteered to represent Mr. Francis because, as the motion judge found on remand, "it was his practice to be on the look-out for arraignments in first-degree murder cases so that he could offer his services . . . as he was personally convinced that he would more effectively and diligently represent defendants in these cases than many attorneys on the 'murder list.'" (A.25-26)

After arraignment, the judge (Linscott, J.) made a record reflecting there was a sidebar conference prior to arraignment between himself, Hrones and the prosecutor. Mr. Francis was not present. Hrones stated if he could not be appointed, he would represent Mr. Francis "for no pay." Hrones also asked "if his appointment to the list of attorneys who may represent indigents accused of murder had been approved at the last meeting of judges." The judge stated Hrones had not been approved. The judge further noted he was Chairman of the committee involved in appointing attorneys to the murder list, Hrones "had applied three or four times, and had been turned down each time." He noted this does not prevent Hrones from private representation, but he wished to make

certain the record reflected "that at no time throughout the trial should any judge consider paying him out of public funds." (R.I.171,320-321)

No colloquy was conducted with Mr. Francis to ensure he was making a knowing and intelligent waiver of his right to court-appointed, compensated counsel. No colloquy was conducted to even inform him of his right to have court-appointed counsel *in lieu* of Hrones. Mr. Francis did not agree to forego certified, paid counsel for unpaid counsel at his murder trial, nor did he know the judge made that decision for him, or the reasons for the judge's refusal to appoint Hrones. (R.I.111-112,171,181-183,320-321)

Mr. Francis testified at the evidentiary hearing held on his new trial motion that he had no knowledge at the time of arraignment or trial that Hrones was representing him *pro bono*.[5] (H.94) It is undisputed that

[5] The motion judge on remand ruled that the defendant "has not proved that, at or about the time of his arraignment, he was unaware that the court had not appointed Mr. Hrones to represent him, or that Mr. Hrones was not being paid by the Commonwealth." (A.26) There was a substantial amount of evidence and an extensive record made at the trial level to establish these facts, which the motion judge neglects to mention. *See* (R.I.141-142,181-183;R.III.122-124)

Hrones did so. (R.I.168-169) Hrones testified at the evidentiary hearing to having no recollection of discussing this issue with Mr. Francis, and testified he would not have discussed it, out of a fear that Mr. Francis would fire him and opt for court-appointed counsel. Hrones did not want to get fired; he wanted to try the case. (H.48-49)

Nineteen-year-old Mr. Francis, as the motion judge ruled, did not understand how appointment of counsel worked, and what his rights were in this regard. (R.I.317-321;R.III.122-124;A.27) He believed Hrones *was* appointed by the court to represent him. His August 18, 1999 letter to CPCS's Leslie Walker requesting assignment of post-conviction screening counsel bears this out. In answer to the question, "Was your trial level attorney hired by you or court appointed?" Mr. Francis

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Hrones, in fact, testified that he was personally incentivized NOT to tell Mr. Francis that he was trying the case for free, because he was afraid if Mr. Francis knew the truth, Mr. Francis might fire him. (H.48-49) The motion judge further found that the issue of how Hrones came to be his lawyer "would not have been a noteworthy matter to the defendant in 1982. . . . the defendant was totally unaware of the significance of the distinction between being represented by a court appointed a lawyer or a private attorney appearing pro bono …." (A.27)

That is, of course, why it was necessary for the arraignment judge to conduct a colloquy to ensure Mr. Francis understood what was happening. *Compare* (R.III.186-214)

answered, "Court appointed." (R.I.182-183)[6] This 1999 correspondence is compelling corroborative evidence of Mr. Francis's stated belief as to this issue, as there was no conceivable motive to fabricate at the time that correspondence was sent. Mr. Francis could not have known that sixteen years later, that this issue would be raised on his behalf. The issue is novel; it does not suggest itself easily.[7]

Mr. Francis testified at the evidentiary hearing that if he knew Hrones was not getting paid, because the court had rejected his application to take appointed murder cases and thus refused to pay him, he would not have agreed to proceed to trial with Hrones. Instead, Mr. Francis explained, he would have chosen an attorney who, due to his

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[6] Hrones was subsequently appointed by the court to represent Mr. Francis on appeal on May 6, 1983. He was compensated for appellate representation in this case. (R.II.62-66) Importantly, when noting that Hrones was appointed as his counsel, Mr. Francis was responding to a question about his attorney ***at trial***. (R.I.182-183)

[7] When Mr. Francis filed his *pro se* new trial motion in 1991, he did not recognize this issue, despite having a copy of the arraignment sidebar transcript and other case documents (H.82-83,94), nor should anyone expect he would have. The novelty of the issue, and the Sixth Amendment analysis that applies to it, is so rarely invoked that the motion judge did not initially make factual findings regarding the matter. (A.20-22)

experience with murder cases, had been certified and would be paid to conduct his defense. Mr. Francis noted that because "the state was paying him; there had to be a good reason. You know, I wanted to win ... I woulda took the paid attorney. It's just ... to me, it just makes sense. I just think he would – no disrespect to anybody, but I just think he probably would have been more qualified." (H.81-82)

In *Commonwealth v. Leonard Lacy*, Hrones gave additional validity to Mr. Francis's concerns by acknowledging, "it is very difficult for counsel to try a case without getting paid. It presents a tremendous hardship." (R.III.196)

In *Lacy,* under circumstances identical to those presented here, the trial judge conducted an exhaustive colloquy[8] with the defendant, on the record, to ensure he understood the rights he was giving up in proceeding

[8] The of Transcript of Colloquy, SUCR1974-79994 (Sullivan, J., Dec. 3. 1974), came into evidence as Exhibit Number 6 at the evidentiary hearing. The relevant excerpts are contained in the record appendix at (R.III.186-214). The *Lacy* transcript reflects that two other Justices of the Superior Court in addition to Sullivan: Tamburello and Roy, also addressed Lacy's understanding of the constitutional rights he was giving up by foregoing paid, certified counsel at his murder trial. (R.III.197-198)

to trial with Hrones, an uncertified and unpaid volunteer. The decision to forego court-appointed counsel, in favor of a volunteer lawyer, was a significant decision.[9] As was argued below, (R.I.13), just as in *Lacy*, the trial judge here had a duty to ensure Mr. Francis made this decision knowingly and intelligently.

SUMMARY OF THE ARGUMENT

In denying Mr. Francis's new trial motion, the judge abused his discretion and committed an error of law where he failed to recognize that the Sixth Amendment right to choice of counsel and the Sixth Amendment Right to assistance of counsel are separate and distinct rights afforded to those accused of crimes. *Powell v. Alabama*, 287 U.S. 45 (1932), places a duty on judges to appoint counsel for indigent defendants. The right to counsel is an inherent fundamental right guaranteed by

[9] The situation here is distinguishable from those where indigent defendants, eligible for court-appointed counsel, choose to pay an attorney to represent them, or have family and friends pool money to pay an attorney on their behalf. However, the motion judge erroneously equates the two situations. *See* (A.16-17). Mr. Francis did not hire or retain Hrones, nobody paid Hrones on his behalf, and Mr. Francis did not waive his right to an attorney who would be paid to defend him. Had Mr. Francis known Hrones was not being paid, he would not have gone to trial with Hrones as his lawyer. (H.81-82)

Gideon v. Wainwright, 372 U.S. 355 (1963). Mr. Francis did not retain Attorney Hrones; he did not choose Hrones as his lawyer. The trial court failed in its duty to afford Mr. Francis the right to choose court-appointed, compensated counsel to assist him at his murder trial, or to accept the services of an uncertified volunteer lawyer. The trial court should have conducted a colloquy with Mr. Francis to make sure he was knowingly and intelligently waiving his right to court-appointed counsel, on these facts, before proceeding to trial with Hrones as Mr. Francis's lawyer. *pp. -15-23*

Mr. Francis was excluded from a sidebar discussion that took place at his arraignment during which the judge ruled Attorney Hrones would not be appointed by the court to try Mr. Francis's murder case, because the judge deemed Hrones to be unqualified for court appointment. It was then decided that Hrones would try the case for free. The significance of that decision, in light of the Sixth Amendment inherent fundamental right to counsel of one's choosing, made that arraignment sidebar a "critical stage" in the trial proceedings. *See Snyder v. Massachusetts*, 291

U.S. 97 (1934). Because Mr. Francis was excluded from that critical stage in his trial proceedings, his conviction cannot stand. *pp.23-31*

The right to counsel of one's choosing and the right to be present at critical stages of the trial proceedings are fundamental rights, unlikely to be waived freely. Violations of these rights amount to structural errors. *See U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012); *Snyder v. Massachusetts*, 291 U.S. 97; *and Weaver v. Massachusetts,* 137 S. Ct. ___ (2017). *pp.31-46*

If this Court does not rule in favor of Mr. Francis on the issues raised in this appeal, it should grant relief to Mr. Francis pursuant to G.L. c. 278, §33E in the interests of justice. Numerous errors and injustices occurred at the trial level. Evidence of guilt, while sufficient to sustain the verdict, was scant. Mr. Francis has spent more than thirty-seven years in prison for a murder he maintains he did not commit. Given the totality of this record, taking into consideration the punishment arrived at and served, along with the fundamental

unfairness of the trial proceedings which placed Mr. Francis at risk for wrongful conviction, this Court should set aside the verdict. *pp.46-48*

ARGUMENT

I. MR. FRANCIS'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHERE THE COURT PERMITTED AN ATTORNEY HE DID NOT RETAIN, DEEMED UNQUALIFIED TO TRY COURT-APPOINTED MURDER CASES, TO REPRESENT MR. FRANCIS FOR FREE, ABSENT A WAIVER COLLOQUY OR ANY INDICATION THAT MR. FRANCIS WAS MADE AWARE OF HIS RIGHT TO CHOOSE BETWEEN COMPENSATED COURT-APPOINTED COUNSEL AND AN UNPAID VOLUNTEER LAWYER.

A. Mr. Francis did not choose or retain Attorney Hrones, and the trial court did not inform Mr. Francis that Attorney Hrones was not a court-appointed lawyer.

As Mr. Francis has testified, and the motion judge has found to be true, Mr. Francis did not choose Attorney Hrones to represent him, and Hrones was not retained by the defendant or any member of his family. (H.94;A.25-26) As a poor teenager from a family with no money, Mr. Francis was entitled to choose court-appointed, paid counsel over non-appointed, *pro bono* counsel as a matter of basic and fundamental constitutional right. Violating a criminal defendant's right to choice of

counsel amounts to structural error because to do so affects "the very framework within which the trial proceeds." *Gonzalez-Lopez,* 548 U.S. at 150. *See Issue III infra.*

It was incumbent upon the court to ensure Mr. Francis understood he had a right to court-appointed counsel, paid to represent him by the state, that he was waiving. In other words, the trial court should have notified Mr. Francis of his right to either have appointed-counsel, approved to handle indigent murder cases in Massachusetts, or to accept Hrones' *pro bono* representation. The court did not do so. *Contrast Commonwealth v. Lacy* (where no fewer than three Superior Court judges (Tamburello, J., Roy, J. and Sullivan, J.) conducted colloquy with the defendant to make sure he knew that he was foregoing a court-appointed attorney before allowing him to proceed to trial with Hrones as *pro bono* counsel). (R.III.186-214) For as the motion judge has ruled, Mr. Francis "was totally unaware of the significance of the distinction between being represented by a court appointed lawyer or a private attorney appearing *pro bono*." (A.27) That is certainly a distinction every defendant, but

especially an indigent teenaged defendant standing trial for murder in the first-degree, should understand before moving forward. In fact, the Sixth Amendment requires it.

While there is nothing improper about *pro bono* representation, Mr. Francis did not choose to proceed to trial with unpaid counsel. (R.I.111-112,171,181-183,320-321) The arraignment judge was aware that Attorney Hrones, who offered to try the case for free, was not certified to try murder cases. In fact, the arraignment judge made a specific record at sidebar indicating he was on the committee that approved attorneys for court–appointed murder work, he knew from his own personal knowledge that trial counsel was not murder-certified despite numerous attempts by counsel to become so certified. (R.I.171,320-321)

This determination by the arraignment judge necessarily leads to the conclusion that Mr. Francis had a right to understand his option to have a more experienced, duly certified attorney who was accepted onto the panel of attorneys who were qualified to try murder cases. Whether Mr. Francis wanted to give up his right to court-appointed counsel and

proceed to trial with Attorney Hrones was his choice to make, not the Court's, and not Attorney Hrones's. An indigent man's right to defend himself against the power of the government, with a lawyer appointed to him that is compensated by the state, is the very essence of a fundamental right in the context of our criminal justice system. *See* Sixth Amendment, United States Constitution and *Powell*, 287 U.S. at 73.

The Commonwealth's focus on the Sixth Amendment guarantee of "assistance of counsel" is misplaced, and seemingly misunderstands the issue of depriving Mr. Francis of his right to choice of counsel. (R.II.50) The United States Supreme Court has interpreted the Sixth Amendment guarantee of the "assistance of counsel" to include the right to be represented by counsel of one's own choosing.[10] *See Gonzalez-Lopez*, 548 U.S. 140.

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[10] Even the dissent in *Gonzalez-Lopez* speaks of the right to choice of counsel, by acknowledging that "assistance of counsel necessarily mean[s] the right to have the assistance of whatever counsel ***the defendant*** was able to secure." 548 U.S. at 154 (Alito, J. dissenting) (emphasis added). In this case, Mr. Francis was deprived of his "ability to secure" the court-appointed attorney he was entitled to under *Gideon*. He was denied his right to court appointed counsel, because the

The phrase "assistance of counsel" encompasses the right of court-appointed counsel for indigent defendants who will be paid by the court for that representation. That is *Gideon's* promise. In this context, Mr. Francis's "choice of counsel" means:

> **a) the choice to proceed to trial with counsel who has failed to meet the murder panel certification requirements, yet is willing to represent you for free because he is motivated to use the representation as a vehicle to get on the court-appointed murder panel; or**
>
> **b) the choice to proceed to trial with counsel already certified by the Court as experienced enough to try your murder case and therefore will be paid by the Court to do so.**

This was a decision for Mr. Francis to make, and nobody else, consistent with due process protections, fundamental fairness, the right to counsel of one's choosing, and the promise of *Gideon*. Were his choice in this regard presented to him by the trial court in the terms described above, following a colloquy like the one conducted in *Lacy*, (R.III.186-214), Mr. Francis would not have proceeded to trial with non-certified, uncompensated counsel ineligible for court appointment. (H.81-82,94)

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court allowed a volunteer, that Mr. Francis never retained, to try his case instead. (R.I.162-163;H.94;A.25-26)

Mr. Francis worried that an attorney that the court refused to pay was "probably less qualified." (H.81-82,94) Those sentiments about Attorney Hrones, regarding his qualifications to try this case, were certainly strongly expressed at sidebar by the arraignment judge, who nevertheless did not inform the defendant of these concerns. (R.I.171,320-321) Further, in the *Lacy* case, Hrones himself stated on the record that *pro bono* murder cases were "very difficult" and presented "a tremendous hardship." (R.III.196)

Even if Hrones had convinced Mr. Francis (as he had convinced Lacy) to allow him to be his trial attorney, it was still the obligation of the trial court (as was recognized in *Lacy*) to inquire of Mr. Francis whether he wanted *pro bono* counsel, he did not retain, to represent him at his murder trial, and whether he understood he had a choice. It was incumbent upon the court make sure Mr. Francis understood the right he was giving up. The trial court's failure to do so failed to protect Mr. Francis's right in violation of the federal and state Constitutions.

B. The trial court failed in its duty to provide the indigent Mr. Francis with court-appointed counsel qualified to handle first-degree murder cases.

In 1932, the U.S. Supreme Court imposed a duty on all trial judges to appoint counsel for indigent citizens facing criminal charges. "The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him." *Powell*, 287 U.S. at 73. This is an inherent fundamental right. *Id.*

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law…. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "***that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard***…." *Holden v. Hardy*, [169 U.S. 366, 389 (1898)] In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.

Powell, 287 U.S. at 71-72 (emphasis added, further citation omitted).

But when the defendant is not choosing his own lawyer, and the Court is choosing his lawyer for him, the Court must choose a lawyer

experienced enough to handle the matter at hand, in this case a first-degree murder case, and compensate that lawyer accordingly. It was specifically because the Court had found Attorney Hrones was not an attorney of such experience that the judge specifically ordered that Attorney Hrones was not to paid with public funds for his representation of Mr. Francis. (R.I.171,320-321)

The promise of *Gideon* is the constitutional right that trumps and dwarfs all others. *See Gideon*, 372 U.S. 335. *Gideon's* promise is of a voice for the voiceless. It is a promise of equal justice, making it one of the most important rights in our entire criminal justice system. It requires that the Court appoint an attorney to an indigent defendant, unless the defendant chooses to proceed to trial with his own counsel, either privately retained and compensated, or retained *pro bono*- or chooses to proceed by representing himself. Mr. Francis did not elect to waive counsel, he did not retain Attorney Hrones, and he certainly did not choose Attorney Hrones as his volunteer lawyer. (R.I.111-112;H.94;A.25-26) Simultaneously, the arraignment judge found that

Attorney Hrones could not be appointed to represent defendants, like Mr. Francis, charged with murder. Thus, by permitting Attorney Hrones to represent Mr. Francis as a volunteer, the court neglected to appoint Mr. Francis counsel from a list of attorneys the court considered qualified to handle murder trials. Under *Powell* and *Gideon*, Mr. Francis's right to court-appointed counsel was violated.

II. THE EXCLUSION OF MR. FRANCIS FROM THE SIDEBAR WHERE ATTORNEY HRONES WAS PERMITTED TO REPRESENT HIM DENIED MR. FRANCIS HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE TRIAL PROCEEDINGS.

A. The trial court failed in its duty to provide Mr. Francis with a fair trial by excluding Mr. Francis from discussions and decision-making about whether the court would appoint Attorney Hrones to represent him at his murder trial.

It was the duty of the trial court to ensure Mr. Francis "was denied no necessary incident of a fair trial." *Powell*, 287 U.S. at 52. Surely, "an incident of a fair trial" entitles an indigent teenager standing trial for murder to appointment of counsel deemed qualified to try the case.

At a minimum, *Powell* required the trial court to fulfill its duty by ensuring Mr. Francis was informed that Attorney Hrones was not qualified for court appointment to his case and had offered to try the case for free because of his lack of qualifications. "The Sixth Amendment does not provide merely that a defense shall be made for an accused; it grants to the accused ***personally*** the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975) (emphasis added).

Everyone involved, except for Mr. Francis, knew his attorney was not certified to try indigent murder cases. (R.I.171,320-321) Mr. Francis was completely excluded from the discussions regarding his right to appointed counsel that were so germane to his right to choose how to defend himself against a first-degree murder charge. By denying Mr. Francis his right to participate in the sidebar proceedings at this "critical stage," the Court violated his rights under the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and his rights under Article Twelve of the

Massachusetts Declaration of Rights.

B. An attorney, not retained by an indigent defendant, asking the trial court for permission to try the defendant's first-degree murder case for free, and the trial court granting that request, constitutes a "critical stage" in the trial proceedings.

In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the United States Supreme Court assumed the Fourteenth Amendment assured the defendant to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* at 106. As the person most affected by the decision to proceed to trial with a *pro bono* attorney not permitted to be court-appointed to murder cases, Mr. Francis was entitled to at least as much information as known to the judge, who was permitting this arrangement, before deciding to forego the court-appointed counsel to which he was entitled. [11]

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[11] The evidence confirms no colloquy was conducted with Mr. Francis, nor was he informed by Hrones of the constitutional right he was forfeiting by foregoing court-appointed counsel. (R.I.111-112,171,317-318) The motion judge also made findings to this effect in his decision. (A.14, n.11)

If a hearing on a motion to suppress is considered to be a "critical stage" of the proceedings under Mass. R. Crim. Proc. 18(a),[12] *see Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 372 (2013), as is the right to be present at competency hearing and at trial and waiver of that right, *see Commonwealth v. L'Abbe,* 421 Mass. 262, 268 (1995), then there is no question that there is a right afforded an accused to be present when a decision is made to forego his Sixth Amendment right to court-appointed counsel and allow an uncertified attorney, who the defendant did not retain, to try his murder case for free. Mr. Francis did not waive his right to be present at this critical stage; indeed he had no idea what was even transpiring. (H.94)

Recently, this Court ruled:

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[12] Rule 18 does not define which court proceedings are critical, leaving the issue to judicial determination. Commentary to the rule explains that "fairness demands that the defendant be present when his substantial rights are at stake." Reporter's Notes to Rule 18. "Where a stage of the proceedings is deemed critical, the defendant's presence is required and the court is not to proceed in his absence without determining that he has effectively waived or forfeited the right to be present. *Taylor v. United States,* 414 U.S. 17 (1973)." *See Commentary to Rule 18(a).* Mr. Francis did not waive or forfeit his right to be present at the sidebar discussion where the decision for counsel was made for him, and his right violated.

> When a judge conducts an inquiry about a consequential matter, such as an allegation of serious misconduct of a juror or a suggestion of juror bias, the defendant is entitled, based on confrontation and fair trial rights, to be present. *Commonwealth v. Dyer*, 460 Mass. 728, 738 (2011) …. *See Commonwealth v. Angiulo*, 415 Mass. 502, 530 & n.26 (1993) (reversal required under art. 12 of Massachusetts Declaration of Rights where names of jurors were withheld and defendant and defense counsel were barred from *voir dire* regarding jurors' fear of defendant); *Commonwealth v. Robichaud*, 358 Mass. 300, 301–303 (1970) (reversal required under art. 12 where defendant was excluded from hearing on juror misconduct).

Commonwealth *vs.* Colon, No. SJC-12362, slip op. at 17 (May 3, 2019).

These Article Twelve violations, requiring reversal where the defendants were excluded, rise nowhere near the level of significance of the Sixth Amendment violation alleged in this case. This Court further discussed this issue as follows:

> While the trial judge may perform minor administrative formalities outside the presence of the defendant, . . . the judge may not bar the defendant from a *voir dire* during which jurors' impartiality may be discussed" (citation omitted). *Angiulo*, 415 Mass. at 530. *See, e.g., Commonwealth v. Dosanjos*, 52 Mass. App. Ct. 531, 535 (2001) ("serious error" for judge to exclude defendant from individual questioning of deliberating jurors); *Commonwealth v. Caldwell*, 45 Mass. App. Ct. 42, 45 (1998) (error where deliberating juror was dismissed during colloquy held outside defendant's presence).
>
> Counsel's presence at sidebar and intention to relay

> information to a defendant does not substitute for the defendant's presence.[13] *See Robichaud*, 358 Mass. at 301, 303 (counsel's presence insufficient in defendant's absence); *Dosanjos*, 52 Mass. App. Ct. at 535 (error despite counsel's presence); *Caldwell*, 45 Mass. App. Ct. at 45 (error notwithstanding counsel's presence). ... Indeed, this does not appear to be a case in which a defendant was "fully informed of everything that occurred" in his absence. ...

Colon, No. SJC-12362, slip op. at 17-18 (May 3, 2019).

If *Colon* is a case where this Court was concerned that the defendant was not "fully informed of everything that occurred" in his absence from a sidebar, then surely this Court must harbor similar concern that Mr. Francis was not "fully informed of everything that occurred" in his absence from his arraignment sidebar.

Also recently, this Court has stated that a defendant may waive his right to be present at a critical stage of the proceedings. Commonwealth *vs.* Fontanez, No. SJC-12469, slip. op. at 3 (Apr. 16,

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[13] In this case, there was no express intention on the part of Hrones to "relay information" from the arraignment sidebar to Mr. Francis. In fact, there is evidence that Hrones's intention was the opposite: he did not want Mr. Francis to find out that the court did not appoint him as counsel, for fear Mr. Francis would have fired him. (H.48-49)

2019) (case implicated fundamental constitutional rights that arise from an unusual fact pattern). Waivers are secured by colloquies.

In *Fontanez*, this Court referenced "a very short list of rights . . . that must be waived personally by a defendant and cannot be waived by his counsel." No. SJC-12469, slip. op. at 5. In showcasing that list, this Court cited *Commonwealth v. Amirault*, 424 Mass. 618, 632 (1997) and *Commonwealth v. Myers*, 82 Mass. App. Ct. 172, 182-183 (2012). *Id.*

Amirault notes that the following rights are not waivable by counsel, and must be waived personally by a defendant: *Commonwealth v. Pavao*, 423 Mass. 798, 802 (1996) (waiver of jury trial must be knowing and voluntary and come "directly from the defendant"); *Commonwealth v. Fernandes*, 390 Mass. 714, 715-718 (1984) (guilty plea must be voluntarily tendered by defendant aware of circumstances). *Amirault*, 424 Mass. at 651 n.23. In keeping with its prior precedent, this Court should find that absent a personal waiver by Mr. Francis, secured by colloquy, his right to court-appointed counsel in this case was not waivable.

On these facts, absent a colloquy that: 1) advised Mr. Francis of Hrones's proposal that Hrones try his case for free; 2) advised Mr. Francis he had a choice to accept the services of an uncertified volunteer or a court-appointed and paid lawyer; and 3) required Mr. Francis to make a knowing, voluntary and intelligent waiver of his right to court-appointed counsel before proceeding to trial with a volunteer lawyer, the trial court denied Mr. Francis his right to participate in the proceedings at a "critical stage" in violation of the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and under Article Twelve of the Massachusetts Declaration of Rights. *See Snyder*, 291 U.S. 97 and *Gideon*, 372 U.S. 335.

III. THE VIOLATIONS OF MR. FRANCIS'S CONSTITUTIONAL RIGHTS TO COUNSEL AND TO BE PRESENT AT A CRITICAL STAGE OF HIS PROCEEDINGS ARE STRUCTURAL ERRORS REQUIRING A NEW TRIAL.

Mr. Francis was unconstitutionally denied his right to choose to proceed to trial with court-appointed counsel who was murder certified, or to choose volunteer attorney Hrones, who he never retained, and who

was deemed unqualified by the trial court to try his case. This is a structural error that warrants a new trial. *Gonzalez-Lopez*, 548 U.S. 140 (denial of right to retained counsel of choice is structural error). "The right to select counsel of one's choice ... has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. "[T]he Sixth Amendment right to counsel of choice … commands not that a trial be fair, but that a particular guarantee of fairness be provided- to wit, that the accused be defended by the counsel he believes to be the best." *Id.* at 140 *citing Crawford v. Washington*, 541 U.S. 36, 61 (2004). "That right was violated here; no additional showing of prejudice is necessary to make the violation 'complete.'" *Id.*

It is the criminal defendant who absolutely controls the decision to waive constitutional rights, and that decision is routinely protected in our criminal justice system by the requirement of a knowing, intelligent and voluntary waiver by the defendant. *See, e.g., Commonwealth v. Lacy* (R.III.186-214).

Excluding Mr. Francis from the discussion and decision-making process regarding his right to choice of counsel, and his right to be represented by court-appointed counsel, was structural error requiring automatic reversal. *See Faretta*, 422 U.S. at 834 ("Personal liberties are not rooted in the law of averages. The right to defend is personal.") "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." *Gonzalez-Lopez*, 548 U.S. at 150, *citing Arizona v. Fulminante*, 499 U. S. 279, 282 (1991) (internal quotations omitted) (*Gideon* errors are structural defects). *See also Faretta*, 422 U.S. at 834 (respect for the individual is "the lifeblood of the law"), *citing Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J. concurring).

This is that rare case where the defendant's trial involved specific and unique circumstances, intruded upon a fundamental right in a dramatic way, violated core notions of fundamental fairness, and should therefore result in the reversal of the conviction.

The relatively recent Sixth Amendment jurisprudence embodied in the decisions of *Frye,* 566 U.S. 134 and *Lafler*, 566 U.S. 156, defeat the Commonwealth's misplaced lower court argument, *see* (R.II.50), and the trial court's similarly flawed legal analysis and analogy, *see* (A.16-17): the purpose of the right to counsel is not merely to ensure a fair trial. The fairness of the conviction and the reliability of the trial are not dispositive to the Sixth Amendment inquiry. The Sixth Amendment right to counsel is "not designed simply to protect the trial…." *Lafler*, 566 U.S. at 165. The Sixth Amendment has a fairness orientation when it ensures us our right to counsel.

Here, Mr. Francis had a constitutional right to court-appointed counsel, as provided by the Sixth Amendment. He was denied his right to be present at the critical stage in the process when his *Gideon* right was forfeited. Mr. Francis did not waive his substantial right under the Sixth Amendment to court-appointed counsel and choose Attorney Hrones instead. He did not retain Attorney Hrones. Denying him his right to choice of counsel amounts to a structural error. As Justice

Scalia so aptly stated, "To argue otherwise is to confuse the right to counsel of choice ... with the right to effective counsel which imposes a baseline requirement of competency on whatever lawyer is chosen or appointed." *Gonzalez-Lopez*, 548 U.S. at 148. Accordingly, no prejudice or harm need be shown, and the fact that trial counsel was "competent" and "not ineffective," *see* (R.II.50;A.16-17), is irrelevant. Because Mr. Francis never competently waived his right to court-appointed counsel, the Sixth Amendment stood as a jurisdictional bar to the judgment of conviction. *See Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938). He must receive a new trial.

A. The right to court appointed counsel due to indigency is a fundamental right that is unlikely to be waived freely.

In 1938, the United States Supreme Court recognized criminal defendants are unlikely to waive their Sixth Amendment right to counsel freely and voluntarily. *Zerbst*, 304 U.S. 458 (overruled in part on other grounds, *Edwards v. Arizona*, 451 U.S. 477 (1981)). Waiver requires not merely comprehension, but relinquishment of a known

right. *Brewer v. Williams*, 430 U.S. 387, 405-406 (1977) and *Edwards*, 451 U.S. at 482. For this reason, courts are to "indulge every reasonable presumption ***against*** waiver of fundamental constitutional rights" and not "presume acquiescence in the loss of fundamental rights." *Zerbst*, 304 U.S. at 464 (emphasis added). In light of this presumption, doubts must be resolved in favor of protecting the constitutional claim, and any waiver of a defendant's right to counsel invokes the protection of the trial court and must be shown to be knowing and intelligent. *Id.* at 464-465. (emphasis added) Such a waiver is defined as the "intentional relinquishment or abandonment of a known right." *Id.* at 464. While an accused may waive his right to counsel, a proper waiver should be secured by the trial court. It would be fitting and appropriate for that waiver to appear upon the record. *Id.* at 465. *See, e.g., Lacy Colloquy at (R.III.186-214).*

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

Zerbst, 304 U.S. at 464.

"Where the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made." *Moore v. Michigan*, 355 U.S. 155, 161 (1957*)*, *citing Zerbst*, 304 U.S. at 464; *Glasser v. U.S.*, 315 U.S. 60, 70 (1942); *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948). "To be valid, the waiver must be voluntary, and there must be an informed and intentional relinquishment of a known right." *Commonwealth v. Torres*, 442 Mass. 554, 571-572 (2004), *citing Brewer*, 430 U.S. at 404.

> In evaluating the validity of a waiver, a court is to consider the "totality of the circumstances" under which it was made ... indulging "in every reasonable presumption against" it. ... ***The Commonwealth bears the burden of proving a valid waiver beyond a reasonable doubt.***

Commonwealth v. Anderson, 448 Mass. 548, 554 (2007) (emphasis added, internal citations omitted). In this case, the Commonwealth has produced no evidence of a valid waiver.

Although only nineteen, Mr. Francis was familiar with appointment of counsel due to indigency. As the Commonwealth pointed out at the trial court level, this was not his first experience with the

criminal justice system; he had some prior knowledge of his rights. (R.II.52) When Mr. Francis was charged in this case and Attorney Hrones, a lawyer he did not retain, showed up to represent him, he reasonably assumed based upon his prior experience that Hrones was his court-appointed, certified, paid lawyer. No defendant, including this one, would be likely to freely waive his right to an attorney deemed qualified to try murder cases, and instead accept the services of a volunteer he did not retain. This is a right of a fundamentally important nature solidly ingrained in our law. *Moore*, 355 U.S. at 161.

Moreover, Mr. Francis's right to be furnished counsel did not depend upon a request. *See, e.g., Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (overruled on other grounds by *Montejo v. Louisiana*, 556 U.S. 778 (2009) (as distinguished from a 5th Amendment right to counsel for purposes of interrogation, which must be invoked).

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society.

> Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before
> impartial tribunals in which every defendant stands equal before the law.

Gideon, 372 U.S. at 344.

Gideon has been cast as the paradigmatic example of structural error. As such, it is a claim "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Chapman v. California*, 386 U.S. 18, 43 (1967). Violating a defendant's choice of counsel rights amounts to structural error requiring automatic reversal because it affects "the very framework within which the trial proceeds." *Gonzalez-Lopez,* 548 U.S. at 150.

The trial court abused its discretion where it erroneously denied

Mr. Francis a new trial by adopting the Commonwealth's flawed legal analysis and ruling a failure to claim or demonstrate ineffective assistance in this context is dispositive. (R.II.50;A.16-17) *See Frye*, 566 U.S. 134 and *Lafler*, 566 U.S. 156. No prejudice or harm need be shown, and the fact that trial counsel was not ineffective is irrelevant. Mr. Francis is entitled to a new trial.

B. The right to be present at a critical stage of one's trial is a fundamental right unlikely to be waived freely.

"The right to be present derives from the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, and art. 12 of the Massachusetts Declaration of Rights." *Robinson v. Commonwealth*, 445 Mass. 280, 285 (2005). "It is a fundamental right, and waiver of it is not lightly presumed." *Campbell*, 83 Mass. App. Ct. at 372.

Mr. Francis was not present at the sidebar where the discussion took place regarding the circumstances under which Attorney Hrones would represent him. Hrones was not an attorney Mr. Francis had

retained to represent him. His presence at that sidebar, held off the record, was essential, and no criminal defendant, including this one, would be likely to freely waive his right to participate. At no time was the content of that sidebar discussion placed on the record, in open court, where Mr. Francis could hear it and participate in it. (R.I.111-112,171, 320-321) The trial court failed in its duty to insure Mr. Francis "was denied no necessary incident of a fair trial." *Powell*, 287 U.S. at 52.

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745–746 (1987). *See also Snyder*, 291 U.S. at 107-08.

Attorney Hrones injected himself into the proceedings, volunteered to try the case for free, and by doing so hoped to increase his chances of achieving his career goal of murder panel appointment. That is certainly information Mr. Francis was entitled to have, and he would not likely have freely waived, his right to receive it.

C. ***Weaver* confirms these violations are structural errors of the type requiring automatic reversal.**

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." For the same reason, a structural error "def[ies] analysis by harmless error standards."

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), *citing Fulminante*, 499 U.S. at 309-310.

In *Weaver*, the United States Supreme Court lists three structural errors that result from denying a criminal defendant his right to counsel of his own choosing. Mr. Francis alleged through his new trial motion that the errors committed in his case touch upon all three.

First, the right at issue "is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. "This is true of the defendant's right to conduct his own defense, which, when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.'" *Id., quoting McKaskle v. Wiggins*, 465 U.S. 168, 177, n.8 (1984). "That right is based on the fundamental legal principle that a defendant must be allowed to

make his own choices about the proper way to protect his own liberty." *Id., citing Faretta*, 422 U.S. at 834. "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. *Id., referencing Gonzalez-Lopez*, 548 U.S. at 149, n.4.[14]

For many reasons, a first-degree murder defendant may not want to have an attorney trying his case for free, not the least of which are the specific concerns Mr. Francis expressed at his evidentiary hearing and through his supplemental affidavit in support of his new trial motion. (H.81-82;R.III.122-124) It was for Mr. Francis to decide how to best "protect his own liberty." *Id., citing Faretta*, 422 U.S. at 834.

Second, the error here is structural because "the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his own attorney, the precise 'effect of the violation cannot be ascertained.'" *Id., citing Gonzalez-Lopez*, 548 U.S. at 149, n.4, *and quoting Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

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[14] This legal precedent reiterated in *Weaver* further defeats the Commonwealth's assertion that because trial counsel was an experienced trial attorney, there was no harm resulting from his *pro bono* representation of Mr. Francis. (R.II.48)

"Because the government will find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' *Chapman* [386 U.S. at 24], the efficiency costs of letting the government try to make the showing are unjustified." *Weaver*, 137 S. Ct. at 1908. Where a defendant foregoes his right to court-appointed counsel and hires his own attorney, he is making a choice of counsel. Mr. Francis made no such choice; he never retained Attorney Hrones. (A.26) The effects of this error are structural; they are too hard to measure. *See id.*

Third, the error here is structural because the indigent defendant was denied his right to accept or reject court-appointed counsel. Such a denial "always results in fundamental unfairness." *Id., citing Gideon*, 372 U.S. at 343-345. "It would be futile for the government to try and show harmlessness." *Id.* The right to court-appointed counsel attached at the time the indictment was returned, and the Sixth Amendment and Article Twelve conferred the right to assistance of counsel. *Anderson*, 448 Mass. at 554. Mr. Francis's Sixth Amendment claims do not fit neatly into any of the three categories of structural error, and

according to the *Weaver* Court, it is not necessary that they do so:

> These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural.

Weaver, 137 S. Ct. at 1908. In *Weaver*, the public trial violation was deemed structural, but for a reason other than fundamental unfairness. Because "the public trial right is subject to some exceptions, not every public trial violation results in fundamental unfairness." *Id.*

By contrast, depriving Mr. Francis of his rights to: 1) choose court-appointed counsel or retain his own attorney; and 2) be present at a proceeding where that decision was considered and ruled upon by the court, resulted in fundamental unfairness. *See id.*

The violation here was a Sixth Amendment violation that pervaded the entire trial. *Id.* As a matter of state law, the constitutional right to counsel dates back to 1780, and it is included within the due process rights of the Fourteenth Amendment. *Id.* at 61, *citing* MA Declaration of Rights, Articles Twelve and Sixty-Eight. Mr. Francis does not claim ineffective assistance of counsel. Trial counsel's

performance is irrelevant to the analysis. The error was committed by the trial court. Because the trial court was responsible for the structural error, it was not "deprived of the chance to cure the violation." *Contrast Weaver*, 137 S. Ct. at 1912. Unlike *Weaver*, here the trial participants "failed to approach their duties with the neutrality and serious purpose that our system demands." *Id.* Mr. Francis is entitled to a new trial.

IV. THIS COURT SHOULD EXERCISE ITS AUTHORITY PURSUANT TO G.L. c. 278, §33E TO ORDER A NEW TRIAL.

If this Court does not rule that Mr. Francis is entitled to a new trial based upon the arguments set forth above, he asks that the violations alleged herein be reviewed pursuant to G.L. c. 278, §33E along with all the other assignments of error and grounds for relief he forwarded in his unsuccessful Rule 30(b) motion. (R.I.16-323)

This is a 1982 first-degree murder conviction where sufficient, but scant, circumstantial evidence connected the defendant to the crime. Mr. Francis unsuccessfully forwarded a post-conviction innocence claim in the trial court, where he argued, *inter alia*, that the Commonwealth withheld exculpatory evidence. (R.I.60-73)

There was no forensic evidence connecting the defendant to this crime, he made no incriminating statements, and there were no eyewitnesses to the murder. Unreliable stranger identification testimony, that was central to the prosecution's evidentiary presentation, could not be challenged at the time of the 1982 trial in the way it could be challenged in a trial today. The law affords Mr. Francis no relief, however, because favorable changes in the law regarding identification are applied prospectively only, *Commonwealth v. Gomes*, 470 Mass. 352, 376 (2015), and the motion judge deemed the claim waived. (R.I.67-78; A.17-18)

Mr. Francis was convicted with the use of improper, prejudicial and inadmissible testimony by a prosecution witness called solely for the purpose of impeachment by prior inconsistent statements in violation of *Commonwealth v. Maldonado*, 766 Mass. 742, 758 (2014). In addition, a witness was allowed to testify as to his certainty of his identification of Mr. Francis, which is a leading cause of wrongful convictions. *See, e.g, Garrett, Convicting the Innocent, Where Criminal Prosecutions Go Wrong (2001).*

Exacerbating the prejudice Mr. Francis suffered from the unreliability of the stranger eyewitness identification, the trial judge improperly instructed the jury on the nature of memory, *see Commonwealth v. Kater*, 388 Mass. 519, 527-528 (1983), and the prosecutor improperly vouched for one of his key witnesses in his closing argument. *See Commonwealth v. Olszewski*, 401 Mass. 749 (1988). The witness the prosecutor vouched for was a defense focus at trial as a third-party culprit. The motion judge also dismissively dispensed with all of these claims on waiver grounds. (R.III.231-232;A.17-18)

Accordingly, pursuant to G.L. c. 278, §33E, should this Court deny relief to Mr. Francis on the claims he forwards, he alternatively asks that this Court afford him the relief he seeks pursuant to G.L. c. 278, §33E.

Conclusion

For all of the foregoing reasons, this Court should grant Kevin Francis a new trial.

Respectfully Submitted,
KEVIN FRANCIS
By his attorneys,

Amy M. Belger

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AMY M. BELGER
B.B.O. No. 629694
841 Washington Street
Holliston, MA 01746
508-893-6031
appellatedefender@gmail.com

Ira L. Gant

_____

IRA L. GANT
B.B.O. No. 678706
Innocence Program
Committee for Public
Counsel Services
21 McGrath Highway
Somerville, MA 02143
617-607-5771
igant@publiccounsel.net

May 23, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R.A.P.

16(a)(6) and (13), 16(e), 16(f), 18, 20 and 21. The length limit was ascertained by automated word count using Microsoft Word Version 16.24, and the word count totaled 8629 words.

Amy M. Belger

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief and its accompanying three-volume record appendix was served on ADAs Dara Kesselheim and Craig Iannini, Office of the Suffolk County District Attorney, 1 Bulfinch Place, Boston, MA 02114 on May 23, 2019 via electronic mail.

Amy M. Belger

INDEX TO ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2018-0129

Suffolk Superior Court
No.8184CR37342

COMMONWEALTH

v.

KEVIN FRANCIS

HEARING NOTICE

This matter is scheduled for hearing before the Court (Gants, C.J.) on Tuesday, August 28, 2018 at 2:30 PM in Courtroom Two.

The single justice believes that the following factual questions need to be answered before the single justice can rule on the defendant's gatekeeper petition. At the hearing, please be prepared to advise the single justice whether the answers to these questions can be resolved through stipulation, or require remand to the Superior Court for further factual findings and, possibly, a further evidentiary hearing.

1. On or about January 8, 1982, when Mr. Hrones filed an appearance to represent the defendant as his private attorney, had he been retained by the defendant or any member of his family?

2. Did the defendant believe at the time of arraignment that the court had appointed Mr. Hrones to represent him as his attorney? If so, when and how did the defendant learn that the court had not appointed Mr. Hrones?

3. Did the defendant believe at the time of arraignment that Mr. Hrones was being paid by the court to represent him? If so, when and how did the defendant learn that Mr. Hrones was representing him pro bono?

By the Court,

Assistant Clerk

ENTERED: August 24, 2018

ERK'S NOTICE	DOCKET NUMBER 8184CR37342	**Trial Court of Massachusetts** **The Superior Court**
CASE NAME: **Commonwealth vs. Kevin S Francis**		Maura A. Hennigan, Clerk of Court
TO: Amy Belger, Esq. Law Office of Amy M. Belger 841 Washington St Holliston, MA 01746		COURT NAME & ADDRESS Suffolk County Superior Court - Criminal Suffolk County Courthouse, 14th Floor Three Pemberton Square Boston, MA 02108

You are hereby notified that on 11/09/2018 the following entry was made on the above referenced docket:

Findings of Fact and Rulings of Law:

in response to the court order of remand from the Supreme Judicial Court for Suffolk County

Judge: Kaplan, Hon. Mitchell H

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
11/09/2018	**Hon. Mitchell H Kaplan**	**(617)788-8160**

Date/Time Printed: 11-09-2018 11:26:35

SCR016\ 06/2014

UNITED STATES CONSTITUTION

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

MASSACHUSETTS DECLARATION OF RIGHTS

Article XII

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article XXVIII

No person can in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.

MASSACHUSETTS GENERAL LAWS

G.L. c. 278, §33E:. In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 18(a) Presence of defendant

In any prosecution for crime the defendant shall be entitled to be present at all critical stages of the proceedings.

Rule 30 (b) New Trial

The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion

the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. 12683

KEVIN FRANCIS
Petitioner/Appellant
v.
COMMONWEALTH
Respondent/Appellee

ON APPEAL FROM A JUDGMENT AND DENIAL OF
A NEW TRIAL MOTION IN
THE SUFFOLK SUPERIOR COURT
PURSUANT TO G.L. CHAPTER 278, §33E

BRIEF
OF THE PETITIONER/APPELLANT

SUFFOLK, SS.