No. 20-

IN THE

Supreme Court of the United States

KEVIN FRANCIS,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Massachusetts Supreme Judicial Court erred when it held that a public defender case screener who did not represent the defendant waived the defendant's meritorious Sixth Amendment claim in the course of the screening process?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner herein, who was the defendant-appellant below, is Kevin Francis. The respondent herein, which was the appellee below, is the State of Massachusetts. Neither party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the Supreme Judicial Court of Massachusetts and the Suffolk County Superior Court:

Francis v. *Commonwealth*, No. 12682 (Mass. June 24, 2020), *reconsideration denied* Aug. 6, 2020

Commonwealth v. *Francis*, No. SUCR1981-037342 (Suffolk Cty. Sup. Ct. Nov. 8, 2018)

There are no other proceedings in state or federal trial or appellate courts, or in this Court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Francis respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 147 N.E. 3d 491 and is reproduced in the appendix to this petition at Pet. App. 1a–76a. The findings of facts and conclusions of law of the trial court below are unpublished, reproduced at Pet. App. 77a–100a.

JURISDICTION

The Massachusetts Supreme Court issued its opinion on June 24, 2020. Pet. App. 1a–76a. It denied a motion for reconsideration on August 6, 2020. *Id.* at 101a–103a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the U.S. Constitution provides:

> 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.

INTRODUCTION

The Commonwealth of Massachusetts allowed an unqualified volunteer to represent nineteen-year-old Kevin Francis at his first-degree murder trial without Mr. Francis's consent and without informing Mr. Francis that he had the right to qualified court-appointed counsel. As the Massachusetts Supreme Judicial Court recognized, there is no question that this clandestine arrangement violated Mr. Francis's Sixth Amendment rights and constitutes structural error. See Pet. App. 19a–20a.

Nonetheless, the 4–3 majority below held that a private attorney working as case screener who did not represent Mr. Francis waived Mr. Francis's meritorious claim by failing to spot the Sixth Amendment violation in a screening process that led the public defender not to appoint counsel for Mr. Francis's appeal. That holding cannot be correct. As the dissent explained, it would be patently "unreasonable" to say a "defendant waives a claim because an attorney reviewed the file in his case but ultimately decided not to represent him." *Id.* at 54a–55a (Gants, C.J., & Budd, J. dissenting in part). Yet that is the precisely the kind of third-party waiver the decision below permits.

The decision below warrants the Court's immediate attention because it establishes a novel and dangerous precedent that a third party can waive the Sixth Amendment rights of an indigent criminal defendant. Finding waiver in these circumstances so departs from the usual course of judicial proceedings, that it warrants this Court's review, if not summary reversal. To be sure, this Court does not sit to correct errors, but an error by a state high court that establishes a third-party waiver precedent for criminal defendants' right

to counsel falls squarely among the types of cases this Court decides to review. See*, e.g.*, *Holmes* v. *South Carolina*, 547 U.S. 319 (2006) (reversing the South Carolina Supreme Court's application of an evidence rule); *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (reversing the Arkansas Supreme Court's decision on rehearing when its Fourth Amendment application was "flatly contrary to this Court's controlling precedent"). Because case screening is an increasingly common feature of the criminal justice system, it is critical that the Court reverse the decision below before the concept of third-party waiver takes root.

STATEMENT OF THE CASE

A. The Trial Judge Permitted an Uncompensated Volunteer to Represent Mr. Francis Without Mr. Francis's Knowledge or Consent.

In 1982, a Massachusetts trial judge permitted attorney Stephen Hrones, an uncompensated volunteer, to represent the nineteen-year-old Kevin Francis at his first-degree murder trial without Mr. Francis's consent and without informing Mr. Francis that he had the right to qualified, court-appointed counsel. See Pet. App. 19a (holding that Mr. Francis had the Sixth Amendment "right to choose between an appointed attorney and counsel who had offered his services for free").

On multiple occasions, Hrones had applied to join the list of attorneys who could be court-appointed in murder cases, but the authorizing judicial panel had rejected him every time. *Id.* at 8a. Undeterred, Hrones staked out arraignment sessions to volunteer his services in first-degree murder cases. *Id.* In this case, Hrones appeared at Mr. Francis's arraignment and privately approached the judge and prosecutor at a

sidebar—out of the presence and earshot of Mr. Francis—to see if he could be appointed to the case. *Id.* The arraignment judge was the chairman of the judicial panel who had rejected Hrones's applications and accordingly refused to appoint him as counsel, citing Hrones's lack of requisite experience. *Id.* Still at sidebar, and without consulting with Mr. Francis, Hrones volunteered to try the case for free. *Id.* at 11a. The arraignment judge agreed but noted for the record "that at no time throughout the trial should any judge consider paying [Hrones] out of public funds." *Id.* at 8a. When the sidebar concluded, no one consulted Mr. Francis or informed him of the arrangement. Hrones entered his appearance as Mr. Francis's counsel, and by all appearances, especially to Mr. Francis, he was court appointed public counsel. *Id.*

The Commonwealth also benefited from this arrangement. Mr. Francis had the Sixth Amendment right to court-appointed, publicly funded counsel. But with Hrones willing to try the case for free, the Commonwealth no longer had to foot the bill. Nor did the Commonwealth have to face a trial adversary appointed from the ranks of qualified, court-approved first-degree murder trial attorneys. Although it would have been lawful for Mr. Francis to exercise an informed choice between Hrones's pro bono services and the services of a qualified court-approved attorney, constitutionally, the "[trial] court [could]not appoint [volunteer] private counsel, and that is what the court did here." *Id.* at 21a.

B. Mr. Francis Was Kept "In The Dark" Through Direct Appeal of His Conviction.

Nine months later, a jury convicted Mr. Francis and he was sentenced to life imprisonment without the possibility of parole. *Id.* at 8a. Hrones remained as

counsel for the direct appeal of Mr. Francis's conviction, which the Supreme Judicial Court affirmed the following year. *Id.* at 28a. At no point during the trial or direct appeal did Mr. Francis have an opportunity to challenge this Sixth Amendment choice-of-counsel violation, and at no point did he have effective counsel to assist him in raising the claim. Throughout the entire post-conviction timeline, Mr. Francis had no idea what had transpired at sidebar during his arraignment in 1982. As Hrones would later testify, he specifically "did not want the defendant to know he was trying the case for free because he did not want the defendant to fire him." *Id.* at 11a. The Supreme Judicial Court found that Hrones "kept the defendant in the dark." *Id.* at 30a.

C. Two CPCS Case Screeners Who Did Not Represent Mr. Francis Failed to Recognize His Meritorious Sixth Amendment Claim.

Mr. Francis filed a motion for new trial in May 1991 pursuant to Massachusetts Criminal Procedure Rule 30 and requested that counsel be appointed to help him pursue collateral relief. Pet. App. 82a. The superior court endorsed Mr. Francis's motion in March 1992 and issued an Order requesting that the Committee for Public Counsel Services ("CPCS" or "the public defender office") appoint counsel to Mr. Francis. *Id.* at 128a.

CPCS is limited by law to providing representation only when "the laws of the Commonwealth or the rules of the supreme judicial court" require it. *Id.* at 96a–97a. However, judges sometimes endorse the appointment of counsel when there is no such right. *Id.* So instead of automatically assigning counsel, CPCS uses a "screening" system that exists to this day: it pays pri-

vate counsel to review post-conviction cases on collateral review and then "advise the chief counsel [of CPCS] whether or not counsel should be appointed." *Id.* at 132a.

In September 1992 CPCS hired a private attorney, James Sultan, to screen Mr. Francis's case for CPCS and advise CPCS whether to appoint counsel. *Id.* In January 1993, Sultan recommended against providing counsel. He noted that the arraignment judge "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." But Sultan did "not believe that this circumstance would entitle Mr. Francis to any relief" without proof of ineffective assistance of counsel. *Id.* at 143a. Adopting Sultan's recommendation, CPCS declined to provide representation, forcing Mr. Francis to litigate his new trial motion without the assistance of counsel. *Id.* at 9a. Because Mr. Francis still believed Hrones was court-appointed, Mr. Francis did not raise the choice-of-counsel violation in his new trial motion. *Id.* The court denied Mr. Francis's motion in September 1993. *Id.*

Mr. Francis wrote to the CPCS Innocence Program in 1999 maintaining his innocence and again requesting post-conviction screening counsel. *Id.* at 202a–203a. Francis's letter responded to an inquiry on the CPCS Innocence Program Intake Form about whether his trial counsel was privately retained or court appointed, to which Mr. Francis wrote "Court appointed." *Id.* at 10a. CPCS assigned the case to a second screening attorney in 2000, who advised CPCS to decline to appoint counsel based on a screening that consisted of nothing more than a review of Mr. Francis's *pro se* new

trial motion and the trial transcripts. *Id.* CPCS accepted that recommendation and once again declined to appoint counsel. The first and second screeners never represented Mr. Francis, and only advised CPCS whether to appoint counsel. See *id.* at 54a (Gants, C.J., & Budd, J. dissenting in part).

D. CPCS Appointed Counsel to Mr. Francis Only After a Third Screener Identified the Sixth Amendment Violation.

In 2012, a third screener reviewed the entirety of the record, saw the Sixth Amendment choice-of-counsel violation, and in 2013, recommended that CPCS appoint counsel to Mr. Francis to pursue this claim. *Id.* at 109a. CPCS adopted the recommendation and appointed the third screener as counsel for Mr. Francis, who then filed a new trial motion pursuant to Rule 30 in 2015. *Id.* at 34a.

The trial court held an evidentiary hearing on Mr. Francis's new trial motion in January 2018. At that hearing, Hrones testified to the substance of the sidebar and stated that "it was his practice to find arraignments in cases of murder." *Id.* at 11a. Mr. Francis also testified and confirmed he had always believed Hrones was court-appointed up until his current counsel had explained otherwise. *Id.* Mr. Francis further testified "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." *Id.*

The trial judge denied Mr. Francis's new trial motion the next month, finding "no constitutional right to court appointed counsel that the defendant has unwittingly waived." *Id.* at 12a. Mr. Francis filed for leave to appeal to the Massachusetts Supreme Judicial Court under G. L. c. 278, § 33E, arguing the alleged choice-

of-counsel violation was both "new and substantial" as required by the Commonwealth's statute governing collateral review of capital cases. *Id.* at 15a. Chief Justice Gants first remanded for additional findings of fact, most notably confirming 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" until his present counsel advised him otherwise. *Id.* at 14a. The Supreme Judicial Court granted the § 33E petition in February 2019. *Id.* at 199a.

E. The Massachusetts Supreme Judicial Court Unanimously Found a Violation of Mr. Francis's Sixth Amendment Rights But a Majority Concluded that CPCS Case Screeners Waived the Claim.

The Supreme Judicial Court unanimously found the Commonwealth had violated Mr. Francis's Sixth Amendment choice-of-counsel right in 1982. Pet. App. 20a. As the majority explained: "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." *Id.* "The court cannot appoint private counsel, and that is what the court did here." *Id.* at 21a.

Next, the majority "conclude[d] that the constitutional error here was the type of structural error identified in [*United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006),] even though it did not render the trial itself an unreliable vehicle for determining guilt or innocence." *Id.* at 28a–29a. "[T]he error here fell into the category of structural error with subtle, widespread effects. . . .

Any comparison of Hrones's performance and that of counsel on the list qualified to try murder cases would be speculative." *Id.* at 28a. The majority did not fault Mr. Francis for Hrones's failure to raise the violation on direct appeal because Hrones "kept the defendant in the dark." *Id.* at 30a. Accordingly, Mr. Francis's 1991 *pro se* motion was the first opportunity for error-correcting review, though the majority did not acknowledge this point.

Relying upon its state rule for post-conviction collateral review, which requires a defendant to assert "[a]ll grounds for relief. . . in the original or amended motion," and cautions that "[a]ny 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.* at 56a (Gants, C.J., & Budd, J. dissenting in part) (emphasis added), the majority ruled Mr. Francis had waived his choice-of-counsel claim.

The majority noted that the transcript of the arraignment "was available" to Mr. Francis when he filed his *pro se* motion in 1991. *Id.* at 4a–5a. Even though CPCS's actions (in contravention of the trial court's order to appoint) denied Mr. Francis assistance of counsel to develop this legally nuanced claim, the majority reasoned that Mr. Francis's "failure to raise the issue in his first motion for a new trial. . . resulted in the passage of more time and made retrial more difficult," such that a finding of waiver was appropriate. *Id.* at 42a. But the majority "[did] not rely on the defendant's conduct alone in finding waiver." *Id.*

Instead, the majority expressly concluded that CPCS waived Mr. Francis's claim through its screening process, noting "the case's long history with CPCS, and

the availability of the transcript revealing the problem with Hrones's appointment for decades." *Id.* at 42a–43a. In other words, the majority found waiver because the transcript was available to CPCS screeners in 1992 and 2000 when they investigated whether CPCS should provide Mr. Francis with representation at all. The court determined that "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." *Id.* at 43a–44a. Thus, the majority "consider[ed] it appropriate to conclude that the choice-of-counsel issue ha[d] been waived." *Id.* at 44a.

Because the majority held that Mr. Francis's choice-of-counsel claim was waived, it analyzed whether this violation resulted in a "substantial risk of a miscarriage of justice." *Id.* at 35a. The majority interpreted this standard as "no less protective" than the standard of review in *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017), and cited from *Weaver*: "[A] reasonable probability of a different outcome but for counsel's failure to object." Pet. App. 36a. The majority called Hrones "an experienced criminal defense lawyer" without acknowledging the repeated rejections of his application to the standing list of approved counsel in murder cases at the time of Mr. Francis's trial. *Id.* at 37a. Moreover, the majority observed that "no issue of ineffective assistance of counsel has been raised in this appeal," which in part culminated in its finding of no "probability of a different outcome or fundamental unfairness as defined by the Supreme Court." *Id.*

F. Three Dissenting Justices Rejected the Majority's Novel Finding of Third Party Waiver.

Three justices dissented in two opinions. Chief Justice Gants, joined by Justice Budd, took issue with the majority's reliance on the actions of CPCS screeners to

find waiver. The dissent explained that CPCS "did not represent [Mr. Francis] at the time they conducted the screening," so "their failure to spot and raise this issue cannot reasonably be held against him." *Id.* at 54a. The dissent also argued that the majority's finding would "impose[] on CPCS an unjustified and profound dilemma in deploying its limited screening resources" if the screening function always "risk[s] waiver of an issue its screeners failed to spot." *Id.* at 55a.

Chief Justice Gants and Justice Budd added that Mr. Francis had not waived his claim because of any delay, emphasizing that "[t]he mere passage of time, however, even a lengthy period of time, does not amount to a waiver." *Id.* at 51a. They also argued that the majority was unreasonable to expect Mr. Francis to raise these issues *pro se*. It was "perfectly understandable . . . to conclude that [Mr. Francis], without the benefit of counsel and with no apparent legal training, could not at that time have perceived, much less appreciated the significance of" the choice-of-counsel violation. *Id.* at 58a. Accordingly, neither basis of the majority's reasoning could underlie waiver.

Justice Lenk also dissented and argued that this kind of choice-of-counsel violation had not yet been recognized prior to *Gonzalez-Lopez*, such that Mr. Francis could not be faulted for failing to raise the claim. Justice Lenk agreed that Mr. Francis could not be faulted for his direct appeal when represented by Hrones, and as to his *pro se* motion, "the state of the law in 1991 suggested that [Mr. Francis] had no claim at all." *Id.* at 66a. Both Massachusetts and federal law at the time "suggested that indigent defendants had no say in the matter of appointed counsel." *Id.* Even the trial judge reviewing this motion was "an experienced jurist [who] treated the issue . . . as previously unexplored

territory." *Id.* at 68a. Justice Lenk therefore applied Massachusetts's state law clairvoyance exception to procedural waiver. *Id.* at 66a.

Justice Lenk also rejected the majority's application of the substantial risk of a miscarriage of justice standard. Justice Lenk argued the majority had misinterpreted *Weaver* by failing to consider the issue of fundamental unfairness and instead solely analyzing the effect on the jury's verdict. *Id.* at 71a. She cited *Gonzalez-Lopez* for the proposition that it is inherently problematic to counterfactually analyze a jury verdict when the structural error is a choice-of-counsel violation—such analysis would involve a "speculative inquiry into what might have occurred in an alternate universe." *Id.* at 74a (quoting *Gonzalez-Lopez*, 458 U.S. at 150). Furthermore, this inquiry necessarily "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." *Id.* at 526. Accordingly, the dissent concluded that the proper interpretation of *Weaver* also must weigh the structural error's "impact on the administration of justice itself," a consideration missing from the majority opinion. *Id.* at 75a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS A DANGEROUS AND NOVEL PRECEDENT PERMITTING THIRD PARTIES TO WAIVE THE SIXTH AMENDMENT RIGHTS OF INDIGENT CRIMINAL DEFENDANTS

The decision below "invent[s] a new and distinct ground for waiver" based on a third party screening process. Pet. App. 55a (Gants, C.J., & Budd, J. dissenting in part). It concludes that CPCS private attorney

case screeners waived Mr. Francis's meritorious Sixth Amendment at a time when CPCS did not represent Mr. Francis. As the dissent below explained, "CPCS staff counsel, when screening the defendant's case in 1992-1993 and 2000, were deciding *whether* CPCS would [appoint counsel to] represent him; they *did not represent him* at the time they conducted the screening, and their failure to spot and raise [the choice-of-counsel] issue cannot reasonably be held against him." *Id.* at 54a (Gants, C.J., & Budd, J. dissenting in part) (emphasis added). Nevertheless, the Supreme Judicial Court "[did] not rely on the defendant's conduct alone in finding waiver," but instead relied explicitly on CPCS screening. *Id.* at 42a. That cannot be correct. The CPCS screening was an internal process. Because CPCS did not represent Mr. Francis at the time of the screening, CPCS could not waive Mr. Francis's rights.

The Court's precedents are clear on this point. The Sixth Amendment right to effective counsel guarantees that a defendant has counsel representing his interests alone. *Penson* v. *Ohio*, 488 U.S. 75, 86–87 (1988) ("[T]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client."). And no one—not the Commonwealth, not CPCS, not even the Supreme Judicial Court—claims that CPCS or its screeners represented Mr. Francis. See Pet. App. 43a (recognizing that CPCS had not accepted the case or appointed counsel). Instead, the court below implicitly rejected the premise that representation is prerequisite to waiver. The court decided that CPCS screening created sufficient incidental benefits for Mr. Francis to justify a holding of waiver, concluding that CPCS "alone controls the public counsel appointment process, and ultimately decides whether a case will be taken." *Id.*

This conclusion raises grave constitutional concerns. The Sixth Amendment requires attorneys to be "single-minded advoca[tes]" for their clients. *Penson*, 488 U.S. at 87. Here, CPCS screening cannot constitute waiver because CPCS and Mr. Francis had conflicting interests, and CPCS representing both conflicting interests therefore violates the Sixth Amendment. See *Glasser* v. *United States*, 315 U.S. 60, 70 (1942), (holding that a court "requiring that one lawyer shall simultaneously represent conflicting interests" violates the Sixth Amendment), *superseded on other grounds by Bourjaily* v. *United States,* 483 U.S. 171 (1987). CPCS interest is in screening to efficiently allocate its limited attorney resources and comply with its statutory requirements, whereas Mr. Francis had an interest in securing a zealous advocate to raise every meritorious claim. The Supreme Judicial Court consequently violated the Sixth Amendment by creating this conflicting interest in representation.

This is not a case in which the defendant benefitted from his lawyer's advocacy and so must be bound by the lawyer's errors or poor performance. It is true that when a client "voluntarily cho[oses an] attorney as his representative in the action . . . he cannot . . . avoid the consequences of the acts or omissions of this freely selected agent." *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 633–34 (1962). But here, CPCS denied Mr. Francis the benefits of representation. Because Mr. Francis did not have the benefit of a CPCS-appointed attorney to represent him in the screening process, he should not suffer the consequences of a CPCS screening error.

II. THIS CASE IS AN IDEAL VEHICLE FOR PREVENTING THE NOVEL AND DANGEROUS PRECEDENT BELOW FROM TAKING ROOT

A. The decision below has grave implications for indigent criminal defendants.

If the decision below stands, it will cripple programs that rely on case screeners to identify meritorious claims for indigent criminal defendants.

The dissent below recognized precisely this problem. By finding that case screeners waived Mr. Francis's meritorious Sixth Amendment claim, the majority below "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." Pet. App. 55a. As a practical matter, CPCS cannot identify cases in which counsel is required by law without some form of case screening. But if the screening process can result in a finding of waiver, defendants will be deterred from requesting CPCS review. Transforming screening into waiver puts both CPCS and indigent defendants in an untenable position.

Allowing the decision below to stand could have significant effects beyond just the CPCS screening process in Massachusetts. Across the country, third parties screen cases for post-conviction relief—state innocence commissions, prosecutorial conviction review units, and nonprofit clinics like those in the Innocence Network rely on case screening functions to provide

their invaluable services.[1] As it stands, the Supreme Judicial Court's decision signals to other states that case screening can trigger waiver and bar relief.

B. This is the right vehicle for the Court to address the question presented.

Without its waiver holding, the court would have granted Francis a new trial because the justices unanimously agreed that Francis's Sixth Amendment choice-of-counsel right had been violated at trial. See Pet. App. 3a–4a, 16a, 27a, 49a–50a, 63a.

The decision below did not rely on any alternative grounds. The court was explicit: it held that Francis's *pro se* collateral review motions could not be an independent basis for waiver, instead addressing his motions as one of many factors. See *id.* at 42a ("[W]e *do not* rely on the defendant's conduct alone in finding a waiver.") (Emphasis added).

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[1] On conviction review units, *see e.g.,* John Hollway, *Conviction Review Units: A National Perspective*, Univ. of Pa. L. Sch. Fac. Scholarship (2016); Brandon Hamburg, *Legally Guilty, Factually Innocent: An Analysis of Post-Conviction Review Units*, 25 S. Cal. Rev. of L. & Soc. Just. 183 (2016). On state innocence commissions, *see e.g.,* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 Ariz. L. Rev. 1027 (2010); Mary K. Tate, *Commissioning Innocence and Restoring Confidence: The Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 Me. L. Rev. 531 (2012).

Further, Francis's 1991 *pro se* motion, which omitted this choice-of-counsel claim, could not constitute an independent basis for waiver because Francis was denied counsel for this motion and had no prior opportunity to raise the claim. This Court held in *Martinez* v. *Ryan,* 566 U.S. 1, 9 (2012), that the government cannot claim procedural waiver when defendants are denied counsel or effective counsel at the first opportunity for error-correcting review. While *Martinez* was a federal habeas case, its reasoning applies equally here. *Martinez* held that a federal habeas court should excuse procedural default of an ineffective assistance of trial counsel claim when (1) the defendant could not raise the claim until collateral review and (2) is denied effective counsel or counsel altogether at this stage.[2] *Id.* at 17. And that is what happened here: Hrones prevented Mr. Francis from raising the choice-of-counsel violation until collateral review, and he was denied counsel at that stage. To not apply *Martinez*'s reasoning here would deny Mr. Francis "fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." See *id.* at 11.

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[2] *Martinez*'s progeny only confirm its application here. *Davila* v. *Davis*, 137 S. Ct. 2058, 2066 (2017), emphasized that the *Martinez* waiver exception is necessary to ensure that trial errors are reviewed. *Id.* at 2066. In constitutional criminal procedure, there is "unique importance [in] protecting a defendant's trial rights." *Id.* And like the ineffective assistance of trial counsel claim in *Martinez*, the choice-of-counsel right in *Francis* is a fundamental trial right. *See United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) ("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.").

C. GVR is appropriate because the underlying decision is clearly erroneous.

This Court should grant, vacate, and remand the underlying decision because doing so will prevent the clearly erroneous practice of third-party waiver from taking hold while also preserving this Court's limited resources. As explained above, it was clearly erroneous for the Supreme Judicial Court to premise waiver on a third-party relationship. Pet. App. 55a ("[W]e have never rested a finding of waiver on this ground, the [majority] cites no authority for doing so, and it would be wholly unreasonable to do so here.") (Gants, C.J., & Budd, J. dissenting in part).

A GVR order here would heed the virtue of "conserv[ing] the scarce resources of this Court," *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam), and prevent a dangerous new practice from taking root and spreading across jurisdictions. This Court would be best served by giving the Supreme Judicial Court the opportunity to revisit its holding now, particularly because the primary question before the court below was whether or not there was a choice-of-counsel violation at all, and neither party raised or briefed the concept of third-party waiver. The issue only emerged once the court below concluded that Mr. Francis had a meritorious Sixth Amendment claim. Here, "the dissenting justices [below] discerned the significance of the issue raised," *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006), and GVR is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, or, in the alternative, the Court should summarily grant, vacate, and remand.

Respectfully submitted,

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