COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13824

COMMITTEE FOR PUBLIC COUNSEL SERVICES,
Appellant

V.

MIDDLESEX AND SUFFOLK DISTRICT COURTS AND ANOTHER,
Appellees

INTERVENER, SUFFOLK COUNTY DISTRICT ATTORNEY'S BRIEF ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK COUNTY

KEVIN R. HAYDEN
District Attorney
For the Suffolk District

ELISABETH MARTINO
Assistant District Attorney
For the Suffolk District
BBO# 673778
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
elisabeth.martino@mass.gov

OCTOBER 2025

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ISSUES 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

The Suffolk County District Attorney (SCDA) intervenes not as an adversary to the defense bar but as a constitutional participant in the administration of justice. The District Attorneys of the Commonwealth bear daily responsibility for prosecuting criminal cases, protecting public safety, and ensuring that every accused person receives a fair trial. In fulfilling that duty, prosecutors share with the defense bar and the judiciary a commitment to the integrity and sustainability of the justice system.

The SCDA's interest in this litigation is institutional. It seeks to preserve the separation of powers set forth in Article 30 of the Declaration of Rights and to ensure that decisions concerning public expenditures remain where the Constitution places them: with the Legislature. As officers of the court and representatives of the executive branch, prosecutors are uniquely positioned to describe how fiscal imbalance within the justice system endangers both fairness and the public's confidence in the rule of law.

FACTS

As Intervener, rather than a party, the SCDA defers to the parties' recitation of facts insofar as they are relevant to its argument.

ARGUMENT

THE COURT HAS NO INHERENT AUTHORITY TO RAISE HOURLY RATES FOR PRIVATE BAR COUNSEL ADVOCATES WHERE THE HOURLY RATES ALREADY SET BY THE LEGISLATURE ARE NOT UNCONSITUTIONAL AND WHERE IT IS EXCLUSIVELY THE ROLE OF THE LEGISLATURE TO MAKE LAWS AND APPROPRIATE FUNDS

The Petitioner's brief takes what this Court has rightly recognized as a serious constitutional failure – the ongoing

shortage of counsel for indigent defendants – and turns it into a moral demand for judicial intervention, impermissibly blurring the line between enforcing constitutional rights and assuming the powers of the Legislature. The petitioner's repeated refrain that "we have been here before," and that the current situation is "disgraceful" or "intolerable" (*see* Pet.Br.7-9) is meant to stir emotion rather than clarify law and, respectfully, this Court should resist that pull. Moral urgency, no matter how genuine, cannot expand judicial power. This Court's duty under Article 30 is not to fix every policy problem, no matter how frustrating, but rather to limit any one branch of government from exercising the core functions of another. In both *Lavallee* and *Carrasquillo* this Court properly struck that balance, intervening only to stop an immediate constitutional violation, then properly deferring to the Legislature to craft a lasting solution involving the amendments of laws and appropriation of funds. See *Carrasquillo v. Hampden County District Courts*, 484 Mass. 367, 393 (2020) (reaffirming that the authority to establish

compensation rates for appointed counsel rests with the Legislature, and that the judiciary's role is limited to enforcing constitutional rights when defendants are left unrepresented); *Lavallee v. Justices in Hampden Superior Court*, 442 Mass. 228, 241 (2004) (recognizing that while the judiciary may implement temporary remedies to address unconstitutional delays in appointment of counsel, the setting of compensation rates for appointed attorneys remains a legislative function). See also G. L. c. 211D, §§ 3, 11 (CPCS is primarily funded by annual appropriations from the Legislature, which sets hourly compensation rates for bar advocates assigned to represent indigent defendants). Now, the Petitioner asks this Court to abandon that restraint and establish a precedent for judicial rate-setting, a step that would erode the separation of powers that sustain public trust when political and moral pressures run high.

The Petitioner's current claims are twofold: first, that this Court has inherent authority to raise rates to ensure proper functioning of the courts (Pet.Br. 22-25), and (2) that,

because the legislatively mandated hourly rates are "unconstitutional," either the Single Justice or the full Court may temporarily raise rates to correct that unconstitutionality (Pet.Br. 25-30). Both assertions are unsupported by law and contrary to established separation-of-powers principles and should therefore be denied. [1]

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[1] The Petitioners take the position that the trial courts may have inherent authority to assign counsel directly in exceptional circumstances rather than send the cases to CPCS for assignment (Pet.Br. 33-37). The Petitioners maintain, however, that "[t]o ensure that indigent defendants receive quality representation, and that the indigent defense system remains separate from the judiciary, courts must send all cases to CPCS for assignment" unless such direct assignment is the "only way for a court to restore the right to counsel" (Pet.Br. 37). The SCDA agrees with the Petitioner that, if that inherent authority exists, it should be exercised only in the most exceptional circumstances. This is for the reasons set out in the Petitioner's brief (Pet.Br.33-37), and additionally for the policy reasons first articulated by the SCDA to the Single Justice below – that permitting individual judges to unilaterally adjust hourly rates on an ad hoc basis would undermine the uniformity and stability necessary for the effective administration of justice and could create a perverse incentive for attorneys to decline appointments until a specific judge grants a rate increase, undermining the integrity and efficiency of the public defense system. It could also have the unintended consequence of prolonging, rather than resolving, the voluntary work stoppage that has precipitated the need for the *Lavallee* protocol in the first place, by allowing private bar advocates to appear for duty days, selectively engage with cases, receive

While the Intervener does not minimize the severity of the current attorney shortage or question the inadequacy of pay rates across the criminal justice system, the question here is not whether the attorney shortage crisis is real; it is whether the Constitution allows this Court to remedy it by rewriting a statute or appropriating funds in the Legislature's place. And the simple answer is: no. The Legislature has demonstrated its commitment to strengthening the indigent defense system by raising bar advocate rates, funding hundreds of new salaried defenders, and reinforcing contract provisions that ensure private attorneys fulfill their public obligation. *See* St. 2025, c. 14, §§ 49-50, 104-105. The issue now is not constitutional authority, but implementation. This Court should not be swayed by rhetoric that confuses impatience with unconstitutionality and be coaxed into overextending its power.

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compensation, and sustain the work stoppage in a way that prevents the *Lavallee* protocol from ever expiring.

This Court's duty is to determine the constitutionality of legislatively enacted statutes, not to legislate compensation. Indeed, "[i]t cannot be disputed that the lawmaking power, encompassing the appropriation power, is within the prerogative of the Legislature." *Opinion of the Justices To Senate*, 375 Mass. 827, 833–34 (1978). See *County of Barnstable v. Commonwealth*, 410 Mass. 326, 335 (1991) (reaffirming that the judiciary may not compel legislative appropriations or intrude on the Legislature's exclusive power over public expenditures); *O'Coin's, Inc. v. Treasurer of Worcester County*, 362 Mass. 507, 510–11 (1972) (recognizing limited inherent judicial authority to expend funds necessary to ensure the functioning of the courts, but emphasizing the separation of powers between branches).

To that end, it is for the Legislature to determine rates for indigent-defense counsel, which necessarily involves balancing competing fiscal demands between the various members of the criminal justice system: defense, prosecution, probation, victim services, and court administration. Those

judgments belong to elected officials accountable to taxpayers, not to the judiciary. See *Commonwealth. v. Gonsalves*, 432 Mass. 613, 619 (2000) ("Of course, any attempt by this court to compel the Legislature to make a particular appropriation . . . would violate art. 30.")

Furthermore, this Court's inherent powers are administrative, not fiscal. They permit the judiciary to compel the minimal resources necessary to keep the courts open, not to fix the compensation of outside contractors. *See O'Coin's*, 362 Mass. at 510. By contrast, ordering higher pay for private counsel would constitute a new appropriation and alter the statutory rate schedule enacted under G. L. c. 211D, § 11.

The Petitioner nevertheless argues that this Court should find the hourly rates set by the Legislature "unconstitutional," which would in turn allow it the unfettered inherent ability to override the legislatively set rates and abrogate the need for any prior appropriations (Pet.Br. 22-30). However, the extra-jurisdictional cases cited by the Petitioner in support of its claim stand in stark contrast to the case at bar

(*See* Pet.Br. 26-27) (citing *Arnold v. Kemp*, 306 Ark. 294, 306 (1991) (holding that statutory fee limits for court-appointed attorneys that effectively prevent adequate representation violate the constitutional right to counsel, but reaffirming that decisions about appropriations and compensation rates rest primarily with the Legislature, not the judiciary); *State v. Lynch,* 796 P.2d 1150, 1164 (Okla.1990) (holding that courts have inherent power to ensure adequate representation for indigent defendants when legislative funding is insufficient); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 30 (1966) (holding that while the judiciary may compel payment of funds indispensable to the operation of the courts, it may not dictate appropriations or exercise general fiscal control, as those powers are vested in the legislative branch); *Knox Cnty. Council v. State ex rel. McCormick*, 217 Ind. 493, 514 (1940) (holding that a court may require the payment of funds necessary to perform its constitutional functions but may not assume general fiscal authority or control appropriations)). Each of those cases involved fee caps or

payment structures so restrictive that attorneys were compelled to serve without reasonable reimbursement and with no legislative remedy in sight. And those state courts acted only after finding that defendants were left entirely without counsel and that the respective state legislatures had ignored repeated pleas for relief.

Massachusetts presents the opposite situation. Since *Lavallee*, the Legislature has repeatedly raised hourly rates for private counsel and expanded CPCS staffing. Most recently, in fiscal year 2025, the Legislature funded 360 new salaried positions and approved across-the-board hourly increases. *See* St. 2025, c. 14, §§ 49-50, 104-10. These appropriations demonstrate not indifference, but active engagement with and in support of the indigent defense system. To hold such legislative action constitutionally insufficient would transform judicial superintendence into budgetary oversight, contrary to the framework of Article 30.

Moreover, the comparative cases recognize, as does *O'Coin's*, that inherent judicial power is a last resort to

prevent the collapse of constitutional process, not a license to override appropriations whenever professionals seek higher pay. Here, the record establishes that the Legislature has responded to the bar advocates' demand for higher hourly pay, that at least some private bar advocates are returning to work, that CPCS is hiring more salaried public defenders, and that the acute attorney shortage crisis originally precipitated by the concerted work stoppage is starting to abate. This is not the moment for stopgap measures that could further unsettle the criminal justice system.

Moreover, were this Court to raise rates only for private bar advocates, it would invite claims of parity from every other under-resourced component of the criminal justice system, including prosecutors, salaried public defenders, and probation officers, who also perform constitutionally essential work. Indeed, Assistant District Attorneys perform among the most demanding functions in state government. They appear daily in multiple court sessions, manage extensive and evolving discovery obligations, and prepare cases outside

regular working hours. Their professional responsibilities are governed by the Rules of Professional Conduct, *see* Mass. R. Prof. C. 3.8 (2023), and by the comprehensive requirements of Mass. R. Crim. P. 14, which now encompass voluminous digital-evidence discovery. Yet unlike other participants in the criminal justice system, they have no ability to decline cases or to strike to improve pay. The Intervener does not suggest that private bar counsel are adequately compensated, but instead maintains that the Constitution does not permit one segment of the justice system to secure higher pay by judicial decree when every participant operates within the same fiscal limits set by the Legislature.

Public trust in the judiciary depends upon the perception that courts apply the law impartially and refrain from assuming policy-making roles. Were this Court to mandate higher compensation for one group of privately contracted attorneys, members of the public could reasonably question the judiciary's neutrality in disputes involving those same lawyers. The courts, prosecutors, and defense counsel form

interdependent parts of a single constitutional organism. When one limb seeks relief at the expense of another through judicial decree, the equilibrium of that organism falters. Cf. *Commonwealth v. Mitchell*, 496 Mass. 66, 79 (2025) (Article 29 of the Massachusetts Declaration of Rights mandates that judges remain "as free, impartial and independent as the lot of humanity will admit" which safeguards "the integrity of the judiciary and the judicial process" by demanding not only actual impartiality but also the avoidance of "even the appearance of partiality") (citation omitted). A judiciary that maintains restraint reinforces public confidence that justice is administered through law, not preference.

The fact inevitably remains that vast numbers of indigent criminal defendants across the Commonwealth continue to go unrepresented. This Court's judicially crafted *Lavallee* protocol serves as the constitutional remedy for that failure. Though the remedy is severe – and comes at significant cost to public safety – it directly targets the only constitutional

violation at issue: the deprivation of counsel for those most in need.[2]

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[2] Indeed, the record in this case bears out that certain private bar advocates certified under CPCS have declined to accept new appointments or to cover full duty-day rotations while continuing to receive compensation on existing publicly funded cases. Such coordinated refusals, even if informal, threaten the constitutional administration of justice and raise profound public-policy concerns. Moreover, because this is a voluntary work stoppage rather than a traditional strike, there are no established parameters or constraints to guide expectations regarding its resolution. There is no straightforward negotiation occurring between two defined parties, nor any commitment from participants to eventually resume full duties. The Legislature has since recognized this issue by including in the 2025 amendments to G. L. c. 211D, § 11, the following provision:

> 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.

St. 2025, c. 14, §§ 49-50, 104-105.

Judicially increasing rates in response to such coordinated action would risk legitimizing conduct that the Legislature has already designated to be evidence of state law violations. See also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (US Supreme Court held that respondent lawyer association's organized boycott, which aimed to secure higher fees for representing indigent criminal defendants, violated federal antitrust laws because it constituted a concerted effort to restrain trade and lacked any characteristics that would justify an exemption from antitrust provisions).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court answer the reported question in the negative and hold that neither this Court, a single justice of this Court, nor 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
For The Commonwealth,

KEVIN R. HAYDEN
District Attorney
For the Suffolk District

/s/ *Elisabeth Martino*

ELISABETH MARTINO
Assistant District Attorney
BBO# 673778
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
elisabeth.martino@mass.gov

October 21, 2025

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ADDENDUM

G. L. c. 211D, § 3: COMMITTEE FOR PUBLC COUNSEL SERVICES – Accepting of gifts, grants or contributions

Said committee may accept gifts, grants or contributions from any source, whether public or private, and may enter into contracts to provide or receive services with any federal, state, county or municipal entity, with any group or individual, whether profit or nonprofit, or with any nonprofit or voluntary charitable group, corporation, association or organization, including any bar association or bar advocate group.

G. L. c. 211D, § 11: COMMITTEE FOR PUBLIC COUNSEL SERVICES – Compensation rates

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.

St. 2025, c. 14, § 49: AN ACT MAKING APPROPRIATIONS FOR THE FISCAL YEAR 2025 TO PROVIDE FOR SUPPLEMENTING CERTAIN EXISTING APPROPRIATIONS AND FOR CERTAIN OTHER ACTIVITIES AND PROJECTS

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)(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 $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.

St. 2025, c. 14, § 50: AN ACT MAKING APPROPRIATIONS FOR THE FISCAL YEAR 2025 TO PROVIDE FOR SUPPLEMENTING CERTAIN EXISTING APPROPRIATIONS AND FOR CERTAIN OTHER ACTIVITIES AND PROJECTS

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.

St. 2025, c. 14, § 104: AN ACT MAKING APPROPRIATIONS FOR THE FISCAL YEAR 2025 TO PROVIDE FOR SUPPLEMENTING CERTAIN EXISTING APPROPRIATIONS AND FOR CERTAIN OTHER ACTIVITIES AND PROJECTS
Section 49 shall take effect on August 1, 2025.

St. 2025, c. 14, § 105: AN ACT MAKING APPROPRIATIONS FOR THE FISCAL YEAR 2025 TO PROVIDE FOR SUPPLEMENTING CERTAIN EXISTING APPROPRIATIONS AND FOR CERTAIN OTHER ACTIVITIES AND PROJECTS
Section 50 shall take effect on August 1, 2026

Mass. R. Crim. P. 14: PRETRIAL DISCOVERY FROM THE PROSECUTION
a.

1. For the purposes of this rule, the prosecution team includes all persons under the prosecuting

office's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecuting office or have done so in the case. The prosecution team includes but is not limited to:

A. Personnel of police departments or other law enforcement agencies who were or are involved in the investigation of the case, before or after charges were issued, or were or are involved in the prosecution of the case;

B. Personnel of other governmental agencies who, in conjunction or collaboration with the prosecutor, were or are involved in the investigation or prosecution of the case;

C. Forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government who were or are involved in the investigation or prosecution of the case;

D. Victim witness advocates and investigators employed by the prosecuting office; and

E. Members of joint state and federal law enforcement task forces who were or are involved in the investigation or prosecution of the case.

2.

A. The prosecutor has a duty in each case to inform each member of the prosecution team whom the prosecutor has reason to believe may be in possession of items or information subject to this rule of the discovery

and preservation obligations required by this rule, and to inquire of each such person as to the existence of any such items or information.

B. The prosecutor has a duty in each case to collect and to disclose to the defense all items and information required by this rule that are in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team.

C. When the prosecutor learns of items or information subject to disclosure which cannot be promptly copied or made available for inspection by the defense, the prosecutor has a duty to promptly notify the defense of the existence, and if known the location, of those items or information, and to instruct an appropriate member of the prosecution team to preserve those items or information until they can be disclosed.

D. When the prosecutor learns of items subject to disclosure that have been destroyed, lost, altered, or which have otherwise become unavailable, or items or information subject to disclosure that a member of the team will not provide the prosecutor, the prosecutor has a duty to promptly notify the defense of the destruction, loss, alteration, or unavailability of the items or the refusal to provide the items or information.

E. The judge may inquire of the prosecutor what actions were taken to achieve compliance with this rule.

b.

1. The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, each of the following items and information, provided it is relevant to the case and in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team:

   A. Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

   B. The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

   C. The names, addresses, dates of birth, and known contact information of the Commonwealth's prospective witnesses other than law enforcement witnesses.

   D. Written or recorded statements of persons the prosecutor may call as witnesses, and notes of interviews by law enforcement with persons the prosecutor may call as witnesses, unless contained within a disclosed statement or report.

   E. The names, business telephone numbers, business email addresses, and business addresses of prospective law enforcement witnesses.

   F. Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject

to Rule 14.4. Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

G. All photographs, video and audio recordings, or other tangible objects, all police or investigator's reports, and all intended exhibits.

H. Reports of physical examinations of any person or of scientific tests or experiments.

I. A summary of identification procedures, and all written, recorded, or oral statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

2.

A. The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, all items and information favorable to the defense in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team. Items and information subject to this section must be disclosed without regard to whether the prosecutor considers the items or information credible, reliable, or admissible and without regard to whether any such information has been reduced to tangible form. The disclosure of any unwritten or intangible information shall be memorialized

as soon as there is a reasonable opportunity, manner, and means to do so.

B. Items and information favorable to the defense are items or information that tend to:

i. Cast doubt on an aspect of guilt as to an element of any count of a charged or lesser included offense;

ii. Cast doubt on the credibility or accuracy of any evidence, including identification or scientific evidence, the prosecutor may introduce;

iii. Cast doubt on the credibility of the testimony of any witness the prosecutor may call;

iv. Cast doubt on the admissibility of any evidence or testimony the prosecutor may introduce;

v. Support the suppression or exclusion of any evidence or testimony the prosecutor may introduce;

vi. Mitigate the charged offense or offenses or any lesser included offense or offenses, diminish the defendant's culpability, or mitigate the sentence;

vii. Establish a defense theory or recognized affirmative defense or exemption to the charged offense or offenses or any lesser included offense or offenses, regardless of whether the defendant has presented such theory or raised

such affirmative defense or exemption; or

viii. Corroborate the defense version of facts or call into question a material aspect of the prosecution's version of facts, even if this aspect is not an element of the prosecution's case.

C. Items or information favorable to the defense include but are not limited to:

i. With respect to any witness the prosecutor may call:

a) Any promise, reward, or inducement sought, requested by, offered to, or given to such witness;

b) Any criminal record of such witness not contained in the court activity record provided pursuant to Rule 14.2(b);

c) Any criminal cases pending against such witness at any relevant time, whether brought by the prosecuting office or by a prosecuting office in any other jurisdiction;

d) Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor by the witness, that recants any written

statement or oral statement known to the prosecutor by the witness, or that omits, adds, varies, or supplements any written statement or oral statement known to the prosecutor by the witness;

e) Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor made by any other witness the prosecutor may call;

f) Any information reflecting bias or prejudice against the defendant by such witness or which otherwise reflects bias or prejudice against any class or group of which the defendant is a member;

g) Any crime, charged or uncharged, committed by such witness, if known to the prosecutor, prosecuting office, or any member of the prosecution team;

h) Any information about such witness contained in any database or list of information about law enforcement misconduct maintained by or available to the prosecuting office; and

i) Any information about any mental or physical impairment or condition of such witness that may cast doubt on such witness's ability to testify truthfully and accurately concerning any relevant event.

ii. With respect to any percipient witness, without regard to whether the prosecutor may call such witness:

a) The failure of the percipient witness to make an identification of a defendant, if any identification procedure has been conducted with such a witness with respect to the crime at issue;

b) Any inconsistent written statement or oral statement of the percipient witness regarding the alleged incident or the conduct of the defendant; and

c) Any written statement or oral statement of the percipient witness that is inconsistent with written statements or oral statements about the alleged incident made by other witnesses.

iii. With respect to any expert witness, other than one pertaining to the defendant's criminal responsibility subject to Rule 14.4, the prosecutor may call:

a) Descriptions of any examinations, tests, or experiments performed by the expert in connection with the case that were inconclusive, whose results were inconsistent with those of any examinations, tests, or experiments included in the expert's report, or whose results were inconsistent with any conclusion or opinion offered by the expert; and

b) Descriptions of negative outcomes of proficiency testing or audits of the expert witness or of any testing or laboratory facility used by the expert for tests or experimentation.

iv. With respect to any person the prosecutor does not anticipate calling:

a) Any written statement or oral statement of such person, including an expert, pertaining to the case that is inconsistent with any written statement or oral statement known to the prosecutor made by a witness the prosecutor may call.

v. Items or information that tend to:

a) Support the proposition that another person committed the crime or had the motive, intent, or opportunity to commit it;

b) Establish deficiencies or lapses in the investigation of the case or the failure of any expert witness or member of the prosecution team to follow established protocols, policies, or professional standards;

c) Call into doubt the authenticity of any evidence the prosecutor may introduce, or the reliability or validity of any expert testimony the prosecutor may introduce; and

d) Suggest that any bias or prejudice against any class or group of which the defendant is a member played any role in the investigation or prosecution of the case.

3.

A. The term "written statement," as used in this rule, means:

i. a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

ii. a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral

declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing-impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

B. The term "oral statement," as used in this rule, means any communication, by speech or nonverbal conduct intended as an assertion, of a person having percipient knowledge of relevant facts and which contains such facts that is not a written statement.

C. If information subject to disclosure exists in statements of multiple forms, including written and oral statements, the entirety of the substance of the information must be fully and completely disclosed, even when such disclosure requires providing written documents and separately disclosing the substance of any unwritten oral statement. The disclosure of any unwritten oral statements should be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.

c. Except as otherwise ordered by the court, the prosecutor shall provide the discovery required by Rule 14(b) at arraignment to the extent that the discovery is in the possession of the prosecutor. The prosecutor shall provide the discovery required by Rule 14(b) then available to the prosecution team by the first pretrial conference.

d. If the prosecution team subsequently obtains possession of items or information subject to disclosure under Rule 14(b), the prosecutor shall promptly disclose to or notify the defense of its acquisition of such additional items or information in the same manner as required for initial discovery.

Mass. R. Prof. C. 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

a. refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;

b. make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

c. not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;

d. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

e. not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

1. the prosecutor reasonably believes:

i. the information sought is not protected from disclosure by any applicable privilege;

ii. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

iii. there is no other feasible alternative to obtain the information; and

2. the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;

f. except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:

1. refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

2. take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;

g. not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

h. refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

i. When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

1. if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

2. if the conviction was obtained by that prosecutor's office,

i. disclose that evidence to the appropriate court;

ii. notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

iii. disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and

iv. undertake or assist in any further investigation as the court may direct.

j. When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

k. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Massachusetts Declaration of Rights, Article 1
All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Massachusetts Declaration of Rights, Article 29
It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

Massachusetts Declaration of Rights, 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.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is written in 14-point Century Schoolbook and contains 2,574 non-excluded words, as determined by using Microsoft Word 2010.

/s/ *Elisabeth Martino*
ELISABETH MARTINO
Assistant District Attorney

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service of the brief to the following counsel via e-mail:

Rebecca A. Jacobstein
Benjamin H. Keehn
Holly T. Smith
Committee for Public Counsel Services
75 Federal Street, 6th Floor
Boston, MA 02110
rjacobstein@publiccounsel.net
bkeehn@publiccounsel.net
hsmith@publiccounsel.net

Marina Pullerits
Jennifer Zalnasky
Assistant Attorneys General
Office of Attorney General Andrea Joy Campbell
One Ashburton Place
Boston, MA 02108
marina.pullerits2@mass.gov
jennifer.zalnasky4@mass.gov

Respectfully submitted
For The Commonwealth,
KEVIN R. HAYDEN
District Attorney
For The Suffolk District

ELISABETH MARTINO
Assistant District Attorney
For The Suffolk District
BBO# 673778
One Bulfinch Place
Boston, MA 02114

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13824

COMMITTEE FOR PUBLIC COUNSEL SERVICES,
Appellant

V.

MIDDLESEX AND SUFFOLK DISTRICT COURTS AND ANOTHER,
Appellees

INTERVENER, SUFFOLK COUNTY DISTRICT ATTORNEY'S BRIEF ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK COUNTY
