

No. SJC-13824

Commonwealth of Massachusetts

Supreme Judicial Court

COMMITTEE FOR PUBLIC COUNSEL SERVICES,
ON BEHALF OF UNREPRESENTED DEFENDANTS IN
MIDDLESEX AND SUFFOLK COUNTIES,
Petitioners-Appellants

v.

MIDDLESEX AND SUFFOLK COUNTY DISTRICT
COURTS AND BOSTON MUNICIPAL COURT,
Respondents-Appellees

BRIEF FOR PETITIONERS-APPELLANTS

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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ISSUE PRESENTED

On September 18, 2025, the single justice (Wendlandt, J.) reserved and reported the following question to the full Court:

In light of the scope of the present shortage of available defense counsel in the District Courts of Middlesex and Suffolk County and in the Boston Municipal Court, whether and under what circumstances the Supreme Judicial Court, a single justice of the Supreme Judicial Court, or any justice of any trial court department is authorized to order increased compensation rates beyond those provided in G. L. c. 211D, § 11 (a), for attorneys accepting representation of indigent criminal defendants.

INTRODUCTION

We have been here before. Once again, indigent criminal defendants find themselves in an unacceptable and constitutionally intolerable position—without counsel. And the reason they once again find themselves without counsel is the same reason they found themselves without counsel in 2004, and the same reason they found themselves without counsel in 2019: “the low compensation rate for district court work set by statute.” RA:207. Compare *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 229 (2004) (counsel shortage “caused by the low rate of attorney compensation authorized by the annual budget appropriation”), and *Carrasquillo v. Hampden County Dist. Courts*, 484 Mass. 367, 392 (2020) (low rates of compensation “a major factor in discouraging private attorneys from accepting court appointments”), with Order, SJ-2025-0244 (July 3, 2025)

(Wendlandt, J.) (statutory rate of \$65 per hour “proven inadequate to secure the representation by bar advocates of indigent defendants”). RA:205.

And like this Court in *Lavallee* and *Carrasquillo*, the single justice in this case implemented the *Lavallee* protocol as a short-term remedy to the constitutional violation of the right to counsel, but did not, at that time, squarely address the low compensation rate, instead deferring to the Legislature to develop a long-term solution to the “ongoing systemic violation of indigent criminal defendants’ constitutional rights to effective assistance of counsel.” A45; RA:209-210. See *Lavallee*, 442 Mass. at 243-244 (fashioning remedy to denial of constitutional right while Legislature created a permanent remedy); *Carrasquillo*, 484 Mass. at 393 (deferring to Legislature to determine best approach to counsel shortage after single justice implemented *Lavallee* protocol). A month later, the Legislature responded, increasing district court case compensation rates to \$75 per hour as of August 1, 2025, and appropriating funds for additional staff attorneys over the next two years. A41; RA:482.

Yet here we are. Two months after the rate increase took effect, the government continues to fail to meet its constitutional obligations, as literally thousands of defendants remain unrepresented, and a significant percentage of duty days remain unfilled. This “unconstitutional state of affairs,” *Lavallee*, 442 Mass. at 245, is disgraceful and intolerable.

The judiciary has the “inherent power to ensure the proper operations of the courts and protect them from impairment resulting from a lack of supporting personnel.” *Carrasquillo*, 484 Mass. at 394, quoting *O’Coin’s, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 515-516 (1972). But a court is not operating properly if, instead of adjudicating cases, it must conduct *Lavallee* hearings because there are not enough lawyers to represent all of the defendants entitled to counsel. The trial courts cannot function under an indefinite state of emergency. Everybody knows that the only solution is to raise the rates.

And yet, here we are. When a statutory compensation scheme leads to the deprivation of a constitutional right, it is unconstitutional. In light of the significant, ongoing deprivation of the right to counsel, even in light of the Legislature’s recent action, this Court should hold that the current rate of compensation for district court cases is unconstitutional under the circumstances found by the single justice in her thorough findings and order below, thus enabling this Court and the single justice to restore access to justice by raising the rates to constitutionally adequate levels.

STATEMENT OF THE CASE AND THE FACTS

Implementation of the Lavallee Protocol

On May 27, 2025, many bar advocates stopped accepting duty days due to “inadequate compensation rates” for district court work set by statute. A.59;

RA:205. Although the work stoppage has affected indigent criminal defendants statewide, its impact was—and remains—most acute in the district courts of Middlesex County and Suffolk County and the Boston Municipal Court (BMC). RA:47. October 2, 2025 Affidavit of Holly T. Smith, ¶4 (Oct. Smith Aff.).¹ By June 13, there were 858 indigent defendants (387 in Middlesex County; 394 in Suffolk County) without counsel throughout the Commonwealth, seventy-seven of whom (16 in Middlesex County; 56 in Suffolk County) were in custody. RA:49. The five offices of CPCS’s Public Defender Division (PDD) in Middlesex and Suffolk Counties—which had been prioritizing intake based on those cases where counsel was “most urgently needed”—were quickly reaching capacity. RA:61, quoting *Carrasquillo*, 484 Mass. at 389. On June 18, citing the ongoing work stoppage and the PDD’s limited remaining capacity, CPCS, on behalf of unrepresented defendants in the Middlesex and Suffolk County district courts and BMC, filed an emergency petition pursuant to G. L. c. 211, § 3, seeking implementation of the *Lavallee* protocol and “‘preliminary relief in the form of increased compensation rates’ until the Legislature is able to address the shortage of counsel on a more permanent basis.” RA:32-33, quoting *Lavallee*, 442 Mass. at 242. Following a

¹ With this brief, CPCS is filing an assented-to motion to expand the record with the affidavits of Deputy Chief Holly Smith and Deputy Chief Arnie Lucinda Stewart in order to provide this Court with the most up-to-date information to which CPCS has access.

preliminary hearing held on June 26, 2025, the single justice ordered the parties and the Suffolk County District Attorney (whose motion to intervene had been allowed) to submit a joint statement of facts, which was filed on July 1. RA:74-189.

While the petition was pending, the number of unrepresented defendants continued to grow. RA:199. By June 29, there were 1,392 indigent defendants without counsel statewide (604 in Middlesex; 646 in Suffolk)—eighty-seven of whom were in custody (25 in Middlesex; 46 in Suffolk)—and PDD offices in Middlesex and Suffolk Counties were either at or approaching capacity. RA:69, 107; 200.

On July 3, following an evidentiary hearing held the previous day, the single justice issued a detailed and comprehensive order in which she found, *inter alia*, that CPCS and the local bar advocate programs—Middlesex Defense Attorneys (MDA) and Suffolk Lawyers for Justice (SLJ)—“have engaged in good faith efforts to provide counsel to indigent defendants.” A57; RA:203. The single justice noted that, before the work stoppage started, CPCS sent a letter to the Chief Justice of the Trial Court Department to notify the courts of “the anticipated work stoppage by bar advocates and of CPCS’s plans to address the anticipated shortage of defense counsel.” RA:94, 203. In that letter, CPCS informed the courts that it was prioritizing cases where counsel was “most urgently needed,” as required by *Carrasquillo*, 484 Mass. at 389. RA:79, 204, 298. “These efforts met with some success

in securing counsel for incarcerated defendants,” the single justice found, as evidenced by the fact that, “as of the filing of CPCS’s petition, most incarcerated defendants had been assigned counsel within seven days.” A58; RA:104, 204. The single justice further found that: (a) “CPCS crafted notices for courtroom clerks to provide to unrepresented defendants at their arraignments, which notices would provide those defendants their docket number, next court dates, and contact information for CPCS”; (b) CPCS continued to advocate with the Legislature for increased compensation rates for bar advocates; and (c) MDA and SLJ “call and email attorneys on a daily basis” to secure counsel for unrepresented indigent defendants.” A59; RA:78, 204-205.

The single justice concluded that, notwithstanding these good faith efforts, “there is an ongoing systemic violation of indigent criminal defendants’ constitutional rights to effective assistance of counsel.” A63-64; RA:209-210, quoting *Carrasquillo*, 484 Mass. at 390-391. The single justice noted that the statutory compensation rate of \$65 per hour for district court assignments had “proven inadequate” to secure bar advocate representation of indigent defendants. A59; RA:205. Indeed, “[e]ven before the work stoppage began,” the single justice

observed, “large percentages of duty day slots went unfilled” in the district courts of Middlesex County and Suffolk Counties and BMC. A60; RA:206.²

In light of the large number of defendants who were without counsel, as well as the fact that there did not appear to be “any concrete present prospects” for remedying the problem of low compensation rates, the single justice granted CPCS’s request and implemented the *Lavallee* protocol in the Middlesex and Suffolk County district courts and BMC. A62-63; RA:208-209. At the same time, the single justice denied without prejudice CPCS’s request for a rate increase, notwithstanding the fact that the “shortage of available defense counsel [was] caused in large part by inadequate compensation rates.” A64; RA:210. Instead, the single justice deferred to the Legislature, as the governmental branch responsible for making laws and appropriating funds, “to devise an appropriate solution,” and to “choose the best policy course for resolving the systemic issue” to resolve the issue. A64; RA:210.

Legislative Action

On August 5, the Governor signed a supplemental budget package that included a provision addressing the rates of compensation for bar advocates.

² “Even back in 2021, Suffolk and Middlesex Counties were struggling to fill their duty days and the BMC, which historically had no problem filling duty days, was experiencing a near crisis with attorney coverage and had a list of clients without counsel.” RA:101 [June 17, 2025 Affidavit of Holly Smith, ¶11].

RA:296. Specifically, the legislation increases the hourly rate for district court cases from \$65 per hour to \$75 per hour as of August 1, 2025, and from \$75 per hour to \$85 per hour as of August 1, 2026. RA:296-297. The legislation also requires the PDD to use its best efforts to hire approximately 160 new attorneys by the end of fiscal year 2026 and an additional 160 new attorneys by the end of fiscal year 2027. RA:297.

Increase in PDD Staff

Between August 5 and August 22, 2025, CPCS hired twenty-two new staff public defenders, all of whom began training on September 8, 2025. October 3, 2025 Affidavit of Arnie Lucinda Stewart, ¶3 (Oct. Stewart Aff.).³ This is in addition to the sixteen attorneys who had already been hired for the PDD's 2025 fall class, for a total of thirty-eight new hires. Oct. Stewart Aff. ¶3; RA:297. Eighty percent of these new hires have been slotted to work in PDD offices in Middlesex and Suffolk Counties. Oct. Stewart Aff. ¶3.

Lavallee Hearings

Since the protocol was implemented on July 3, and as of September 15, a total of 183 defendants who had been in custody for more than seven days without counsel have been released following a *Lavallee* hearing. RA:280. However, not all

³ See n.1, *supra*.

defendants who have had such a hearing have been released; in at least 11 cases, the presiding judge held that CPCS had not made good faith efforts to secure counsel and thus did not order release. RA:288-290, 292, 295. The judge's lack of good faith effort determinations were based for the most part on the seriousness of the offense and the fact that CPCS had not asked the single justice to reconsider her denial without prejudice of CPCS's request that the Court increase compensation rates. RA:288-290, 291, 377, 380-381, 383, 387-388, 392-393, 397-398, 402-403.

For five defendants, the judge ordered that the attorney appointed to the case be compensated at a rate of \$100 per hour. RA:290-292, 294, 296. In so ordering, the judge stated that he was not raising the rates for all bar advocates but was doing so "based on this particular circumstance for this particular case and to remedy the ongoing constitutional violation" of the defendant's rights. RA:290. See also RA:294 (court made clear that his order did not raise the bar advocate rates for all defendants, just this defendant). The judge ordered increased compensation rates for three defendants prior to the legislative increase in rates and for two defendants after the increase had taken effect. RA:382, 389, 394, 399, 404. CPCS was able to find counsel for all five defendants at the \$100 per hour rate ordered by the judge. RA:290, 292, 295-296.

Current Status of the Counsel Shortage

As of October 2, 2025, there were 2,653 unrepresented indigent defendants throughout the Commonwealth (1,133 in Middlesex County; 1,329 in Suffolk County), seventy-five of whom (seven in Middlesex County; fifty-eight in Suffolk County) were in custody. Oct. Smith Aff. ¶¶1-2, 7-12. This number of unrepresented defendants does not include over 800 individuals whose cases were dismissed without prejudice after a 45-day *Lavallee* hearing. RA:280.

The number of unrepresented defendants being reported to CPCS by the courts on a weekly basis has been decreasing over the past few weeks, presumably because more bar advocates are accepting assignments at arraignment. Oct. Smith Aff. ¶¶15-16. In addition, with fewer in-custody defendants being added to the list, both of the PDD's Suffolk County offices and one of its Middlesex County offices have recently resumed scheduling some duty day coverage. Oct. Stewart Aff. ¶4.

The duty day calendars for Middlesex County have improved slightly since the increased compensation rates went into effect, but bar advocate participation is still significantly lower than it was prior to the work stoppage. RA:83, 282-284. The duty day calendars for Suffolk County have seen more improvement than those in Middlesex County, but bar advocate duty day participation in Suffolk County also remains lower than it was prior to the work stoppage. Oct. Smith Aff. ¶¶19-21; RA:83, 282-284.

SUMMARY OF THE ARGUMENT

This Court has both the authority and the obligation to safeguard the constitutional right to counsel. This authority stems, in part, from the judiciary's inherent power to ensure that the courts have the resources, including human resources, necessary for the courts to operate properly. Indeed, this Court may order the expenditure of public funds, even absent a legislative appropriation, to protect the courts from impairment due to a lack of supporting personnel. Court-appointed counsel are essential for the proper administration of justice and, therefore, this Court can, if necessary, temporarily raise compensation rates if the inadequacy of those rates results in an ongoing systemic violation of the right to counsel. Pp. 18-25.

In light of the fact that thousands of indigent defendants remain without counsel even after the Legislature has attempted to remedy the problem, this Court should find that the current compensation rates are unconstitutional under the circumstances found by the single justice below. Other states' highest courts have held statutory limitations on compensation to court-appointed attorneys to be unconstitutional. Doing so here would allow a single justice of the Supreme Judicial Court for Suffolk County, under that court's general superintendence powers, to temporarily increase the compensation rates above those provided in G. L. c. 211D, § 11(a). Given the duration and scope of the counsel shortage, this

Court should also strengthen the *Lavallee* protocol to provide greater protections to indigent defendants. Pp. 25-32.

Courts of general jurisdiction have the inherent authority to do that which is required to ensure a fair trial. Although the courts must ordinarily assign CPCS to represent indigent defendants, and CPCS then appoints counsel, in exceptional circumstances in an individual case, a court may appoint counsel directly. In those circumstances, the court may set a fair rate of compensation. This is a power the trial courts must use sparingly so as to avoid undermining the independence of the indigent defense system, which would itself compromise the constitutional adequacy of that system. Pp. 32-37.

ARGUMENT

- I. **When unconstitutionally low rates of compensation for court-appointed counsel lead to a systemic violation of the right to counsel and the Legislature has either failed to act or acted in a manner that has not resolved the constitutional crisis, this Court and a single justice thereof have the authority to order increased compensation rates.**

“The government of the Commonwealth . . . has a constitutional obligation to ensure that there is an adequate supply of publicly funded defense attorneys available to represent eligible indigent criminal defendants.” *Carrasquillo*, 484 Mass. at 368. That constitutional obligation is being dishonored today to a degree that “far exceed[s]” previous systemic violations of the right to counsel in Massachusetts, as the single justice made clear in ordering the implementation of

the *Lavallee* protocol on July 3. A52; RA:198. The “unconstitutional state of affairs” at issue in *Lavallee* involved fifty-eight defendants without counsel. *Lavallee*, 442 Mass. at 235 n.10, 245. The petition for relief in *Carrasquillo* “reported that 155 defendants were unrepresented.” *Carrasquillo*, 484 Mass. at 390 n.27. Since the work stoppage began on May 27, 2025, more than 7,000 indigent defendants have been arraigned across Massachusetts without “the guiding hand of counsel,” *Powell v. Alabama*, 287 U.S. 45, 69 (1932), to which they were entitled. Oct. Smith Aff. ¶5. Even now, almost two months after the Legislature raised the rates, the number of indigent defendants without counsel remains in the thousands. Oct. Smith Aff. ¶1. There can be no question that the “ongoing systemic violation of indigent criminal defendants’ constitutional rights to effective assistance of counsel” that warranted imposition of the *Lavallee* protocol three months ago is ongoing still. A63; RA:209, quoting *Carrasquillo*, 484 Mass. at 390-391.

What is in question is whether, in light of the extraordinary number of people without counsel and the fact that the Legislature’s attempted remedy has not resolved the problem, this Court and a single justice of the Supreme Judicial Court have the authority to order increased compensation rates beyond those provided in G. L. c. 211D, § 11(a). The answer, unequivocally, is yes.

A. This Court has the obligation to protect the right to counsel.

There is “no question” that the right to counsel enshrined in article 12 “is a fundamental constitutional right.” *Lavallee*, 442 Mass. at 234. It attaches “at least by the time of arraignment,” *id.* at 234-235, and “extends to every critical stage of the criminal process.” *Id.* at 235 (citations omitted). The right to counsel is “essential to fair trials,” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), because without counsel, indigent defendants cannot access the other constitutional rights that they have. See *United States v. Cronin*, 466 U.S. 648, 654 (1984) (“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”). See also U.S. Const. Amend. VI; U.S. Const. Amend. XIV. “It is difficult to overstate the essential importance of the right to counsel in our adversary system of criminal justice.” *Commonwealth v. Dew*, 492 Mass. 254, 261 (2023).

The constitutional “duty” to provide counsel to indigent criminal defendants “falls squarely on the government.” *Lavallee*, 442 Mass. at 246. The government is failing in this regard. Due to low compensation rates for court-appointed attorneys, thousands of indigent criminal defendants have not been provided with counsel at arraignment; over 1,200 have been waiting for counsel for more than forty-five days. RA:279-280. This is a “[s]ignificant delay”—one that does not merely “endanger[]” the right to counsel, *Carrasquillo*, 484 Mass. at 381,

but effectively obliterates it. In short, low compensation rates have once again caused a “systemic problem of constitutional dimension.” *Lavallee*, 442 Mass. at 244.

B. This Court is both authorized and obliged to take action when the government is systematically violating indigent defendants’ right to counsel.

Lavallee makes crystal clear that, when presented with a systemic violation of the right to counsel, the Supreme Judicial Court has both the authority to act to mitigate the harm as well as the constitutional obligation to do so. See *Lavallee*, 442 Mass. at 244 (“[W]hile the constitutional rights of particular petitioners have not yet been adequately addressed, our powers of general superintendence *require* us to fashion an appropriate remedy to the continuing constitutional violation”); 246 (where there is “no assurance that [ameliorative measures recently taken by the executive and legislative branches] will solve the problem,” the Supreme Judicial Court “*must* address the ongoing harm to defendants who are still deprived of counsel”) (emphases supplied).

Protecting the constitutional rights of defendants, including the right to counsel, is a core function of the judiciary. Cf. *Simmons v. State Pub. Def.*, 791 N.W.2d 69, 85–86 (Iowa 2010) (“It is the responsibility of the judicial branch to ensure that indigents receive effective assistance of counsel.”) Accordingly, when systemic violations of the right to counsel have occurred as a result of insufficient

compensation rates, this Court has exercised its general superintendence powers to address the “the continuing constitutional violation” suffered by the unrepresented defendants. *Lavallee*, 442 Mass. at 244. Specifically, this Court established “presumptive time limits for the assignment of counsel,” ruling that “‘an indigent defendant who is held in lieu of bail or under an order of preventive detention may not be held for more than seven days without counsel,’ and that ‘no defendant entitled to court-appointed counsel may be required to wait more than forty-five days for counsel to file an appearance.’” *Carrasquillo*, 484 Mass. at 382, quoting *Lavallee*, 442 Mass. at 246. By its terms, however, the *Lavallee* protocol “is only a temporary remedy.” *Carrasquillo*, 484 Mass. at 391. It does not address the root cause of the problem, which is, of course, money.

C. This Court is authorized to order the expenditure of funds to remedy constitutional violations and to ensure the proper functioning of the courts.

When this Court has implemented the *Lavallee* protocol, rather than remedy the situation by increasing the rates, it has “defer[red]” for the specific purpose of giving the Legislature the opportunity to devise a long-term solution. *Lavallee*, 442 Mass. at 245; *Carrasquillo*, 484 Mass. at 393; A64; RA:210. Recognizing that any solution to the counsel shortage would require the expenditure of funds, and that “[t]he power to direct the spending of State funds is a quintessential prerogative of the Legislature,” *Lavallee*, 442 Mass. at 241, this Court has deferred

to legislative action. *Id.* at 243-244; *Carrasquillo*, 484 Mass. at 393. See also *County of Barnstable v. Commonwealth*, 410 Mass. 326, 335 (1991) (“oversight of the public fisc is a responsibility that, in the normal scheme of things, is within the Legislature’s sole province”); Article 30, Mass. Declaration of Rights (“the judicial shall never exercise the legislative and executive powers”). This Court has twice now deferred to the Legislature, as the branch responsible for enacting laws and appropriating funds, to choose among competing policy options and determine the best approach to fulfill the Commonwealth’s obligations to indigent criminal defendants. See *Carrasquillo*, 484 Mass. at 393-394; *Lavallee*, 442 Mass. at 242-243.

However, the fact that this Court has, up until now, chosen not to increase the rates does not mean that it cannot do so. To the contrary, courts do not stand by and allow the government to trample on constitutional rights merely “because funds have not been appropriated to remedy the wrong.” *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 532 (1983). Moreover, the Court cannot defer, even temporarily, the exercise of powers it does not have. *Lavallee*, 442 Mass. at 242 (noting other state courts deferring “only temporarily”).

As the highest constitutional court of the Commonwealth, this Court has “the inherent common law and constitutional powers . . . to protect and preserve the integrity of the judicial system and to supervise the administration of justice.” *Shaw’s Supermarkets, Inc. v. Melendez*, 488 Mass. 338, 339-40 (2021). See also Article

II, Mass. Declaration of Rights (“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”). Inherent powers include the authority to protect the courts from impairment due to inadequate facilities or a lack of supporting personnel. *O’Coin’s*, 362 Mass. at 511. Pursuant to its general superintendence authority over lower courts, this Court also has the power to “ensure that cases are tried fairly and expeditiously.” *Commonwealth v. O’Brien*, 432 Mass. 578, 584 (2000).

The right to counsel is a “constitutional imperative” that not only “protect[s] the rights of the accused,” but also “help[s] to ensure the integrity of our justice system.” *Carrasquillo*, 484 Mass. at 394, 395. The importance of assigned counsel to a properly functioning judiciary is recognized nationwide. See, e.g., *People v. Jones*, 186 Cal. App. 4th 216, 242 (2010) (excessive caseloads bear on the integrity of the judicial system itself); *Wilson v. State*, 574 So. 2d 1338, 1342 (Miss. 1990) (Robertson, J., concurring) (“If an adequate courthouse is essential to the administration of justice, so are competent counsel.”). Court-appointed counsel are “necessities, not luxuries.” *Gideon*, 372 U.S. at 344. Thus, this Court has acknowledged that a shortage of defense counsel is the type of situation where it would be appropriate

to exercise its “inherent power to ensure the proper operations of the courts and to protect them from impairment resulting from a lack of supporting personnel.” *Carrasquillo*, 484 Mass. at 394.

The fact that a court may need to order the Commonwealth to expend funds to ensure a functioning judicial system is of no moment. “The scope of inherent judicial authority reaches beyond traditional adjudicatory powers and encompasses (but is not limited to) the court’s power to commit the fiscal resources of the Commonwealth and other governmental agencies necessary to ensure the proper operation of the courts.” *First Justice of the Bristol Div. of the Juvenile Court Dep’t v. Clerk–Magistrate of the Bristol Div. of the Juvenile Court Dep’t*, 438 Mass. 387, 397 (2003). A prior appropriation is not required where the expenditure is necessary to allow the judiciary to fulfill “its responsibilities to the people under the Constitution.” *O’Coin’s*, 362 Mass. at 511. Although the inherent power to order the disbursement of funds is a duty that “must be borne responsibly,” *Carrasquillo*, 484 Mass. at 394, quoting *O’Coin’s*, 362 Mass. 510, it is a duty that the courts possess if necessary “to secure the full and effective administration of justice.” *O’Coin’s*, 362 Mass. at 514.

D. This Court has the authority to temporarily increase the rates set by the Legislature if they are unconstitutionally low.

One of this Court’s functions is to determine the constitutionality of legislatively enacted statutes. See *Commonwealth v. Jackson*, 369 Mass. 904, 908

(1976) (question before court whether statute “complies with constitutional mandates”). See also *Bates v. Director of Office of Campaign & Political Finance*, 436 Mass. 144, 168 (2002) (imperative duty of judicial branch to “say what the Constitution requires”). Statutes that impact the state treasury are not exempt from constitutional analysis by the judiciary. See *Bates*, 436 Mass. at 155 (holding that Constitution requires Legislature to appropriate funds for clean elections law). Thus, the fact that the Legislature has codified rates of compensation for court-appointed counsel in G. L. c. 211D, § 11(a), does not insulate those rates from judicial scrutiny.

This Court may not amend the rates enacted by the Legislature, even temporarily, unless they have proven to be constitutionally inadequate. See *County of Barnstable*, 410 Mass. at 335 (courts may interfere with legislative funding decision only if “insufficient provision for the judiciary’s constitutionally required needs”). The procedure set forth in *Carrasquillo* to determine if there is an ongoing systemic violation of indigent defendants’ constitutional rights to counsel is suitable for this purpose if the reason for the systemic violation is inadequate compensation rates. *Carrasquillo*, 484 Mass. at 390-391 (listing eight factors for single justice to consider when deciding whether *Lavallee* protocol is warranted). If this Court holds that it has the authority to override the Legislature’s compensation scheme in these limited circumstances, it would not be alone.

Other states' highest courts have held statutory limitations on compensation to court-appointed attorneys to be unconstitutional. See, e.g., *Arnold v. Kemp*, 306 Ark. 294, 306 (1991) (holding fee cap portion of statute unconstitutional); *State v. Lynch*, 796 P.2d 1150, 1164 (Okla.1990) (holding that the rate of compensation for indigent defense was too low and setting payment guidelines until Legislature acts); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 30 (1966) (statutory fee cap unconstitutional as applied to facts of the case); *Knox Cnty. Council v. State ex rel. McCormick*, 217 Ind. 493, 514 (1940) (statute unconstitutional to the extent it purports to deny courts ability to pay court-appointed counsel without prior appropriation: Courts "must have power to appoint counsel, and order that such counsel shall be compensated if necessary. . . . [T]he right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council.").

E. In light of the scope of the present shortage of available defense counsel, this Court should hold that the compensation rates set in G. L. c. 211D, § 11(a) are unconstitutional under the circumstances found by the single justice, and, in so doing, provide the single justice with the authority to temporarily raise the rates.

In *Carrasquillo*, this Court held that a single justice could issue an order implementing the *Lavallee* protocol upon a finding that there is a systemic violation of the right to counsel. *Id.* at 390-391. Rather than requiring the full Court's approval to protect the right to counsel, the Court in *Carrasquillo* instructed CPCS to petition a single justice pursuant to G. L. c. 211, § 3, and permitted the

single justice to “handle the case directly.” *Carrasquillo*, 484 Mass. at 390. The single justice was instructed to make evidentiary findings and, if the single justice determined that there was an ongoing systemic violation of the right to counsel, the single justice was authorized to make “[t]he ultimate decision whether to trigger the *Lavallee* protocol.” *Id.* at 390-391.

Thus, protecting the right to counsel is not just the domain of the full Court. If the single justice is authorized to order the “strong medicine” of the *Lavallee* protocol upon a showing that the constitutional right to counsel is not being honored, the single justice may make other orders as necessary to protect the right to counsel. *Carrasquillo*, 484 Mass. at 389.

However, in order for the single justice to temporarily increase the rates, this Court first must find the statute unconstitutional as applied in light of the scope of the shortage of available defense counsel. Although the justices of the Supreme Judicial Court, like the full Court, have general superintendence of the administration of the lower courts pursuant to G. L. c. 211, § 3, the general superintendence powers of the individual justices “shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional.”

Given the present shortage of available defense counsel, this Court should find the rates are unconstitutional as applied. Implementation of the *Lavallee*

protocol put the Legislature on notice that the Commonwealth's indigent counsel system was in crisis and something needed to be done. The Legislature responded, amending G. L. c. 211D, § 11(a) to increase the rates from \$65 per hour to \$75 per hour as of August 1, 2025, and then to \$85 per hour on August 1, 2026, as well as increasing funding for staff attorneys in the PDD. See Chapter 14 of the Acts of 2025, §§ 2A, 48-49, 104-105. Unfortunately, this has not resolved the problem for indigent defendants in Middlesex and Suffolk Counties.

The number of people without counsel remains in the thousands. Oct. Smith Aff. ¶¶1, 4. As of September 15, 2025, over 1200 people have been awaiting the appointment of counsel for over forty-five days, and at least 800 defendants have had their cases dismissed while awaiting counsel. RA:279-280. Some of these cases are being brought back, the damage to defendants' ability to fairly defend themselves already done. Oct. Smith Aff. ¶23. While the duty day calendars are showing signs of improvement in Suffolk County, almost fifty percent of duty days were uncovered in September. RA:284. In Middlesex County, over two-thirds of all duty days remain unfilled for the remainder of the year. RA:283; Oct. Smith Aff. ¶21.

The PDD has hired new attorneys and intends to place eighty percent of them in Middlesex and Suffolk Counties, but this will not eliminate the counsel shortage in the near future. Understanding that the PDD could not significantly

ramp up operations overnight, the Legislature provided funds to hire approximately 160 new attorneys by the end of fiscal year 2026 and an additional 160 new attorneys by the end of fiscal year 2027. While the current rates may be sufficient once the PDD has onboarded the hundreds of staff attorneys funded by the Legislature, they are not sufficient right now, where “the number of unrepresented indigent defendants remains substantial.” RA:482.

These circumstances, where the Legislature has acted but the measures taken have not yet resolved the problem and it is unclear if or when they will, parallel the situation this Court confronted in *Lavallee*. *Id.* at 245; RA:482. In *Lavallee*, the Attorney General asked this Court to delay taking action for sixty days in light of then-recent legislative measures to “augment the staffing” of the PDD. *Id.* at 245. The Court refused because there was “no assurance” that the “recent legislative measures” would solve the problem and could not in any event do anything “for the petitioners presently before the court.” *Id.* Similarly, this Court should declare the rates unconstitutional as applied, even though the Legislature has acted, because “the constitutional rights of [the] petitioners have not yet been adequately addressed. *Lavallee*, 442 Mass. 244.

- F. Given the unprecedented duration and magnitude of the current counsel crisis, this Court should also strengthen the *Lavallee* protocol to provide greater protections for unrepresented defendants.

The *Lavallee* protocol is “strong medicine,” *Carrasquillo*, 484 Mass. at 389, but it is not a cure for the denial of the right to counsel. As designed, it is only meant to be a stopgap measure to prevent the most onerous burdens of the “systemic lapse” from being borne by indigent defendants. *Lavallee*, 442 Mass. at 246. It does not provide a mechanism (temporary or otherwise) for securing defense counsel during periods of shortage; the only way to do that effectively is to raise the rates by an amount sufficient to make it economically viable for bar advocates to take on this difficult work. See *Carrasquillo*, 484 Mass. at 378, 393 (noting that number of unfilled duty day slots in the District Courts of Hampden County was “greatly reduced” within three weeks of CPCS’s implementation of an “emergency duty day rate” for those bar advocates willing to sign up for such duty days, and concluding that “increases in compensation do remedy counsel shortages”).

In light of the duration and sheer magnitude of the present shortage of available defense counsel, the fact that the Legislature’s remedy has not had the desired effect of eliminating the ongoing systemic violation of the right to counsel, and the fact that the Commonwealth is restarting prosecutions of charges that have been dismissed after a 45-day *Lavallee* hearing, greater protections are now needed. Some unrepresented defendants now find themselves in an interminable

merry-go-round where charges come and go yet they have to keep coming back to court and remain subject to harsh pretrial conditions as their cases continue to go uninvestigated, witnesses' memories continue to fade, and physical evidence continues to disappear because there are still not enough attorneys willing to work at the current rates. Given these circumstances, this Court should prescribe even stronger medicine until the right to counsel is fully honored.

To that end, the presumptive time limits for the assignment of counsel should be reduced so that no indigent defendant is held under an order of preventive detention for more than three days without counsel and no defendant waits more than thirty days for counsel to file an appearance before the case is dismissed. At forty-five days or soon thereafter, the trial court should be required to dismiss the case with prejudice. This should be done administratively, as requiring the presence of the defendant “does not further the aims of the protocol.” RA:269. If this Court does not amend the *Lavallee* protocol to require dismissal with prejudice, the Court should order that no cases may be refiled or reopened upon motion until the single justice finds that a defendant is likely to get counsel if the case is brought forward.

II. Trial courts have the authority to raise compensation rates in exceptional individual cases where constitutionally required.

It is a bedrock principle that “courts of general jurisdiction under [our] Constitution have the inherent power to do whatever may be done under the

general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake.” *Carrasquillo*, 484 Mass. at 383, quoting *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 179 (1911). Since a fair trial requires “the guiding hand of counsel,” *Lavallee*, 442 Mass. at 237, quoting *Powell*, 287 U.S. at 69, ensuring that indigent defendants’ constitutional right to counsel is being honored falls under this purview. Indeed, this Court has acknowledged that a trial court judge has the authority, in an individual case, to release an unrepresented defendant or dismiss the case of an unrepresented defendant if constitutionally required in that case. *Carrasquillo*, 484 Mass. at 391.

It follows, then, that a trial court judge has the authority to raise the rates in an individual case where constitutionally required. Nevertheless, in light of the importance of assuring that indigent defendants receive the effective assistance of counsel, the circumstances in which a trial court may properly exercise such authority are extremely limited.

A. In exceptional circumstances in an individual case, the trial court has the authority to order compensation rates above those provided for in G. L. c. 211D, § 11(a).

Historically, the trial courts have had the authority to appoint counsel where constitutionally required. See, e.g., *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, 185-186 (2017) (prior to enactment of 211D, courts had sole

authority to appoint counsel); *Baird v. Attorney General*, 371 Mass. 741 (1977) (trial court could appoint counsel for minor “asserting a constitutional right to an abortion in State-mandated civil proceeding”). Concomitant with that authority was the power to approve compensation for court-appointed counsel. See *Baird*, 371 Mass. at 762-764 (approving compensation without specific appropriation); *Abodeely v. County of Worcester*, 352 Mass. 719, 724 (1967) (judge approves payment to appointed counsel). The authority to provide compensation to court-appointed attorneys derives not only from the court’s inherent powers, as discussed in Part I(C), *supra*, but also from G. L. c. 213, § 8 which states that “[t]he courts shall, respectively, receive, examine and allow accounts for services and expenses incident to their sittings and order payment thereof out of the state treasury.”⁴ “Only those expenses reasonably necessary for the operation of the court are to be judicially incurred.” *County of Barnstable*, 410 Mass. at 332 (internal quotations and citations omitted).

When the Legislature created CPCS in 1983, it gave CPCS “sole and independent authority to assign counsel for indigent criminal defendants,” and tasked the agency with responsibility for ensuring the competence and quality of assigned counsel. *Deputy Chief Counsel*, 477 Mass. at 187. Pursuant to G. L. c. 211D, §

⁴ This statute applies only to this Court and the Superior Court.

5, judges must assign cases to the committee; they cannot assign cases to an individual attorney or group of attorneys. *Deputy Chief Counsel*, 477 Mass. at 186-187. Counsel assigned through CPCS's Private Counsel Division are required to be paid at the rates set forth in G. L. c. 211D, § 11(a) ("rates of compensation payable to all counsel, who are appointed or assigned to represent indigents within the private counsel division of the committee . . . shall, subject to appropriation, be as follows ...").

In "exceptional circumstances," however, S.J.C. Rule 3:10(6), permits a trial judge to utilize a different procedure to appoint counsel. Cf. *Commonwealth v. Charles*, 466 Mass. 63, 73 (2013) ("The very concept of inherent power carries with it the implication that its use is for occasions not provided for by established methods.") Exceptional circumstances include those where it was necessary to protect an indigent defendant's constitutional rights. See *Carrasquillo*, 484 Mass. at 391. If exceptional circumstances warrant the use of the court's inherent power to appoint counsel directly, rather than sending the case to CPCS for appointment, the attorneys appointed by the court would not be subject to the compensation rates in G. L. c. 211D, § 11(a). Instead, pursuant to its inherent authority to ensure the functioning of the court and, for the superior court, its authority to allow "expenses incident to" its sitting under G. L. c. 213, § 8, the court would be obligated to set a fair compensation rate for that case. See *Abodeely*, 352 Mass. at 724

(suggesting judges should allow compensation at a fair rate). See also *Carrasquillo*, 484 Mass. at 394 (courts have inherent power to ensure proper operations of the courts to protect from impairment resulting for lack of supporting personnel), citing *O'Coin's*, 362 Mass. at 510.

B. The trial courts' authority to appoint counsel directly, rather than assigning the case to CPCS for appointment, must be used sparingly so as not to undermine the integrity of the Commonwealth's indigent defense system.

Permitting courts to appoint counsel in any but the most exceptional circumstances would be destructive to the provision of constitutionally adequate indigent defense services. The court could appoint lawyers who do not have the training, knowledge, skill, experience, supervision, and support necessary to ensure effective representation. The quality of representation provided by attorneys appointed through the court would not be effectively monitored, and adherence with performance standards, required of all bar advocates and staff attorneys, could not be assured.

Allowing judges to circumvent CPCS and appoint counsel directly also threatens CPCS's independence. CPCS has the statutory responsibility to "plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis." G. L. c. 211D, § 1. The chief purpose of vesting CPCS with the independent authority to assign counsel

is to ensure that appointed counsel will not be beholden to a judge or any party other than the client, to whom counsel owes a duty of zealous advocacy. Indeed, abolishing such judicial patronage was a key reason that Chapter 211D was enacted. See *Deputy Chief Counsel*, 477 Mass. at 185 (explaining that, prior to enactment of Chapter 211D, “judges, despite the obvious constitutional conflict in exercising that role, had exclusive authority for the appointment of counsel”).

To ensure that indigent defendants receive quality representation, and that the indigent defense system remains independent from the judiciary, courts must send all cases to CPCS for assignment. However, if the only way for a court to restore the right to counsel is to assign counsel directly, it has the inherent authority and obligation to do so.

CONCLUSION

In light of the scope of the present shortage of available defense counsel in the District Courts of Middlesex and Suffolk County and in the Boston Municipal Court, and in light of the inefficacy of the legislative response in restoring the right to counsel for indigent criminal defendants in those courts following the single justice’s imposition of the *Lavallee* protocol on July 3, 2025, this Court, a single justice of the Supreme Judicial Court, and any justice of any trial court department is authorized to order increased compensation rates beyond those provided in G.

L. c. 211D, § 11(a), for attorneys accepting representation of indigent criminal defendants.

Respectfully submitted,

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October 6, 2025

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2025-0244

COMMITTEE FOR PUBLIC COUNSEL SERVICES

v.

MIDDLESEX AND SUFFOLK COUNTY DISTRICT COURTS and another¹

INTERIM ORDER AND RESERVATION AND REPORT

This matter came before the court, Wendlandt, J., on the petition of the Committee for Public Counsel Services (CPCS), brought on behalf of unrepresented indigent criminal defendants with cases pending in the Middlesex and Suffolk County District Courts and in the Boston Municipal Court (Courts), which petition was filed on June 18, 2025. At the time CPCS filed the petition, it requested that, in light of the shortage of defense counsel, I order an increased rate of attorney compensation until the Legislature could devise a long-term solution. See Emergency Pet., No. SJ-2025-0244, Dkt. 2, at 9-11 (June 18, 2025). The Courts opposed this request. See Resp. to Emergency Pet., No. SJ-2025-0244, Dkt. 13, at 11-15 (June 25, 2025).

On July 3, 2025, following an evidentiary hearing at which each of the parties and the intervenor Suffolk County District

¹ The Boston Municipal Court.

Attorney (SCDA) agreed that the evidence, which was presented by affidavit and by live testimony, warranted the imposition in the Courts of the protocol described in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 247-249 (2004), I ordered the imposition of the Lavallee protocol in the Courts. See Order, No. SJ-2025-0244, Dkt. 23, at 22 (July 3, 2025). In deference to the Legislature, however, I denied without prejudice CPCS's request to increase attorney compensation rates. See id. at 21.

The Legislature has since responded. On August 5, 2025, the Governor signed a supplemental budget package that provided for increasing the rate of attorney compensation for district court cases by \$20 per hour over the next two years and appropriating funds for the hiring of 320 additional CPCS staff attorneys over that same time period. See c. 14 of the Acts of 2025, §§ 2A, 48-50, 104-105.

Nevertheless, it is not clear from the record before me whether this legislation will cure the current shortage of defense counsel, and if so, on what timetable. The number of unrepresented indigent criminal defendants remains substantial. Consequently, on August 22, 2025, I ordered the parties, including the SCDA, to file briefs and a joint statement of undisputed facts addressing whether I should reserve and report to the full court the issue of the permissibility of judicial

rate setting. See Mem. of Decision & Order, No. SJ-2025-0244, Dkt. 47, at 22-24 (Aug. 22, 2025). I received those filings on September 15, 2025.

Upon review and consideration of those filings, I conclude that this case raises an important question of law, and I hereby reserve and report that question to the full court as follows for its determination: In light of the scope of the present shortage of available defense counsel in the District Courts of Middlesex and Suffolk County and in the Boston Municipal Court, whether and under what circumstances the Supreme Judicial Court, a single justice of the Supreme Judicial Court, or any justice of any trial court department is authorized to order increased compensation rates beyond those provided in G. L. c. 211D, § 11 (a), for attorneys accepting representation of indigent criminal defendants.² See G. L. c. 211, §§ 3, 6. See also Carrasquillo v. Hampden County Dist. Courts, 484 Mass. 367, 394 (2020) (noting "inherent power to ensure the proper operations of the courts").

The record shall consist of the following:

² In its Brief, filed on September 15, 2025, CPCS requested that I additionally reserve and report the question of whether a district court judge erred in declining to order the release of five defendants on the ground that CPCS had not made good faith efforts to obtain counsel for them. See Brief of CPCS, No. SJ-2025-0244, Dkt. 56, at 7 (Sept. 15, 2025). I hereby deny that request and decline to reserve and report that issue.

1. All papers filed before the single justice in this case as of the date of this reservation and report, including the Joint Statement of Undisputed Facts, filed in this case on September 15, 2025;
2. The docket sheet for this case; and
3. This reservation and report.

The matter shall proceed in all respects in conformance with the Massachusetts Rules of Appellate Procedure. CPCS shall be deemed the appellant, and the Courts and the SCDA shall be deemed the appellees.³ CPCS's brief shall be filed no later than October 2, 2025. The Courts' brief and the SCDA's brief shall be filed no later than October 17, 2025. CPCS's reply brief, if any, and any amicus briefs, shall be filed no later than October 24, 2025. Enlargements of time should not be anticipated. Oral argument shall take place in November 2025.

By the court,

/s/ Dalila Arguez Wendlandt

Dalila Arguez Wendlandt
Associate Justice

Dated: September 18, 2025

³ In their Memorandum of Law, filed on September 15, 2025, the Courts renew their earlier request that I invite the relevant bar advocate organizations, Middlesex Defense Attorneys, Inc., and Suffolk Lawyers for Justice, to intervene or otherwise participate in this case. See Courts' Mem. of Law, No SJ-2025-0244, Dkt. 54, at 4-5 n.1 (Sept. 15, 2025). I hereby deny that request.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2025-0244

COMMITTEE FOR PUBLIC COUNSEL SERVICES

v.

MIDDLESEX AND SUFFOLK COUNTY DISTRICT COURTS and another¹

ORDER

This matter came before the court, Wendlandt, J., on the petition of the Committee for Public Counsel Services (CPCS), brought on behalf of unrepresented indigent criminal defendants in Middlesex and Suffolk Counties and filed on June 18, 2025. The petition sought relief pursuant to G. L. c. 211, § 3. Specifically, it sought the implementation of the protocol described in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 247-249 (2004) (the Lavallee protocol),² in the

¹ The Boston Municipal Court.

² In Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246-249 (2004), the full court established a protocol to protect the rights of indigent criminal defendants when a shortage of available attorneys interferes with the prompt appointment of defense counsel to represent those defendants. First, the full court established presumptive time limits for the assignment of counsel. Id. at 246 ("an indigent defendant who is held in lieu of bail or under an order of preventive detention may not be held for more than seven days without counsel" and "no defendant entitled to court-appointed counsel may be required to wait more than forty-five days for counsel to file an appearance"). Second, the full court outlined a system

Middlesex and Suffolk County District Courts and in the Boston Municipal Court (Courts), and further, it asked this court to impose increased compensation rates for attorneys representing indigent criminal defendants.

For the reasons set forth infra, I conclude that "despite good faith efforts by CPCS and the local bar advocate organization[s], there is an ongoing systemic violation of indigent criminal defendants' constitutional rights to effective assistance of counsel due to CPCS's incapacity to provide such assistance through its staff attorneys or through bar advocates." Carrasquillo v. Hampden County Dist. Courts, 484 Mass. 367, 390-391 (2020). As requested in the petition, this order imposes the Lavallee protocol on the Courts and provides conditions for the ongoing monitoring of the shortage of counsel. See Lavallee, 442 Mass. at 247-249. I deny without prejudice CPCS's additional request that I set rates of compensation for counsel representing indigent defendants.

Background. "CPCS is responsible for 'plan[ning], oversee[ing], and coordinat[ing] the delivery of criminal and certain noncriminal legal services by salaried public counsel,

for implementing these time limits, subject to further refinement. Id. at 247-248 (discussing, inter alia, designated judge's obligation to schedule prompt status hearing for each unrepresented indigent defendant who has been held in pretrial detention for more than seven days, or whose case had been pending for more than forty-five days).

bar advocate and other assigned counsel programs and private attorneys serving on a per case basis' on behalf of indigent criminal defendants and other litigants who are entitled to counsel." Carrasquillo, 484 Mass. at 373, quoting G. L.

c. 211D, § 1. CPCS's public defender division (PDD) "provides salaried staff attorneys to represent indigent defendants in criminal proceedings." Carrasquillo, supra at 374. Relevant to the present dispute, CPCS has five PDD offices in Middlesex and Suffolk Counties: in Middlesex County, (1) the Framingham PDD office, (2) the Lowell PDD office, and (3) the Malden PDD office; and in Suffolk County, (4) the Boston Trial Office, and (5) the Roxbury Defenders Unit. See Aff. of A. Stewart, ¶ 2 (June 17, 2025) (Stewart Aff.).

In addition, "[t]hrough [its] private counsel division" (PCD), "CPCS . . . enters into contractual agreements with bar advocate groups and other organizations for the purpose of providing private defense attorneys to indigent persons who are not represented by PDD attorneys." Carrasquillo, 484 Mass. at 374. The bar advocate organizations relevant to the instant petition are Middlesex Defense Attorneys, Inc., (MDA) in Middlesex County and Suffolk Lawyers for Justice (SLJ) in Suffolk County. See Aff. of H. Smith, ¶ 4 (June 17, 2025) (Smith Aff.).

Commencing on May 27, 2025, many bar advocates began refusing to accept either duty day assignments³ or new cases for the representation of indigent criminal defendants (work stoppage). See Smith Aff., ¶ 15. Approximately three weeks after the work stoppage, CPCS filed the present petition in this court, which it supplemented on June 20, 2025. In its filings, CPCS maintained that the inability to secure counsel for indigent criminal defendants amounted to an ongoing systemic violation of defendants' rights to counsel requiring resolution by this court pursuant to G. L. c. 211, § 3. See Carrasquillo, 484 Mass. at 389-390 (describing procedural mechanism for, inter alia, CPCS to seek to implement Lavallee protocol). On June 23, 2025, the Suffolk County District Attorney (SCDA) timely filed a motion to intervene, which was allowed.⁴

On June 25, 2025, the Courts filed their response. The Courts did not dispute "that the root cause of the work stoppage

³ Under the duty day system, CPCS staff attorneys or bar advocates "are assigned to a particular court for the day, represent indigent individuals at arraignment, and ordinarily accept assignment of those individuals' cases." Carrasquillo, 484 Mass. at 369.

⁴ On June 23, 2025, the Massachusetts Association of Criminal Defense Lawyers (MACDL) filed a motion for leave to file an amicus curiae letter and a proposed letter. That motion is allowed.

The Middlesex County District Attorney was invited to intervene on the same timetable as the Suffolk County District Attorney (SCDA), but did not do so.

[was] the low rates of compensation for bar advocates, and that the result . . . [was] a significant shortage of counsel willing to represent indigent criminal defendants" in the Courts. Resp'ts' Resp. to Emergency Pet'n, Dkt. 13, at 10-11 (June 25, 2025) (Courts' Resp.). Further, "[i]n light of the vital challenges created by the current defense counsel shortage, the Courts request[ed] that an evidentiary hearing be scheduled" pursuant to the procedure described in Carrasquillo, 484 Mass. at 389-390. Courts' Resp., at 2, 7, 9-10. The Courts expressed that "an evidentiary hearing may well demonstrate that institution of the protocol is appropriate here." Id. at 11. The Courts, however, opposed CPCS's request that this court set rates of compensation. See id. at 11-15.

Also on June 25, 2025, the SCDA filed a response, agreeing that an evidentiary hearing, as described in Carrasquillo, 484 Mass. at 389-390, was warranted.⁵ SCDA Resp., Dkt. 15, at 1-2, 6 (June 25, 2025).

A preliminary hearing was held on June 26, 2025. The parties and the SCDA agreed to proceed by affidavits, and further agreed to submit a joint statement of disputed and

⁵ On June 25, 2025, the Plymouth County District Attorney moved to intervene, which motion the court denied without prejudice on the ground that the petition sought to invoke the Lavallee protocol only in the Middlesex and Suffolk County District Courts and the Boston Municipal Court.

undisputed facts.⁶ I directed the parties and the SCDA to focus the affidavits and joint statement on the unrepresented indigent criminal defendants whose cases are pending in the Courts.

I scheduled an evidentiary hearing for July 2, 2025. On July 1, 2025, the parties provided a detailed statement of facts; the representations therein were supported by affidavits and other exhibits simultaneously provided by the parties.⁷

On July 2, 2025, I held an evidentiary hearing. As anticipated by the parties and the SCDA, I took evidence by affidavit. Specifically, in connection with the hearing, the court considered all affidavits filed to date in this case, as well as the parties' joint statement of facts and the supporting exhibits. In addition, two witnesses were sworn at the hearing and provided testimony: the General Counsel for CPCS and the Deputy Chief Counsel of CPCS's PDD. See Aff. of L. Hewitt, ¶ 1 (June 16, 2025) (Hewitt Aff.); Stewart Aff., ¶ 1. At the hearing, as in the joint statement of facts, the parties and the SCDA represented that they agreed that imposition of the Lavallee protocol was warranted. See Statement of Facts, Dkt.

⁶ As Carrasquillo provides "[t]he single justice . . . may rely on affidavits or hear testimony as he or she deems appropriate." Carrasquillo, 484 Mass. at 390 n.30.

⁷ At the July 2, 2025, evidentiary hearing, the SCDA represented that he joined the parties' statement of undisputed facts.

20, at ¶ 65 (July 1, 2025) (SoF). I agree, and pursuant to the terms described below, hereby impose the Lavallee protocol with respect to the Courts at issue, that is, the District Courts in Middlesex and Suffolk Counties and the Boston Municipal Court.

Discussion. Legal Standard. "The government of the Commonwealth . . . has a constitutional obligation to ensure that there is an adequate supply of publicly funded defense attorneys available to represent eligible indigent criminal defendants." Carrasquillo, 484 Mass. at 368. When it appears that the government has failed to meet that obligation, the full court set forth procedures to invoke the Lavallee protocol. See Carrasquillo, 484 Mass. at 389-390.

In particular, where a substantial number of indigent criminal defendants are deprived of representation, and where cooperative efforts among the courts, CPCS, and district attorneys have failed to mitigate the problem, a request to invoke the Lavallee protocol is properly brought pursuant to G. L. c. 211, § 3. See Carrasquillo, 484 Mass. at 389-390. When such a request is made:

"the single justice must determine whether, despite good faith efforts by CPCS and the local bar advocate organization[s], there is an ongoing systemic violation of indigent criminal defendants' constitutional rights to effective assistance of counsel due to CPCS's incapacity to provide such assistance through its staff attorneys or through bar advocates. . . . If the single justice determines that there is such an ongoing systemic

violation, then an order imposing the Lavallee protocol is warranted."

Carrasquillo, 484 Mass. at 390-391.

In reaching that determination, the single justice is directed to make findings regarding the following factors:

(1) "the number of unrepresented indigent defendants"; (2) "the length of time for which they have been unrepresented"; (3) "the current caseloads of local CPCS staff attorneys and bar advocates"; (4) "whether CPCS and the local bar advocate organization[s] have engaged in good faith efforts to provide counsel for unrepresented indigent defendants"; (5) "whether there is a shortage of available defense counsel and, if so, what has caused the shortage"; (6) "how long the shortage has continued and is likely to continue"; (7) "the prospects for remedying the problem"; and (8) "such other issues as the single justice . . . may deem pertinent." Id. at 390. In making these factual findings, "[t]he single justice . . . may rely on affidavits or hear testimony as he or she deems appropriate."

Id. at 390 n.30.

Findings. As to each of these factors, I make the following findings:

1. The number of unrepresented indigent defendants. On June 29, 2025, there were at least 587 unrepresented indigent defendants in the District Courts of Middlesex County, and at

least twenty-five of those defendants were in custody. See SoF, ¶¶ 1-2. At least six of those defendants in custody have been held for longer than seven days. See id. at ¶ 7.

On that same date, there were at least forty-six unrepresented indigent defendants in the Chelsea District Court, which is in Suffolk County, and at least nine of those defendants were in custody. See SoF, ¶¶ 5-6. And there were at least 557 unrepresented indigent defendants in the divisions of the Boston Municipal Court, and at least thirty-six of those defendants were in custody. See id. at ¶¶ 3-4. At least twenty-one unrepresented defendants in custody in Suffolk County have been held for longer than seven days. See id. at ¶ 8.

The current numbers far exceed the totals of unrepresented indigent defendants, including defendants held in custody, that gave rise to the ultimate applications of the Lavallee protocol in the Lavallee and Carrasquillo cases. See Carrasquillo, 484 Mass. at 389 n.27 (while no specific number of unrepresented indigent defendants is dispositive, noting that in Lavallee, the single justice petitions were filed on behalf of twenty-four defendants, with numbers rising to fifty-eight defendants with thirty-one held in custody, while in Carrasquillo, 155 defendants were unrepresented, including five who were being held in pretrial detention).

The number of unrepresented indigent defendants has broadly increased since the beginning of the work stoppage. In the Middlesex County District Courts, on May 30, 2025, there were approximately 128 unrepresented indigent defendants, including fourteen in custody. See Smith Aff., ¶ 17. As of June 6, 2025, there were approximately 255 unrepresented defendants, including nineteen in custody; and as of June 13, 2025, there were approximately 387 unrepresented defendants, including sixteen in custody. See Smith Aff., ¶¶ 17-18. On June 20, 2025, there were twenty-two unrepresented defendants held in custody in connection with cases in the Middlesex District Courts. See Supp. Aff. of H. Smith, ¶ 1 (June 20, 2025) (Supp. Smith Aff.). On June 24, that number rose to twenty-four. See Second Supp. Aff. of H. Smith, ¶¶ 1-2 (June 25, 2025) (2nd Supp. Smith Aff.). By June 29, as set forth supra, there were at least 587 unrepresented indigent defendants in Middlesex District Courts, including twenty-five who were in custody. See SoF, ¶¶ 1-2.

In Suffolk County, in Chelsea District Court and the Boston Municipal Court, as of May 30, 2025, there were approximately ninety-three unrepresented indigent defendants, including seventeen in custody. See Smith Aff., ¶ 17. As of June 6, 2025, there were approximately 238 unrepresented indigent defendants, including thirty in custody; and as of June 13, 2025, there were approximately 394 unrepresented indigent

defendants, including fifty-six in custody. See id. at ¶¶ 17-18. On June 20, 2025, there were seventy-five unrepresented defendants held in custody in connection with cases in Chelsea District Court and the Boston Municipal Court. See Supp. Smith Aff., ¶ 1. And on June 24, that number was fifty-six. See 2nd Supp. Smith Aff., ¶¶ 1-2. By June 29, as set forth supra, there were at least 603 unrepresented indigent defendants in Chelsea District Court and the divisions of the Boston Municipal Court, including forty-five in custody. See SoF, ¶¶ 3-6.

2. The length of time for which they have been unrepresented. On June 29, 2025, there were at least six unrepresented indigent defendants in Middlesex County who had been in custody for longer than seven days, and there were at least twenty-one unrepresented indigent defendants in the Chelsea District Court and the Boston Municipal Court who had been in custody for longer than seven days. See SoF, ¶¶ 7-8.

As to unrepresented indigent defendants who are out of custody, it is expected that, in the absence of any remedial measures to alter the current situation, by the end of July, hundreds of them will have been without representation for forty-five days. See SoF, ¶ 9. See also Smith Aff., ¶ 22. Specifically, it is expected that by July 25, approximately 145 unrepresented indigent defendants in the Middlesex County District Courts will have had their cases pending for at least

forty-five days. See Third Supp. Aff. of H. Smith, ¶ 16 (June 30, 2025) (3rd Supp. Smith Aff.). For the Chelsea District Court and the Boston Municipal Court, that number is expected to be approximately 126. See id.

3. The current caseloads of local CPCS staff attorneys and bar advocates. While the situation is necessarily fluid in light of the changing status of ongoing criminal cases, most of the five PDD offices at issue are at or will soon be approaching their respective capacities for taking on new criminal cases.⁸ As of June 20, 2025, the staff attorneys employed in CPCS's two PDD offices in Suffolk County, i.e., the Boston Trial Office and the Roxbury Defenders Unit, were at or beyond their capacities and could not accept new cases. See Supp. Smith Aff., ¶ 2; Supp. Aff. of A. Stewart, ¶ 3 (June 20, 2025) (Supp. Stewart Aff.); Stewart Aff., ¶ 2. At the July 2 hearing, the Deputy Chief Counsel of CPCS's PDD testified that the Roxbury Defenders Unit reached its capacity again on July 1, and further, that while the three PDD offices in Middlesex County presently have some capacity remaining, they are approaching their respective capacity limits. As an example with respect to caseloads, the Deputy Chief Counsel testified that the Roxbury Defenders Unit

⁸ For PDD attorneys, caseload capacity is an individualized determination based on multiple factors including experience, volume of cases, types of cases, and case-specific demands. See SoF, ¶ 10; Stewart Aff., ¶ 13.

took on over 250 more cases in May and June of this year than it did during May and June of 2024.

There appears to be capacity for bar advocates to take the cases of unrepresented indigent defendants. For bar advocates, CPCS sets an annual caseload cap of 250 weighted cases (with various types of cases counting for different amounts toward that total). See SoF, ¶¶ 17, 18 n.4; 3rd Supp. Smith Aff., ¶¶ 17, 19-22. No bar advocates from Middlesex or Suffolk Counties have reached this cap, and it reset on July 1, 2025. See SoF, ¶¶ 18-19; 3rd Supp. Smith Aff., ¶¶ 18, 23.

Moreover, there is a statutory cap on the number of hours that may be billed annually by bar advocate attorneys, which is set by G. L. c. 211D, § 11 (b), at 1,650 hours. See SoF, ¶ 20; 3rd Supp. Smith Aff., ¶ 24. Pursuant to its authority under G. L. c. 211D, § 11 (c), for fiscal year 2025, CPCS raised that cap to the maximum number allowed by law, 2,000 hours. See SoF, ¶ 21; 3rd Supp. Smith Aff., ¶ 25. As of June 25, 2025, only five bar advocates working through MDA had reached this cap and only ten bar advocates working through SLJ had reached it. See SoF, ¶ 22; 3rd Supp. Smith Aff., ¶ 26.

Unfortunately, as described infra, despite this apparent capacity, bar advocates are currently engaged in a work stoppage in view of the compensation rates set by the Legislature, which have not increased for years. In addition, the numbers of bar

advocates have declined steadily in Suffolk County in recent years. See SoF, ¶ 82; Smith Aff., ¶ 8. In 2018, there were 371 bar advocates working in Suffolk County. In 2019, there were 365; in 2020, 341; in 2021, 321; in 2022, 307; in 2023, 293; in 2024, 285. See id. In 2025, there were 283 bar advocates in Suffolk County, eighty-eight fewer than in 2018. See id.

4. Whether CPCS and the local bar advocate organizations have engaged in good faith efforts to provide counsel for unrepresented indigent defendants. CPCS, including its PDD and PCD divisions, and the local bar advocate organizations, MDA and SLJ, have engaged in good faith efforts to provide counsel to indigent defendants.

Prior to the beginning of the work stoppage, CPCS sent a letter to the chief justices of various courts to notify them of the anticipated work stoppage by bar advocates and of CPCS's plans to address the anticipated shortage of counsel. See SoF, ¶ 24; Smith Aff., ¶ 12. In accordance with that plan, for days where there was no duty day attorney in a particular court:

"[T]he courts were asked to assign the cases to CPCS and send them to the PCD and the local [bar advocate program] for assignment of counsel. The PCD and [bar advocate program] then [would] attempt to find counsel, prioritizing those cases where the defendant [was] held, and particularly those cases where the PDD ha[d] a conflict. If counsel [was] not located within seven days for an incarcerated defendant, CPCS assign[ed] the case to the PDD as long as there [was] no conflict and the local office ha[d] capacity."

SoF, ¶ 25; Smith Aff., ¶ 13. Consistent with this plan, CPCS prioritized PDD's representation in cases where a defendant was held in custody. See SoF, ¶¶ 29-33; Stewart Aff., ¶¶ 4-8. These efforts met with some success in securing counsel for incarcerated defendants. See Smith Aff., ¶¶ 19-20. Indeed, as of the filing of CPCS's petition, most incarcerated defendants had been assigned counsel within seven days. See id. at ¶ 20.

Moreover, CPCS crafted notices for courtroom clerks to provide to unrepresented indigent defendants at their arraignments, which notices would provide those defendants their docket numbers, next court dates, and contact information for CPCS. See SoF, ¶ 26; Smith Aff., ¶ 14.

CPCS continues to advocate for increased compensation rates with the Legislature, including for increased rates for bar advocates. See Hewitt Aff., ¶ 2. At the July 2 hearing, the General Counsel for CPCS testified that CPCS has been in constant communication with the Legislature, providing it with frequent updates regarding, *inter alia*, the numbers of unrepresented indigent defendants currently incarcerated. While CPCS believes that the issue is receiving serious attention and that the Legislature will take action, CPCS's General Counsel testified that it is presently unclear whether, when, and how the Legislature will act. See SoF, ¶ 52. See also 3rd Supp. Smith Aff., ¶ 67.

For their part, the relevant bar advocate organizations, MDA and SLJ, "call and email attorneys on a daily basis" to secure counsel for unrepresented indigent defendants. SoF, ¶ 35; 3rd Supp. Smith Aff., ¶ 31. These efforts have had some success, as there are still some bar advocates willing to take certain cases, including, for example, cases involving current or former clients. SoF, ¶ 36; 3rd Supp. Smith Aff., ¶ 32.

5. Whether there is a shortage of available defense counsel and, if so, what has caused the shortage. There is a shortage of available defense counsel caused in large part by inadequate compensation rates. The Courts do not dispute that "low rates of compensation" caused the work stoppage, which then resulted in "a significant shortage of counsel willing to represent indigent criminal defendants" in the courts at issue. Courts' Resp., at 10-11.

Current compensation rates are set by State statute, and for district court assignments, the statutory compensation rate is sixty-five dollars per hour. See G. L. c. 211D, § 11 (a); SoF, ¶ 81; Smith Aff., ¶ 6. These rates have proven inadequate to secure the representation by bar advocates of indigent defendants in the Courts. See 3rd Supp. Smith Aff., ¶ 56; Smith Aff., ¶¶ 7, 15.

On May 27, 2025, the work stoppage commenced when many bar advocates began refusing on the basis of these rates to accept

either duty day assignments or new cases for the representation of indigent criminal defendants. See Smith Aff., ¶ 15. Even before the work stoppage, large percentages of duty day slots went unfilled in the Courts. See SoF, ¶ 57; Smith Aff., ¶ 11. In March 2025, thirty-two percent of duty day slots went unfilled in Middlesex County, and in Suffolk County, twenty-four percent went unfilled. See id. In April, that number remained thirty-two percent in Middlesex County and rose to forty percent in Suffolk County. See id.

The majority of bar advocates in Middlesex and Suffolk Counties are now no longer taking district court duty days or accepting new district court cases. See SoF, ¶ 59; Smith Aff., ¶ 15. This work stoppage significantly exacerbated the above-described shortage in duty day coverage, and Middlesex and Suffolk counties were most affected. See SoF, ¶¶ 58-59; Smith Aff., ¶ 15. Due to the lack of bar advocates, arraignment sessions in the Courts are often understaffed or unstaffed. See SoF, ¶ 59; Smith Aff., ¶ 11. For June 2025, eighty-six percent of duty day slots went unfilled in Middlesex County and seventy-five percent went unfilled in Suffolk County. See SoF, ¶ 59; Smith Aff., ¶ 15. For July, seventy-seven percent of duty day slots remain unfilled in Middlesex County, fifty-two percent remain unfilled in Chelsea District Court, and seventy-two percent remain unfilled in the Boston Municipal Court. See SoF,

¶¶ 60-62; 3rd Supp. Smith Aff., ¶¶ 63-65. For August, sixty-six percent of duty day slots remain unfilled in Middlesex County, forty-seven percent remain unfilled in Chelsea District Court, and sixty-five percent remain unfilled for the Boston Municipal Court. See id. See also Carrasquillo, 484 Mass. at 377 (noting duty day coverage issues).

Also, as noted supra, the number of bar advocates working in Suffolk County has decreased steadily by a total of eighty-eight in the years since 2018. See SoF, ¶ 82; Smith Aff., ¶ 8.

6. How long the shortage has continued and is likely to continue. The present shortage of counsel began in the Courts in May 2025, as described supra. It will likely continue for the foreseeable future because there are at present no apparent prospects for a significant remediation of the problem. First, the numbers of unrepresented indigent defendants in the Courts have grown significantly since the beginning of the shortage, which suggests that these numbers will continue to rise, particularly as the relevant PDD offices are at or approaching their capacities for criminal case work. Second, there is no information before the court regarding any expected end to the work stoppage. See SoF, ¶ 64; 3rd Supp. Smith Aff., ¶ 67. Third, as the underlying problem is the low compensation rate for district court work set by statute, it is likely that Legislative action will be required to remediate the problem.

See G. L. c. 211D, § 11 (a). While CPCS has expressed confidence in a Legislative solution, the testimony of its General Counsel at the July 2 hearing established only that the Legislature is aware of the problem but not that it has taken or will immediately take any concrete steps to resolve it. See SoF, ¶ 52. See also 3rd Supp. Smith Aff. ¶ 67.

7. The prospects of remedying the problem. For these same reasons, there do not appear to be any concrete present prospects for remedying the problem, which is ultimately caused by the rates of pay set for bar advocates.

8. Such other issues as the single justice may deem pertinent. The Courts have requested that the Lavallee protocol be modified such that the status hearings provided for in Lavallee should be conducted by the Chief Justice of the District Court, or her designee, and the Chief Justice of the Boston Municipal Court, or her designee. At the July 2 hearing, CPCS asked that these hearings be conducted, as in Lavallee and Carrasquillo, by regional administrative justices of the Superior Court, arguing that this would be more efficient, as the Superior Courts would have more room for holding defendants in custody and would provide central locations for the hearings. Where the Superior Courts are not presently the subject of the Lavallee protocol, and where the cases at issue are already in the Courts, I adopt the Courts' recommendation, as described

infra. See Lavallee, 442 Mass. at 247 (tasking single justice with "refining that system, or modifying it, after consultation with those who will be affected"). I also adopt CPCS's recommendation to modify the protocol such that the Courts will continue, in good faith, to provide daily lists, as described infra, as this closely approximates the current practice.

Application of Lavallee Protocol. "The constitutional right to counsel in a criminal prosecution, guaranteed by art. 12 and the Sixth and Fourteenth Amendments, entails the right of indigent defendants charged with serious crimes to have counsel appointed at public expense" at all critical stages of the prosecution (quotation and citation omitted). Carrasquillo, 484 Mass. at 379-380 & n.17. Significant delay after arraignment in assigning counsel endangers this right. See id. at 381.

Based on the foregoing findings, and with particular emphasis on the number of unrepresented indigent defendants, I agree with the parties and the intervenor that the Lavallee protocol should be and hereby is applied to the Middlesex and Suffolk County District Courts and to the Boston Municipal Court, as described infra. Specifically, I find that "despite good faith efforts by CPCS and the local bar advocate organization[s]" -- here, MDA and SLJ -- "there is an ongoing systemic violation of indigent criminal defendants'

constitutional rights to effective assistance of counsel due to CPCS's incapacity to provide such assistance through its staff attorneys or through bar advocates." Carrasquillo, 484 Mass. at 390-391.

Rate-setting request. For the reasons articulated in Lavallee and Carrasquillo, I deny without prejudice the request of CPCS that this court set rates of compensation for bar advocates. Although the court has "inherent power to ensure the proper operations of the courts and protect them from impairment resulting from a lack of supporting personnel . . . 'this inherent power is a duty which must be borne responsibly,' and 'with due consideration for the prerogatives of the executive department and the Legislature, whenever the exercise of an inherent judicial power would bring us near the sphere of another department.'" Carrasquillo, 484 Mass. at 394, quoting O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 515-516 (1972). I therefore "defer to the Legislature's authority, as the governmental branch vested with the power to make laws and appropriate funds, to devise an appropriate solution," and to choose the best policy course for resolving the systemic issue described herein. Carrasquillo, supra at 370-371.

The Lavallee protocol is "strong medicine." Carrasquillo, 484 Mass. at 389. It is designed to balance the government's

legitimate right to protect the public's safety, well-articulated by the SCDA at the evidentiary hearing, with the duty of this court "to remedy an ongoing violation of a fundamental constitutional right to counsel." Id. at 383 n.19.

Conclusion. For the foregoing reasons, it is **ORDERED** that the Lavallee protocol shall be and hereby is implemented with respect to the Courts. As requested by the Courts, the protocol will be modified such that the hearing with respect to any case in the District Court will be held by the Chief Justice of the District Court or a single justice of that department designated by the Chief Justice thereof, and the hearing with respect to any case in any division of the Boston Municipal Court will be held by the Chief Justice of the Boston Municipal Court or a single justice of that court designated by the Chief Justice thereof (Chief Justice). With that modification, as directed in Lavallee, 442 Mass. at 247-249 & n.18, it is hereby ordered that:

"The clerk-magistrate of each District Court in [Middlesex and Suffolk] Count[ies] [and each Division of the Boston Municipal Court] . . . shall, [in good faith] on a [daily] basis, prepare a list of all unrepresented criminal defendants facing charges in their respective courts and shall forward that list to the [Chief Justice] . . . , the district attorney, the Attorney General, and chief counsel for CPCS. Such list shall contain the name of each defendant; the pending charges and docket numbers; the date of arraignment; the defendant's bail status; and whether the defendant is being held under an order of preventive detention. If there are no such unrepresented defendants, the clerk-magistrate's report shall so indicate.

On receipt of that list . . . , the [Chief Justice] shall schedule a prompt status hearing with respect to each defendant who has been held for more than seven days, or each defendant whose case has been pending for more than forty-five days. If, as of the time of that hearing, any defendant on that list is still unrepresented by counsel, the [Chief Justice] shall determine whether CPCS has made a good faith effort to secure representation for each such defendant.⁹ If the [Chief Justice] determines that, despite good faith efforts of CPCS and any efforts by others to secure representation for any such defendant, there is still no counsel willing and available to represent a defendant, then the [Chief Justice] must order the following: (1) with respect to any defendant who has been held in lieu of bail or pursuant to an order of preventive detention for more than seven days, the [Chief Justice] shall order that the defendant be released on personal recognizance and may, in view of the emergency nature of this remedy, treat this as an exception to Commonwealth v. Dodge, 428 Mass. 860, 864-866, 705 N.E.2d 612 (1999), and impose probationary conditions pursuant to G. L. c. 276, § 87, without the defendant's consent; (2) with respect to any defendant who has been facing a felony charge for more than forty-five days without counsel, or a misdemeanor or municipal ordinance violation charge for more than forty-five days without counsel on which a judge has not declared, pursuant to G. L. c. 211D, § [2B], an intention to impose no sentence of incarceration, the [Chief Justice] shall order that the charge or charges be dismissed without prejudice until such time as counsel is made available to provide representation to that defendant."

⁹ "[I] expect that CPCS, pursuant to its authority under G. L. c. 211D, § 6 (b), will take all reasonable measures to expand the list of attorneys available to accept assignments in criminal cases in [Middlesex and Suffolk] Count[ies], who are not members of [Middlesex Defense Attorneys, Inc., or Suffolk Lawyers for Justice]. In addition, the [Chief Justice] . . . , may pursue all reasonable means to develop [her] own list of qualified and available attorneys from which [she] may make assignments, consistent with S.J.C. Rule 1:07, as amended, 431 Mass. 1301 (2000), whenever CPCS certifies that it has no available attorney. Such attorneys shall be entitled to compensation from CPCS appropriated funds at the rates approved by the Legislature." Lavallee, 442 Mass. at 248 n.18.

I note additionally that, as the court explained in Carrasquillo, release or dismissal is not automatic:

"The remedies of release from pretrial detention or dismissal of charges become available only if, at the time of [the] subsequent status hearing before the [Chief Justice], the defendant remains unrepresented and, despite the good faith efforts of CPCS, there is no attorney willing and available to represent the defendant."

Carrasquillo, 484 Mass. at 391 n.31. Moreover:

"[N]othing herein prohibits a judge in his or her court room session from deciding that ordering release of a defendant who has been held in pretrial detention without counsel, or ordering dismissal of the charges without prejudice where a defendant has been unrepresented, is constitutionally required in the particular circumstances of an individual case."

Id. at 391.

Further, so that the court periodically can assess the continuing need for the protocol, it shall be and hereby is **ORDERED** that the parties shall provide the court with an update to the information as to each of the factors described in Carrasquillo, 484 Mass. at 390, and considered supra, which update is to be provided at least every thirty days, beginning on August 4, 2025 (periodic update); provided, however, that any party may provide the court with an earlier update as circumstances warrant or seek termination of the Lavallee protocol at any time. For each periodic update, CPCS shall provide its update first; within seven days thereafter, the Courts shall submit their response, and the SCDA is invited to

file a response.¹⁰ Alternatively, a joint status report containing the information may be submitted. After receipt of a periodic update or any other updates, I will assess the need for any further information or a hearing.

So ordered.

By the court,

/Dalila Arguez Wendlandt/

Dalila Arguez Wendlandt
Associate Justice

Entered: July 3, 2025

¹⁰ See note 4, supra (discussing Middlesex County District Attorney).

UNITED STATES CONSTITUTION

Sixth Amendment

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

MASSACHUSETTS DECLARATION OF RIGHTS

Article 11. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article 12. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make

any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

ARTICLE 30: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASSACHUSETTS SESSION LAWS

Chapter 14 of the Acts of 2025

Section 2A.

* * *

Committee for Public Counsel Services

0321-1599. For a reserve to expand the number of public defenders employed by the committee for public counsel services established in chapter 211D of the General Laws; provided, that the expansion shall prioritize increasing the proportion of indigent clients represented by public defenders in a manner that ensures clients are timely represented by counsel; provided further, that the committee shall prioritize the hiring of public defenders that serve areas with unrepresented individuals awaiting counsel assignment, including counties with a recent history of private bar advocate work stoppages; provided further, that the committee shall use best efforts to hire approximately 160 new attorneys in the public defender division by the end of fiscal year 2026 and an additional 160 new attorneys in said division by the end of fiscal year 2027; provided further, that the committee may transfer funds from this item to item 0321-1500 of section 2 of the general appropriations acts for fiscal years 2026 and 2027; provided further, that not later than September 1, 2025, the committee shall submit a hiring plan to the clerks of the senate and house of representatives, the joint committee on the judiciary and the senate and house committees on ways and means, which shall include an update on hiring activity under this item to date of the plan's submission and outline the committee's plan to hire attorneys in a manner that

ensures clients are timely represented by counsel; provided further, that not later than July 15, 2026, the committee shall submit a report to the clerks of the senate and house of representatives, the joint committee on the judiciary and the senate and house committees on ways and means that shall include, but not be limited to: (i) the total number of public defenders employed by the committee; (ii) the number of public defenders hired under this item, delineated by county served; (iii) the total number of cases handled by the committee in fiscal year 2026, delineated by whether the case was handled by a public defender or a private bar advocate and the type of case; (iv) the average caseload per public defender; (v) the change to the proportion of indigent clients represented by public defenders due to new public defenders hired under this item; (vi) the estimated reduction in hours billed by private bar advocates due to the increase in public defenders hired under this item and the savings associated with that reduction in hours billed; and (vii) recommendations on the future balance of cases between public defenders and private bar advocates; and provided further, that the funds appropriated in this item shall be made available through June 30, 2027..... \$40,000,000

* * * *

Section 48. Subsection (b) of section 6 of chapter 211D of the General Laws, as so appearing, is hereby amended by inserting after the first paragraph the following paragraph:-

The committee shall require all contractual agreements for the appointment of private counsel to prescribe requirements for the minimum coverage and availability to be required for private counsel. Private counsel contractual agreements shall be required to be renewed biannually.

Section 49. Section 11 of said chapter 211D, as so appearing, is hereby amended by striking out subsection (a) and inserting in place thereof the following subsection:-

(a)(I) The rates of compensation payable to all counsel, who are appointed or assigned to represent indigents within the private counsel division of the committee in accordance with the provisions of paragraph (b) of section 6, shall, subject to appropriation, be as follows: for homicide cases the rate of

compensation shall be \$130 per hour; for superior court non-homicide cases, including sexually dangerous person cases, the rate of compensation shall be \$95 per hour; for district court cases and children in need of services cases the rate of compensation shall be \$75 per hour; for children and family law cases and care and protection cases the rate of compensation shall be \$95 per hour; for sex offender registry cases and mental health cases the rate of compensation shall be \$75 per hour. These rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the commonwealth, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. This periodic review shall take place not less than once every 3 years.

(2) An agreement between private bar advocates to refuse to compete for or accept new appointments or assignments unless the rates of pay under this section are increased shall be evidence of a violation of section 4 of chapter 93; provided, that evidence of an agreement between private bar advocates to refuse to compete for or accept new appointments or assignments unless the rates of pay under this section are increased shall include, but shall not be limited to, any county where not less than 25 per cent of private bar advocates are refusing to compete for or accept new appointments or assignments.

Section 50. Subsection (a) of said section 11 of said chapter 211D, as amended by section 49, is hereby further amended by striking out paragraph (1) and inserting in place thereof the following paragraph:-

(a)(1) The rates of compensation payable to all counsel, who are appointed or assigned to represent indigents within the private counsel division of the committee in accordance with the provisions of paragraph (b) of section 6, shall, subject to appropriation, be as follows: for homicide cases the rate of compensation shall be \$140 per hour; for superior court non-homicide cases, including sexually dangerous person cases, the rate of compensation shall be \$105 per hour; for district court cases and children in need of services cases the rate of compensation shall be \$85 per hour; for children and family law cases and care and protection cases the rate of compensation shall be \$105 per hour; for sex

offender registry cases and mental health cases the rate of compensation shall be \$85 per hour. These rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the commonwealth, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. This periodic review shall take place not less than once every 3 years

* * * *

Section 104. Section 49 shall take effect on August 1, 2025.

Section 105. Section 50 shall take effect on August 1, 2026.

MASSACHUSETTS GENERAL LAWS

Chapter 211, § 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the

selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Chapter 211D, § 1. There shall be a committee for public counsel services, hereinafter referred to as the committee, to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis. The committee shall consist of 15 persons: 2 of whom shall be appointed by the governor; 2 of whom shall be appointed by the president of the senate; 2 of whom shall be appointed by the speaker of the house of representatives; and 9 of whom shall be appointed by the justices of the supreme judicial court, 1 of whom shall have experience as a public defender, 1 of whom shall have experience as a private bar advocate, 1 of whom shall have criminal appellate experience, 1 shall have a background in public administration and public finance, and 1 of whom shall be a current or former dean or faculty member of a law school. The court shall request and give appropriate consideration to nominees for the 9 positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association and other appropriate bar groups including, but not limited to, the Massachusetts Black Lawyers' Association, Inc., Women's Bar Association of Massachusetts, Inc., and the Massachusetts Association of Women Lawyers, Inc.

All members of the committee shall have a strong commitment to quality representation in indigent defense matters or have significant experience with issues related to indigent defense. The committee shall not include presently serving judges, elected state, county or local officials, district attorneys, state or local law enforcement officials or public defenders employed by the commonwealth. The term of office of each member of the committee shall be 4 years. Members of the committee may be removed for cause by the justices of the supreme judicial court. Vacancies shall be filled by the appointing authority that made the initial appointment to the unexpired term of the appointee within 60 days of the occurrence of the vacancy. An appointee shall continue in office beyond the expiration date of the appointee's term until a successor in office has been appointed and qualified. No member shall receive any compensation for

service on the committee, but each member shall be reimbursed for actual expenses incurred in attending the committee meetings.

Chapter 268A shall apply to all members, officers and employees of the committee, except that the committee may provide representation or enter into a contract pursuant to section 3 or section 6, although a member of the committee may have an interest or involvement in any such matter if such interest and involvement is disclosed in advance to the other members of the committee and recorded in the minutes of the committee; provided, however, that no member having an interest or involvement in any contract under section 3 may participate in any particular matter, as defined in section 1 of chapter 268A, relating to such contract.

Chapter 211D, § 5. Said committee shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency. The committee may also establish a system for the provision of counsel in any pre-arraignment procedure. A justice or associate justice shall assign a case to the committee, as hereafter provided, after receiving from the probation officer a written report containing the probation officer's opinion as to the defendant's ability to pay for counsel, based on the standards and procedures provided for in section two.

Chapter 211D, § 11, as amended through St. 2022, c. 126, §§ 96-100.

(a) The rates of compensation payable to all counsel, who are appointed or assigned to represent indigents within the private counsel division of the committee in accordance with the provisions of paragraph (b) of section 6, shall, subject to appropriation, be as follows: for homicide cases the rate of compensation shall be \$120 per hour; for superior court non-homicide cases, including sexually dangerous person cases, the rate of compensation shall be \$85 per hour; for district court cases and children in need of services cases the rate of

compensation shall be \$65 per hour; for children and family law cases and care and protection cases the rate of compensation shall be \$85 per hour; for sex offender registry cases and mental health cases the rate of compensation shall be \$65 per hour. These rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the state, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. This periodic review shall take place not less than once every 3 years.

(b) The committee shall set an annual cap on billable hours not in excess of 1,650 hours. Counsel appointed or assigned to represent indigents within the private counsel division shall not be paid for any time billed in excess of the annual limit of billable hours. It shall be the responsibility of private counsel to manage their billable hours.

(c) Notwithstanding the billable hour limitation in subsection (b), the chief counsel of the committee may waive the annual cap on billable hours for private counsel appointed or assigned to indigent cases if the chief counsel finds that: (i) there is limited availability of qualified counsel in that practice area; (ii) there is limited availability of qualified counsel in a geographic area; or (iii) increasing the limit would improve efficiency and quality of service; provided, however, that counsel appointed or assigned to such cases within the private counsel division shall not be paid for any time billed in excess of 2,000 billable hours. It shall be the responsibility of private counsel to manage their billable hours.

Chapter 213, § 8. The courts shall, respectively, receive, examine and allow accounts for services and expenses incident to their sittings and order payment thereof out of the state treasury.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in fourteen-point Athelas font, and contains 7,361 words excluding the cover page, table of contents, table of authorities, and certificates of compliance and service. The word count was determined through use of the “Word Count” feature in Microsoft Word for Office 365.

/s/ Rebecca Jacobstein

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2025, I served a copy of the original Brief and accompanying Record Appendix via email to:

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David McGowan, david.mcgowan@mass.gov

I further certify that I served a copy of the Corrected Brief on October 6, 2025.

/s/ Rebecca Jacobstein
Rebecca Jacobstein