COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. 13824

COMMITTEE FOR PUBLIC COUNSEL SERVICES,

Petitioner-Appellant,

v.

MIDDLESEX AND SUFFOLK COUNTY DISTRICT COURTS AND ANOTHER

Respondent-Appellee.

On Reservation and Report
from the Supreme Judicial Court for Suffolk County

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AND THE AMERICAN CIVIL LIBERTIES UNION

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Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, neither the American Civil Liberties Union, Inc. ("ACLU"), nor the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") has a parent corporation and no publicly held corporation owns any stake in any of these organizations.

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Statement of Interests of Amici Curiae

The American Civil Liberties Union ("ACLU") is a nonprofit civil rights organization. The ACLU of Massachusetts ("ACLUM"), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Amici have a strong and longstanding interest in protecting the rights of criminal defendants in the Commonwealth, including the core constitutional right to counsel. ACLUM and the American Civil Liberties Union Foundation of Massachusetts regularly appear before this Court to protect these rights as counsel for either a party or friend of the Court. *See, e.g., Lavallee v. Justices in Hampden Super. Ct.*, 442 Mass. 228 (2004) (direct representation); *Carrasquillo, v. Hampden County Dist. Cts.*, 484 Mass. 367 (2020) (amicus).

Declaration of Amici Curiae

Pursuant to Mass. R. App. P. 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel, or any other person or entity, other than amici curiae, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief; and

(c) neither amici nor their counsel represent or has represented one of the parties to the present appeal in another proceeding involving similar issues; attorneys for ACLUM represented parties in *Lavallee*, 442 Mass. 228, and amicus in *Carrasquillo,* 484 Mass. 367.

Introduction and Summary of Argument

Indigent criminal defendants in the Commonwealth have experienced a recurring counsel crisis for over two decades. The judiciary has offered the Legislature ample opportunities to cure this constitutional violation. But the Legislature has not done so. A different approach is now required: with thousands of defendants lacking representation, justice further deferred will be justice denied. This Court should declare the statutory compensation scheme unconstitutional as applied in this context, implement an interim scheme, and articulate a framework to determine when a permanent

compensation scheme satisfies the constitutional right to counsel such that the temporary judicial solution can be lifted.

More than twenty years ago, this Court deemed the failure of the Commonwealth to provide counsel to 58 unrepresented defendants, 31 of whom were in pretrial custody, "a systemic problem of constitutional dimension." *Lavallee*, 442 Mass. at 244. The Court recognized that the counsel shortage was "caused" by low attorney compensation rates. *Id.* at 229. Yet this Court did not order a rate increase at that time. Instead, it crafted a protocol for releasing and eventually dismissing charges against unrepresented defendants that, at least in theory, could both temporarily address the constitutional crisis and prompt the Legislature to increase rates as part of a "permanent remedy." *Id*. at 242-44.

But, in what would become a theme, the Legislature acted with its eyes fixed on the ground beneath them, and ignored the path ahead. Neither this Court's urging, nor the prospect of court-ordered releases from custody, prompted the Legislature to enact a compensation scheme that would secure defendants' rights long-term. Instead, the Legislature

responded to *Lavallee* by raising the rates in 2005, but not enough to stave off the next crisis.

It was therefore predictable that, after the Legislature added just $3 an hour to the District Court rate over the next fifteen years, another emergency arrived. In 2020, CPCS filed a petition on behalf of 155 unrepresented defendants, five of whom were in custody. Both parties "identified low rates of compensation of bar advocates as a major factor in discouraging private attorneys from accepting court appointments." *Carrasquillo*, 484 Mass. at 392. Again, this Court did not order rate increases. Instead, the judiciary reconfigured the *Lavallee* protocol and "defer[ed] to the Legislature" to address a more permanent solution regarding compensation. *Id.* at 389-91, 393.

The Legislature's response was minimal and without foresight for the future. It raised rates from $53 to $60 per hour for District Court cases—an increase that, adjusted for inflation, did not even bring compensation back to the rate implemented in 2005. *See infra.*

Cumulatively, the Legislature's repeated inaction led to the crisis today, which has grown an order of magnitude larger. Since May 27, 2025, more than 7,200 defendants have gone unrepresented, of whom

more than 1,300 have been in custody. *See* October 2, 2025 Affidavit of Holly T. Smith ("Smith Affidavit") ¶ 5.[1] In July, the Single Justice recognized that "the underlying problem is the low compensation rate for District Court work set by statute." RA:207.[2] At that time, the Single Justice instituted the *Lavallee* protocol and again "defer[red]" to the Legislature to address compensation. RA:210.

The most recent legislative response neither met the moment nor provided a long-term solution. In August 2025, the Legislature passed a supplemental budget authorizing an hourly rate increase of just $10 per hour beginning on August 1, 2025—bringing the hourly rate for District Court work to $75—and another $10 increase beginning August 1, 2026. RA:296-97 ¶ 90-96. It also added an antitrust provision that exposes appointed private counsel to both civil and criminal liability if they enter an agreement to refuse new assignments unless rates increase, with the potential for liability based purely on 25% of appointed counsel in one county not taking cases. RA:297 ¶ 91. In other

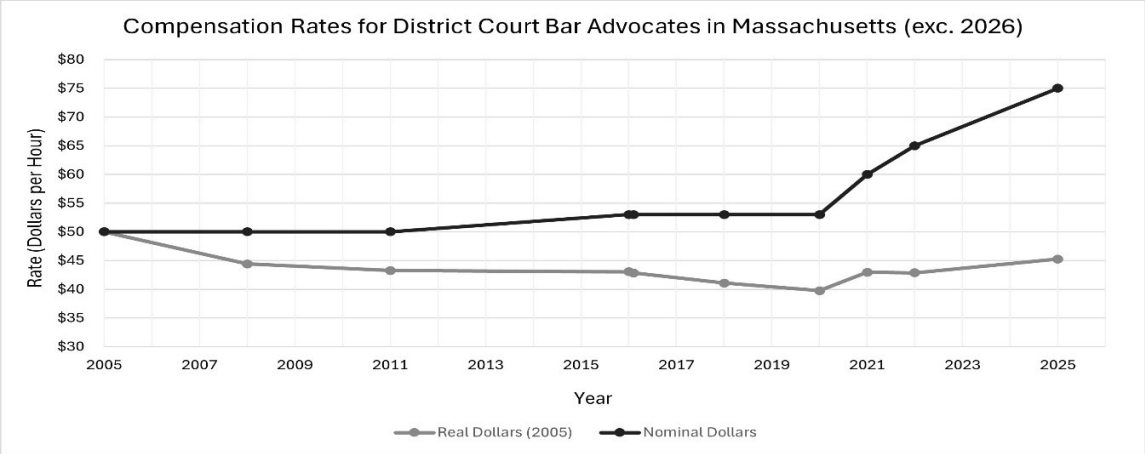
[1] The Smith Affidavit is attached to CPCS' Motion to Expand the Record.

[2] The Record Appendix is cited as "RA."

words, the Legislature instructed bar advocates: to represent indigent criminal defendants, you must accept pay worth less than what you were making in 2005, and you must take on an enormous and intrinsic risk of civil or criminal liability in doing so.

Not surprisingly, the crisis has remained. In early October 2025, there were 2,653 unrepresented defendants, 75 of whom were detained. Smith Affidavit ¶¶ 1-2.

In short, despite multiple entreaties by this Court, the Legislature has not meaningfully fixed the broken system, which continues to trigger widespread violations of the right to counsel. Over the course of decades, legislative inaction simply has not kept pace with what the Constitution requires. The District Court compensation rate has increased only $25 in twenty years. When considered alongside inflation, the actual purchasing power of the District Court compensation rate has steadily duplicated the woefully inadequate rates that have prevailed for the last two decades:



The newest legislation does not break this trend: the purchasing power of the newly-instituted $75 hourly rate would have been approximately $45 in 2005, which is *less than* the rate implemented in response to *Lavallee*.[3]

Amici respectfully submit that the time for deferring to the Legislature is over. Thus far, this Court has adopted the approach of some state courts to "*temporarily defer[] in the first instance, and only temporarily*, to legislative action to ensure that the system for

[3] *See* G.L. c. 211D, § 11(a) as amended by St.2005, c. 54, § 2; St.2008, c. 182, § 69; St.2011, c. 68, § 115; St.2015, c. 46, § 119; St.2016, c. 133, § 119; St.2016, c. 283, § 16; St.2018, c. 154, §§ 49, 50; St.2020, c. 227, § 53; St.2021, c, 24, §§ 59 to 63; St.2022, c. 126, §§ 96 to 100; St. 2025, c. 14, §§ 49-50, 104-05. Purchasing power for this chart was calculated using the Bureau of Labor Statistics Consumer Price Index Data, publicly available at https://data.bls.gov/timeseries/CUUR0000SA0, https://www.bls.gov/cpi/data.htm, and through the CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

compensation for indigent representation meets constitutional standards." *Lavallee*, 442 Mass. at 242 (emphasis added). But the first, second, and third instance for the Legislature to fix this problem has long since passed. This Court should now join the state courts that, as a "last resort[,] have granted preliminary relief in the form of increased compensation rates but have simultaneously directed their Legislatures to amend permanently the compensation rates for indigent representation." *Id.*

First, this Court should declare the compensation statute unconstitutional as applied in this context. The low compensation rate and the punitive antitrust provision deter private counsel from taking appointed cases, leading to the violation of defendants' right to counsel. This Court has both the authority and an obligation to safeguard the Massachusetts Constitution by ruling that a statute which is directly causing constitutional violations is unconstitutional. Pgs. 15 to 21.

Second, this Court should implement a temporary compensation scheme to protect defendants' right to counsel until the Legislature enacts a constitutional compensation statute. To set this interim relief, this Court can look to well-established factors that other courts have

used to analyze attorney compensation, including consideration of overhead, cost of living and non-monetary factors. Pgs. 22 to 37. As the current crisis has already stretched on for more than five months in the face of ineffective legislation, this Court's temporary remedy should be instituted without delay, and the Court should articulate a framework to determine when a permanent compensation scheme satisfies the constitutional right to counsel. Pgs. 37 to 42.

Argument

Where, as here, "fundamental constitutional rights are violated, and where," as here, "the Legislature fails to remedy the constitutional deficiencies after having had the opportunity to do so […] the judiciary must provide such a remedy." *Goldstein v. Secretary of Commonwealth*, 484 Mass. 516, 527 (2020).

I. Because Chapter 211D, § 11(a), as amended by Chapter 14 of the Acts of 2025, §§ 49-50, 104-05, deprives defendants of their right to counsel, the Court should declare this statutory compensation scheme unconstitutional.

"The right to counsel is a fundamental right protected by both the Sixth Amendment and art. 12." *Commonwealth v. Fico*, 462 Mass. 737, 740 (2012). The Massachusetts right to counsel is more protective than

its Federal corollary. *See, e.g., Commonwealth v. Murphy*, 448 Mass. 452, 466 (2007) ("We have elsewhere described in detail the instances where this court has interpreted the art. 12 right to counsel more expansively than the Sixth Amendment, including granting indigent defendants the right to appointment of counsel years before the United States Supreme Court"); *Carrasquillo*, 484 Mass. at 371-72 (describing history of right to counsel in Massachusetts predating Federal right). It is the government's obligation to fulfill that right by providing counsel for indigent defendants, *see Carrasquillo,* 484 Mass. at 368; *Lavallee*, 442 Mass. at 246, and it is the judiciary's duty to safeguard that right by remedying its violation, *see Goldstein*, 484 Mass. at 527.

Indigent defendants in the Commonwealth are currently experiencing a constitutional counsel crisis "greater in scope" than the ones that confronted this Court in *Carrasquillo* or *Lavallee*, and its "root cause" is attorney compensation. RA:265, 261-62. This Court has thus far deferred to the Legislature to address attorney compensation. But the mere attempt by the Legislature to do something does not insulate the resulting legislation from judicial review. To the contrary, a statute that causes a violation of constitutional rights is

unconstitutional. *See, e.g.*, *Commonwealth v. Perry*, 155 Mass. 117, 121 (1891) ("A statute which violates [certain fundamental rights] is unconstitutional and void"). And the judiciary is empowered to review and remedy constitutional violations enacted by statute. *See, e.g.*, *Goldstein*, 484 Mass. at 527; *Whiteside v. Merchants' Nat'l Bank of Boston*, 284 Mass. 165, 171 (1933).

Judicial review of the compensation scheme would be consistent with the decisions of other state courts. Those decisions illustrate that the judiciary "can and must have a say with respect to whether a chosen system is constitutionally sound." *Duncan v. State*, 284 Mich. App. 246, 341 (2009) (allowing challenge to system funding appointed counsel).[4] The New York Superior Court directly concluded that the statutory scheme setting compensation rates for assigned counsel was unconstitutional because it "result[ed] in a real and immediate threat

[4] The *Duncan* litigation has a lengthy history. The substantive and controlling appellate court decision is as follows: *Duncan v. State*, 284 Mich. App. 246 (2009), *aff'd on other grounds*, 486 Mich. 906 (2010), *reconsideration granted, order vacated*, 486 Mich. 1071 (2010), *order vacated on reconsideration,* 488 Mich. 957 (2010), *and order reinstated*, 488 Mich. 957 (2010), *and rev'd*, 486 Mich. 1071 (2010), and *order vacated on reconsideration*, 488 Mich. 957 (2010).

that these litigants will be, and are being, denied their constitutional rights to the meaningful and effective assistance of counsel and due process of law." *New York County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 414 (Sup. Ct. 2003) (hereinafter "*NYCLA*"). The Wisconsin Supreme Court has remarked on its power to rule on the constitutionality of a statute setting counsel compensation rates. *E.g.*, *In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 62-64 (Wis. 2018)[5] (noting that court has the power to rule on the constitutionality of the rate and ordering increased compensation to "forestall what is clearly [ ] an emerging constitutional crisis"). Still other courts have found certain compensation rates and structures for obtaining appointed counsel unconstitutional as applied. *See, e.g., White v. Board of County Comm'rs of Pinellas County*, 537 So. 2d 1376, 1378 (Fla. 1989) (holding statute setting maximum fee limitation "unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused")

[5] The Wisconsin Supreme Court's order is included in amici's addendum ("Add."), and citations herein are to the addendum pages. It is also available at https://docs.legis.wisconsin.gov/misc/sco/312.pdf.

(citations omitted); *State v. Smith*, 140 Ariz. 355, 362 (1984) (holding county's bidding procedure to procure counsel "violates the right of a defendant to due process and right to counsel").

Judicial review of the compensation scheme is especially warranted here because this Court has repeatedly and painstakingly given the Legislature opportunities to produce a constitutionally adequate statute. Thus, to the extent this Court must exercise "due consideration" for the Legislature when reviewing the constitutionality of statutes, it has already done so. *O'Coins, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 515-16 (1972). The time is ripe for this Court to exercise its own duty to safeguard the state Constitution and directly address the constitutionality of the compensation statute. And where, as here, the statute is the "root cause" of a systemic violation of constitutional rights, this analysis should lead to one conclusion: the statute as applied in this context is unconstitutional. RA:265, 261-62.

Two months into the most recent counsel crisis, the Legislature passed a new compensation scheme with two components: a payment schedule, which increases the hourly rate by just $10 an hour in 2025,

and a punitive antitrust provision that subjects appointed private counsel to civil and criminal penalties for organizing to seek higher compensation. *See* Chapter 14 of the Acts of 2025, § 49(a)(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"). The statute further exposes appointed private counsel to potential liability—thereby disincentivizing their work—by declaring that 25% of appointed private counsel "refusing to compete for or accept new appointments or assignments" in any given county shall be evidence of a prohibited agreement. *Id*.

Just as any person contemplating a new job considers both salary and non-monetary conditions like healthcare benefits, vacation allowances, or hybrid schedules, both the hourly rate and the antitrust provision impact an attorney's consideration of whether to take assignments. Here, the threat of antitrust enforcement creates a profound disincentive to take appointed cases, thus compounding the unconstitutionality of the low compensation rates. *See e.g.*, Brief of 328 Massachusetts Bar Advocate Attorneys ("BA Br.") 20, n. 19 (antitrust

provision "serves only to further dissuade" from accepting appointments); BA Add. 154 ¶ 6 ("When [the antitrust provision] was signed into law, I determined that it would not be practical or safe for me to continue to be a bar advocate").

Indeed, it is undeniable that both the small rate increase and the punitive antitrust provision so disincentivize attorneys from taking appointed cases that it violates defendants' right to counsel. RA:261. In the two months after the new rates and antitrust provision went into effect, between 41%-78% of the scheduled duty days in the affected courts went unfilled. Smith Affidavit ¶¶ 16, 21.

Nearly three months since the Legislature had its most recent opportunity to address the constitutional crisis, thousands of defendants remain unrepresented. Because the low payment rates and the strong deterrent effect of the antitrust provision have resulted in a continuing violation of defendants' constitutional rights, this Court should declare the current compensation scheme unconstitutional as applied in this context. *See* G.L. c. 211, § 3 (general superintendence allows superseding of laws found unconstitutional).

II. The Court should use its authority to order an interim compensation scheme until the Legislature issues a constitutionally sufficient statute.

The lengthy duration of the deprivation of indigent defendants' rights caused by ineffective legislative action indicates two things.

First, if this Court declares that the governing statute violates defendants' Article 12 rights, it can and should remedy that violation by ordering an interim compensation package that would go into effect immediately and remain in effect until the Legislature replaces the unconstitutional statute with a constitutional statute.[6] Second, given

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[6] *See, e.g.*, *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); *New York County Lawyers Ass'n v. State*, 191 N.Y.S.3d 378, 380 (2023) (holding court had authority to order prospective rate increase "to increase the incentives for attorneys to participate in [appointed private counsel work] that is necessary to adequately protect the constitutional right of indigent litigants to effective legal representation"); *see also First Justice of Bristol Div. of Juvenile Court Dep't v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dep't*, 438 Mass. 387, 397–98 (2003) (holding courts have "inherent judicial authority" that "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, […] to control the practice of law, […] to control and supervise personnel within the judicial system, [… and] to control a court's own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court") (internal citations and quotations omitted).

that the Legislature's prior attempts to resolve this crisis have repeatedly failed, this Court should adopt a clear framework to determine whether a proposed legislative solution is constitutionally sufficient to lift the interim judicial remedy.

a. The Court's determination of an interim compensation package may be guided by consideration of a common set of factors that are routinely used by courts.

Courts possess expertise in determining the contours of a temporary compensation package, as it is "peculiarly within the judicial province to ascertain reasonable compensation" for appointed counsel. *Smith v. State*, 394 A.2d 834, 838 (N.H. 1978).[7] Exercising that competency, state courts have regularly determined what constitutes sufficient compensation across the varied circumstances in which attorney compensation arises, including constitutional analyses of defendants' rights in systematic and post-conviction contexts, compulsory appointed counsel work, individual petitions for additional fees in extraordinary circumstances, and state-wide rate adjustments.

[7] *See Simmons v. State Pub. Def.*, 791 N.W.2d 69, 87–88 (Iowa 2010), citing *State v. See*, 387 N.W. 2d 583, 586 (Iowa 1986) (courts are experts in determining reasonable fees for appointed counsel).

In a recent process analogous to the circumstances before this Court, the Supreme Court of Wisconsin undertook a comprehensive assessment in response to a petition asking that court to amend the compensation rates applicable for appointed private counsel. *See In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 47. A constitutionally sufficient compensation package will naturally, but need not only, include an increased rate. *See Duncan*, 284 Mich. App. at 281 n.7 (court's "overriding concern is constitutionality," and "constitutional compliance could come in any variety or combination of forms"). To establish such a compensation scheme, courts commonly consider multiple factors "designed to ensure that an indigent defendant receives effective assistance of counsel." *Simmons v. State Public Def.*, 791 N.W.2d 69, 87 (Iowa 2010).

i. Overhead and expenses.

A constitutionally adequate hourly rate must attract enough attorneys to ensure that defendants are not left without representation, which at a minimum requires providing attorneys with an ability to make a living. *See, e.g.*, *Carrasquillo*, 484 Mass. at 392 (noting low rate of compensation "discourag[es]" appointed work and that "financial

stress [is] a central issue affecting the well-being of privately assigned counsel"); *Jewell v. Maynard*, 181 W. Va. 571, 579, 581 (1989) (raising rates that "do not now cover a lawyer's overhead" so that attorney can "make a living" after costs and expenses).

As a result, it is no surprise that across every context of compensation-setting, courts emphasize attorney overhead and expenses.[8] "Overhead expenses may include office rent, telecommunications, utilities, support staff salaries and benefits,

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[8] *See, e.g.*, *State ex rel. Stephan v. Smith*, 242 Kan. 336, 361 (1987) (considering "counsel's fixed expenses and overhead"); *People v. Fortune*, 682 N.Y.S.2d 803, 805 (Sup. Ct. 1998) (noting rate-setting courts should consider overhead and expenses in New York City); *Lynch*, 796 P.2d at 1160 (noting state must pay "a rate which is not confiscatory, after considering overhead and expenses"); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132 (W.D. Wash. 2013) (considering "overhead[] and routine investigation costs"); *Simmons*, 791 N.W.2d at 87 (noting overhead for average Iowa lawyer in 2010 was in excess of $70,000); *Bailey v. State*, 309 S.C. 455, 463 (1992) (noting compensation that "fail[s] to cover even the overhead costs of maintaining [a] law office[]" is "gross and fundamental unfairness"); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 30 (1966) (noting fee cap statute "cannot constitutionally be applied" where appointed counsel "suffer[] an extreme, if not ruinous, loss of practice and income and must expend large out-of-pocket sums"); *State v. Young*, 143 N.M. 1, 3 (2007) (considering overhead in comparison to hourly rate for appointed counsel); *NYCLA*, 763 N.Y.S.2d at 417 (noting "when the rate is insufficient to cover overhead and provide a profit, attorneys refuse to take cases"); Ill. Sup. Ct. R. 299(a) (noting court should consider overhead in setting reasonable appointed counsel fee).

accounting, bar dues, legal research services, business travel, and professional liability insurance. Many attorneys also have student loan payments." *In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 60 n.12. In particular, law school loans and professional liability insurance are facing fast-rising costs. *See* BA Add. 106 (law school loans "can take decades to pay back at a cost of $150 to $1,200 a month"); Sawicki, *Insurers Say Legal Malpractice Costs Keep Outpacing Inflation*, Law360 (May 20, 2025), https://www.law360.com/pulse/articles/2342325/insurers-say-legal-malpractice-costs-keep-outpacing-inflation.

Overall, appointed attorneys must pay thousands of dollars every month to cover even minimal overhead. BA Br. 14-13, BA Add. 106. A calculation of the hourly compensation rate should consider these overhead rates to ensure defendants' constitutional rights. *See, e.g.*, *Bailey*, 309 S.C. at 464 ("The link between compensation and the quality of representation remains too clear").

ii. Inflation of professional and cost-of-living expenses.

To ensure that a rate is sufficiently high to incentivize attorneys to take appointed work—in other words, to ensure that a rate is

constitutional—many courts use inflation calculations to inform their analysis of overhead and cost-of-living expenses, particularly in comparison with the time when a challenged rate was first implemented.[9] *Carrasquillo* itself noted the growing gap between the legislative commission's recommended compensation rates and actual rates using the Bureau of Labor Statistics CPI Inflation Calculator. *See* 484 Mass. at 392-93. Notably, certain costs specific to—and required

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[9] *See, e.g.*, *Jewell*, 181 W. Va. at 581 ("Twelve years have now passed [since the court's last assessment of rates], the cost of living has more than doubled, and […] these pay rates do not now cover a lawyer's overhead"); *Stephan*, 242 Kan. at 364 (noting fee schedule has "not kept up with inflation[]"); *New York County Lawyers Ass'n v. The State of New York*, No. 156916/2021, 2022 WL 2916783, at *4 (N.Y. Sup. Ct. July 25, 2022), *aff'd* at 191 N.Y.S.3d 378 (2023) (raising rate from $90 to $158/hour and noting state failed to raise counsels' rates since court-ordered minimum rate 19 years prior); *Bailey*, 309 S.C. at 464 ("[R]ising costs must be figured into the equation"); *White*, 537 So. 2d at 1380 (allowing fees in excess of statutory maximum based in part on "increased cost of living since the statute was last amended"); *In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 49 (raising rate that "has not changed in nearly 25 years"). Though courts do remark on statutory rates that have long gone unchanged, the focus of their analyses is generally the rate of inflation and reasonable pay in relation to inflated overhead rather than the time since amendment alone. *See e.g.*, *In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 48 ("[T]he real reason for this petition is not merely because an increase in the compensation rate […] is overdue," but because "chronic underfunding […] has reached a crisis point").

by—legal practice have at times risen more than inflation rates. For example, between 2005-2024, average law school tuition alone rose between 21%-48% depending on the type of school.[10] *See In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 60 n.12 (student loan payments are part of overhead).

To ensure that rates meet the actual experience of inflation and cost-of-living on the ground, this Court should consider inflation specific to Massachusetts. The CPI Inflation Calculator is based on city averages across the United States, but Suffolk and Middlesex counties are significantly more expensive than many U.S. cities,[11] and the most

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[10] This calculation is made using the CPI Inflation Calculator, and data compiled by Law Hub. *Cost Of Attendance*, *Law School Tuition in the United States, 1985-2024*, Law Hub, https://www.lawhub.org/trends/tuition (last visited Oct. 24, 2025). In 2005, average law school tuition for public resident students was $13,145, the equivalent of $21,259.26 in 2024; for public non-resident students was $22,987, the equivalent of $37,176.62 in 2024; and for private students was $28,900, the equivalent of $46,739.65 in 2024. Average law school tuition in 2024 for public resident students was $31,542, 48% more than the equivalent cost in 2005; for public non-resident students was $44,859, 21% more than the equivalent cost in 2005; and for private school students was $57,927, 24% more than the equivalent cost in 2005.

[11] For good reason, the Legislature structured G.L. c. 211D, § 11(a) to set a statewide compensation rate based not on location, but on type of case. This Court's interim remedy should adopt that statewide

recent Consumer Price Index for the Northeast reports that the Boston and Cambridge Metropolitan Area has a higher inflation rate than the U.S. city average rate.[12] If the rates continue to "fail to cover basic living expenses, especially in a high-cost area like Greater Boston," BA Add. 15, n.10, then they will be inadequate to protect defendants' rights.

iii. Rates for comparable work.

Courts setting attorney compensation rates also frequently look to market rates in other areas of practice as benchmarks.[13]

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structure, both to minimize intrusion into the Legislature's statutory scheme and to forestall the negative impacts on defendants in more remote parts of the state that would follow a county-specific remedy. *See In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 52, 64 (raising rates statewide despite differing impacts of rates by location and "state of crisis" in single region). Though the *Lavallee* protocols are in place only in Middlesex and Suffolk, defendants' constitutional rights are being violated statewide. Smith Affidavit ¶ 4; BA Br. 25 (defendants in other counties unrepresented, and sometimes held for weeks without counsel, without benefit of *Lavallee* protections).

[12] U.S. Bureau of Labor Statistics, *Northeast Information Office*, *Consumer Price Index Overview Table – Northeast*, https://www.bls.gov/regions/northeast/data/xg-tables/ro1xg01.htm (last visited Oct. 24, 2025).

[13] *See, e.g.*, *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 443 (Alaska 1987) (setting rate reflective of "compensation received by the average competent attorney operating on the open market"); Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal*

Though most courts, including Massachusetts, have long "consider[ed] as fair a rate somewhat below that which should be appropriate were counsel privately employed," *Abodeely v. Worcester County*, 352 Mass. 719, 724 (1967), courts nonetheless examine private practice rates as a helpful guide.[14] *See* BA Add. 66 ¶ 2 (appointed counsel makes less for full day in court on appointed work than "just a couple hours working on a private case"); BA Add. 160 ¶ 17 (appointed counsel charges $250-$300/hour for private cases).

In addition to looking at the prevailing rates for private practice, courts commonly look to the rates for Federal appointed cases as a

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Help, 55 Hastings L.J. 835, 848 (2004) ("The ABA Standards for Criminal Justice recommend that lawyers who provide defense services should receive a reasonable hourly rate […] comparable to that which an average lawyer would receive from a paying client for performing similar services") (quotations and alterations omitted).

[14] *See, e.g.*, *In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 60 (examining "the mean hourly rate for private practitioners" generally and criminal attorneys specifically); *Fortune*, 682 N.Y.S.2d at 807 (discussing cost of defense services "if provided by private counsel"); *Smith*, 140 Ariz. at 361 (1984) (noting ABA guideline on determining fees includes consideration of "fee customarily charged in the locality for similar services"); Ill. Sup. Ct. R. 299(a) (noting court should consider comparable services rate in setting reasonable appointed counsel fee).

barometer.[15] In Massachusetts, the current Federal CJA rate for non-capital cases is $175/hour, and $140/hour for non-panel associates. *See* United States District Court for the District of Massachusetts, Rates for CJA Work on CJA Cases, https://www.mad.uscourts.gov/attorneys/cja-rates.html.

Some courts also look to public defender salaries as an informative data point. In so doing, however, they note the rate for appointed private counsel must be higher to account for the fact that they are responsible for covering their own overhead and expenses.[16] This Court should similarly set a rate reflecting that appointed private counsel do not have public employee benefits and must use their hourly pay to

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[15] *See, e.g.*, *Carrasquillo*, 484 Mass. at 393 (referencing hourly rate for Federal defenders as "benchmark for bar advocate rates"); *Jewell*, 181 W. Va. at 581–82 (setting minimum for appointed counsel compensation to rate equal to Federal rate adjusted for inflation); *NYCLA*, 763 N.Y.S.2d at 415 (setting appointed counsel rate equal to Federal assigned counsel rate).

[16] *See, e.g., Lynch,* 796 P.2d at1161 (setting appointed counsel rate based on public defender compensation, but "provision must be made" for overhead and expenses); *see also Young,* 143 N.M. at 5 ("Unlike the public defenders employed by the PD, [appointed] attorneys must pay overhead").

cover overhead. *See* BA Br. 16 n. 12 (detailing benefits provided to CPCS staff attorneys but not appointed counsel).

Finally, courts have also noted instances when "other professionals, some with perhaps less training, education and overhead expenses than [appointed] lawyers […] receive higher rates of compensation" in determining whether and how to raise rates. *NYCLA*, 763 N.Y.S.2d at 417.[17] In Massachusetts, appointed private counsel are "paid considerably less than the experts [they] hire on [their] client's behalf despite [their] comparable or greater level of education," and are, under the new legislation, paid only "the same rate of $75 per hour as the private investigators […] whose work [they] supervise." BA Add. 149 ¶¶ 9-10.

iv. Recommendations by appointed private counsel and experts.

In considering a compensation scheme that safeguards indigent defendants' constitutional right to counsel, courts have repeatedly considered the input of appointed private counsel as to both the costs of

[17] *See also Young*, 143 N.M. at 3-4 ("The videographer, who merely records witness interviews, receives $75/hour, and has received at least three to four times the amount that the attorneys have been compensated.") (quotation omitted).

practice and an ultimately reasonable rate.[18] Defense lawyers are well-situated to speak to the minimum compensation that would be sufficient to enable them to do the important public service of representing indigent defendants, and this Court may and should listen to them as the parties with lived experience regarding what it takes to make a living as appointed counsel. BA Br. 8 (appointed counsel "never entered this form of legal practice in order to achieve affluence, and they are not asking for that here. They submit this brief to illuminate the harsh realities they now face—that they are simply unable to earn a reasonable living while doing what they love to do and have always been committed to do—to serve justice—but literally can no longer afford it").

[18] *See, e.g.*, *In re the Petition to Amend SCR 81.02*, 2018 WI 83, Add. 47, 64 (granting attorneys' petition to raise compensation rate from $70/hour to $100/hour based in part on criminal defense lawyer association's and individual attorneys' representations); *Young*, 143 N.M. at 6 ("[I]n our judgment, the amount requested […] will avert a constitutional challenge to the effectiveness of their counsel based on inadequacy of resources"); *State v. Brisman*, 661 N.Y.S.2d 422, 424 (Sup. Ct. 1996) (affirming the granting of attorney's request of enhanced compensation of $75/hour given extraordinary circumstances).

Here, appointed private counsel have provided information regarding the realities and expenses of practice, and, based on their experience and expertise, have proposed a rate of $125 per hour for District Court assignments as a temporary solution. That rate reflects overhead expenses and inflation, as well as a March 2022 recommendation of $120 from the Special Master in *Carrasquillo*. BA Br. 28.[19] This Court may take that information into consideration as one among many factors in determining a constitutionally sufficient rate.

v. Non-monetary components of the total compensation package.

Setting hourly compensation rates is not the only way a statute can make indigent defense more or less attractive to prospective criminal defense attorneys. Thus, to determine whether a statutory compensation package is constitutionally adequate, courts should analyze incentives and deterrents beyond the hourly rate itself.

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[19] Many courts—including this one—have taken note of the recommendations by commissions and experts dedicated to the question of a sufficient rate for appointed counsel. *See, e.g.*, *Carrasquillo*, 484 Mass. at 392 (citing various commissions and reports); *NYCLA*, 763 N.Y.S.2d at 415 (relying on "the convincing testimony of [bar association]'s experts and witnesses").

Most commonly, courts have addressed whether "rates of pay together with [statutory] fee caps" endanger adequate representation. *Jewell*, 181 W. Va. at 579 (noting Kansas found "virtually identical" statutory structure "unacceptable" in *State ex rel. Stephan v. Smith*, 242 Kan. 336 (1987)).[20] Courts have also considered the incentivizing impact of the timeliness of payment.[21]

In line with this approach, this Court should consider the impact of factors beyond the rate itself, including the disincentivizing antitrust provision.[22] The record demonstrates that this provision has a

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[20] *See also NYCLA*, 763 N.Y.S.2d at 418 ("Artificial caps on compensation yield unconscionable results"); *Simmons*, 791 N.W.2d at 88, citing *Olive v. Maas*, 811 So.2d 644, 652 (Fla. 2002) (mandatory fee caps create "economic disincentive[s] for appointed counsel to spend more than a minimal amount of time on case").

[21] *See, e.g., Jewell*, 181 W. Va. at 582 (describing payment delay as detrimental to retaining appointed counsel as low pay rate); *Hulse v. Wilfvat*, 306 N.W.2d 707, 712 (Iowa 1981) (noting "assurance that the fee ordered by the court will be paid[]" relevant in determining reasonable compensation).

[22] Because this case arises in the context of remedying systemic violations of defendants' right to counsel, amici discuss the antitrust provision herein only with respect to its impacts on defendants' constitutional rights. It is worth noting, however, that the provision also implicates private counsel's rights to free expression, to association, and to petition the government. *See* Arts. 16 and 19 of the Massachusetts Declaration of Rights. The provision also lacks clear definitions for many of the terms used therein and seems to read out

significant impact on indigent defendants' right to retain appointed counsel. *See, e.g.*, BA Add. 154-155 ¶¶ 7-12 (attorney withdrawing as appointed counsel for lack of "a way to insure against" risk of liability that is "now intrinsic"); BA Add. 156 (attorney licensed in multiple states may not take appointments in Massachusetts as result of new legislation and considering taking appointments out of state).[23] Critically, undersigned counsel could not identify any other state with an antitrust provision, or a similarly strong deterrent provision.[24]

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basic intent requirements of criminal law. Amici defer substantive discussion of these other concerns raised by the statute, but note in this context that at minimum, these potential deficiencies in the statute further threaten defendants' constitutional right to counsel by powerfully deterring attorneys from including appointed cases in their legal practice.

[23] *Cf.* Sixth Amendment Center, *Paying Attorneys of the Sixth*, https://6ac.org/paying-attorneys-of-the-sixth/ (listing Massachusetts' pay as lower than neighboring states and noting "less rural states often are at risk of losing lawyers to neighboring states" with better compensation).

[24] Though no other state has as strong a deterrent provision, some include incentivizing provisions that Massachusetts does not offer, such as malpractice-related coverage, *see, e.g.*, Ohio Rev. Code § 120.41(B) (indemnification); Utah Code Ann. § 78B-22-303 (immunity), and no-cost access to legal research programs, *see, e.g.*, 94-649 Me. Code R. ch. 303 § 2; Kan. Admin. Regs. § 105-6-2; Idaho State Public Defender, FAQ, https://spd.idaho.gov/faq/.

To the extent the antitrust provision remains a part of the compensation scheme—and there are good reasons it should not—the rate will have to reflect the sizeable risk of enhanced liability for attorneys considering taking appointed cases in Massachusetts in addition to all of the other considerations. If the antitrust provision is removed, it would obviate the need for the rate to account for that particular deterrence, but it would still require an increased rate that reflects the other factors described *supra* (Part II.a.i-iv). *See Duncan*, 284 Mich. App. at 281 n. 7 (court's "overriding concern" of "constitutional compliance could come in any variety or combination of forms"); *Lavallee*, 442 Mass. at 244 (this Court's "powers of general superintendence require [it] to fashion an appropriate remedy" where there is a "continuing constitutional violation suffered by indigent criminal defendants").

b. The Court's interim remedy should be issued immediately and remain in place until the Court determines that the Legislature has issued a constitutional compensation scheme.

This Court has made clear that "the burden of a systemic lapse [in counsel] is not to be borne by defendants." *Lavallee*, 442 Mass. at 246. For that reason, the Court rejected the Attorney General's request in

Lavallee to delay judicial action for sixty days to see if legislative actions would resolve the problem, noting that those measures "ha[d] not yet resulted in relief", and there were "no assurance[s]" they would do so. *Id.* at 245-46.

Unfortunately, indigent defendants have continued to bear the burden of today's counsel crisis despite the *Lavallee* protocol: they have gone unrepresented, been held in custody, and are often being re-charged as they cycle through the system without an attorney to begin investigation, all while memories and evidence fade. *Id.* at 391. Smith Affidavit ¶¶ 1-5, 13-23. This Court's interim remedy should therefore take effect immediately, before defendants are further disadvantaged and deprived of their constitutional rights pending uncertain legislation.

Because the mere fact of legislative action does not assure protection of indigent defendants' rights, and to ensure a clear endpoint to the judiciary's interim remedy, this Court should also articulate a framework to determine when a permanent compensation scheme satisfies the constitutional right to counsel such that the temporary solution can be lifted. *See, e.g., Lavallee*, 442 Mass. at 245-46.

On the one hand, this Court could assess the constitutionality of the legislative response by measuring its actual impact on defendants. Under this mechanism, the Court could lift its interim rates as soon as the Legislature enacts a new compensation scheme, but retain jurisdiction and leave the *Lavallee* protocol in place so that this Court (or the Single Justice) could evaluate whether the new compensation scheme satisfies Article 12. Such a determination would be appropriate if the number of unrepresented defendants was consistently "reduced to zero" or a "few." *Carrasquillo v. Hampden County Dist. Cts.*, SJ-2019-0247, Docket No. 85 (June 30, 2022) (leaving *Lavallee* protocol in place until "the number of unrepresented District Court defendants [was] reduced to zero" and the number of unrepresented Superior Court defendants were "few"[25]). If, in the alternative, there continued to be unrepresented defendants, this would demonstrate that the new

[25] Specifically, the last update from the *Carrasquillo* parties prior to lifting the protocol indicated that "there were only two unrepresented indigent [Superior Court] defendants one of whom had been on the list awaiting counsel for two days and one who had been on the list for three days." *Carrasquillo*, SJ-2019-0247, Docket No. 85 (June 30, 2022).

legislation was unconstitutional and that this Court should re-institute the interim rates.

This framework requires caution, as it essentially experiments with defendants' rights. After the Court lifted its interim rates, if the new legislation did not fulfill the government's obligation to provide counsel, then defendants would bear that burden. For that reason, if the Court adopts this method, it should analyze the constitutionality of the new legislation as quickly as possible and re-institute the interim rates if the number of unrepresented defendants is not swiftly reduced to zero.

As an alternative, this Court could assess the constitutionality of the legislative response by focusing on the content of the legislation itself. Under this mechanism, the Court could retain jurisdiction, leave its interim rates in place, and stay any new compensation scheme during its assessment, which would be lifted only after the Court (or the Single Justice) concludes that the content of the legislative compensation scheme satisfies Article 12. *See, e.g., 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, 397-98 (2003) (noting

court has inherent authority to control administration of justice and courts' proceedings and operation). Such a determination would be appropriate if the legislative rate was equal to or greater than the interim rates (without additional non-monetary deterrence provisions),[26] or based on a conclusion that the legislative compensation scheme adequately reflected the factors discussed *supra*, Part II.a.[27] A temporary stay of the new compensation statute during this Court's determination of that legislation's constitutionality would intrude minimally on the Legislature, is an appropriate exercise of inherent judicial authority, and ensures that indigent defendants would not experience further deprivation of rights during the assessment period. *See Lavallee*, 442 Mass. at 246 (emphasizing that the government, and

[26] Such an assessment would only be functional where there are no structural differences between the Court's remedy and the new legislation.

[27] Notably, the mere *consideration* of those factors by the Legislature would not satisfy constitutionality on its own, but a rate that adequately *reflects* the impact of those factors on appointed counsel would ensure that the government can secure counsel for every indigent defendant.

not defendants, must bear the burden of systemic violations of Article 12).

Conclusion

For the foregoing reasons, amici urge the Court to declare the current compensation statute unconstitutional as applied in the current context, to implement a temporary compensation package that satisfies Article 12, and to articulate a framework to determine when a permanent compensation scheme satisfies the constitutional right to counsel such that the temporary judicial solution can be lifted. Such actions are necessary to protect not only indigent defendants, but "to ensure the integrity of our justice system and to protect all of the Commonwealth's residents." *Carrasquillo*, 484 Mass. at 395.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES
UNION OF MASSACHUSETTS, and
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By their attorneys,

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October 27, 2025

Certificate of Compliance

I, Jessie J. Rossman, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 17 (brief of an amicus curiae) and Rule 20 (form and length of briefs, appendices, and other documents). I further certify that this brief complies with Rule 20's length limit in that it was prepared in 14-point Century Schoolbook font using Microsoft Word for Windows and, according to Microsoft's wordcount tool, contains 7,278 words.

/s/ Jessie J. Rossman
Jessie J. Rossman

Certificate of Service

I, Jessie J. Rossman, hereby certify that I will cause the above Amici Curiae brief to be served on October 27, 2025 via email and through the Massachusetts e-filing system on counsel of record for the parties, with a copy to amici:

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ADDENDUM TABLE OF CONTENTS

SUPREME COURT OF WISCONSIN

No. 17-06

In re the Petition to Amend SCR 81.02

FILED

JUN 27, 2018

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

The Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, and a number of individuals[1] have filed an administrative rule petition asking the court to amend Supreme Court Rule (SCR) 81.02. Supreme Court Rule 81.02 sets the compensation rate applicable when the court appoints a lawyer.[2] Since

[1] Francis W. Deisinger, Paul G. Swanson, Christopher E. Rogers, Dean A. Strang, Jerome F. Buting, Louis B. Butler, Janine P. Geske, John A. Birdsall, Henry R. Schultz, Keith A. Findley, Franklyn M. Gimbel, Walter F. Kelly, Peggy A. Lautenschlager, John T. Chisholm, Kelly J. McKnight, E. Michael McCann, Daniel D. Blinka, James M. Brennan, Ben K. Kempinen, John S. Skilton, James C. Boll, Ralph M. Cagle, Robert R. Gagan, Diane S. Diel, Thomas S. Sleik, Gerald W. Mowris, Gerald M. O'Brien, Jon P. Axelrod, Michael J. Steinle, Howard A. Pollack, Thomas R. Streifender, Joseph E. Tierney, and Christy A. Brooks.

[2] There are a number of situations in which a court may need to appoint counsel, such as guardians ad litem in family cases. Often, the individual requiring legal representation is not indigent and the court may establish a payment plan to enable the individual to obtain and pay for the legal services, or the county may seek full or partial reimbursement for the costs.

1994, the compensation rate in SCR 81.02 has been $70/hour.[3] It has not changed in nearly 25 years.

As the petitioners candidly acknowledge, however, the real reason for this petition is not merely because an increase in the compensation rate in SCR 81.02 is overdue.

Chronic underfunding of the Office of the State Public Defender (SPD) has reached a crisis point. In filing this petition, the petitioners hope to leverage the rulemaking power of this court to persuade the legislature to raise the compensation rate it authorizes the SPD to pay private counsel to represent indigent criminal defendants under Wis. Stat. § 977.08.

That Wisconsin's compensation rate for SPD appointed attorneys is abysmally low is not in dispute. Wisconsin's $40/hour compensation rate is the lowest in the entire nation. It has been

[3] Initially, the rate in SCR 81.02 was $50/hour, with lesser rates for office and travel time. See S. Ct. Order, In the Matter of the Amendment of SCR 81.02, Compensation of Court Appointed Attorneys (May 19, 1978). In 1989 it was raised to $60/hour. See S. Ct. Order, In the Matter of the Amendment of SCR 81.02, Compensation of Court Appointed Attorneys (issued Dec. 9, 1988, eff. Jan. 1, 1989).

In 1993, several rule petitions were filed asking the court to modify SCR 81.02. The State Bar of Wisconsin sought a compensation rate increase. Racine County sought permission to enter into flat rate contracts for guardian ad litem appointments. Legal Aid Society of Milwaukee, Inc. and the Office of Lawyer Regulation sought leave to contract for legal services at a lower rate. The court increased the rate from $60 to $70/hour and adopted SCR 81.02(1m), permitting flat rate contacts. See S. Ct. Order 93-02, In the Matter of the Amendment of SCR 81.02, Compensation of Court Appointed Attorneys (issued June 21, 1993, eff. July 1, 1994). The court agreed to delay the effective date for a year, in order to accommodate county budgets.

unchanged since 1995. Wis. Stat. § 977.08(4m).[4] Most attorneys will not accept SPD appointments because they literally lose money if they take these cases. Consequently, the SPD struggles to find counsel who will represent indigent criminal defendants.

Seven years ago, we denied a very similar rule petition, but observed that "[i]f this funding crisis is not addressed, we risk a constitutional crisis that could compromise the integrity of our justice system." See S. Ct. Order 10-03, In the matter of the petition to amend Supreme Court Rule 81.02 (issued July 6, 2011). The petitioners assert that the situation has continued to deteriorate and the predicted constitutional crisis is now upon us. The petitioners urge us to raise the compensation rate in SCR 81.02 and to declare "unreasonable" the rate set by the legislature in Wis. Stat. § 977.08(4m).

This rule petition was filed on May 25, 2017. The court discussed the petition in open administrative rules conference on June 21, 2017, and voted to contact legislators, solicit additional information from the petitioners, and schedule a public hearing.[5]

[4] In 1978, the legislature set the hourly rate of compensation for SPD appointed private counsel at $35/hour and $25/hour for travel time. In 1992 the legislature increased the rate to $50/hour for in-court time and $40/hour for out-of-court time; travel time remained at $25/hour. However, in 1995, the legislature eliminated payment for out-of-court and reduced the in-court rate to $40/hour. The $25/hour rate for travel remained unchanged. The legislature has not increased this rate in nearly 25 years.

[5] The petitioners asked the court to schedule the public hearing for May 2018.

On January 19, 2018, the court sent a detailed letter to the petitioners posing several questions. On March 17, 2018, the court solicited public comment and, on April 17, 2018, the court extended the public comment period to May 1, 2018. The petitioners responded to this court's questions by letter dated March 22, 2018 and provided a supplemental report dated April 19, 2018.

The court received over 100 written comments from judges, lawyers, administrators, legal organizations, and members of the public. All but three support the petition.[6]

The court conducted a public hearing on May 16, 2018. Attorney John A. Birdsall and Attorney Henry R. Schultz presented the petition to the court. Numerous speakers appeared. The testimony presented to the court was often eloquent and very informative. The court discussed the matter at length in closed conference and voted to grant the petition, in part.

The right to counsel in criminal proceedings is a fundamental constitutional right and a cornerstone of our justice system. U.S. Const. amend. VI; Wis. Const. art. I, § 7; In Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court explained:

> [L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble

[6] All of the documents filed in this matter are available on the court's website at: www.wicourts.gov/scrules/1706.htm.

> ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. at 344. Indeed, long before Gideon, Wisconsin recognized the need to appoint counsel for indigent criminal defendants. Carpenter v. County of Dane, 9 Wis. 274 (1859).

Since Gideon, the SPD has provided that legal representation to qualified indigent defendants in cases specified by state law.[7] Wisconsin's SPD uses a "hybrid" system of representation, employing SPD staff attorneys and also assigning cases to certified attorneys who are members of the private bar. See Wis. Stat. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08. Private attorneys currently handle nearly half of all SPD eligible representations. The SPD pays these attorneys in one of two ways, as provided in Wis. Stat. § 977.08(4m): (1) a $40/hour rate ($25/hour for travel) with no payment allotment for overhead; or (2) a flat, per-case contracted amount.[8]

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[7] Although we refer primarily to indigent criminal defendants, the SPD also handles civil commitments, protective placements (personal guardianship), revocations of conditional liberty (probation, parole, or extended supervision), termination of parental rights, juvenile delinquency proceedings, and certain other juvenile court matters. Applicants for public defender representation must meet strict financial guidelines to qualify for appointment of an attorney by the SPD.

[8] Wis. Stat. § 977.08(4m)(c) provides:

> Unless otherwise provided by a rule promulgated under s. 977.02(7r) or by a contract authorized under sub. (3)(f), for cases assigned on or after July 29, 1995, private local attorneys shall be paid $40 per hour for time spent related to a case, excluding travel, and $25 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip

The SPD acknowledges that the current reimbursement rate in Wis. Stat. § 977.08 "severely disrupts both the quantity and quality of representation. As the reimbursement rate has become more disparate from the market rate of compensation, there has been a significant impact on defendants, victims, and all sectors of the criminal justice system at both the state and county level." Forty dollars an hour does not even cover a lawyer's overhead expenses. The SPD confirms that while the number of appointments has remained relatively steady, the number of attorneys willing to take these public defender appointments has declined steadily, from 1099 attorneys in 2012 to only 921 attorneys in 2017.

The testimony from our public hearing indicates that the decrease in lawyers available to accept SPD appointments disproportionately affects rural counties and has reached a state of crisis in Northern Wisconsin.[9]

In Bayfield County, cases are now assigned to out-of-county private attorneys 99 percent of the time. At a recent legislative hearing, the SPD testified that its Appleton office had to make an average of 17 contacts per case just to find an assigned counsel attorney. In three difficult cases, it took 302, 261, and 260 contacts to find an attorney. The Ashland office (Ashland, Bayfield, and Iron counties) needed nearly 39 contacts per case and an average

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requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

[9] For example, in FY 2012, Ashland County appointed only 28 percent of cases to out-of-county private attorneys. In FY 2017, that number had risen to 73 percent.

of 24 days to find an attorney. In Marathon County, it takes an average of 80 contacts and 17 days to appoint a private attorney to a case. In Price County, it takes an average 33 days to appoint a private attorney to a case.

These data are amply supported by the anecdotal experiences recounted in the many written comments and testimony provided to the court. The Honorable John P. Anderson, Bayfield County Circuit Court, explains the problems he faces in his courtroom:

> In the last year or two, I have had to appoint lawyers at higher rates for criminal defendants who *are* eligible for public defender representation, but the public defender's office cannot find an attorney willing to accept the very low reimbursement rate paid. I have had individuals sitting in jail unable to post cash bond in serious felony cases for upwards of four to six weeks without representation. Once such a lengthy time has passed, I feel I have no choice but to find an attorney at county expense. I find it hard to conclude that allowing someone to be held in custody without legal representation for that long is something other than a constitutional crisis. It is also becoming an unfunded mandate imposed upon the counties, requiring that they shoulder the costs which are supposed to be covered by the state through the public defender's office.

The Honorable Robert E. Eaton, Ashland County Circuit Court, describes granting "adjournments, too numerous to count, while indigent defendants wait for representation. These litigants qualify for representation through the State Public Defenders Office. However, it often times takes weeks and months to locate an attorney who will take their case."

State Bar President Paul G. Swanson, one of the petitioners, notes that:

> The State Bar of Wisconsin stands united in the proposition that, in order to provide competent representation to indigent criminal defendants, compensation must be increased significantly. The reality of the situation is that attorneys who take these appointments at the current private bar rate are, to a large extent, providing a pro bono service. The rate discourages experienced practitioners and the general effect of this is a diminishment of the rights of individuals underrepresented or facing delays in representation, which only serves to prejudice those rights.

A long time prosecutor states:

> This problem is perhaps most severe in counties where the well-documented heroin epidemic has resulted in a disproportionately greater increase in crime and the pool from which to draw assigned counsel for the indigent is comparatively small. In Manitowoc county, for instance, Preliminary Examinations and other hearings are frequently adjourned for lack of appointed counsel. Indigent defendants continue to be held in custody while the local SPD office tries to find lawyers to represent them. The result is not only an unjust delay affecting the rights of indigent defendants and victims of crime, but an inefficient use of scarce judicial resources. Defendants incarcerated in other counties or prison must be returned and then transported back for the adjourned hearing at county expense. Cities and counties pay overtime for police officers who are subpoenaed to appear in court only to have the hearing adjourned for another day. SPD pays an ever growing amount of travel expenses to appointed counsel from surrounding or more distant counties. Court and DA calendars become further clogged, leading to pressure for additional prosecutors and judges. . .

Another attorney recounts that one defendant waited six months for an attorney. He observes "[s]ince the daily cost of incarcerating a defendant in the jail is roughly $100 per day, the inability to get this defendant an attorney has already cost the county more than $18,000."

Attorney Christopher Zachar describes seeing the same defendants appearing in court week after week without counsel:

> They plead for bond reductions and try to explain that they are losing their jobs, their homes, and their families while they wait on an attorney. Witnesses aren't interviewed, evidence isn't preserved, and the lives that these defendants are fighting to preserve fade while they sit in jail. Some of these defendants are unequivocally innocent, but because they are poor they will wait in jail with everyone else.

The SPD has not sat idly by as this state of affairs developed. Since the legislature reduced the SPD reimbursement rate in 1995, the SPD has petitioned the legislature for an increase in every biennial budget request, without success. Since 1999, 18 separate formal efforts to obtain a rate increase have been tried and failed. SPD budget requests have not been included in the budget introduced by the Governor. None of the proposed stand-alone legislation received a public hearing or vote by the Legislature or its standing committees.[10]

This funding crisis is certainly not unique to Wisconsin. Across the nation, inadequate funding for indigent criminal defense has compromised the constitutional rights of individuals, as well as

[10] We note three recent, unsuccessful, attempts to raise the rate by statute: (1) Assembly Bill (AB) 275, introduced June 29, 2015, proposed raising the assigned counsel rate to $85/hour. AB275 was referred to the Committee on Judiciary on June 29, 2015. An amendment to raise the proposed rate to $100/hour was offered on January 19, 2016 and defeated on April 13, 2016. There was no further action taken; (2) AB37, introduced January, 2017, proposed raising the rate to $100/hour. AB37 was referred to the Committee on Judiciary on January 20, 2017 but was never acted upon; see also SB283; (3) AB828, proposed January 2018, proposed a three tiered rate for different types of cases of $55/hour, $60/hour and $70/hour. AB828 was referred to the Committee on Judiciary on January 12, 2018 but was never acted upon.

the ability of the justice system to function properly. Other states have faced legal challenges in this regard.

In Massachusetts, for example, the Massachusetts Committee for Public Counsel Services (CPCS) traditionally provides most right to counsel representation through assigned counsel. In 2004, indigent defendants, represented by CPCS and the American Civil Liberties Union, filed a lawsuit claiming that chronic underfunding of the assigned counsel system (then an average of $40/hour) resulted in an insufficient number of attorneys willing to accept assignments.

The Massachusetts court declined the petitioners' request to raise the statutory compensation rate directly, mindful that appropriating funds under that statute was "a legislative matter."

However, the court determined that indigent criminal defendants were indeed being denied their constitutional right to counsel because of the lack of attorneys willing to serve at the low rates. The court issued an order to show cause why pre-trial detainees should not be released after seven days if no counsel was appointed and why criminal charges should not be dismissed after 45 days against any defendant who was entitled to counsel and had not received one. See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 812 N.E.2d 895 (2004).

Facing the imminent release of criminal defendants, the Massachusetts state legislature promptly convened a special session and passed a bill increasing compensation for indigent defense attorneys and establishing "a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel." This action ultimately resulted in an increase in

assigned counsel compensation rates and the CPCS budget has more than doubled since 2004.

Between 2009 and 2017, class-action suits have been filed in Michigan, New York, Texas, California, Pennsylvania, and Idaho. In February 2007, the ACLU, along with two law firms, filed a class action lawsuit on behalf of indigent defendants charged with felonies in three Michigan counties. They sued the counties as well as the state. The complaint alleged that the state had done "nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation."

In July 2013, after more than six years of protracted litigation, the Michigan legislature passed comprehensive reform legislation, and the ACLU dismissed the lawsuit. The statutory changes created the Michigan Indigent Defense Commission, a state agency with authority to promulgate and enforce right to counsel standards, including compensation standards across the state. Duncan v. Michigan, 284 Mich. App. 246, 774 N.W.2d 89 (2009). See also Hurrell-Harring v. New York, 15 N.Y.3d 8, 930 N.E.2d 217 (2010) (after seven years of litigation the matter settled, with the state agreeing to: pay 100 percent of the cost for indigent representation in the five named counties; ensure that all indigent defendants are represented by counsel at their arraignment; establish and implement caseload standards for all attorneys; and assure the availability of adequate support services and resources. In 2017, the state extended the settlement to all counties); see also Tucker v. Idaho, 162 Idaho

11, 394 P.3d 54 (2017) (holding, inter alia, in pretrial proceedings that "[a] criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice," citing United States v. Cronic, 466 U.S. 648 (1984)).[11]

With this, we turn to the petition that is before us. This petition asks the court to: (1) raise the compensation rate in SCR 81.02(1) from $70/hour to $100/hour, (2) tie that rate to cost of living increases, (3) repeal a provision, SCR 81.02(1m), permitting legal service contracts at a lesser rate, and (4) declare that payment of an hourly rate less than the rate in SCR 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wis. Stat. § 977.08 is "unreasonable."

This rule petition implicates the sometimes complicated interplay of statutes and rules that govern which criminal defendants are sufficiently indigent to qualify for legal representation, who represents these indigent criminal defendants, how much these lawyers are compensated for their services, and who pays the bills.

Considerable and long-standing precedent confirms the court's authority to appoint counsel and to set an appropriate compensation rate for court appointed attorneys. County of Dane v. Smith, 13 Wis. 585, 586 (1861) (expressly affirming the court's "power and duty" to appoint counsel to defend paupers and other indigent person charged with crime, and to bind the county to pay the costs of the

[11] On January 17, 2018, the Idaho court ruled that this challenge can proceed as a class action.

appointment); County of Door v. Hayes-Brook, 153 Wis. 2d 1, 3, 449 N.W.2d 601, 602 (1990). Indeed, while compensation of court appointed counsel is generally described as an area of shared authority, the judiciary has the ultimate authority to set compensation for court appointed counsel. State ex rel. Friedrich v. Circuit Court for Dane Cty., 192 Wis. 2d 1, 10, 531 N.W.2d 32, 34-35 (1995) (stating "courts have the power to set compensation for court-appointed attorneys and are the ultimate authority for establishing compensation for those attorneys. The courts derive this power and ultimate authority from their duty and inherent power to preserve the integrity of the judicial system, to ensure and if necessary to provide at public expense adequate legal representation, and to oversee the orderly and efficient administration of justice.").

The counties' obligation to pay the costs of court appointed counsel has also been settled for well over a century. Carpenter v. County of Dane, 9 Wis. 274 (1859) (rejecting county's objection to paying for court appointed counsel on the theory that the constitution didn't specify it, stating the county's obligation was "clear and manifest" and that "[i]t seems eminently proper and just that the county, even in the absence of all statutory provision imposing the obligation, should pay an attorney for defending a destitute criminal.").

We are wholly persuaded that increasing the compensation rate in SCR 81.02 from $70/hour to $100/hour is appropriate. As early as 1859, in Carpenter, Wisconsin courts recognized the necessity of court appointed counsel for impoverished felony defendants, the court's inherent authority to appoint such counsel, and the

concomitant obligation of the counties to pay the costs for the appointed counsel. Id.; Wis. Const. art. VII, § 3(1) (vesting the supreme court with "superintending and administrative authority over all courts"); County of Dane v. Smith, 13 Wis. 585, 589 (1861).

The petitioners have demonstrated that the current rate in SCR 81.02 is significantly lower than the average hourly rate charged by Wisconsin lawyers. In 2017, the mean hourly rate for private practitioners in Wisconsin was $251/hour. Criminal attorneys have a typical mean hourly billing rate of $168/hour, and the median hourly billing rate for a criminal law private practitioner is $183/hr. Moreover, on average, 35 percent of a Wisconsin private practice attorney's gross revenue is needed for overhead expenses.[12] A rate of $100/hour is reasonable and necessary to ensure the court can obtain needed counsel to assist in the administration of justice.

We decline to tie the rate in SCR 81.02 to a cost of living increase. Our rule requires the court to "review the specified rate of compensation every two years" and we commit to doing so, henceforth. SCR 81.02(1). We also decline to repeal SCR 81.02(1m) and ban fixed rate contracts for legal services. The petitioners express concern that fixed rate contracts pay lawyers "the same amount, no matter how much or little" the lawyer works on each case, such that it is in the lawyer's "personal interest to devote as

[12] Overhead expenses may include office rent, telecommunications, utilities, support staff salaries and benefits, accounting, bar dues, legal research services, business travel, and professional liability insurance. Many attorneys also have student loan payments.

little time as possible to each appointed case."[13] We are advised that fixed-fee contracting accounts for only a small fraction of the total SPD appointments to the private bar. Moreover, per Wis. Stat. § 977.08(3)(f) and (fg), the SPD is required to offer fixed fee contracts. Meanwhile, counties rely on these contracts to manage guardian ad litem and other appointments.

Our decision to raise the rate in SCR 81.02 is warranted and appropriate. However, we know it will have a profound impact on existing county budgets. If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of $40/hour, as is increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense. See State v. Dean, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

Thus, costs for indigent defense, which should be borne by the state as a whole, are being shifted to individual counties. The Bayfield County Administrator confirms that his county often cannot find attorneys who will accept representation at the current rate, so they are required to offer more money in order to find counsel. Then, the county's ability to recoup some of this money through collections is compromised, because of the lower rate set in the

[13] Several states ban fixed rate contracts. Idaho, for example, requires that representation shall be provided through a public defender office or by contracting with a private defense attorney "provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney." I.C. § 19-859. South Dakota Unified Judicial System Policy 1-PJ-10, bans flat fee contracting. Its policy requires that "[a]ll lawyers . . . be paid for all legal services on an hourly basis."

rule. In an April 2018 report, the Sixth Amendment Center[14] agrees that imposing the cost of counsel on counties is undesirable because "the local jurisdictions most in need of indigent defense services are often the ones least able to afford them." In many instances "the circumstances that limit a county's revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates."

This interplay between the rate paid by the SPD and the court's rate in SCR 81.02 brings us to the last request in the pending rule petition. The petitioners ask that we declare, in our court rule, that "payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable."

The threshold question is whether this court has the authority to declare a legislative mandate "unreasonable." The court might, in a different procedural posture, be called upon to rule on the constitutionality of the statutory rate in Wis. Stat. § 977.08(4m).

[14] The Sixth Amendment Center is a national non-profit organization "dedicated to ensuring that no person of limited means is incarcerated without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the U.S. Constitution." It conducts research, evaluates state justice systems, and testifies on right to counsel issues before state legislatures, state supreme courts and the U.S. Congress. In April 2018, the petitioners filed with this court a report authored by the Sixth Amendment Center, entitled "Justice Shortchanged II – Assigned Counsel Compensation in Wisconsin (April 2018, 6th Amendment Center).

See State v. Holmes, 106 Wis. 2d 31, 41, 315 N.W.2d 703, 710 (1982) (stating, inter alia, that the Wisconsin Constitution grants the "supreme court power to adopt measures necessary for the due administration of justice in the state, including . . . to protect the court and the judicial system against any action that would unreasonably curtail its powers or materially impair its efficacy.") However, that question is not before us today.

This court has traditionally exercised great care to avoid controversy with the legislature. We are highly mindful of the separation of powers and do not engage in direct confrontation with another branch of government unless the confrontation is necessary and unavoidable. See Gabler v. Crime Victims Rights Board, 2017 WI 67, ¶30, 376 Wis. 2d 147, 897 N.W.2d 384; see also Integration of the Bar Case, 244 Wis. 8, 47-50, 11 N.W.2d 643 (1943). We thus decline to use our administrative regulatory process to undermine a legislative enactment.

We are, however, deeply concerned about the impact of prolonged underfunding of the SPD on our duty to ensure the effective administration of justice in Wisconsin. We agree that the consequence - significant delays in the appointment of counsel - compromises the integrity of the court system and imposes collateral costs on criminal defendants and their families, and on all citizens of this state: jobs lost, additional expenses incurred, and justice denied. We have a constitutional responsibility to ensure that every defendant stands equal before the law and is afforded his or her right to a fair trial as guaranteed by our constitution.

We hope that a confrontation in the form of a constitutional challenge will not occur and trust that the legislature will work with the courts, the SPD, the petitioners, the counties, and other justice partners to ensure adequate funding for the SPD that is urgently needed to forestall what is clearly, an emerging constitutional crisis. Therefore,

IT IS ORDERED that, effective January 1, 2020:

SECTION 1. Supreme Court Rule 81.02(1) is amended to read:

Except as provided under sub. (1m), attorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at ~~the~~ a rate of $~~70~~100 per hour or a higher rate set by the appointing authority. The supreme court shall review the specified rate of compensation every two years.

SECTION 2. Supreme Court Rule 81.02(2) is amended to read:

The rate specified in sub. (1) applies to services performed after ~~July 1, 1994~~January 1, 2020.

IT IS FURTHER ORDERED that the court declines to repeal Supreme Court Rule 81.02(1m), as requested by the petitioners.

IT IS FURTHER ORDERED that the court declines to adopt proposed Supreme Court Rule 81.02(3), as requested by the petitioners, which would declare that payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statute § 977.08 is unreasonable.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 27th day of June, 2018.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. *(concurring in part, dissenting in part).* I wholly agree that the rate in SCR 81.02 should be increased. However, I would make the increase effective July 1, 2018. I would not unduly delay the effective date of this change.

¶2 I am authorized to state that Justice Shirley S. Abrahamson joins this opinion.

¶3 DANIEL KELLY, J. *(dissenting).* Compensation for attorneys appointed by the court to represent indigent criminal defendants is absurdly inadequate. The petitioners have established this proposition to an almost metaphysical certainty, which is no mean feat for a question of economics. The solution seems pretty simple——pay more. And it would be that simple if we shared the power of the purse with the legislature, there were no limits to financial resources or competing demands for them, and the money used to pay the attorneys belonged to the court. As it is, none of those conditions is true. So when we tell Wisconsin's counties to pay for the attorneys we appoint, we are trespassing on authority that belongs to others.

¶4 We know, and have known for over two-hundred years, that the power of the purse belongs to the legislature, not us. In arguing the benefits of the newly proposed United States Constitution, Alexander Hamilton observed that "[t]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary has no influence over either the sword or the purse, ..." The Federalist No. 78, at 522-23 (Alexander Hamilton) (Jacob Cooke ed., 1961). James Madison was of the same mind:

> The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They in a word hold the purse; . . . . This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress

> of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, supra, at 394 (James Madison); see also The Federalist No. 48, supra, at 334 (James Madison) (stating that "the legislative department alone has access to the pockets of the people").

¶5 Our constitution follows these principles by entrusting the spending power to the legislature. It provides that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, § 2. "Laws" are what come of "bills": "No law shall be enacted except by bill." Wis. Const. art. IV, § 17(2). "Bills" are created through the exercise of legislative power: "Any bill may originate in either house of the legislature, and a bill passed by one house may be amended by the other." Wis. Const. art. IV, § 19; see also Wis. Const. art. IV, § 17(1) ("The style of all laws of the state shall be 'The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:'"). And all legislative power belongs, unsurprisingly, in the legislative branch: "The legislative power shall be vested in a senate and assembly." Wis. Const. art. IV, § 1. The method by which the government spends the people's money is, therefore, plain beyond question. Funds may leave the treasury only pursuant to an appropriation, appropriations must be made by law, a law is created by a bill, bills are adopted through the exercise of legislative power, and legislative power belongs in the legislature. Nowhere in that seamless whole is there any room for the judiciary to insert itself. Quite clearly,

therefore, our constitution puts the spending power beyond the judiciary's reach.

¶6 The judiciary, as an institution, is not qualified to exercise that authority. As a foundational matter, when the advisability of a policy depends on competing considerations, it is a sure sign the question belongs to the legislature. We have this on no less an authority than the United States Supreme Court: "When an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'" Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (internal marks omitted) (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

¶7 The power to spend consists of nothing but such competing considerations. Every decision about laying taxes, spending the proceeds, and the object of the expenditures, involves matters of public policy. Each decision operates against the backdrop that money is not inexhaustible, and the demand for spending always outstrips the amount available to spend. As a consequence, public policy questions require the balancing of one good against another, prioritization, and triaging emergencies so the most immediately important needs are addressed first. That is why we have previously recognized that the spending power belongs to the legislature, not us. "Specifically regarding appropriations, Wis. Const. art. VIII, §§ 2 and 5 empower the legislature, not the judiciary, to make policy decisions regarding taxing and spending." Flynn v. DOA, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998) (emphasis added);

see also State ex rel. Thomson v. Giessel, 265 Wis. 207, 213, 60 N.W.2d 763 (1953) (stating that it is "the power of the legislature to appropriate public funds").

¶8 So our constitution, our cases, and the wisdom of the Founders all tell us that only the legislature may make appropriations. But when we tell counties to pay the attorneys we appoint, we are exercising that power. "An appropriation is 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'" State ex rel. Finnegan v. Dammann, 220 Wis. 143, 148, 264 N.W. 622 (1936) (quoted source omitted). Our rule requires the counties to reserve enough public revenue that they will be able to pay for how ever many attorneys the judiciary may happen to appoint.

¶9 Not only does our Rule trespass on the authority to appropriate funds, we don't even engage in an analysis of all the considerations that drive taxing and spending decisions. We bypass all of the weighing, the compromises, the triaging, the prioritization, and simply announce that the counties' top priority is paying appointed counsel. When we issue an order, we expect it to be obeyed. So when the county boards next meet, they must adjust their budgets and all of their spending priorities to make room for the non-negotiable financial obligation we impose on them. And what if there is simply no room for our demand? Will we order them to raise taxes? The power to appropriate goes hand-in-hand with the power to tax, so

the court's assertion of power seems to leave room for that option. See State ex rel. Owen v. Donald, 160 Wis. 21, 124, 151 N.W. 331 (1915) ("It is a maxim of the law that the power to appropriate is coextensive with the power to tax and so has fundamental and inherent limitations.").

*

¶10 I am not insensible to the fact that Wisconsin's judiciary has been ordering counties to pay for appointed counsel for almost as long as we have been a State. Such a lengthy history is due considerable respect. And I am keenly aware that I stand in a long succession of minds who have already considered this question, and nonetheless continued the tradition. But the judiciary cannot expand its authority into the legislative domain through adverse possession,[1] or the legislature's long acquiescence.[2] This is an evergreen subject, and we should stand ready to explain the reach of our jurisdictional borders whenever called upon to do so. Therefore, it is appropriate to examine the clutch of cases the court offered as support for this Rule to see what insight they

[1] "Each branch has exclusive core constitutional powers, into which the other branches may not intrude." Flynn v. DOA, 216 Wis. 2d 521, 545, 576 N.W.2d 245 (1998).

[2] "It is . . . fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch." Rules of Court Case, 204 Wis. 501, 503, 236 N.W. 717 (1931); see also id. ("[A]ny attempt to abdicate [a core power] in any particular field, though valid in form, must, necessarily, be held void." (internal quotation mark omitted) (quoting State ex rel. Mueller v. Thompson, 149 Wis. 488, 491-92, 137 N.W. 20 (1912))).

might offer into the source of our authority to appropriate county funds for the payment of appointed counsel.

¶11 Carpenter v. County of Dane, 9 Wis. 249 (*274) (1859), is the earliest case the court cites in support of this Rule. The opinion certainly contains statements supporting the proposition we advance today, but it's thin on the source of authority we seek. The court started its analysis by acknowledging that neither our constitution nor our statutes provide any authority for holding a county liable for payment of appointed counsel:

> It was insisted by the attorney for the county that as there was no provision in the constitution or statutes of the state, fixing the liability upon the county for such services, that therefore the county could not be held liable for them. It is true, we find no express provision of law declaring that the county shall pay for services rendered by an attorney appointed by the court, in defending a person on trial for a criminal offense; . . . .

Carpenter, 9 Wis. at 250-51 (*275).

¶12 Nonetheless, the Carpenter court concluded the county must pay because "[i]t seems eminently proper and just that the county, even in the absence of all statutory provision imposing the obligation, should pay an attorney for defending a destitute criminal." Id. at 252 (*277). The absence of any constitutional or statutory authority should have prompted a thorough-going analysis of why the court thought it nevertheless possessed the authority it was exercising. But the analysis is heavy on rhetorical questions, and short on grounds for authority. "Is it said that the court should, under such circumstances, assign the accused counsel, who must perform

services gratuitously?" the court asked. Id. That question immediately begot another: "But why should an attorney be required to devote his time, attention and all the energies of his nature, to the defense of a criminal, for nothing?" Id. Those are good and fair questions, and the answer we are apparently supposed to give is that the court, naturally, should not countenance such a result. But answering that the attorney should not work for free says nothing about who should pay him. The questions assume that if the court does not pay, then no one will, and that the importance of payment actually creates the authority to spend the county's money.

¶13 The balance of Carpenter's analysis, it appears, depends on principles of symmetry. The county's residents elect and pay for the district attorney, the court noted, so it must also take on the concomitant duty to pay for the defense. Why? Because "surely the citizens of a county are vitally more interested in saving an innocent man from unmerited punishment than in the conviction of a guilty one." Id. at 251 (*276). "Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?" Id. at 252 (*277). The assumption, again, is that the need for payment creates the authority to use the county's money. An attorney's need for compensation does not create in the judiciary the authority to confiscate another's resources to pay him.

¶14 Our court returned to this question a few years later in Dane County v. Smith, 13 Wis. 654 (*585) (1861). Smith affirmed Carpenter's rationale, and did so in even more explicit

and stark terms. With respect to compelling counties to pay for appointed counsel, it said, "[t]he power results from the necessities of the case." Smith, 13 Wis. at 656 (*587). That's a shockingly comprehensive assertion of power. If this is true, then no one in need of payment may lament, for the court holds itself out as the appropriator of last resort. But it is not true. We haven't the power of the purse, even when we think we really need it.

¶15 The Smith court also said counties were bound to pay for an indigent's defense on an implied contract theory:

> [T]he law, which gave the power to order [the appointment of defense counsel], implied the promise to pay. This is agreeable to the general doctrine, that whoever knowingly receives or assents to the services of another, which are of value and contribute to his benefit, impliedly undertakes to pay such sum as the services are reasonably worth. It has even a stronger foundation——that of an employment previously authorized.

Id. at 657 (*587-88). Whatever the persuasive force of this reasoning in theory, it is incapable of translating into a county's obligation to pay for the indigent's defense in practice. The county does not appoint the attorney; the court does. So if the appointment creates an implied undertaking to pay for counsel's services, the implication is that the court will pay, not the county. The Smith court, therefore, identifies no cognizable source of authority on which we can rely to compel counties to pay for defense counsel.

¶16 Finally, we made a direct pitch for the legislature's power of the purse in State ex rel. Friedrich v. Circuit Court for Dane Cty., 192 Wis. 2d 1, 531 N.W.2d 32 (1995) (per curiam).

There, the court addressed the differing attorney compensation rates in Wis. Stat. § 977.08(4m) and our Rule 81.02. See Friedrich, 192 Wis. 2d at 8-9. The court determined that compensation for court-appointed attorneys "fall[s] within the area of power shared by the judiciary and the legislature." Id. at 34. Consequently, we concluded that "courts have the power to set compensation for court-appointed attorneys and are the ultimate authority for establishing compensation for those attorneys." Id. at 10. We identified no constitutional provision to support that proposition, instead relying on our undefined and undefinable "inherent powers": "The courts derive this power and ultimate authority from their duty and inherent power to preserve the integrity of the judicial system, to ensure and if necessary to provide at public expense adequate legal representation, and to oversee the orderly and efficient administration of justice." Id.

¶17 The Wisconsin Constitution places the power to appropriate public funds exclusively in the hands of the legislature. Nonetheless, the Friedrich court concluded that our amorphous "inherent powers" were sufficient to give us a piece of that authority. Friedrich's conclusion does not bear much weight, however, because although the court conducted a separation-of-powers analysis, it never even mentioned the constitutional provisions explicitly vesting the appropriation power in the legislature.

*

¶18 I think it is fair to say that raising the hourly rate for court-appointed attorneys is a "just and salutary measure." But just because it is good, and even needful, does not create in us the authority to make it so. Our "inherent powers" are no match for our constitution's explicit grant of the appropriation power to the legislature. Justice Joseph Story, in his indispensable Commentaries, said:

> [T]he judiciary is naturally, and almost necessarily (as has been already said) the weakest department. It can have no means of influence by patronage. Its powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither lay taxes, nor appropriate money, nor command armies, or appoint to offices.

2 J. Story, Commentaries on the Constitution of the United States § 541, at 23-24 (Boston: Hilliard, Gray, & Co., 1833) (footnote omitted). If our "inherent powers" give us the right to spend the counties' public revenue, then Justice Story was not just wrong, he was wildly wrong. We delved our undefinable "inherent power," and found we are not weak at all. We are strong, so strong we may spend public revenue whenever we find there is sufficient need of it. And not even an explicit constitutional provision granting that power to another branch can stop us.

¶19 We are strong, but perhaps not prudent. We should honor the wisdom of the Founders, and relinquish this incursion on legislative prerogatives. This would fix the error we have entertained for an exceedingly long time, but it will not fix the very real problem the petitioners brought to us. They speak truly when they say there is a constitutional crisis on the

horizon. The evidence that indigent defendants are being held in jail for extended periods of time for want of counsel is deeply disturbing. The constitution may have something to say about the predicament of such defendants; it would be unfortunate if a declaration on that question were necessary. The petitioners must address themselves to the legislature, something I know they have done many times before. Perhaps persistence will grant them a more responsive audience.

¶20 For these reasons, I respectfully dissent.

¶21 I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this dissent.

SUPREME JUDICIAL COURT
for Suffolk County
Case Docket

FREDDIE CARRASQUILLO, JR. and all other similarly situated defendants in
HAMPDEN COUNTY v. HAMPDEN COUNTY DISTRICT COURTS
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
SJ-2019-0247

CASE HEADER

Case Status	Dismissed
Status Date	08/01/2023
Nature	Superintendence c 211 s 3
Entry Date	06/14/2019
Sub-Nature	Access to Counsel
Single Justice	Wendlandt, J.
TC Ruling	
TC Ruling Date	
SJ Ruling	
TC Number	
Pet Role Below	
Full Ct Number	SJC-12777
Lower Court	
Lower Ct Judge	John M. Payne, Jr., J.

ADDITIONAL INFORMATION

ATTACHMENT TO PAPER #9 and #16 (IMPOUNDED) LOCATED IN BROWN EXPANDABLE FOLDER ATTACHED TO FILE.

INVOLVED PARTY	ATTORNEY APPEARANCE
Freddie Carrasquillo, Jr. Petitioner	Rebecca A. Jacobstein, Esquire Benjamin H. Keehn, Esquire
Hampden County District Courts Respondent	Timothy J. Casey, Assistant Attorney General
Hampden County District Attorney Office Other interested party	Katherine E. McMahon, Assistant District Attorney Jennifer Fitzgerald, Esquire Paul J. Caccaviello, Assistant District Attorney
Clerk - SJC for the Commonwealth Clerk for Commonwealth	

DOCKET ENTRIES

Entry Date	Paper	Entry Text
06/14/2019		Case entered.
06/17/2019	#1	MOTION To Waive Filing Fee with Certificate of Service filed for Attorney Lawrence Madden by Atty. Rebecca Jacobstein.
06/14/2019	#2	Emergency Petition to Vacate Order to Accept Appointments with Certificate of Service and Attachments filed for Lawrence Madden by Atty. Rebecca A, Jacobstein.
06/17/2019	#3	Emergency MOTION For An Immediate Stay And An Immediate Hearing with Certificate of Service filed by Atty. Rebecca Jacobstein. (SEE PAPER #31)
06/17/2019		Fee Waiver ALLOWED by Judge. (Budd, J.)
06/18/2019	#4	Emergency MOTION To Vacate Appointment In Commonwealth v. Garcia, 1923CR003619 with Certificate of Service and attachments filed by Atty. Rebecca Jacobstein. (SEE PAPER #31)
06/18/2019		Hearing scheduled for 06/24/2019.
06/18/2019		Docket Note: All parties notified via email regarding hearing scheduled for 6/24/19 at 10 AM.
06/19/2019	#5	Notice of Appearance with Certificate of Service filed for Honorable John M. Payne by AAG Timothy Casey.
06/20/2019	#6	Copy of Letter to Judge Payne from Tracy Magdalene, Supervising Attorney, CPCS filed by Petitioner.
06/24/2019	#7	MOTION To Amend Caption with Certificate of Service filed by Atty. Rebecca Jacobstein. (6/24/19: "Per the within, MOTION is ALLOWED (Budd, J.))
06/24/2019	#8	MOTION To Supplement The Record with attachments and Certificate of Service filed by Atty. Rebecca Jacobstein. (SEE PAPER #31)

06/24/2019	#9	MOTION To Impound with Certificate of Service and attachment filed by Atty. Rebecca Jacobstein. (7/31/19: "Per the within MOTION without objection is ALLOWED WITHOUT HEARING." (Budd, J.))
06/24/2019		Hearing held before (Budd, J.)
06/24/2019	#10	Appearance of Atty. Benjamin H. Keehn for Freddie Carrasquillo, Jr., filed.
06/24/2019	#11	Appearance of Atty. Rebecca A. Jacobstein for Freddie Carrasquillo, Jr., filed.
06/24/2019	#12	Appearance of AAG Timothy J. Casey for Hampden County District Courts filed.
06/24/2019	#13	Appearance of ADA Shane T. O'Sullivan for Hampden County District Attorney Office filed.
06/26/2019	#14	Parties' Agreement To Abide By Interim Order filed by Atty. Rebecca Jacobstein and AAG Timothy Casey.
06/28/2019	#15	MOTION To Vacate Appointments Made Pursuant To Judge Payne's Unconstitutional Order And Incorporated Memorandum Of Law with Certificate of Service and attachments filed by Atty. Rebbecca Jacobstein and Atty. Benjamin Keehn. (SEE PAPER #31)
06/28/2019	#16	MOTION To Impound with Certificate of Service and attachment filed by Atty. Rebecca Jacobstein and Atty. Benjamin Keehn. (7/31/19: Per the within, MOTION is without objection is ALLOWED WITHOUT HEARING." (Budd, J.))

06/28/2019	#17	INTERIM ORDER: "This matter came before me on an emergency petition to vacate an order of a judge in the District Court. The order required the attorney in charge of the Committee for Public Counsel Services public defender's office in Hampden County "to provide counsel to Courtroom 1 in the Springfield District Court every day who shall accept appointments in all cases as ordered by the Court to represent clients at arraignment, bail hearings, hearings pursuant to G. L. c. 123, § 35, and any other matter that the Court deems necessary." CPCS seeks vacatur of this order because, it argues, its attorneys' existing caseloads already exceed applicable limits, and further involuntary appointments would make it impossible to provide constitutionally adequate representation to indigent criminal defendants. CPCS represents that the shortage of counsel available in Hampden County to represent indigent criminal defendants has reached crisis proportions. The parties have submitted an "Agreement to Abide By Interim Order," which I treat as a joint proposed interim order, under which, until further order of this court, the judge's order would be superseded by the protocol set forth in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004). I agree that this is appropriate because the Lavallee protocol was designed not only for the petitioners in that particular case and for the other indigent defendants who had criminal cases pending in Hampden County at the time, but also for all future indigent defendants in Hampden County, such as the petitioners in this case and other similarly situated indigent defendants. Id. at 247. For that reason, and consistent with the parties' agreement, it is hereby ORDERED that: 1. From the date of entry of this Interim Order until further order of this court, the Order of the Springfield District Court, dated June 12, 2019 (Payne, J.), shall be superseded by this Interim Order, which shall apply to all District Courts in Hampden County. This Interim Order institutes and implements the protocol announced in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004), for all of the District Courts in Hampden County, until further order of this Court. Specifically, as directed in Lavallee: The clerk-magistrate of each District Court in Hampden County, and the clerk-magistrate of the Hampden Superior Court shall, on a weekly basis, prepare a list of all unrepresented criminal defendants facing charges in their respective courts and shall forward that list to the Superior Court RAJ, the District Court RAJ, 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 each week, the Superior Court RAJ 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.[1] If, as of the time of that hearing, any defendant on that list is still unrepresented by counsel, the Superior Court RAJ shall determine whether CPCS has made a good faith effort to secure representation for each such defendant.[2] If the Superior Court RAJ 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 Superior Court RAJ 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 Superior Court RAJ 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 (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 Superior Court RAJ 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. See Lavallee, 442 Mass. at 247 49 & nn.17-18. 2. The parties are in disagreement as to the status of those defendants who were assigned counsel by the public defender's office in Hampden County, under protest, pursuant to Judge Payne's Order from June 12, 2019, until the date of this Interim Order. The parties shall submit memoranda making any recommendation with respect to those defendants on or before Monday, July 1, 2019. The court will review those memoranda and consider making any supplemental orders that may be appropriate. 3. In addition to notifying the parties, the clerk of this court shall forthwith provide copies of this Interim Order to the clerk of the Hampden Superior Court, the clerk of all District Courts in Hampden County, and the Regional Administrative Justices of the Superior Court and District Court in Hampden County. 4. Finally, each side shall inform the court, within seven days, by letter, of its position on the question whether the protocol outlined above, if extended indefinitely, would provide an appropriate solution going forward, and if it takes the position that the answer is "no," it shall explain its reasons why it does not agree. [1] The Superior Court RAJ for the western region will be designated a judge of the District Court Department for purposes of this procedure, pursuant to G. L. c. 211B, § 9. See Trial Court Rule XII, "Requests for Interdepartmental Judicial Assignments" (2005). His or her designation shall last for six months, and for such additional six-month periods as the single justice may determine. [2] 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 Hampden County, who are not members of Hampden County Lawyers for Justice. In addition, the Superior Court RAJ, with the assistance of the Regional Administrative Justice of the District Court for region 6, may pursue all reasonable means to develop his or her own list of qualified and available attorneys from which he or 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." (Budd, J.)
06/28/2019	#18	Notice to counsel/parties, regarding paper #17 filed.
06/28/2019	#19	Respondent's Opposition To Petitioners' Motions To Retroactively Vacate Order To Accept Appointments with Certificate of Service filed by AAG Timothy Casey.
07/02/2019	#20	Response to Respondent's Opposition to Motion to Vacate Appointments with Certificate of Service filed by Atty. Rebecca A. Jacobstein and Atty. Benjamin H. Keehn.
07/05/2019	#21	Letter to Justice Budd from CPCS Atty. Rebecca Jacobstein and Atty. Benjamin H. Keehn, dated July 5, 2019, filed.
07/05/2019	#22	Copy of Letter to Speaker DeLeo from CPCS - Anthony J. Benedetti, Chief Counsel dated June 24, 2019, filed.
07/08/2019	#23	Letter to Justice Budd from Laura S. Gentile, Hampden County Clerk of Courts, dated July 1, 2019 filed.
07/10/2019	#24	Copy of letter to Laura S. Gentile, Clerk of Courts, Hampden Superior Court from Atty. Benjamin Keehn.
07/12/2019	#25	Copy of letter to Laura S. Gentile, Clerk of Courts, Hampden Superior Court from Atty. Benjamin Keehn dated July 8, 2019, filed

07/12/2019	#26	Letter to Clerk Doyle from Atty. Benjamin H. Keehn saying "Kindly update my mailing address and telephone number for notice purposes in this case: Benjamin H. Keehn Committee for Public Counsel Services Public Defender Division 298 Howard Street, Suite 300 Framinghman, MA 01702 (508) 620-0350 Thank you for your assistance." filed
07/19/2019	#27	Letter to Clerk Doyle from Atty. Rebecca Jacobstein, Director of Strategic Litigation and Atty. Benjamin H. Keehn, Appellate Counsel to the Trial Unit saying "Please find enclosed a Motion to Vacate "Under Protest" Assignments and accompanying affidavit and attachments (except for the record which has already been filed in this Court) filed today in *Commonwealth v. Torres* in the Springfield District Court. We would like this motion brought to the attention of the single justice (Budd, J.), as it pertains directly to the *Carrasquillo* petitioners' Motion to Vacate Appointments Made Pursuant to Judge Payne's Unconstitutional Order (paper no. 15), which has been pending before the single justice since June 28, 2019. Thank you for your attention to this matter." filed
07/19/2019	#28	Copy of Motion to Vacate "Under Protest" Case Assignments and Attachments filed in the Springfield District Court by Atty. Benjamin H. Keehn. (Also see paper #30)
07/19/2019	#29	Letter to Maura S. Doyle, Clerk from AAG Timothy Casey saying ... "The Interim Order appropriately provides that it wil remain in effect "until further order of this Court." Interim Order at 2, ¶ 1. The implication of this language is that the Interim Order is temporary. It is the hope of the District Courts that the concerted efforts of all participants in the criminal justice system-including the Legislature-the reporting called for by the Interim Order and the Lavallee protocol will, in the foreseeable future, yield reports that no defendants are held in custody, or have pending charges again them, without the appointed counsel to which they are constitutionally entitled. Once the point is reached where the Hampden District Courts are consistently reporting that no indigent criminal defendants are without appointed counsel, the Interim Order should be dissolved and the case should be closed." filed.
07/22/2019	#30	Copy of Corrected Motion To Vacate "Under Protest" Case Assignments filed by Atty. Rebecca Jacobstein and Atty. Benjamin Keehn.
07/24/2019	#31	Reservation and Report: "Due to the obvious importance of the issues raised herein, I hereby reserve and report without final decision this entire case, including the petition to vacate the underlying order of the District Court judge and the motions to vacate the specific appointments of counsel made pursuant to that order, to the full court for determination on the record." ... (Budd, J.)
07/24/2019	#32	Notice of assembly of the record.
07/24/2019	#33	Notice to counsel/parties, regarding paper #'s 31 & 32 filed.
07/26/2019	#34	Letter to S.J.C for Suffolk County from S.J.C for the Commonwealth saying; Pursuant to Mass.R.A.P. 10(a)(3), you are hereby notified that, on July 25, 2019, the above-referenced case was entered on the docket of this court.
07/31/2019	#35	Notice to counsel/parties, regarding paper #'s 9 & 16 filed.
07/24/2020	#36	Rescript: March 30, 2020; Ordered, that the following entry be made in the docket; viz., -- For the reasons stated in the opinion, the June 12 order and subsequent appointments of CPCS staff attorneys in Springfield PDD office pursuant to that order invalid. The case is remanded to the county court to determine whether a hearing is required concerning the current availability of defense counsel to represent indigent defendants in Hampden County and whether the Lavallee protocol imposed by the single justice is still required. (Lowy, J.)
08/10/2020	#37	JUDGMENT after Rescript from the SJC for the Commonwealth.
08/10/2020	#38	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 37 filed.
09/09/2020	#39	Letter to Justice Budd from CPCS Atty. Rebecca Jacobstein and Atty. Benjamin Keehn dated 09/04/2020 and received on 09/09/2020, filed.
09/21/2020	#40	Letter to Justice Budd from CPCS Atty. Rebecca Jacobstein and Atty. Benjamin Keehn dated 09/21/2020 and received on 09/21/2020, filed.
10/26/2020		********END OF FOLDER NUMBER ONE********
10/26/2020		********START OF FOLDER NUMBER TWO********

10/26/2020 #41 INTERIM ORDER: "In 2019, the Springfield office of the Committee for Public Counsel Services (CPCS) refused to accept any more appointments to represent indigent criminal defendants, claiming it had exceeded its caseload capacity.[1] *Carrasquillo* v. *Hampden County Dist. Courts*, 484 Mass. 367, 369 (2020). A District Court judge ordered CPCS to accept new appointments (June 12 order). *Id* at 368. CPCS filed a petition, pursuant to G. L. c. 211, § 3, in the single justice session of this court (county court) seeking relief from that order. *Id*. at 369. As single justice, I entered an interim order superseding the June 12 order and adopting the *Lavallee* protocol for Hampden County District Courts.[2] Interim Order, No. SJ-2019-0247 (June 28, 2019) (Budd, J.). I then reserved and reported the case to the full court. *Carrasquillo*, 484 Mass. at 369.

In *Carrasquillo*, 484 Mass. at 389-391, 396, the court vacated the June 12 order for CPCS to accept new appointments, and articulated a process by which to decide whether, in the event of other, future defense counsel shortages, the *Lavallee* protocol is necessary. The court left in place the already-adopted *Lavallee* protocol and remanded the case to the county court "to determine whether a hearing is required concerning the current availability of defense counsel to represent indigent defendants in Hampden County and whether the *Lavallee* protocol imposed by the single justice is still required." *Carrasquillo*, *supra* at 396.

In two letters filed with the court, CPCS has provided information about the availability of defense counsel to represent indigent criminal defendants in Hampden County. In a letter dated September 4, 2020, CPCS represented that its Springfield office was "reaching the outer limits of its case-taking capacity." CPCS cited two reasons: (1) the July 12, 2019, emergency compensation increase for bar advocates was "no longer in effect;" and (2) "[d]ue to the pandemic, case assignments [were] far outpacing case resolutions, and people who were summonsed to court rather than arrested [were] now being arraigned, leading to a marked increase in the number of people requiring counsel."

In a letter dated September 21, 2020, CPCS stated that its Springfield office no longer would accept new appointments or cover duty days.[3] Additionally, CPCS represented that Hampden County Lawyers for Justice (HCLJ) could not find enough bar advocates willing to cover duty days. *Supra* at 1 n.1. CPCS stated that eleven defendants did not receive "prompt" arraignments as required by Mass. R. Crim. P. 7, with some defendants spending extra nights in jail.[4] CPCS further indicated that in October, across the county, there were thirty-three court dates without any anticipated duty day coverage. In hopes of freeing up CPCS attorneys to accept new appointments, CPCS stated that it sent a list of approximately 200 cases to the district attorney that CPCS believed could be disposed of quickly.

No other information about the availability of defense counsel for indigent criminal defendants in Hampden County has been provided, and the Commonwealth has not provided a response.

While the information provided by CPCS is helpful, additional data are required to determine whether the *Lavallee* protocol should remain in place. With that in mind, I order that:

1. Within fourteen days, CPCS shall provide the following information with respect to criminal cases in Hampden County District Courts:

a. the current number of unrepresented indigent defendants, specifically identifying the number in pretrial detention;

b. the length of time, beginning from arraignment, for which they have been unrepresented, and the charges against them;[5]

c. the current caseloads of local CPCS staff attorneys and bar advocates, including -

i. whether CPCS is now taking new appointments or covering duty days;

ii. the number and dates of instances when the *Lavallee* protocol led to the release of defendants or dismissal of charges since it was adopted on June 28, 2019;

d. CPCS and HCLJ's efforts to increase available defense counsel for unrepresented indigent defendants, including -

i. the current compensation and cap on hours for bar advocates, and whether CPCS has petitioned the Legislature to raise compensation or the cap.[6]

2. Within seven days of CPCS's filing, the Commonwealth shall submit its position with respect to the continued imposition of the *Lavallee* protocol. If it opposes the continuation of the protocol, the Commonwealth shall provide detailed reasons for the opposition, with any data it contends support that position.

3. The parties may also submit any additional information, including information relevant to the shortage of defense counsel, or the reasons therefore, and any solutions they may recommend.

After receipt of the parties' submissions, I will assess the need for any further information or a hearing. The *Lavallee* protocol remains in effect pending further order of the court. So ordered." (Budd, J.)

[1] "Indigent criminal defendants in the Springfield District Court and other Hampden County courts are represented either by staff attorneys employed by CPCS in its public defender division (PDD), or by certified private defense attorneys, also known as 'bar advocates,' provided by Hampden County Lawyers for Justice (HCLJ) under a contract with CPCS." *Carrasquillo* v. *Hampden County Dist. Courts*, 484 Mass. 367, 368-369 (2020).

[2] Under the *Lavallee* protocol, a Superior Court Regional Administrative Justice (RAJ), or, for the western region, a District Court judge - both referred to hereafter as "judge" - holds a "status hearing with respect to each [unrepresented] defendant who has been held for more than seven days, or each [unrepresented] defendant whose case has been pending for more than forty-five days." *Lavallee* v. *Justices in Hampden Superior Court*, 442 Mass. 228, 247-248 (2004). The judge determines whether, "despite good faith efforts of CPCS and any efforts by others to secure representation for any such defendant," counsel cannot be secured. *Id*. at 248. Upon such a finding, the judge

must release unrepresented defendants who have been held in pretrial detention for more than seven days, or, with limited exceptions, dismiss charges, without prejudice, against defendants who have been unrepresented for more than forty-five days. *Id.* at 248-249.

[3] "CPCS staff attorneys and . . . bar advocates are responsible for covering 'duty days' in the Hampden County courts, during which they 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] Rule 7 of the Massachusetts Rules of Criminal Procedure provides: "A defendant who has been arrested and is not released shall be brought for arraignment before a court if then in session, and if not, at its next session."

[5] The foregoing information should be readily available to CPCS. Interim Order, No. SJ-2019-0247 (June 28, 2019) (Budd, J.) ("The clerk-magistrate of each District Court in Hampden County, and the clerk-magistrate of the Hampden Superior Court shall, on a weekly basis, prepare a list of all unrepresented criminal defendants facing charges in their respective courts and shall forward that list to the Superior Court RAJ, the District Court RAJ, 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").

[6] "For fiscal year 2020 . . . the Legislature authorized CPCS to waive . . . statutory caps and to allow private attorneys to bill up to 2,000 hours annually if CPCS determines 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.' St. 2019, c. 41, § 68. . . . [In addition, e]xperience demonstrates that increases in compensation do remedy counsel shortages. CPCS addressed the recent crisis in Hampden County, in part, by instituting an emergency flat duty day rate of $424 for bar advocates serving in the Hampden County District Courts. And in 2018, legislation authorizing CPCS to declare an emergency and raise the hourly rate from $55 to $75 for private attorneys handling care and protection cases, see St. 2018, c. 24, § 8, reportedly remedied counsel shortages for those cases within one week of taking effect." *Carrasquillo*, 484 Mass. at 375, 393.

10/28/2020	#42	EMAIL Notice to Counsel/Parties Re: P.# 41 filed.
10/28/2020	#43	Notice to Springfield District Court Criminal, regarding paper #41 filed.
11/10/2020	#44	MOTION to Extend Time with Certificate of Service filed by Atty. Benjamin H. Keehn. **(11/12/20 "Per the within, Motion is ALLOWED WITHOUT HEARING. (Budd, J.))**
11/12/2020	#45	CPCS's Response to Interim Order with Certificate of Service and attachment A filed by Atty. Rebecca Jacobstein and Atty. Benjamin Keehn.
11/13/2020	#46	EMAIL Notice to Counsel/Parties Re: P.# 44 filed.
11/13/2020	#47	Notice to lower court, regarding paper #44 filed.
11/25/2020	#48	Letter and attachments dated 11/25/2020 to Eric Wetzel, First Assistant Clerk from Timothy Casey, Assistant Attorney General, filed.
11/25/2020	#49	Letter to Chief Justice Budd from Anthony D. Gulluni, Hampden District Attorney, filed.
11/30/2020	#50	Hampden District Attorney Anthony D. Gulluni's MOTION to Impound CORI Materials with attached Certificate of Service filed for the Commonwealth by ADA Katherine E. McMahon. (11/30/20 "Per the within, Motion is **ALLOWED WITHOUT HEARING**." (Budd, J.))
12/01/2020	#51	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 50 filed.
12/15/2020		Docket Note: This matter has been reassigned to J. Wendlandt as J. Budd's successor
01/08/2021	#52	Letter to Justice Wendlandt from Atty. Rebecca Jacobstein and Atty. Benjamin H. Keehn with attached Affidavits and calendars, filed.

01/29/2021	#53	THIRD INTERIM ORDER: "At an earlier stage of this case, a single justice in the county court entered an order adopting the protocol described in Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228, 247-249 (2004), for the Hampden County District Courts.[1] She then reserved and reported the case to the full court. See Carrasquillo v. Hampden County Dist. Courts, 484 Mass. 367, 369 (2020). In its decision in Carrasquillo, the court left in place the single justice's order imposing the so-called Lavallee protocol, and remanded the case to the county court "to determine whether a hearing is required concerning the current availability of defense counsel to represent indigent defendants in Hampden County and whether the Lavallee protocol imposed by the single justice is still required." Carrasquillo, supra at 396. On October 26, 2020, a single justice entered an interim order (second interim order) requiring the parties to provide the court with certain information material to the determination whether the Lavallee protocol is still required in the Hampden County District Courts. The Committee for Public Counsel Services, the Hampden County District Courts, and the Hampden District Attorney have now submitted their responses. Among other things, those responses describe efforts undertaken by the courts, the offices of the district attorneys, and the Committee for Public Counsel Services to address the underlying conditions that led to the implementation of the Lavallee protocol. The filings also indicate that the parties do not oppose continuation of the protocol for the time being. In addition, some of the filings suggest actions this court might take to further address the issues that resulted in the need for the protocol. Having reviewed the record and the filings, and recognizing the fluid nature of the situation, I conclude that no action by this court is required at the present time. Upon consideration, so that the court can assess the continuing need for the protocol, the parties are ordered to provide the court with an update to the information described in the second interim order. CPCS shall provide its update no later than the close of business on April 22, 2020, and the Commonwealth shall submit its response within seven days thereafter. Alternatively, the parties may submit a joint status report containing the required information. The Lavallee protocol shall remain in effect until further order of this court." (Wendlandt, J.) [1] Under the Lavallee protocol, a Superior Court regional administrative justice (RAJ) (or, for the western region, a District Court judge) holds a "status hearing with respect to each [unrepresented] defendant who has been held for more than seven days, or each [unrepresented] defendant whose case has been pending for more than forty-five days." Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228, 247-249 (2004). The RAJ determines whether, "despite good faith efforts of CPCS and any efforts by others to secure representation for any such defendant," counsel cannot be secured. Id. Upon such a finding, the RAJ must release, with probationary conditions, unrepresented defendants who have been held in pretrial detention for more than seven days, or, with limited exceptions, must dismiss charges, without prejudice, against defendants who have been unrepresented for more than forty-five days. Id.
01/29/2021	#54	EMAIL Notice to Counsel/Parties Re: P.# 53 filed.
04/22/2021		Docket Note: Per the order of Justice Wendlandt, CPCS shall provide its update no later than the close of business on April 29, 2021, and the Commonwealth shall submit its response within seven days thereafter.
04/29/2021	#55	CPCS's Response to Third Interim Order with Certificate of Service and attachment filed by Atty. Rebecca Jacobstein and Atty. Benjamin Keehn.
05/19/2021		Docket Note: Per the order of Justice Wendlandt, Hampden County District Courts shall provide its update no later than the close of business on June 3, 2021.
05/27/2021	#56	Letter to Justice Wendlandt, dated May 27, 2021 from Atty. Rebecca Jacobstein, filed.
06/03/2021	#57	Respondent's Letter with attachment to Assistant Clerk Wetzel filed by AAG Timothy J. Casey.
06/07/2021	#58	Letter to Justice Wendlandt from ADA Jennifer Fitzgerald dated June 7, 2021 in response to plaintiffs' and respondents' status reports, filed.

06/09/2021	#59	FOURTH INTERIM ORDER: "On October 26, 2020, a single justice of the court entered an interim order (Second Interim Order) requiring the parties to provide the court with certain information material to the determination whether the protocol described in Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228, 247-249 (2004),[1] is still required in the Hampden County District Courts. On January 29, 2021, after reviewing those materials, and recognizing that there was no opposition to the continuation of the protocol, I concluded that no action was necessary, and directed the parties to provide an update to the information described in the second interim order several months later. The Committee for Public Counsel Services, the Hampden County District Courts, and the District Attorney for Hampden County have now submitted their responses. Those responses continue to describe sustained efforts taken to address the underlying conditions that led to implementation of the Lavallee protocol. Nonetheless, there is no opposition to continuation of the protocol for the time being. Having reviewed the materials provided, I conclude that no action by this court is required at the present time. So that the court periodically can assess the continuing need for the protocol, the parties are directed to provide the court with an update to the information described in the Second Interim Order at least every six months, beginning on December 1, 2021 (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 Hampden County District Courts shall submit their response and the District Attorney for Hampden County is invited to file a response. Alternatively, a joint status report containing the information may be submitted. The Lavallee protocol remains in effect. After receipt of a periodic update or any other updates, I will assess the need for any further information or a hearing. So ordered. (Wendlandt, J.) [1] Under the Lavallee protocol, a Superior Court Regional Administrative Justice (RAJ) (or, for the western region, a District Court judge) holds a "status hearing with respect to each [unrepresented] defendant who has been held for more than seven days, or each [unrepresented] defendant whose case has been pending for more than forty-five days." Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228, 247-249 (2004). The Superior Court RAJ determines whether, "despite good faith efforts of CPCS and any efforts by others to secure representation for any such defendant," counsel cannot be secured. Id. Upon such a finding, the Superior Court RAJ, must release, with probationary conditions, unrepresented defendants who have been held in pretrial detention for more than seven days, or, with limited exceptions, dismiss charges, without prejudice, against defendants who have been unrepresented for more than forty-five days. Id.
06/09/2021	#60	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 59 filed.
09/03/2021	#61	Letter to Justice Wendlandt with attached Exhibits A-J from Atty. Rebecca Jacobstein and Atty. Benjamin H. Keehn, filed.
09/09/2021	#62	(PARTIALLY IMPOUNDED) Supplemental Status Report from Respondents, The Hampden County District Courts with Certificate of Service and Exhibits A & B filed by AAG Timothy J. Casey.
09/21/2021	#63	Letter to Justice Wendlandt with attached Exhibits A & B from Atty. Rebecca Jacobstein and Atty. Benjamin H. Keehn, filed.

09/28/2021	#64	Response of the Hampden County District Attorney's Office to petitioners' and respondents' status reports filed by ADA Jennifer N. Fitzgerald saying... The Hampden County District Attorney's Office writes in response to the petitioners' and respondents' status reports. The Office writes paiiicularly to address the request by the respondents to have a hearing before a special master to address the causes of the ongoing counsel sh01iage in Hampden County and the claim by the petitioners that Judges Callan and Mulqueen have erroneously denied motions filed under the protocol set fo1ih by the Supreme Judicial Comi in Lavallee v. Justices in Hampden Super. Ct., 442 Mass. 228 (2004). The Office of Hampden District Attorney Gulluni remains committed to the expeditious resolution of criminal cases in Hampden County. We are mindful of the requirements of public safety, victims' rights, the needs of individual defendants, and the unique circumstances of each case, so as to do our paii in preventing counsel shortages, but this Office considers the Com1's actions to date sufficient to address the respondents' concerns. Further, the recent decisions by Judges Callan and Mulqueen suggest that the extent and impact of the counsel sh01iage may be overstated and that the present implementation of the Lavallee protocol is having the desired effect. There have been cases in which, after Lavallee motions were filed and oppositions prepared, counsel was quickly found for the defendant and seemingly without issue. Additionally, certain defendants who faced a period of non-representation in recent months faced it solely because they dismissed attorneys, some after arraignment, some after a dangerousness hearing, and some at later points in the process. Allowing those defendants relief pursuant to the Lavallee protocol would serve only to improperly incentivize degradation of attorney-client relationships and reward tardiness on the part of CPCS in obtaining new counsel for defendants who dismiss their attorneys. Furthermore, the Office believes Judge Callan and Judge Mulqueen properly decided the cases that were before them, and that the petitioners' belief to the contrary stems from a mistake on the part ofCPCS as to the nature and scope of certain of its responsibilities. As to the motion decided by Judge Mulqueen, the petitioners complain that CPCS was not representing the defendant because the appointment was to CPCS as a whole and not to the Springfield Public Defender Division ("PDD") of the office. This Office is aware of no regulation or law that requires or even allows such differentiation, nor is it clear as to CPCS's present capacity to represent further clients. The petitioners' initial status report speaks briefly, and in conclusory terms, about the workloads of staff attorneys from CPCS's Springfield PDD office, and a supplemental report similarly addresses the attempts of staff attorneys from the CPCS offices in Worcester, Northampton, and Pittsfield to provide coverage for shortages, but the Office has seen no information, in any form, as to the caseloads of staff attorneys from CPCS's other fourteen offices. A plain reading of St. 2019, c. 41, § 2, line item 0321-1500 and G. L. c. 211D, subsection 6(a), also shows that CPCS's present obligation to represent twenty percent of all criminal defendants is a minimum obligation and does not prevent them from representing all, or nearly all, criminal defendants in the absence of available private counsel. Therefore, the Office is unclear at this time as to whether CPCS actually lacks capacity to represent clients in Hampden County. As for the petitioners' challenge to Judge Callan's decisions, the Office suggests that CPCS's insistence that it cannot represent either defendant is based upon a misunderstanding of subsection 6(a). Subsection 6(a) may be confusing, but it does not, as the petitioners suggest, provide a blanket prohibition against CPCS representing codefendants or representing defendants where some form of conflict exists and preclude their representation of either defendant. While subsections 6(a)(i) and 6(a)(ii) provide exceptions to the presumptive appointment of CPCS to represent defendants, subsection 6(a)(iii), by its plain language, provides an exception to those exceptions "if the chief counsel determines in writing that insufficient numbers of qualified attorneys are available for assignment by the private counsel division." Indeed, subsection 6(a)(iii) is applicable "notwithstanding any general or special law to the contrary" (emphasis added), which plain language necessarily includes the two exceptions upon which the petitioners attempt to rely. We do not suggest that individual attorneys engage in such representation, or that two attorneys from the same regional PDD office should do so, but we agree with Judge Callan that the statutory language requires CPCS to serve as a "backstop to a qualified private attorney shortage" and they should do so unless and until every CPCS attorney across the state has a full caseload.

10/12/2021	#65	ORDER: "On October 26, 2020, a single justice of this court entered an interim order (Second Interim Order) requiring the parties to provide the court with certain information material to the determination whether the protocol described in Lavallee v. Justices of in Hampden Superior Court, 442 Mass. 228, 247-249 (2004), is still required in the Hampden County District Courts. I subsequently issued a Fourth Interim Order, on June 9, 2021, requiring the parties to provide the court with an update every six months, beginning on December 1, 2021, of the information required by the Second Interim Order, so that the court can periodically assess the continuing need for the Lavallee protocol. The order also provided that any party may provide the court with an earlier update as circumstances may warrant. On September 3, 2021, the Committee for Public Counsel Services filed an update indicating that the situation in Hampden County "has deteriorated significantly" and that providing adequate duty day coverage in the Hampden County District Courts remains, generally, difficult. According to CPCS, as of the filing of its update, there were fifty-eight indigent criminal defendants without counsel, eleven of whom were being held. CPCS also indicated that following several Lavallee hearings in the District Court in August, two judges found that CPCS is not making good faith efforts to find attorneys to represent indigent defendants. CPCS disputed the findings and averred that it continues to make good faith efforts to provide counsel. CPCS also maintained that in certain cases, it cannot provide counsel because of conflicts. The Hampden County District Courts also provided an update, on September 9, 2021, stating that the counsel shortage in Hampden County "has become acute." The update noted that the situation led to the resumption of Lavallee hearings, after over a year and one-half without any such hearings. In the update, the District Courts ask that I conduct, or direct another neutral decisionmaker to conduct, "an inquiry into the causes of the counsel shortage crisis in Hampden County, and possible solutions to be implemented by CPCS, the courts, and other participants in the criminal justice system in Hampden County." CPCS then filed a second update, on September 21, 2021, in which it further detailed its continuing efforts to address the counsel shortage. Among other things, CPCS implemented the emergency duty day rate in Hampden County, which resulted in an increase in attorneys taking duty days in Hampden County. As of the filing of the second update, ninety-five defendants were without counsel, twelve of whom were being held, and four of whom had cases that had been pending for more than forty-five days. While it maintains that the filings in the case are clear as to the reasons for the counsel shortage, as well as the possible solutions, CPCS has indicated that it is amenable to a hearing before a neutral factfinder as suggested by the update of the District Courts. Finally, on September 28, 2021, the Hampden County District Attorney's Office filed a response to the updates furnished by CPCS and the District Courts.[1] The District Attorney maintains that this court's actions to date have been sufficient to address the concerns expressed by the District Courts and that the implementation of the Lavallee protocol is having the desired effect. Further, the District Attorney indicated that he is unclear as to whether CPCS actually lacks capacity to represent clients in Hampden County because CPCS has not, in the District Attorney's view, provided sufficient information regarding attorney caseloads. The District Attorney neither indicated that he is in favor of a hearing, nor did he specifically object. Order I hereby ORDER that this case be assigned to Hon. Judd Carhart (ret.) as special master for the purpose of conducting an inquiry into the reasons for the ongoing counsel shortage in Hampden County. The special master may schedule a hearing or hearings as he deems necessary; may receive evidence, including, if he deems it appropriate, witness testimony; shall make detailed factual findings relevant to the cause or causes of the counsel shortage and the possible cures; may, in his sole discretion, invite participation from other stakeholders whom he believes would provide insight into the shortage of defense counsel or otherwise be helpful in eliciting possible solutions; and may take any other steps he deems appropriate to marshal the evidence and provide a report to this court. In particular, the parties should provide evidence, and the special master should make findings, with respect to the caseloads in the Hampden District Courts over time, the resources available to CPCS and its allocation of those resources, and other factors that contribute to the shortage of counsel. Additionally, the parties, in conjunction with the special master, are directed to discuss, and report to this court on, possible solutions to the counsel shortage problem. They are encouraged to be creative in crafting possible solutions. In considering solutions, the parties should focus on solutions within the judiciary's authority to implement, although they need not be confined to judicial solutions. The parties should attempt, to the fullest extent possible, to formulate possible solutions on which they can agree. The parties shall prepare a joint document outlining their proposals, to accompany the special master's report when it is transmitted to this court. The parties' joint document should indicate which proposals are agreed, and, for those that are not agreed, the respective positions of the parties as to each proposal. The special master may, if he wishes, join in the parties' reported proposals and may report proposals of his own. The special master shall report his findings and conclusions on the counsel shortage problem, and the parties shall provide their proposed solutions, to me within forty-five days of the date of this order, although the special master may request additional time if he finds it necessary to do so. (Wendlandt, J.) [1] As provided in the Fourth Interim Order, the Hampden County District Attorney may, but is not required to, file a response.
10/12/2021	#66	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 65 filed.
10/13/2021	#67	Working Group via Zoom is scheduled for Friday, October 15, 2021 at 2:00pm before Special Master Hon. Judd Carhart (ret.)
11/01/2021	#68	Working Group is scheduled for Tuesday, November 9, 2021 at 2:00pm at the John Adams Courthouse in Courtroom 2 (Holmes) before Special Master Hon. Judd Carhart (ret.).
11/01/2021		Docket Note: IN RE: Paper #68: all parties notified via email on 11/01/2021.

11/23/2021	#69	Interim Report of the Special Master: "Judd J. Carhart, Special Master in this matter, makes the following Interim Report as follows: 1. On October 12th, 2021, this Honorable Court appointed Judd J. Carhart as Special Master to assist Justice Wendlandt in the inquiry for the reasons for the ongoing counsel shortage for indigent defendants in Hampden County. 2. A working group,[1] consisting of representatives from the Committee for Public Counsel Services (CPCS), the Massachusetts Trial Court, the Hampden County Lawyers for Justice, the Hampden County District Attorney's Office, and the Hampden County Bar Association (the Committee) was established to facilitate the inquiry into the causes for the shortage of counsel for indigent defendants in Hampden County and to suggest viable solutions to the current shortage of counsel. 3. On October 15, 2021, an organizational meeting was held, via videoconference, for the purpose of establishing a working protocol to assist the Special Master in completing the inquiry into the causes of the shortage of counsel for indigent defendants. Subsequent to the meeting, the Special Master sent a series of written requests, to be answered in affidavit form, to each of the members of the Committee. The requests sought statistics relative to the resources available to CPCS and the Trial Court in the staffing of counsel and Court personnel in Hampden County (a copy of the Requests for Information is attached hereto and marked as "Ex.1"). At the Committee meeting, it was agreed that the responses to the Requests for Information would be submitted to the Special Master by November 19, 2021. 4. On November 9, 2021, an in-person meeting of the Committee was held in Courtroom Two of the Supreme Judicial Court. At that meeting, a timeline was established for the completion of the Requests for Information from the Committee members. At that meeting it was agreed that the responses to the Requests for Information would be filed with the Court by November 19, 2021. 5. The answers to the Requests for Information have been received and docketed. Each of the Committee members will be asked to submit their opinions as to the cause of the shortage of counsel for indigent defendants in Hampden County.[2] 6. Upon receipt of the various opinions as to the shortage of counsel, an in-person meeting of all Committee members will be held in the Roderick Ireland Courthouse in order to discuss the divergent views for the causes of the shortage.[3] 7. I have begun to interview each of the stakeholders in order to assist me in my fact-finding role. Additionally, I have spoken with Chief Justice Dawley and have sought his opinion as to the proper resolution of this matter. 8. After the Roderick Ireland Courthouse meeting, the Committee members will be asked to submit, in writing, their suggestions for the solutions, both long-term and short-term, to the shortage of counsel for indigent defendants in Hampden County. 9. The Order of Assignment of the Special Master ordered the Special Master to report his findings and conclusions to the Court within forty-five days. Given the number of parties involved and the complex nature of the problem(s) presented in seeking viable solutions to this pressing issue, it is the opinion of the Special Master that the inquiry cannot be concluded within forty-five days. Wherefore, the Special Master respectfully requests an additional ninety days to complete his inquiry and report his findings and recommendations." [1] The Committee consists of Attorneys Rebecca Jacobstein and Benjamin Keehn of CPCS; Attorney David Hoose and Sara Pegus of the Hampden County Lawyers for Justice; Attorneys Paul Sullivan and Lee Kavanaugh of the Massachusetts Trial Court; Attorneys Bethany Stevens and Kristen Stone of the District Court; John Gay, the Clerk of Court of the Springfield District Court; Azizah Yasin, First Assistant Clerk of the Holyoke District Court; Shana Wilson of the Hampden Superior Court Clerk's Office; Assistant District Attorney Paul Caccaviello of the Hampden County District Attorney's Office; Noreen Nardi and Krystle Bernier of the Hampden County Bar Association; and Assistant Attorney General Timothy Casey of the Massachusetts Attorney General's Office. [2] It is anticipated that Judge Kevin Maltby, First Justice of the Springfield District Court, Judge William Hadley, First Justice of the Holyoke District Court and Judge Michael Callen, Regional Administrative Judge of the Superior Court will submit their respective opinions as to the cause of the shortage of counsel in Hampden County. [3] It is anticipated that Judges Maltby, Hadley and Callen will attend the meeting.
11/23/2021	#70	EMAIL Notice with attachments to Counsel/Parties Re: P.#69 sent by Assistant Clerk Stephen Cronin, filed.
11/24/2021	#71	ORDER: "This matter came before the Court, Wendlandt, J., on the Interim Report of the Special Master, Honorable Judd Carhart (ret.). The Special Master requested an additional ninety (90) days to complete his inquiry and report his findings and recommendations. Upon consideration thereof, it is ORDERED that the Special Master shall have an additional ninety (90) days to report his findings and recommendations to this Court." (Wendlandt, J.)
11/24/2021	#72	EMAIL Notice with attachment to Counsel/Parties Re: P.# 71 sent by Assistant Clerk Stephen Cronin, filed.
03/22/2022	#73	Letter to Justice Wendlandt from Special Master Judd Carhart (Ret.), filed.
03/22/2022	#74	Report of the Special Master, filed.
03/22/2022	#75	Exhibits 1-18 to Paper #74, filed by Special Master Judd Carhart (Ret.).

04/04/2022	#76	ORDER: "On June 28, 2019, this court issued an Interim Order that instituted and implemented the protocol set forth in Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228 (2004), for all of the District Courts in Hampden County. Following the parties' updates in response to several subsequent interim orders, however, the Lavallee protocol remains in effect in the District Courts in Hampden County. On October 12, 2021, per the parties' request, I assigned this case to Hon. Judd Carhart (ret.) as special master for purposes of conducting an inquiry into the reasons for the ongoing counsel shortage. The special master has submitted his comprehensive report to the court. In light of the report, and the special master's recommendations, and to aid the court in better determining next steps, the parties are hereby ordered to provide the court with an update to the information described in the Second Interim Order, dated October 26, 2020. In addition to that information, the update should provide the following: 1. the number of unrepresented indigent defendants who, since the implementation of the Lavallee protocol in the District Courts in Hampden County, were held in pretrial detention for more than seven days and subsequently released because counsel could not be secured for them; and 2. the number of unrepresented indigent defendants who, since the implementation of the Lavallee protocol in the District Courts in Hampden County, have had their charges dismissed, without prejudice, because the defendant remained unrepresented for more than forty-five days; a. the number of such defendants whose charges were dismissed without prejudice who were subsequently re-charged. The Committee for Public Counsel Services shall provide its update within fifteen days of the date of this order; within seven days thereafter, the Hampden County District Courts shall submit their response. The District Attorney for Hampden County is also invited to submit a response, within seven days of CPCS's update. Alternatively, the parties are encouraged to submit a joint update. After receipt of the parties' submissions, or joint submission, the court will schedule a status hearing. (Wendlandt, J.)
04/04/2022	#77	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 76 filed.
04/19/2022	#78	CPCS's Response to Interim Order with Certificate of Service and Exhibits A-D, filed by Atty. Rebecca A. Jacobstein.
04/25/2022	#79	Assented-To MOTION to Enlarge Deadline for Respondents to File Submission in Response to Court's April 4, 2022 Order with Certificate of Service filed by AAG Timothy Casey. **(04/27/22 "Per the within, Motion is allowed, without hearing." (Wendlandt, J.))**
04/26/2022		Motion Under Advisement. (Wendlandt, J.).
04/26/2022	#80	Response of the District Attorney for Hampden County to the Court's Interim Order of April 4, 2022 with Certificate of Service filed by ADA Jennifer Fitzgerald.
04/27/2022	#81	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 79 filed.
05/03/2022	#82	Response of the Hampden County District Courts, filed by AAG Timothy J. Casey.
05/16/2022		Hearing scheduled for Friday, June 24th at 1:00pm at the John Adams Courthouse in Courtroom 2 (Holmes) before Justice Wendlandt. All parties were notified via email by Asst. Clerk Cronin.
06/24/2022		Hearing held before (Wendlandt, J.)
06/24/2022	#83	Appearance of Atty. Rebecca A. Jacobstein for Petitioner Freddie Carrasquillo, Jr..
06/24/2022	#84	Appearance of AAG Timothy J. Casey for Respondent Hampden County District Courts filed.

06/30/2022	#85	ORDER: "On June 28, 2019, this court issued an interim order that instituted and implemented the protocol set forth in Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228 (2004), for all of the District Courts in Hampden County. Since that time, the court has issued several subsequent interim orders and required the parties to provide periodic updates so that the court could assess the continuing need for the Lavallee protocol. In October 2021, I assigned the case to a special master for the purpose of conducting an inquiry into the reasons for the ongoing counsel shortage in Hampden County. The special master submitted a comprehensive report on March 22, 2022. Thereafter, the parties supplied additional updates, and I held a hearing with the parties, on June 24, 2022, to discuss possible next steps, and, in particular, to address the issue whether there is any continuing need for the Lavallee protocol. For the reasons that follow, I conclude that there is no current need to continue the protocol. The protocol has been in place for three years. At the time that it was implemented, and for much of the ensuing three years, the protocol was necessary "to protect the rights of indigent defendants" because a shortage of available attorneys was interfering with the prompt appointment of defense counsel to represent those defendants in a substantial number of cases. Carasquillo v. Hampden County Dist. Courts, 484 Mass. 367, 370 (2020). The periodic updates filed by the parties during that time indicated the continuing need for the protocol. The parties most recent updates, however, filed in April and May 2022, indicate something different. In its update, the Committee for Public Counsel Services (CPCS) noted that in September 2021, there were ninety-five unrepresented defendants in Hampden County, most of whom had cases pending in the Holyoke District Court. The number of unrepresented District Court defendants in that court has now been reduced to zero. Even for those defendants who require Superior Court counsel, the numbers of unrepresented defendants are few. CPCS has indicated that, as of April 15, 2022, there were only two unrepresented indigent defendants one of whom had been on the list awaiting counsel for two days and one who had been on the list for three days. If the counsel shortage in Hampden County had reached a crisis point in September 2021, that crisis has abated. The change in circumstances is due largely, if not entirely, to the extraordinary efforts of the parties to address the problems and find solutions. Among other things, CPCS has been able to open a second Hampden County Public Defender Division office with an initial staff of ten attorneys that has now been expanded to twelve attorneys; increase duty day rates for private attorneys; and waive the cap on the number of hours that private attorneys may bill, at least for the 2022 fiscal year. While I appreciate CPCS's observation that the fact of the Lavallee protocol brings pressure to bear on the system - that the existence and requirements of the protocol maintains an awareness of the urgency of the issue for the various stakeholders, it appears that the changes that have lessened the need for the protocol will continue to be effective even without the protocol. Additionally, at the June 24 hearing, counsel for the District Court pledged to continue to provide the weekly list of unrepresented criminal defendants required by the courts June 28, 2019, interim order, even if the protocol is lifted. These continued weekly lists will help keep CPCS apprised of the needs for counsel and aid in the process of appointing counsel. All of this indicates that there is no longer a need for the protocol. However, because the protocol has been in place for three years, and because the changes that have brought us to this point are, to some degree, new, the parties shall continue to provide the court with periodic, six month updates. CPCS shall, as it has pursuant to prior orders, provide its update first, and should continue to include in its updates the following information: a. the current number of unrepresented indigent defendants, specifically identifying the number in pretrial detention; b. the length of time, beginning from arraignment, for which they have been unrepresented, and the charges against them; c. the current caseloads of local CPCS staff attorneys and bar advocates, including whether CPCS is now taking new appointments or covering duty days; d. CPCS and HCLJ's efforts to increase available defense counsel for unrepresented indigent defendants, including the current compensation and cap on hours for bar advocates, and that status of any ongoing efforts to petition the Legislature for continued additional funding. Within seven days thereafter, the Hampden County District Courts shall submit their response, and the District Attorney is again invited to file a response as well. As the special master noted in his report, the Lavallee protocol was never meant to be a permanent solution. And, due to the extraordinary efforts of the parties, there is no longer a continuing need for it. I therefore ORDER that the Lavallee protocol implemented by the court's June 28, 2019, interim order is hereby lifted. The parties shall provide the court with their next update on December 1, 2022." (Wendlandt, J.)
06/30/2022	#86	eNotice to Counsel/Parties and Lower Court Re: P.# 85 filed.
11/30/2022	#87	MOTION to Extend Time with Certificate of Service filed by Atty Rebecca Jacobstein and Atty. Benjamin Keehn. (11/30/2022: "Per the within, MOTION is ALLOWED WITHOUT HEARING." (Wendlandt, J.))
11/30/2022		Motion Under Advisement. (Wendlandt, J.).
11/30/2022	#88	eNotice to Counsel/Parties Re: P.# 87 filed.
11/30/2022	#89	ORDER: "This matter came before the Court, Wendlandt, J., on a motion, filed by petitioners, to extend time to file an update with the Court. The respondent assents to the motion. Upon consideration thereof, it is ORDERED that the motion is ALLOWED. The parties shall provide the Court with an update on or before Thursday, January 5, 2023." (Wendlandt, J.)
12/01/2022	#90	eNotice to Counsel/Parties Re: P.# 89 filed.
01/05/2023	#91	CPCS's Response to Order Entered on June 30, 2022 (P#85) with Certificate of Service filed by Attorney Rebecca A. Jacobstein.
01/11/2023	#92	Status Report from Respondents, The Hampden County District Courts, with Certificate of Service filed by AAG Timothy J. Casey.
02/01/2023	#93	CPCS's UPDATED Response to Order Entered on June 30, 2022 with Certificate of Service, filed by Attorneys Jacobstein and Keehn.

02/02/2023	#94	ORDER: "On June 28, 2019, this court issued an interim order that instituted and implemented the protocol set forth in Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228 (2004), for all of the District Courts in Hampden County. The protocol was in place for three years, until I ordered, on June 30, 2022, that it be lifted. I also ordered the parties to continue to provide the court with periodic, six month updates, as they had been doing while the protocol was in place. The parties have now filed their first updates since the protocol was lifted. In general, the changes that led to the decision to lift the protocol -- the parties' continued, sustained efforts to address the counsel shortage problems and find solutions -- have continued to keep the counsel shortage in Hampden County at bay. Additionally, the Committee for Public Counsel Services continues to institute additional changes and pursue new initiatives, including pursuing funding, through discussions with the Legislature, for a Regional Response office in western Massachusetts; implementing the District Court Plus Certification program, to help address the limited number of attorneys previously available to take superior court cases; and continuing to waive the cap on the number of hours that private attorneys may bill for the 2023 fiscal year. I recognize that the problems are not entirely resolved, and I share, to some degree, the Hampden County District Courts concern that CPCS has discontinued the emergency duty day rate that previously helped in alleviating the counsel shortage. Given the various changes that CPCS continues to implement, however, I conclude that no action by the court is required at the present time. The parties shall continue to provide the court with periodic, six month updates, and, as before, any party may provide the court with an earlier update as circumstances warrant. CPCS shall, as it has pursuant to prior orders, provide its update first, and should continue to include in its updates the information described in the court's June 30, 2022, order. Within seven days thereafter, the Hampden County District Courts shall submit their response, and the District Attorney is again invited to file a response as well. The parties shall provide the court with their next update on July 3, 2023." (Wendlandt, J.)
02/02/2023	#95	eNotice to Counsel/Parties and Lower Court Re: P.# 94 filed.
06/07/2023	#96	Letter to Justice Wendlandt from Hampden County Lawyers for Justice, Inc. dated March 15, 2023, received by Assistant Clerk Cronin on June 7, 2023 filed.
07/07/2023	#97	Petitioner's Assented-To Motion for Extension with Certificate of Service filed by Atty. Rebecca Jacobstein and Atty. Benjamin Keehn. (07/07/2023: "Per the withing MOTION is ALLOWED without hearing. " (Wendlandt, J.))
07/07/2023		Motion Under Advisement. (Wendlandt, J.).
07/07/2023	#98	eNotice to Counsel/Parties and Lower Court Re: P.# 97 filed.
07/17/2023	#99	CPCS's Response to Order Entered on February 2, 2023 with Certificate of Service and attachment filed by Atty. Rebecca Jacobstein and Benjamin Keehn.
07/24/2023	#100	Second Status Report From Respondents The Hampden County District Courts with Certificate of Service, filed by Attorney Timothy J. Casey.
08/01/2023	#101	ORDER: "This matter came before the Court, Wendlandt, J., on a response filed by the Committee for Public Counsel Services, on behalf of the petitioners, and a status report filed by the Attorney General, on behalf of the respondents, pursuant to an order, dated February 2, 2023. Upon review of these pleadings, and there being no objections from the parties, it is hereby ORDERED that the petition is DISMISSED." (Wendlandt, J.)
08/01/2023	#102	eNotice to Counsel/Parties and Lower Court Re: P.# 101 filed.

As of 08/07/2023 10:25am