No. 20-6731

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

REPLY OF PETITIONER

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REPLY BRIEF

Massachusetts acknowledges that the decision below relied on a "screener's omission[]" when it concluded that Mr. Francis waived his meritorious Sixth Amendment claim, even though the screener was not his counsel. BIO 14. Nevertheless, Massachusetts argues that the petition should be denied based on what it describes as "independent and adequate state procedural grounds" for the result below. *Id.* at 15. That argument mischaracterizes the majority's opinion, ignores the reasoning in *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and misconstrues Massachusetts law. Massachusetts's other formulaic arguments about Mr. Francis' "unique circumstances," BIO 21, and the lack of a circuit split, *id.* at 25, do not respond to the petition's core assertion: the Court should grant, vacate, and remand, to prevent the novel and dangerous principle of third-party waiver from taking root.

I. THE DECISION BELOW RELIED ON A NOVEL PRINCIPLE OF THIRD-PARTY WAIVER FOR INDIGENT DEFENDANTS

Massachusetts does not defend the principle of third-party waiver but argues that this case is a "poor vehicle" for the court to answer the question presented. BIO 14. According to the state, the decision below would "likely stand" on remand because "Massachusetts law" required Petitioner to raise the question presented at the first available opportunity, and he failed to do so for "thirty-three years after the violation took place." BIO 15. That argument is untenable for three reasons.

First, Massachusetts ignores the SJC's express statements that it relied on the actions of CPCS to find waiver, and did not consider other facts suffi-

cient to find that Mr. Francis alone waived his claim. The majority was explicit: "[W]e do not rely on the defendant's conduct alone in finding waiver." Pet. App. 42a. And it rejected precisely the interpretation of Massachusetts law the state advances: "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." Pet. App. 45a.

Nevertheless, Massachusetts emphasizes that "the arraignment transcript was available" in 1992 when Mr. Francis filed a *pro se* motion for a new trial. BIO 18.[1] It acknowledges that "[a]s part of the screening process, the petitioner provided all the documents and information in his possession to the screener." *Id.* at 16. Yet Massachusetts attempts to reframe the opinion below as though Mr. Francis waived it independently of any CPCS involvement merely because the transcript was available.[2]

That is not how the SJC decided this case. The SJC made very clear that it "also considered the multiple

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[1] *See also* BIO 19 ("[T]he 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.").

[2] Mere availability of a transcript has not been recognized as a legal ground for waiver. And for good reason. To do so would be as preposterous as the Galactic Hyperspace Planning Council asserting that Earthlings must have been aware their planet was slated for demolition because the planning charts had been on display in Earth's "local planning department on Alpha Centauri for fifty of your Earth years so [Earthlings] had plenty of time to lodge any formal complaint . . . ." Douglas Adams, *The Hitchhiker's Guide to the Galaxy*, 26 (1979).

opportunities *counsel* had to correct the problem before deciding there was a waiver," along with the passage of time. Pet. App. 45a (emphasis added). In other words, it treated CPCS – third-party case screeners who did not represent Mr. Francis – as holding the power to waive Mr. Francis' meritorious claim. Indeed, the SJC noted that CPCS has a "significant responsibility that entails the identification of legal issues during the screening process, [that] is not comparable to private counsel's decision to take a case", and 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. As the dissent recognized, the majority's finding as to waiver was based on the "unreasonable" proposition that 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).

Second, Massachusetts' characterization of the purported waiver cannot be squared with this Court's reasoning in *Martinez,* 566 U.S. at 9. In *Martinez*, this Court held that the government cannot claim procedural waiver when a defendant was denied effective counsel at the first opportunity for error-correcting review. See *id.* at 18. The facts are even more egregious here than in *Martinez*, because Hrones – Mr. Francis' volunteer unappointed and unpaid counsel represented him in his direct appeal and continued to keep Mr. Francis "in the dark" about what had occurred at the arraignment hearing. Pet. App. 30a. In 1991, Mr. Francis filed a motion asking for appointment of counsel. *Id.* at 82a. The Superior Court endorsed the motion and issued an order for CPCS to appoint counsel. *Id.* at 128a. But

that order was countermanded by the Chief Counsel for CPCS, a state agency in the judicial department that has no judicial power. *Id.* at 9a. Mr. Francis was thus denied effective counsel at that point too. The first time Mr. Francis had counsel that could engage in error correcting review of his conviction was in December 2014, when counsel was finally appointed. *Id.* at 34a.

As Chief Justice Gants explained in dissent, finding waiver here would be particularly "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." *Id.* at 56a. Given that Massachusetts Rule of Criminal Procedure 30(c)(2) gives the trial court discretion to excuse waiver, under the facts of this case, "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." *Id.* at 58a.

Massachusetts' Opposition all but ignores how the reasoning in *Martinez* pertains to this situation; it only attempts to distinguish *Martinez* in a footnote observing that *Martinez* was a federal habeas review case and this is not. BIO 23 n. 14. But the principle in *Martinez* applies with full force here: Mr. Francis was denied any counsel (let alone effective counsel), in direct contravention of the Superior Court's order, at the first possible opportunity anyone could have raised the issue. And like the right to effective counsel in *Martinez*, choice of counsel is a fundamental trial right warranting automatic reversal and a new trial. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). It would be absurd to excuse procedural default where a defendant had the assistance of

counsel who fell below the standards of *Strickland*, but find structural error waived where the defendant was denied the assistance of *any* counsel to identify the error.

Third, Massachusetts is wrong to suggest that there is an adequate and independent basis for the SJC's decision under state law. Massachusetts cites *Sochor* v. *Florida,* 504 U.S. 527 (1992), BIO 19, but that decision recognizes that the state court opinion must "indicate clearly and expressly that the state ground is an alternative holding" in order for this doctrine to apply. *Sochor,* 504 U.S. at 533 (internal citation omitted). That is simply not what the SJC did below.

After holding that Mr. Francis' right to choice of counsel under the State and Federal Constitutions was violated, and that this was structural error warranting automatic reversal, the SJC stated that "[n]onetheless, 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." Pet. App. 5a. (emphasis added). The SJC relied most heavily on this Court's Sixth Amendment decision in *Weaver* to support its holding that the "passage of time has huge consequences." Pet. App. 34a. See*, e.g., id.* at 30a–37a, 49a (explaining that "[w]e recognize, as does the Supreme Court, that the passage of time, particularly the great passage of time, matters" and citing both *Weaver* v. *Massachuetts*, 137 S. Ct. 1899, 1912 (2017) and *Commonwealth* v. *Robinson*, 102 N.E.3d 357, 362 (Mass. 2018)). When analyzing whether there was a

"substantial risk of a miscarriage of justice" the SJC explicitly stated that "[w]e have interpreted this standard, *as we must*, to be no less protective than the United States Supreme Court standard of review in *Weaver*." Pet. App. 35a (emphasis added). "[W]hen [a state] Supreme Court time and again [rules] because it says the Federal Constitution *requires it*, review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it." *Kansas* v. *Carr*, 577 U.S. 108, 118 (2016). This Court noted in *Carr* that "[w]hen we correct a state court's federal errors, *we return power to the State, and to its people*." *Id.* (internal citation omitted).

The SJC is in need of such correction here. Using federal law as its benchmark, the majority concluded that "[w]e 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." Pet. App. 37a.

The SJC plainly knew how to "'indicate[] clearly and expressly' that [a] state ground is an alternative holding," *Sochor,* 504 U.S. at 533 (internal citation omitted), and it declined to do so for its waiver analysis. In footnote 8, citing *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), the SJC held that "[s]hould the Supreme Court standard change [for choice of counsel], and we make no projections whatsoever in that regard, as that is not our prerogative, . . . 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." Pet. App. 29a. (emphasis added). This stands in stark contrast to its waiver analysis where although the SJC relies on federal law, there is a complete absence of such a clear statement.

Moreover, the SJC's opinion does not rest on *any* of the purported "alternative" grounds that Massachusetts claims are sufficient for this Court to affirm. The SJC's majority opinion never discusses, or even cites in its analysis, the state procedural rule, Rule 30(c)(2) of the Massachusetts Rules of Criminal Procedure, upon which Massachusetts relies. BIO 17. Chief Justice Gants' dissenting opinion points out that this procedural rule could only provide a basis for *not* finding waiver under these circumstances. Pet. App. 52a, 56a–59a; see also *id.* at 58a ("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."). The SJC also never stated that Mr. Francis' possession of the transcripts alone was a sufficient and alternative basis for finding waiver of his Sixth Amendment and state Constitutional choice of counsel claim. Cf. BIO 18. In fact, as discussed above, the SJC "[r]ecogniz[ed] the stringency of [public trial] case law" and, thus, did "not rel[y] simply on defendant's failure to raise the issue . . . in his first motion for a new trial." The SJC held that Mr. Francis' possession of the transcripts and failure to raise this error in his first motion for a new trial was not the basis for finding waiver. Pet. App. 45a.

II. THE DECISION BELOW CREATES A PERILOUS PRECEDENT AND WARRANTS REVIEW

Massachusetts' remaining arguments bypass the heart of the petition and confirm that the decision below cannot survive review.

1. Massachusetts contends that this Court should deny the petition because the "decision below is correct." BIO 28. But Massachusetts does not expressly defend the proposition that a third-party screener can waive an indigent defendant's meritorious Sixth Amendment claim. Instead, Massachusetts asserts that the decision could stand for a variety of other reasons, including a procedural rule the majority never even mentioned and the dissent expressly rejected as a basis for the decision. Compare BIO 17 with Pet. App. 52a, 56a–59a. Although Massachusetts asserts that the SJC did not rely "solely" on the actions of a third party to find waiver, BIO 24, it never explains how CPCS's conduct could be relevant *at all* when CPCS was not Mr. Francis' counsel. Because CPCS did not represent Mr. Francis at the time of the screening, the SJC was plainly wrong to consider *any* of the actions of CPCS in its waiver analysis. Massachusetts never wrestles with this fundamental problem, or the petition's argument that CPCS cannot possibly play *any* role in the waiver analysis because of its conflicting interests. Pet. 13–15.

2. Massachusetts also contends that the decision below is "fact-bound," BIO at 24, and involves "unique circumstances" that are unlikely to recur. *Id.* at 22. But Mr. Francis never suggested that the particular circumstances of his arraignment hearing are what makes this case worthy of review. Instead, the cert-worthy issue is what the dissent referred to as the "invent[ion of] a new and distinct ground for

waiver," Pet. App. 55a (Gants, C.J., & Budd, J. dissenting in part). As the dissent recognized, the implications of this new form of waiver extend to the entire CPCS screening process. Pet. App. 55a. Massachusetts claims that broader concerns about screening programs in general are "unfounded" because the decision below does not hold that "screening alone can trigger waiver." BIO 28. But if the actions of third parties figure into the waiver analysis *at all*, that is dangerous enough. As the petition points out, and Massachusetts does not deny, third parties screen cases in a variety of contexts that create the same risks the dissent recognized as to CPCS. Pet. 15–16.

3. Massachusetts' argument that there is no "split of authority," BIO 25, as to the question presented is not a response to the petition. The petition argues that the SJC's ruling is novel and warrants reversal before a split even develops. Pet. 15–19. The petition expressly requests that the Court "grant, vacate, and remand the underlying decision" before the SJC's new third party waiver rule takes root. *Id.* at 18. Massachusetts contends the Court should reject that request because this case does not "fit" into a category the Court considers appropriate for GVR. BIO 21. But that argument is premised on the notion that Mr. Francis is asking the court to "step in and correct" an error in a "highly fact-specific analysis." *Id.* at 27. That is not an accurate characterization of what the petition seeks. Mr. Francis is not looking to the Court to correct the SJC's factual analysis but to confirm that "a plain legal error infects the judgment," *Hicks* v. *United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring), because the SJC relied on a third party's conduct to find that an indigent defendant waived his meritorious Sixth Amendment claim.

In these circumstances, there is no reason for the court not to simply "correct an obvious judicial error," *Id.* at 2001, and ample reason for it to affirmatively reject the "new and distinct ground for waiver," that was just "invent[ed]" by the SJC. Pet. App. 55a.

CONCLUSION

For the foregoing reasons, the Court should grant, vacate, and remand the case to the SJC.

Respectfully submitted,

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