No. 20-6731

In the
Supreme Court of the United States

KEVIN FRANCIS,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Massachusetts Supreme Judicial Court's holding that the petitioner procedurally waived his Sixth Amendment choice-of-counsel claim by failing to raise it until thirty-three years after the violation took place, in contravention of state procedural rules that require defendants to raise claims of error at the first available opportunity, forms an independent and adequate state-law bar to the petitioner's federal constitutional claim.

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INTRODUCTION

This petition should be denied because the case is a poor vehicle for deciding the question presented by the petitioner. The unique circumstances leading to waiver of the choice-of-counsel claim here are unlikely to recur, and a decision in the petitioner's favor would not result in relief on remand. Moreover, the question presented by the petitioner fails to satisfy this Court's criteria under Rule 10. The question of whether a public defender case screener's failure to recognize a claim can play a role in procedural waiver analysis has not been addressed by any other lower court. Accordingly, there can be no split of authority on the issue. Nor does the petitioner assert that a conflict exists with any decision of this Court. Finally, the Massachusetts court's application of its own well-established waiver principles to the unique circumstances of the case was consistent with this Court's precedent.

STATEMENT

1. In 1982, the petitioner was convicted of the first-degree murder of Vanessa Marson, who was his former girlfriend. Pet. App. 6a. The victim had been stabbed multiple times in the chest and skull. Pet. App. 2a, 6a. An eyewitness, Terrence Smith, identified the petitioner from an array of ten to twelve photographs as the

man whom he had seen running after the victim with a knife. Pet. App. 6a. "Smith testified that the man came within fifteen feet of him and [ ] that he saw 'a very good side view' of the man." *Id.* He also identified the victim from a photograph as the woman he saw running. *Id.* There was evidence at trial "that the [petitioner] had threatened the victim two months before the murder occurred." *Id.*

2. The petitioner's arraignment took place on January 8, 1982. Pet. App. 6a. At the time, Francis was nineteen years old and indigent. *Id.* Attorney Stephen Hrones appeared at the arraignment on his own initiative. *Id.* He had not met the petitioner prior to arraignment, and had never been in contact with him or with his family. Pet. App. 6a-7a.

Hrones had been a member of the Massachusetts bar since 1972. Pet. App. 6a. He was an experienced criminal defense attorney who "had represented defendants *pro bono* in murder cases on four or five occasions, and had tried numerous felony cases." *Id.* At the time, Massachusetts Superior Court Rule 53(1) provided that attorneys could not be appointed to represent indigent defendants unless they were included on "the official Standing List of Counsel established by a majority of the

[superior court] justices." Pet. App. 7a.[1] Hrones had not yet been approved for the official list in 1982.[2] However, he asked the judge's permission at arraignment to represent the petitioner without pay. *Id.*

The trial judge conducted a sidebar discussion with Hrones and the prosecutor, "out of the presence and earshot" of the petitioner. *Id.* Still at sidebar, the judge summarized this conversation for the record as follows:

> I would like the record to show that when the case of Kevin Francis was called for arraignment, Mr. [Hrones] stepped up and asked if he and the assistant district attorney could approach the bench. I allowed them to do so.
>
> Mr. [Hrones] 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.

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[1] As the SJC noted, "[t]his rule no longer governs how counsel is assigned to indigent defendants." Pet. App. 20a, n.6. Instead, the Committee for Public Counsel Services ("CPCS") is now tasked with "the appointment or assignment of counsel." *Id.* In addition, the SJC "now has rules requiring a judge to inform an indigent party that he has the right to be represented by counsel at public expense." Pet. App. 21a, n.7 (citing S.J.C. Rule 3:10, § 2, as appearing in 475 Mass. 1301 (2016)).

[2] As discussed in more detail below, the petitioner filed two motions for a new trial after his conviction was affirmed. Hrones testified at the evidentiary hearing on the petitioner's second motion for new trial that he was not on the list of approved attorneys for first-degree murder cases at the time of the petitioner's arraignment because he did not yet then meet the requirement of being a member of the Massachusetts bar for at least ten years. Pet. App. 95a. He was appointed to represent the petitioner on direct appeal in 1983 and was compensated for the appellate representation. Pet App. 8a-9a.

> As chairman of the committee involved I know that Mr. [Hrones] 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 [petitioner] 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.

Pet. App 7a-8a. Hrones then confirmed in open court that he would file an appearance for the petitioner as private counsel. Pet. App. 8a. The judge did not conduct a colloquy with the petitioner and did not ask whether Hrones had conferred with him about the arrangement for *pro bono* representation. *Id.* On September 21, 1982, the jury found Francis guilty of first-degree murder. *Id.*

After trial, on May 6, 1983, the court appointed Hrones to represent the petitioner and to be compensated out of public funds for his appellate representation. Pet. App. 8a-9a. In Massachusetts, appeals from first-degree murder convictions are governed by Mass. Gen. Laws ch. 278, § 33E, which provides for broad, plenary review of "the whole case, both the law and the evidence, to determine whether there has been any miscarriage of justice." *Dickerson v. Attorney Gen.*, 396 Mass. 740, 744, 488 N.E.2d 757, 760 (1986). The Supreme Judicial Court ("SJC") affirmed the conviction on March 7, 1984. *Commonwealth v. Francis*, 391 Mass. 369, 461 N.E.2d 811 (1984).

3. The petitioner filed his first motion for new trial *pro se* on May 24, 1991. Pet. App. 9a, 128a. In preparing the motion, he had a copy of the trial transcripts, including the sidebar discussion that made clear Hrones's status as private counsel, working without pay. *Id.* However, Francis did not raise a claim under the Sixth Amendment or Article 12 of the Massachusetts Constitution's Declaration of Rights based on his right to choose counsel. *Id.*

Along with his motion for new trial, Francis also filed a motion for the appointment of counsel. Pet. App. 152a. On March 9, 1992, the court sent this request to the Committee for Public Counsel Services ("CPCS"), the state's public defender service, for screening in order to determine whether Francis qualified for the appointment of counsel in accordance with CPCS criteria. *See* Pet. App. 152a, 131a.[3] Attorney James Sultan, serving as a CPCS-appointed screener, reviewed the petitioner's case and recommended against the appointment of counsel. Pet App. 139a.[4] He noted the circumstances of Hrones's appointment in his report to CPCS (a

[3] A memorandum outlining the CPCS policy for assigning counsel in post-conviction collateral matters, dated January 23, 1992, is included in Pet. App. 130a-131a.

[4] In describing the first screening, the SJC incorrectly stated that "it [was] not clear whether the attorney had the transcripts." Pet. App. 9a. In fact, Attorney Sultan's letter mentioned that he had reviewed the transcript. Pet. App. 134a.

copy of which was sent to the petitioner), but he did "not believe that this circumstance would entitle Mr. Francis to any relief unless some shortcoming by Mr. Hrones could be demonstrated." Pet App. 134a.

In 1999, Francis requested that CPCS appoint counsel to file a second motion for new trial. Pet. App. 10a. Attorney Richard Shea, another CPCS screener, reviewed the petitioner's case and found that "[t]here was no meritorious issue deserving counsel." Pet. App. 142a, n.1. Shea also failed to identify any claim arising out of the circumstances in which Hrones entered his appearance at the arraignment. *Id*. Accordingly, CPCS did not appoint post-conviction counsel at that time. Pet. App. 10a.

CPCS screened the petitioner's case again in 2012, and at that time appointed an attorney to pursue a second motion for new trial, which was filed by counsel in 2015. Pet. App. 169a.[5] In this motion, the petitioner argued that "he was denied his right to counsel under the Sixth Amendment and art. 12 when he made no knowing

[5] In an affidavit filed in the superior court on February 20, 2017, the petitioner asserted that he wrote to CPCS in 2011, "requesting that Attorney Belger (specifically) be assigned to screen [his] case." Pet. App. 176a. Francis explained that he met Attorney Belger through a friend. Pet. App. 175a.

and intelligent waiver of his right to a court-appointed lawyer approved to try murder cases." Pet. App. 10a.[6]

4. In January 2018, a Superior Court judge held an evidentiary hearing. Pet. App. 11a.[7] At the hearing, Hrones testified that it was possible that the petitioner was not made aware of the sidebar discussion regarding his appointment. Pet. App. 95a. He "also testified that he did not want the [petitioner] to know he was trying the case for free because he did not want the [petitioner] to fire him." *Id.* The petitioner testified that he believed Hrones to have been court appointed, and 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." *Id.* According to the petitioner's testimony, he did not know about the sidebar discussion and did not understand the distinction between private *pro bono* counsel and court-appointed counsel until the attorney representing him in connection with the second motion for new trial explained it to him. *Id.*

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[6] The petitioner's other arguments in his second motion for new trial were rejected by the motion judge, were not before the SJC in the second appeal, and are not before this Court. *See* Pet App. 10a-11a, n.2.

[7] The judge who presided over the 1982 trial had long since retired, so the second motion for new trial was litigated before a different judge. Pet. App. 11a, n.3.

The judge denied the petitioner's motion, finding "no constitutional right to court appointed counsel that the defendant has unwittingly waived." Pet. App. 12a. Francis then filed a "gatekeeper" petition in the single justice session of the SJC, pursuant to Mass. Gen. Laws ch. 278, § 33E.[8] After a hearing, the single justice remanded the case to resolve certain factual questions related to Hrones's appointment at trial. Pet. App. 12a-13a. On remand, the motion judge made the following pertinent findings: (1) neither the petitioner nor his family had retained Hrones at the arraignment; (2) the petitioner 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"; and (3) the petitioner did not raise the Sixth Amendment and Article 12 choice-of-counsel issue in the first motion for new trial, because he was "totally unaware of the significance of the distinction between being represented by a court appointed lawyer or a private attorney appearing pro bono" at the time. Pet.

[8] Mass. Gen. Laws ch. 278, § 33E provides that, as to any new trial motions filed after the issuance of the rescript on direct appeal in first-degree murder cases, "no appeal shall lie . . . unless [a single justice determines that the motion] presents a new and substantial question which ought to be determined by the full court."

App. 13a-14a. The single justice then granted Francis's application for leave to appeal. Pet. App. 15a.

A divided SJC affirmed the denial of Francis's second motion for new trial. The Justices all agreed on some points. In particular, they all agreed that the petitioner's rights under the "Sixth Amendment and art. 12 were violated when he was deprived of the opportunity to choose between paid, court-appointed counsel and the representation offered by Hrones." Pet. App. 4a. Relatedly, all the SJC justices found that the petitioner's "right to be present during a critical stage of the proceedings under both Federal and State Constitution [was] violated" when he was excluded from the sidebar discussion in which the judge permitted Hrones to represent the petitioner without compensation. *Id*. Furthermore, the SJC unanimously held that both claims involved "structural violations requiring automatic reversal absent waiver," because defendants have a fundamental right to the choice of private counsel. *Id*.

A majority of four Justices went on to find, however, that the petitioner procedurally waived his claims involving the right to choose counsel and the right to be present at a critical stage of the proceedings.[9] In so concluding, they stated:

> [T]he 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.

Pet. App. 4a-5a. Applying the state-law standard of review for waived claims (*see* Pet. App. 35a, citing *Commonwealth v. Robinson*, 480 Mass. 146, 147 & n.3 (2018)), the majority also concluded "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." Pet. App. 30a. In these circumstances, "it was not

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[9] In Massachusetts, procedural waiver is distinct from "a waiver of a right, which ordinarily must be knowing, intelligent, and voluntary, [and the former] more closely resembles a forfeiture." *Commonwealth v. Robinson*, 480 Mass. 146, 147, 102 N.E.3d 357, 358-359 n.1 (2018) (citing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring)). *See also United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (quotation omitted).

reasonable to conclude that the error materially influenced the verdict or that a fundamentally unfair trial took place." Pet. App. 36a-37a (citing *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1913 (2017); *Commonwealth v. Randolph*, 438 Mass. 290, 297-298, 780 N.E.2d 58, 67 (2002)).

The majority began its analysis of waiver by noting that the petitioner should not be faulted for not raising the choice-of-counsel issue at the arraignment or on direct appeal. Pet. App. 30a. Hrones represented the petitioner from arraignment through direct appeal, he did not want the petitioner to know that he was not paid for his work at trial, and he appeared "to have kept the [petitioner] in the dark." *Id.* The majority "[did] 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." Pet. App. 30a-31a. The majority "also consider[ed]" the failure of CPCS screeners to identify the claim in 1992-1993 and in 2000, once again emphasizing that the transcript was available both to the petitioner and to the attorneys who screened his case. Pet. App. 31a.

In finding waiver, the majority relied on its structural-error cases that involved public-trial violations. In those decisions, the SJC found structural error "waived when the issue was not raised at trial, on direct appeal, or in the first motion for a

new trial." Pet. App. 33a (collecting cases). The court has "found these errors waived even where the defendant was not aware of the violation at trial." *Id.* (citing *Robinson*, 480 Mass. at 152-153; *Commonwealth v. Jackson*, 471 Mass. 262, 269, 28 N.E.3d 437, 444 (2015), *cert. denied*, 577 U.S. 1145 (2016)); *Commonwealth v. Wall*, 469 Mass. 652, 672-673, 15 N.E.3d 708, 725 (2014)). Here, the petitioner did not raise the issue for thirty-three years. The majority observed that, "[w]hen 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." Pet. App. 34a.

Three justices dissented in part: Chief Justice Gants authored one of the opinions, which Justice Budd joined, and Justice Lenk filed her own separate opinion. Chief Justice Gants and Justice Budd were of the view that the petitioner's thirty-three-year delay in raising the choice-of-counsel issue did not result in waiver. Pet. App. 51a. Chief Justice Gants recognized 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."

Pet. App. 52a. He disagreed, however, that the claim was "reasonably available" to the petitioner here. *Id.* In his view, the petitioner could not reasonably have been expected to raise the issue in his *pro se* first motion for new trial. Pet. App. 56a-62a. Further, Chief Justice Gants argued that the screeners' failure to identify the issue "cannot constitute a basis" for waiver. Pet. App. 54a.

Justice Lenk dissented for different reasons. She believed that the "clairvoyance exception"[10] applied both to the petitioner's *pro se* motion for new trial and to the screeners' review of the case because "it was not until the [*United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006),] 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." Pet. App. 69a.

The majority responded at length to the dissenting opinions. *See* Pet. App. 37a-50a. Specifically, the court emphasized that the petitioner had the opportunity to raise the choice-of-counsel issue in his *pro se* motion for new trial: "[i]t was at that point that the error could and should have been first raised so that it could have been

[10] The clairvoyance exception "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. In these circumstances [courts] review the claim as if it had been properly preserved." *Randolph*, 438 Mass. at 295, 780 N.E.2d at 65 (quotations and citations omitted).

quickly addressed and corrected if the [petitioner] had wanted different counsel." Pet. App. 42a. This failure to raise the issue at the first available opportunity was "important to consider in [the] waiver analysis, and [was] not irrelevant, as it resulted in the passage of more time and made retrial more difficult." *Id*. The majority "[did] not rely on the [petitioner]'s conduct alone in finding waiver" but "also consider[ed] the case's long history with CPCS, and the availability of the transcript revealing the problem with Hrones's appointment for decades." Pet. App. 42a-43a. The majority added: "This is not, we emphasize, a case where the prosecution concealed evidence from the [petitioner], or where the evidence was unavailable." Pet App. 43a. Given the delay of more than thirty years, it was reasonable to consider both the petitioner's own failure to identify the claim and the screeners' oversight as part of "the over-all calculation [of] whether a waiver [had] occurred." *Id*.

REASONS TO DENY THE WRIT

I. This Case Is a Poor Vehicle for Deciding the Question Presented.

This Court should deny certiorari because this case is a poor vehicle for deciding the question presented by the petitioner. First, the lower court's finding of waiver was not grounded in the screeners' omissions alone and would likely stand even if this Court decided that it was improper to consider the screeners' failure to

identify the choice-of-counsel claim. Second, the SJC's decision was based on the totality of circumstances unique to this case, which are very unlikely to recur.

A. The Lower Court's Finding of Procedural Waiver Was Based on an Independent and Adequate State Ground, and the Resolution of the Third-Party Waiver Issue Will Not Alter the Outcome.

Massachusetts law requires defendants to raise claims of error "'at the first available opportunity.'" *Commonwealth v. Morganti*, 467 Mass. 96, 102-103, 4 N.E.3d 241, 247 *cert. denied*, 574 U.S. 933 (2014) (quoting *Randolph*, 438 Mass. at 294, 780 N.E.2d at 64). *See also Commonwealth v. LaChance*, 469 Mass. 854, 858, 17 N.E.3d 1101, 1105 (2014) (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"), *cert. denied*, 577 U.S. 922 (2015).

The petitioner waived his choice-of-counsel claim by failing to raise it for "thirty-three years after the violation took place," despite having had the opportunity to do so earlier. [11] Pet. App. 30a (citing *Robinson*, 480 Mass. at 152, 102 N.E.3d at

[11] The petitioner presupposes that Hrones's appointment as private counsel at his arraignment resulted in a choice-of-counsel violation under the Sixth Amendment. Below, the Commonwealth contested that such a violation had occurred. *See* SJC-12683, appellee's brief, at 34-41, https://www.ma-appellatecourts.org/pdf/SJC-12683/SJC-12683_05_Appellee_Commonwealth_Brief.pdf. However, even if this Court were to conclude that the circumstances here did not amount to a Sixth

362; *Jackson*, 471 Mass. at 269, 28 N.E.3d at 443; *Weaver*, 137 S. Ct. at 1911-1912). When the petitioner filed his first motion for new trial on May 24, 1991, *pro se*, "he had transcripts of the trial and the arraignment in his possession." Pet. App. 9a. The arraignment transcript included the trial judge's summary of the sidebar conference, in which the judge had allowed Hrones to represent the petitioner. However, the petitioner did not "raise a Sixth Amendment or art. 12 claim based on his right to choose counsel" in his first motion for new trial. *Id.* In 1992-93, an attorney for CPCS screened the petitioner's case. As part of the screening process, the petitioner provided all the documents and information in his possession to the screener. *Id.* At that point, the petitioner again had the opportunity to present the choice-of-counsel claim to the trial court, but "neither the [petitioner] nor CPCS raised the Sixth Amendment or art. 12 issue." *Id.* In 1999, the petitioner requested that CPCS screen his case again; yet, he did not raise the choice-of-counsel issue at that point either. *Id.* at 10a.

Amendment violation, the SJC found a choice-of-counsel violation under article 12 of the Massachusetts constitution. Pet. App. 29a, n.8 (noting "that *Gonzalez-Lopez* was a five-to-four decision with a vigorous dissent.").

Massachusetts Rule of Criminal Procedure 30, the state rule governing most post-conviction motions for relief, provides for waiver of any claims that may be brought under rule 30 but are not raised in the defendant's first motion for new trial:

> All grounds for relief claimed by a defendant under [provisions of rule 30] 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.

Mass. R. Crim. P. 30(c)(2). This requirement is consistent with the federal law principle that a "'right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Puckett v. United States*, 556 U.S. 129, 134 (2009) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

Like its federal analogs, Rule 30(c)(2) "was intended [in part] to establish finality of convictions" and was "not intended to foreclose from future consideration grounds which were not known and could not have been found out with the exercise of due diligence." Reporter's Notes to Mass. R. Crim. P. 30; *see also Robinson*, 480 Mass. at 156, 102 N.E.3d at 365 (Budd, J., concurring). In the public-trial-right context, the SJC found procedural waiver in cases where defendants "waited so long between the violation of [their] public trial right and bringing the claim to the

attention of a court that it would be unreasonable to believe that [they] could not have discovered the violation earlier with the exercise of due diligence." *Robinson, 480 Mass.* at 158, 102 N.E.3d at 367 (Budd J., concurring). Here, the petitioner did not exercise due diligence because the arraignment transcript was available for over thirty years before he first raised the claim in the second motion for new trial. Although the petitioner actively pursued post-conviction relief by filing a motion for new trial and by corresponding with CPCS screeners on multiple occasions during that time, he failed to raise the choice-of-counsel claim for over three decades.

Structural-error claims can be waived. The SJC explained that, "[n]otwithstanding the importance of the rights preserved . . . , structural rights can be procedurally waived." Pet. App. 33a (citing *Robinson*, 480 Mass. at 150, 102 N.E.3d at 361; *Jackson*, 471 Mass. at 269, 28 N.E.3d at 443; *Wall*, 469 Mass. at 673, 15 N.E.3d at 725). In addition, these errors can be "waived even where the defendant was not aware of the violation at trial." Pet. App. 34a. Such a view of structural error rests on this Court's "clear precedent establishing that structural errors can be procedurally waived just like any other constitutional error, and that 'the term "structural error" carries with it no talismanic significance as a doctrinal matter.'" Pet. App. 38a-39a (quoting *Weaver*, 137 S. Ct. at 1910).

Based on the principles outlined above, the petitioner's failure to raise his choice-of-counsel claim in his *pro se* motion for new trial, combined with a delay of more than thirty years during which the arraignment transcript was in the petitioner's possession, form a sufficient basis for finding waiver under well-established procedural waiver jurisprudence in Massachusetts. Furthermore, *pro se* litigants are held to the same standard as those who have counsel. Pet. App. 42a. *See Mains v. Commonwealth*, 433 Mass. 30, 36, 739 N.E.2d 1125, 1130 (2000) (the rule that *pro se* litigants "are held to the same standards as practicing members of the bar" also applies to "defendants on collateral review who unsuccessfully sought to have counsel appointed").

Where the state court based its finding of waiver on independent and adequate state procedural grounds, this Court's review is unwarranted. *See Sochor v. Florida*, 504 U.S. 527, 533 (1992) (holding that the Florida Supreme Court's ruling that a federal constitutional claim was forfeited for failure to make a contemporaneous objection was an adequate and independent state ground, barring this Court's review of the claim on direct appeal); *see also Coleman v. Thompson*, 501 U.S. 722, 730 (1991) ("When this Court reviews a state court decision on direct review pursuant to 28

U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do.") (emphasis in original).

Even without considering the failure of CPCS screeners to identify the violation in 1992-1993 and 2000, the SJC would likely find the petitioner's choice-of-counsel claim to have been waived, where the transcript detailing the choice-of-counsel violation was available for more than thirty years.[12] As the court emphasized, "the claim was certainly not raised at the first available opportunity as [the SJC's] cases emphasize and require." Pet. App. 44a (citing *Morganti*, 467 Mass. at 102-103). Thus, the resolution of the third-party-waiver issue in the petitioner's favor would likely not lead to relief for him on remand to the SJC.

Finally, granting the petition, vacating the decision, and remanding the case, as the petitioner requests, would not be appropriate here, because the SJC did not erroneously rule on a federal constitutional claim. The petitioner's reliance on

[12] Even if this Court were to interpret the SJC majority's opinion as treating the screeners' failure to spot the claim as one necessary component for waiver here, this case would still not present cleanly or clearly the question of whether that component alone is sufficient for waiver. At most, the SJC "also *considered*" the screeners' action as part of its "over-all" waiver analysis. Pet. App. 42a-43a. But, the court certainly did not *hold* that "a public defender case screener who did not represent the defendant waived" the choice-of-counsel claim, Pet. i, and the petitioner's claim that this novel, highly fact-bound decision somehow poses a grave threat to Sixth Amendment rights rings hollow, *see infra* Part II.B.

Youngblood v. West Virginia, 547 U.S. 867 (2006), in support of his argument that GVR is appropriate is misplaced. In that case, the Supreme Court of Appeals of West Virginia affirmed a petitioner's conviction "without examining the specific constitutional claims associated with the alleged suppression of favorable evidence," which had been clearly presented to the state court. *Youngblood*, 547 U.S. at 869. The SJC, by contrast, did not overlook any constitutional claims presented by the petitioner. Neither does this case fit into any other of the categories in which GVR might be appropriate, such us where there has been an intervening legal development that may lead the court below to reach a different outcome on remand. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also Hicks v. United States*, 137 S. Ct. 2000 (2017) (Gorsuch, J., concurring) (GVR granted where "[a] plain legal error infect[ed] [the lower court's] judgment," namely that "a man was wrongly sentenced to 20 years in prison under a defunct statute"); *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (GVR proper where the Court is "not certain that the case was free from all obstacles to reversal on an intervening precedent").

B. The Unique Circumstances of This Case Are Not Likely to Recur.

The SJC "recognize[d] 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." Pet. App. 27a. Rather, this case involves an indigent defendant who needed court-appointed counsel, and the right to choose one's counsel is not absolute. Pet. App. 18a. For example, "it does not extend to [indigent] defendants who require counsel to be appointed for them." *Id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 151-152). Here, "the [petitioner] did not have the right to choose between court-appointed attorneys [who are publicly compensated], [but] he did have the right to choose between an appointed attorney and counsel who had offered his services for free." Pet. App. 19a. This highly unusual situation, in which the petitioner's right to choose counsel was violated without his knowledge, is unlikely to recur. [13]

The petitioner's claim that the decision below will "cripple programs that rely on case screeners to identify meritorious claims for indigent criminal defendants" (Pet. 15) is unfounded. There is no indication in the SJC majority's opinion that the screeners' failure to spot the choice-of-counsel claim *alone* would have resulted in procedural waiver. Rather, it made clear that, over the course of more than three

[13] In his brief to the SJC, the petitioner acknowledged that the circumstances of his case were unusual: "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." Pet. App. 197a.

decades with the complete trial transcript in his possession, the petitioner failed to satisfy the state-law requirement that claims be brought "at the first available opportunity." *See*, *e.g.*, Pet. App. 44a. There is even less reason to think that other states will follow such a third-party waiver theory (*see* Pet. 15-16), where the SJC itself did not embrace it, and neither has any other state or federal court.

Moreover, the SJC did not hold that "Francis's *pro se* collateral review motions could not be an independent basis for waiver."[14] Pet. 16. Instead, throughout the opinion, the majority emphasized that neither the petitioner nor the attorneys who screened his case noticed the choice-of-counsel claim for thirty-three years, even though the arraignment transcript clearly explaining the circumstances of attorney Hrones's representation was available throughout that time period. *See*, *e.g.*, Pet. App. 44a, 45a, 49a. The court repeatedly stated that the screeners' failure to identify

[14] The petitioner's reliance on *Martinez v. Ryan*, 566 U.S. 1 (2012), to support the argument that the omissions in his *pro se* motion for new trial cannot alone form the basis for procedural default under state law is inapposite. *See* Pet. 17. *Martinez* was a habeas case that addressed only a narrow question of "whether ineffective assistance in an initial-review collateral proceeding on a *claim of ineffective assistance* at trial may provide cause for a procedural default *in a federal habeas proceeding*." 566 U.S. at 9 (emphasis added). In answering this question in the affirmative, this Court recognized that the exception applies only in a case presenting those circumstances. The petitioner offers no basis for extending the holding of *Martinez* to his choice-of-counsel claim, presented in entirely different circumstances.

the claim could be "also considered," never stating that the screeners were solely responsible for waiver. *Id*. at Pet. App. 31a, 42a, 45a.

In sum, the SJC below simply applied Massachusetts' longstanding procedural waiver doctrine to highly fact-bound circumstances that warranted a finding of waiver under Massachusetts law—regardless of the role of case screeners. Accordingly, this case is a poor vehicle for deciding the question presented by the petitioner and does not warrant review by this Court.

II. The Petition Does Not Present a Federal Question Warranting the Court's Consideration.

In addition to the significant vehicle problems identified above, the petition does not meet the criteria stated in this Court's Rule 10. The petitioner does not allege that the SJC's decision conflicts with that of any other court. He has not shown that the SJC's references to the screeners in discussing his waiver of his right-to-choice-of-counsel claim conflicts with any decisions of this Court. Finally, he has cited no other cases addressing procedural waiver or forfeiture in factually similar circumstances. The petition should therefore be denied.

A. The Petition Does Not Identify a Split of Authority on the Question Presented, or Any Conflict with a Decision of This Court.

The petitioner does not attempt to claim that a split of authority exists on his question presented. *See*, *e.g.*, Pet. 12 (acknowledging "novel" issue). Indeed, the petition does not even identify any other cases in the lower courts involving a claim of a violation of the choice-of-counsel right that has been procedurally waived or forfeited—let alone cases discussing whether repeated screening of a case by public defenders over decades, requested by a defendant who has the complete trial transcript, might play a role in the waiver analysis. *See*, *e.g.*, *id.* at 12-14.

To be sure, the sequence of events in this case was highly unusual: a private attorney was allowed to represent a criminal defendant *pro bono*, without the defendant's knowledge that the attorney was not being paid out of state funds; the petitioner omitted this claim from a *pro se* motion for new trial filed nine years after conviction; and, although the petitioner repeatedly sought appointment of counsel in later years, he still did not identify this claim in his requests, nor did the public defender case screeners identify the claim for another twenty-two years. The SJC concluded that, in these circumstances, Francis waived his choice-of-counsel claim "by failing to raise this right until thirty-three years after the violation took place."

Pet. App. 33a. According to the court, "[t]o conclude otherwise would tear the fabric of [its] well-established waiver jurisprudence that 'a defendant must raise a claim of error at the first available opportunity.'" Pet. App. 35a (quoting *Morganti*, 467 Mass. at 102-103). The petitioner has not identified any decisions in which a similar set of circumstances presented themselves, much less yielded a different result.

As the petitioner acknowledges, "this Court does not sit to correct errors." Pet. 2. *See Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (noting that "[e]rror correction is outside the mainstream of the Court's functions") (quotations and citations omitted). Thus, even if the SJC had been wrong to consider the public defender screeners' actions in its waiver analysis, this Court's review would still be unwarranted.[15]

This case is nothing like the decisions in *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001), on which the petitioner relies in arguing that his case "falls squarely among the types of cases this Court decides to review." Pet. 3. *Holmes* presented the question of whether a state evidentiary rule violated a criminal defendant's federal constitutional right to have

[15] As explained in Part III, the decision below was in fact correct, so this Court's intervention is not required for the additional reason that there is no error to correct.

"a meaningful opportunity to present a complete defense." 547 U.S. 319. In *Sullivan,* the "Arkansas Supreme Court's decision on rehearing [was] flatly contrary to this Court's controlling precedent." 532 U.S. at 771. Francis's petition, by contrast, asks this Court to step in and correct an alleged error in the SJC's highly fact-specific analysis of procedural waiver under state law.[16]

B. The Decision Below Provides No Basis for Other Lower Courts to Adopt a Novel Rule That Third Parties May Waive a Defendant's Sixth Amendment Rights.

Recognizing that there is no split of authority on the question presented, the petitioner nevertheless urges this Court to review his case because, in his view, the SJC's decision "establishes a novel and dangerous precedent that a third party can waive the Sixth Amendment rights of an indigent criminal defendant." Pet. 2. This argument is unavailing because the SJC did not hold that a third party, such as a screener, can independently waive a defendant's right to choice of counsel. Instead, the SJC "consider[ed] the case's long history with CPCS, and the availability of the

[16] The petitioner suggests that the SJC's consideration of the screeners' actions in its waiver analysis "violated the Sixth Amendment by creating [a] conflicting interest in representation." Pet. 14. Yet, the SJC appeared to recognize that the screeners did not represent the petitioner. *See*, *e.g.*, Pet. App. 43a (noting that "CPCS screening is different from CPCS review once CPCS has accepted a case"). Therefore, this Court's cases prohibiting lawyers from representing conflicting interests are inapplicable.

transcript revealing the problem with Hrones's appointment for decades," alongside the petitioner's failure to bring the claim in his first motion for new trial and his own possession of the transcript. Pet. App. 42a-43a.

The petitioner believes that, without this Court's immediate intervention, the SJC's "decision signals to other states that case screening can trigger waiver and bar relief." Pet. 16. Where the SJC did not hold that screening alone can trigger waiver, its decision is unlikely to cause other courts to reach that conclusion. And, as noted above, the petitioner cited no other cases in which this issue has even arisen, and the unusual circumstances of the petitioner's case are not likely to recur. This Court's review is therefore not warranted.

III. The Decision Below Is Correct.

This Court's review is unwarranted for the additional reason that the SJC did not err in holding that the petitioner waived his Sixth Amendment claim.

A. The SJC's Fact-Bound Conclusion that the Defendant Procedurally Waived His Claim of a Choice-of-Counsel Violation Was Correct.

The SJC correctly concluded that the petitioner waived his choice-of-counsel claim, under its well-established principle that defendants must raise claims of error at the first available opportunity in order to avoid waiver. Pet. App. 35a (citing

Randolph, 438 Mass. at 294). This Court has emphasized the importance of this doctrine of procedural waiver or forfeiture: "'No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Puckett*, 556 U.S. at 134 (quoting *Yakus*, 321 U.S. at 444).

The petitioner had an opportunity to raise these claims of violations during his 1982 prosecution in the first motion for new trial filed in 1991, because he had the transcript documenting the violation. Pet. App. 30a, 42a. The possibility that he was unaware of the choice-of-counsel violation at the time does not preclude waiver. *See Wall*, 469 Mass. at 672, 15 N.E.3d at 725 (noting, in the public trial violation context, that "[a] procedural waiver may occur where the failure to object is inadvertent").

The petitioner repeatedly requested the appointment of counsel in his post-conviction proceedings, in 1991 and 1999, but has not pointed to anything in the record suggesting that he raised this issue to the public defender screeners assigned to his case, despite the fact that the circumstances of his counsel's appointment were addressed in connection with screening. Those screeners apparently reviewed the transcript and were aware that Hrones represented the petitioner without pay, even

if they failed to spot the choice-of-counsel violation. The first CPCS screener, James Sultan, wrote a letter in 1993 explaining his reasons for his recommendation not to appoint counsel, and he sent a copy of this letter to the petitioner. Pet. App. 139a. He noted that the trial 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." Pet. App. 134a. In addition to the transcript that the petitioner himself had possessed for years by then, this communication could have alerted the petitioner that his attorney was not paid for his representation at trial.[17] According to his testimony at the hearing on his second motion for new trial, the petitioner would not have wanted to be represented by an attorney who was not paid for his services. Pet. App. 11a-12a. In these circumstances, the SJC did not err in concluding that "it [was] not irrelevant or unreasonable to consider those screenings in the over-all calculation whether a waiver has occurred" under Massachusetts law. Pet. App. 43a.

[17] Attorney Sultan's letter is dated January 8, 1993. Pet. App. 133a. At that time, the petitioner's motion for new trial was still pending. Pet. App. 152a. In fact, on July 12, 1993, the petitioner filed a *pro se* motion for an evidentiary hearing. *Id.* As he was actively litigating his motion at the time, he had an opportunity to amend it with the choice-of-counsel claim before it was denied on September 23, 1993, *see* Pet. App. 152a.

B. The SJC's Decision that Counsel's Capable Representation of the Defendant at Trial Did Not Create a Substantial Risk of a Miscarriage of Justice Was Consistent with Federal Law.

This Court has emphasized that, "[i]n 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*, 137 S. Ct. at 1913. Here, the petitioner's claim of a structural error was procedurally waived; nevertheless, Massachusetts law permitted him to obtain relief if he made a showing of a substantial risk of a miscarriage of justice. Pet. App. 35a. The SJC did not err in concluding that the petitioner had failed to make such a showing. *Id.* at 36a-37a.

The SJC has "interpreted the substantial risk of a miscarriage of justice standard as being essentially the same as the prejudice requirement where the defendant raises an ineffective assistance of counsel claim due to counsel's failure to object to [a] court room closure." *Robinson*, 480 Mass. at 154, 102 N.E.3d at 364 n.8 (citing *LaChance*, 469 Mass. at 858, 17 N.E.3d at 1105, for the proposition that the SJC "interpret[s] [the] substantial risk of miscarriage of justice standard as being essentially [the] same as [the] prejudice requirement for [a] claim of ineffective assistance of counsel"). Under this 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.'" Pet. App. 72a-73a (quoting *Weaver*, 137 S. Ct. at 1913).

The SJC correctly concluded that the petitioner has not demonstrated that he was prejudiced by the improper appointment of Hrones to represent him at trial. Indeed, he did not bring a claim of ineffective assistance of counsel on appeal or in his most recent motion for new trial. Pet. App. 37a. Moreover, there was strong evidence of the petitioner's guilt at trial: "[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." *Id.* (quoting *Francis*, 391 Mass. at 375-376).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 7, 2021