COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SUFFOLK, SS.
No. 12683

KEVIN FRANCIS
Petitioner/Appellant
v.
COMMONWEALTH
Respondent/Appellee

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

AMICUS BRIEF OF THE CATO INSTITUTE AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of criminal liability, the proper and effective role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is the only statewide association of lawyers in Massachusetts devoted exclusively to serving all segments of the defense bar. MACDL's mission includes protecting the individual rights of citizens of the Commonwealth, maintaining the integrity and independence of criminal defense lawyers, and preserving the adversarial system of justice.

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[1] Mass. R. App. 17(c)(5) Statement: No counsel for either party authored this brief in whole or in part. No one other than amici made monetary contributions to its preparation or submission. Neither amici nor their counsel represent the parties to the present appeal in another proceeding involving similar issues, nor were they a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF THE ARGUMENT

Criminal defense is personal business. A criminal defendant may never face a more momentous occasion than his trial, nor one where his decisions have greater personal consequence. The Supreme Court has therefore recognized that the Constitution not only mandates procedural rights for the accused, but also secures a defendant's autonomy in the exercise of those rights: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975).

At the same time, of course, the Sixth Amendment guarantees the "assistance of counsel," which entails both the defendant's right to choice of counsel, as well as the right to effective, court-appointed counsel for indigent defendants. But even when represented by counsel, the defendant himself remains the "master" of his defense. *Id.* at 820. A defendant therefore has "ultimate authority to make certain fundamental decisions regarding the case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and has the right to be personally present at "critical" stages of the criminal proceeding, *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The Sixth

Amendment's guarantee of defendant autonomy is so fundamental that violations of this right "rank[] as error of the kind . . . called 'structural'" and are "not subject to harmless-error review." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018).

Kevin Francis's autonomy was violated when the trial court permitted him to be represented at his murder trial by an attorney that he did not knowingly choose and who was not qualified for court appointment. By excluding Mr. Francis from the sidebar where it was determined that Stephen Hrones—whom the trial judge himself determined to be unqualified—would try his case for free, the court simultaneously excluded Mr. Francis from a critical stage of his trial and effectively denied him the right to choice of counsel. Because these rights are structural in nature, Mr. Francis is automatically entitled to a new trial.

More generally, securing a defendant's autonomy to make a knowing, voluntary choice of his trial advocate is especially important today, in light of the diminishing role of the jury trial itself. Though intended to be the cornerstone of criminal adjudication, the jury trial has been all but replaced by plea bargaining as the baseline of criminal adjudication—and

there is ample reason to doubt whether the bulk of such pleas are truly voluntary. While coercive plea bargaining is a complex problem with no simple solution, defendants must at least be assured that they will have a zealous, competent advocate to aid in their defense if they choose to go trial. If defendants like Mr. Francis can be misled as to the very nature of their representation, this assurance will be lost.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE AUTONOMY OF CRIMINAL DEFENDANTS TO DECIDE UPON THE FUNDAMENTAL NATURE AND PURPOSE OF THEIR REPRESENTATION.

The principle of defendant autonomy underlies the Supreme Court's decisions across a wide range of contexts—most notably, self-representation, choice of counsel, and the defendant's authority to make fundamental decisions and participate in critical stages of his proceeding, even when represented by counsel. Taken as a whole, this jurisprudence establishes that, while the assistance of counsel is generally necessary for an effective defense, it must be chosen and guided by the defendant himself.

A. The right to self-representation

Although self-representation is not specifically at issue in this case, the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806 (1975) and its subsequent self-representation cases are helpful for understanding the relationship between defendant autonomy and choice of counsel more generally.

In holding that a defendant has the right to represent himself, the *Faretta* Court relied on the larger and more fundamental right "to make one's own defense personally," *id.* at 819, of which self-representation is only one component. The Court emphasized that all of the procedural rights in the Sixth Amendment, not just the assistance of counsel, are "grant[ed] to the accused personally, *id.*, and that this suite of "defense tools" must be protected as an "aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally," *id.* at 820. Thus, a defendant's autonomy lives within the Sixth Amendment's guarantee that "the accused personally" possesses "the right to make his defense," *id.* at 819, and it shall not be taken from him.

The extensive history of the right to self-representation discussed in *Faretta* underscores the historical basis for defendant autonomy more generally. *See id.* at 821-32. Self-representation is, in some sense, the ultimate expression of autonomy, as it includes the right to conduct the entirety of one's own defense personally. And many of the Colonial Era sources relied upon by the Court grounded this right in the natural liberty of all free persons. *See id.* at 828 n.37 (Pennsylvania Frame of Government of 1682 provided that "in all courts all persons of all persuasions may freely appear in their own way"); *id.* at 829 n.38 (Georgia Constitution in 1777 secured "that inherent privilege of every free-man, the liberty to plead his own cause"); *id.* at 830 n.39 (Thomas Paine, in support of the 1776 Pennsylvania Declaration of Rights, argued that people have "a natural right to plead [their] own case").

The subsequent self-representation case law reinforces this autonomy-driven understanding of *Faretta*. *McKaskle v. Wiggins* explicitly confirms that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." 465 U.S. 168, 178 (1984). *See also Indiana v. Edwards*, 554 U.S. 164, 176 (2008) ("'[d]ignity' and 'autonomy' of

individual under-lie self-representation right”). In *Rock v. Arkansas*, the Court held that “an accused’s right to present his own version of events in his own words” was “[e]ven more fundamental to a *personal defense* than the right of self-representation.” 483 U.S. 44, 52 (1987) (emphasis added). In other words, the right to a “personal defense”—the defendant’s autonomy—is the fountainhead from which flow specific procedural guarantees. And in *Weaver v. Massachusetts*, the Court explained that the right to self-representation “is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” 137 S. Ct. 1899, 1908 (2017).

B. The right to assistance of counsel

Of course, as even the *Faretta* majority acknowledged, “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts.” 422 U.S. at 834. The Sixth Amendment itself thus explicitly guarantees a defendant the right “to have the assistance of counsel for his defence.” U.S. Const. amend. VI. And crucially for this case, this right has two distinct components.

First a defendant has the right to retain counsel of his own choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). While the Assistance of Counsel Clause does not discuss "choice of counsel" in so many words, the "right to select counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. It is not just a procedural protection, but rather a reflection of the larger right to a personal defense. This component of 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 the counsel *he believes to be best*." *Id.* at 146 (emphasis added).

Second, for indigent defendants unable to retain their own counsel, the Sixth Amendment guarantees the right to have counsel appointed for their defense. *See Gideon v. Wainwright*, 372 U.S. 355 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). This includes the right to have counsel appointed who does not have a conflict of interest in representing the defendant, *see Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978), and who is qualified to provide *effective* representation in the defendant's particular case, *see Strickland v. Washington*, 466 U.S. 668 (1984).

Even when counsel is appointed for the defendant, they are still acting as an *assistant*, not the master of the defense; indeed, the Supreme Court has specifically instructed that the duties of appointed counsel include the duty "to consult with the defendant on important decisions" and "to keep the defendant informed of important developments in the course of the prosecution." *Id.* at 688.

C. The right to make fundamental decisions and participate in critical stages of the proceeding

Once a defendant chooses to be represented by counsel, "law and tradition may allocate to the counsel the power to make binding decisions of strategy in many areas." *Faretta*, 422 U.S. at 820. But a defendant retains "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)). These "fundamental decisions" include whether to enter a guilty plea,[2] waive the right to a jury trial,[3] testify

[2] *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[3] *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988) (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277 (1942).

on one’s own behalf,[4] maintain innocence before a jury,[5] and whether to take an appeal.[6]

Relatedly, even when represented by counsel, defendants have the right “to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” *Kentucky v. Stincer*, 482 U.S. 730, 745-46 (1987); *see also Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (defendant has a right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge”). This Court recently elaborated upon this requirement, clarifying that the defendant has the right to be personally present “[w]hen a judge conducts an inquiry about a consequential matter, such as an allegation of serious misconduct of a juror or a suggestion of juror bias.” *Commonwealth v. Colon*, 482 Mass. 162, 172 (Mass. 2019) (quoting *Commonwealth v. Dyer*, 460 Mass. 728, 738 (Mass. 2011)).

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[4] *Jones*, 463 U.S. at 751; *see also Rock v. Arkansas*, 483 U.S. 44, 49 (1987).

[5] *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

[6] *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Jones*, 463 U.S. at 751.

Most crucially, this Court held in *Colon* that "[c]ounsel's presence at sidebar and intention to relay information to a defendant does not substitute for the defendant's presence," *id.* at 173-74, and that "[t]his is especially so where . . . counsel agrees to restrict the information that he would share with the defendant," *id.* at 174. This Court has therefore gone even further than the Supreme Court in clarifying that the representation by counsel cannot usurp a defendant's autonomy in the control of his own defense, and that these concerns are especially fraught when a defendant is kept in the dark about key conversations and proceedings pertaining to his case.

II. MR. FRANCIS'S AUTONOMY WAS IMPERMISSIBLY VIOLATED WHEN THE TRIAL COURT PREVENTED HIM FROM MAKING A KNOWING AND INTELLIGENT DECISION REGARDING HIS CHOICE OF COUNSEL.

As petitioner explains in detail, the trial court's decision to exclude Mr. Francis from the conversation in which it was agreed that Mr. Hrones would represent him as an unpaid volunteer violated Mr. Francis's Sixth Amendment rights—both because it deprived him of the "assistance of counsel" guaranteed by the Sixth Amendment, *see* Br. of Pet'r at 23-31, and because it excluded him from a critical stage of his proceeding,

id. at 31-38. And because these fundamental rights are structural in nature, Mr. Francis is automatically entitled to a new trial. *See id.* at 38-53.

Whether or not Mr. Hrones ultimately provided "effective" representation within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), is irrelevant. The question is not whether Mr. Hrones provided, in the Court's view, substantively adequate representation, but whether the trial court usurped from Mr. Francis a fundamental decision that was supposed to be within his ultimate control—whether to retain in his murder trial a volunteer, unpaid attorney that the trial court itself had deemed unqualified for appointment. *Cf. McCoy v. Louisiana*, 138 S. Ct. 1500, 1510-11 (2018) ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . [T]he violation of [the defendant's] protected autonomy right was complete when the court allowed counsel to usurp control of an issue within [the defendant's] sole prerogative.").

It is crystal clear that choice of counsel is an issue within the defendant's sole prerogative, regardless of whether a judge agrees or disagrees with the defendant's reasoning. *See United States v.*

Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (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 the counsel *he believes to be best*") (emphasis added). It is similarly clear that, had Mr. Francis been accurately informed about the nature of Mr. Hrones's representation, he would never have chosen to retain him. *See, e.g.*, Br. of Pet'r at 18-19 ("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.").

To be clear, Mr. Francis's reluctance to accept an unpaid, volunteer lawyer to represent him in a murder trial was eminently reasonable. As Mr. Hrones himself acknowledged in a similar case where he represented a different defendant, "it is very difficult for counsel to try a case without getting paid. It presents a tremendous hardship." *Id.* at 19. But whether Mr. Francis was ultimately justified in this concern is irrelevant; what matters is that he had a fundamental right to make an informed decision for himself on this matter, and the trial court deprived him of that right. He is therefore entitled to a new trial.

III. SECURING DEFENDANT AUTONOMY IS ESPECIALLY IMPORTANT TODAY, IN LIGHT OF THE VANISHING ROLE OF THE JURY TRIAL GENERALLY.

The defendant's inherent right to make fundamental decisions in his own case—including the right to make an informed decision as to choice of counsel—is the core concern of the Sixth Amendment and the chief issue relevant to this appeal. But protecting defendant autonomy is also crucial because of its connection to a larger, structural threat to our criminal justice system—the erosion of the criminal jury trial itself.

The jury trial was intended to be the cornerstone of criminal adjudication in this country, and it is discussed more extensively in the Constitution than nearly any other subject. Article III states, in mandatory, structural language, that "[t]he Trial of all Crimes . . . *shall* be by Jury; and such Trial *shall* be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2 (emphases added). The Bill of Rights guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," U.S. Const. amend. VI; and that no person be "twice put in jeopardy of life or limb," U.S. Const.

amend. V. Notably, the jury trial is the only individual right mentioned in both the original body of the Constitution and the Bill of Rights.

Yet despite its intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, at 25

("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.").

Most troubling, there is ample reason to believe that many criminal defendants—regardless of factual guilt—are effectively coerced into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014. In a recent report, the National Association of Criminal Defense Lawyers extensively documented this "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." Nat'l Ass'n of Crim. Def. Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It 6 (2018). When prosecutors have the discretion to engage in unbridled charge stacking—especially in light of severe mandatory minimums—they can exert overwhelming pressure on defendants to plead out, no matter the merits of their case. *See id.* 7, 24-38.

The result is not only that criminal prosecutions are rarely subjected to the adversarial testing of evidence that our Constitution envisions, but also that

citizens are deprived of their prerogative to act as an independent check on the state in the administration of criminal justice. We have, in effect, traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders.

One of the few tools defendants have to resist the pressure to plead guilty is the guarantee of a zealous, competent advocate, committed to the defendant's fundamental goals in his case, and capable of putting the state to its heavy burden of proof. But that tool amounts to little if a defendant can have no assurance that he will be able to make an informed decision about choice of counsel. When deciding whether to exercise their Sixth Amendment rights, defendants should at least have confidence that they will have a meaningful, informed choice between retained counsel of their own selection, or a qualified, court-appointed attorney.

The demise of the jury trial is a deep, structural problem, with no single cause or solution. But the least we can do is not exacerbate the situation by diminishing the ability of defendants to make informed decisions

about their own advocate. Reversing the decision below would be a small but significant step toward restoring the jury trial itself to its proper and intended role.

CONCLUSION

For the foregoing reasons, as well as those presented by Petitioner/Appellant, the Court should reverse and grant Mr. Francis a new trial.

Respectfully submitted,

October 15, 2019

s/ *Chauncey B. Wood*

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus brief, including but not limited to Mass R. App. P. 17.

s/ *Chauncey B. Wood*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief and its accompanying was served on:

- Amy M. Belger, Law office of Amy M. Belger, 841 Washington Street, Holliston, MA 01746,
- Ira L. Gant, Innocence Program Committee for Public Counsel Services, 21 McGrath Highway, Somerville, MA 02143, and
- ADAs Dara Kesselheim and Craig Iannini, Office of the Suffolk County District Attorney, 1 Bulfinch Place, Boston, MA 02114,

on October 15, 2019 via electronic mail.

s/ *Chauncey B. Wood*