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SJC-12683

COMMONWEALTH vs. KEVIN FRANCIS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 150.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So ordered.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Accordingly, I respectfully dissent.