SJC-12777

FREDDIE CARRASQUILLO, JR., & others[1] vs. HAMPDEN COUNTY DISTRICT COURTS.

Suffolk. November 7, 2019. - March 30, 2020.

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

Constitutional Law, Assistance of counsel, Separation of powers, Judiciary. Committee for Public Counsel Services. Attorney at Law, Compensation. Practice, Criminal, Assistance of counsel. Supreme Judicial Court, Superintendence of inferior courts.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on June 14, 2019.

The case was reported by Budd, J.

Rebecca A. Jacobstein, Committee for Public Counsel Services (Benjamin H. Keehn, Committee for Public Counsel Services, also present) for the petitioners.

Matthew R. Segal (Jessica Lewis also present) for Hampden County Lawyers for Justice.

Timothy J. Casey, Assistant Attorney General, for the respondents.

Chauncey B. Wood, for Massachusetts Association of Criminal Defense Lawyers, was present but did not argue.

[1] All other similarly situated criminal defendants in Hampden County.

The following submitted briefs for amici curiae:
K. Neil Austin, Stephen Stich, & David Siegel for Boston Bar Association.
Shane T. O'Sullivan, Assistant District Attorney, for District Attorney for the Hampden District.
Donna Patalano & Stephanie Ainbinder, Assistant District Attorneys, for District Attorney for the Suffolk District.

LOWY, J. The right to counsel is one of the most fundamental principles in our criminal justice system. Individuals who are charged with offenses for which they face imprisonment if convicted are constitutionally entitled to representation by defense counsel at public expense if they cannot afford to retain their own attorney. The government of the Commonwealth therefore has a constitutional obligation to ensure that there is an adequate supply of publicly funded defense attorneys available to represent eligible indigent criminal defendants. See G. L. c. 211D, §§ 2B, 5. In this case, we consider once again how courts should proceed when it appears that the government has failed to meet that obligation.

The petitioners challenge an order dated June 12, 2019 (June 12 order), issued by the First Justice of the Springfield Division of the District Court Department (Springfield District Court), that required the attorney in charge of the Springfield office of the Committee for Public Counsel Services (CPCS) "to provide counsel to Courtroom I in the Springfield District Court every day who shall accept appointments in all cases as ordered

by the Court to represent clients at arraignment[s], bail hearings, hearings pursuant to G. L. c. 123, § 35, and any other matter that the Court deems necessary." The First Justice issued this order in response to a shortage of available defense attorneys that left many indigent criminal defendants in the Springfield District Court without counsel.

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. CPCS staff attorneys and HCLJ 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. Due to a shortage of available private attorneys, however, it has been increasingly difficult for HCLJ to find enough bar advocates who are willing and able to cover HCLJ's allotted share of duty days in the Springfield District Court's criminal session over the last two years. Consequently, beginning in 2018, CPCS staff attorneys in the Springfield PDD office stepped in to cover more duty days and take substantially

more cases in the Springfield District Court than they had taken previously.

Due to the volume of additional cases, the attorney in charge of the Springfield PDD office and CPCS's deputy chief counsel determined in June 2019 that the staff attorneys in the Springfield PDD office had exceeded their caseload capacity and they could not provide effective assistance to any additional clients. Accordingly, on June 11, the attorney in charge informed the First Justice of the Springfield District Court that CPCS staff attorneys in the Springfield PDD office could not handle any more duty days in that court.

In response, the First Justice issued the June 12 order. CPCS then filed an emergency petition in the single justice session of this court (the Supreme Judicial Court of Suffolk County or county court) pursuant to G. L. c. 211, § 3, seeking to vacate the June 12 order, and later moved to vacate the Springfield District Court's subsequent appointments of PDD staff attorneys as defense counsel under the June 12 order.[2] The

[2] The Committee for Public Counsel Services (CPCS) initially filed the petition on behalf of the attorney in charge of the Springfield public defender division (PDD) office. CPCS subsequently amended the caption to list the petitioners as Freddie Carrasquillo, Jr. (one of the unrepresented indigent defendants for whom the Springfield Division of the District Court Department appointed counsel from the Springfield PDD office), and all other similarly situated defendants in Hampden County.

single justice reserved and reported the matter for our consideration.

We recognize that the First Justice was taking emergency action that he deemed necessary under the circumstances to protect indigent defendants' constitutional rights to counsel and to avoid halting proceedings in new criminal cases in the Springfield District Court. We conclude, however, that the June 12 order and the court's subsequent appointments of CPCS staff attorneys in the Springfield PDD office under that order were invalid. The June 12 order and subsequent appointments of CPCS staff attorneys improperly infringed upon CPCS's statutory authority to control assignments and to limit caseloads for its staff attorneys under G. L. c. 211D because the order and the appointments overrode CPCS's determination that the staff attorneys in its Springfield office had already reached their caseload capacity and could not accept any more cases, without any contrary findings by the court that put in doubt the validity of that determination. We also note our concern that, to the extent such an order may require CPCS staff attorneys to accept more appointments than they can reasonably handle, it risks interfering with their ethical obligations under the Massachusetts Rules of Professional Conduct to act with reasonable diligence and promptness in representing their

clients, and thereby threatens to undermine the very right to counsel that the order seeks to protect.

In Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246-249 (2004), where we faced a similar problem in Hampden County sixteen years ago, we established a protocol to protect the rights of indigent defendants when a shortage of available attorneys interferes with the prompt appointment of defense counsel to represent those defendants. In the present case, while it would have been preferable for the First Justice or CPCS to take steps to invoke that protocol once the shortage of available defense counsel became apparent, we recognize that that task was nearly impossible because we did not specify how to do so in Lavallee. As such, in this opinion we outline a process through which CPCS, or the regional administrative justice (RAJ) who oversees a court affected by such a shortage, may seek to trigger the Lavallee protocol by filing a petition in the county court pursuant to G. L. c. 211, § 3.

We also discuss other proposals suggested by the parties and amici[3] to remedy the shortage of available defense counsel in Hampden County. We note in particular that the parties and most

[3] We acknowledge the amicus briefs submitted by the district attorney for the Hampden District, by the district attorney for the Suffolk District, by the Boston Bar Association, and by Hampden County Lawyers for Justice and the Massachusetts Association of Criminal Defense Lawyers.

of the amici appear to agree that the statutory hourly rates for bar advocates are too low and should be increased. Although we frame this issue below, we defer to the Legislature's authority, as the governmental branch vested with the power to make laws and appropriate funds, to devise an appropriate solution.

Finally, we call upon all members of the bar to consider stepping forward as a public service to assist in representing indigent defendants, as attorneys have done many times throughout our history.

Background. 1. Appointment of counsel for indigent defendants in criminal proceedings. Appointing counsel to represent indigent defendants in criminal proceedings has deep roots in Massachusetts history. As early as the 1790s, this court began appointing defense counsel for defendants in capital cases tried before it, and in 1820 the Legislature authorized such appointments by statute.[4] During most of the Nineteenth

[4] See Commonwealth v. Hardy, 2 Mass. 303, 303 (1807) (noting that two attorneys had been "assigned by the Court as counsel for the prisoner"); St. 1820, c. 14, § 8 (authorizing Supreme Judicial Court to assign trial counsel to persons indicted and arraigned for capital offenses); Rogers, "A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780-1980, 41 Am. J. Legal Hist. 440, 442-443 & n.6 (1997), citing N. Dane, General Abridgement and Digest of American Laws, VII:335, 210-218 (1824); Rosenfeld, The Right to Counsel and Provision of Counsel for Indigents in Massachusetts: The Hennessey Era, 74 Mass. L. Rev. 148, 148 (1989). The present-day version of the 1820 statute can be found in G. L. c. 277, § 47.

Century, leading members of the Massachusetts bar accepted these appointments without compensation as a service to the community and the profession.[5] In 1893 and 1911, however, after the Legislature transferred jurisdiction over capital cases to the Superior Court, it also authorized payment of reasonable compensation and expenses to court-appointed attorneys defending persons indicted for murder who were otherwise unable to procure counsel.[6]

In the 1950s and 1960s, the Supreme Judicial Court took several steps to make appointed defense counsel more broadly available to indigent defendants in noncapital cases, often anticipating later rulings by the United States Supreme Court.

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[5] See Rogers, 41 Am. J. Legal Hist. at 443. As the court described the process in an 1870 opinion:

> "When a prisoner has not obtained counsel, it is usual for the court to request some member of the bar to aid him; and we believe that no prisoner has been compelled to go to trial in a capital case without being ably and faithfully defended. The members of the bar have been ready, so far as they reasonably could do so, to give their best services gratuitously, in aid of any prisoner who was unable to pay counsel."

Clark, petitioner, 104 Mass. 537, 543 (1870).

[6] See St. 1893, c. 394, §§ 1, 2, currently codified as G. L. c. 277, §§ 55, 56. See also St. 1911, c. 432, §§ 1, 2. Original jurisdiction over capital cases was transferred to the Superior Court by St. 1891, c. 379, § 1. See discussion in Rogers, 41 Am. J. Legal Hist. at 444-445, 449; Rosenfeld, 74 Mass. L. Rev. at 148.

In a pair of decisions issued on the same day in 1957, we reversed convictions in two noncapital cases on the ground that the defendants' rights to a fair trial under art. 12 of the Massachusetts Declaration of Rights had been violated because the defendants were not represented by counsel.[7] In 1958 -- five years before the Supreme Court extended the right to counsel under the Sixth Amendment to the United States Constitution to State criminal defendants under the Fourteenth Amendment in Gideon v. Wainwright, 372 U.S. 335 (1963) -- we promulgated S.J.C. Rule 10, which required assignment of counsel in all noncapital felony cases in the Superior Court unless the defendant waived this right or was able to obtain counsel. See S.J.C. Rule 10, 337 Mass. 813 (1958).[8] The rule also affirmed "the inherent discretionary power of any court to appoint counsel" in any other case. Id. In 1964, we amended rule 10 to require assignment of counsel in any case where the defendant faced imprisonment, anticipating the standard announced by the

[7] See Brown v. Commonwealth, 335 Mass. 476, 482 (1957) (lack of counsel in armed robbery case resulted in "an accretion of prejudicial happenings which added up to a failure to secure the fundamentals of a fair trial and hence to a violation of art. 12"); Pugliese v. Commonwealth, 335 Mass. 471, 475-476 (1957) (where defendant lacked sufficient intelligence to represent himself in kidnapping case, art. 12 required assignment of counsel to secure fundamentals of fair trial).

[8] S.J.C. Rule 10 was the precursor to current S.J.C. Rule 3:10, as appearing in 475 Mass. 1301 (2016).

Supreme Court in Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). See S.J.C. Rule 10, as amended, 347 Mass. 809 (1964). And in 1967, we held that attorneys who are so appointed are also entitled to compensation. See Abodeely v. County of Worcester, 352 Mass. 719, 723-724 (1967) ("when the court assigns counsel for the defence in the cases of needy criminal defendants then counsel should be paid from the county treasury" pursuant to G. L. c. 213, § 8).

The responsibility for meeting the increased demand for court-appointed defense counsel initially fell upon the newly established Massachusetts Defenders Committee, "the first Statewide publicly funded defender agency," and a "patchwork of county defender programs." Deputy Chief Counsel for the Pub. Defender Div. of the Comm. for Pub. Counsel Servs. v. Acting First Justice of the Lowell Div. of the Dist. Court Dep't, 477 Mass. 178, 184 (2017) (Deputy Chief Counsel). Unfortunately, the Massachusetts Defenders Committee was "[p]lagued by a shortage of resources" and therefore "unable to deliver on its mission to provide counsel to all indigent defendants eligible to receive the service."[9] Id. Meanwhile, the county defender

[9] Despite these challenges, the Massachusetts Defenders Committee laid the foundation for the future Committee for Public Counsel Services. Many distinguished lawyers and judges, including members of this court, began their legal careers

programs lacked standards and supervision and provided inadequate representation.[10]

In 1976, Supreme Judicial Court Chief Justice Edward Hennessey established a committee to recommend improvements in the indigent defender system. Id. at 185 & n.4. That committee expressed particular concern about the county defender programs' "primary focus on limiting costs" and their "lack [of] adequate supervision, training programs, staffing and control of caseloads."[11] Based on the committee's recommendations, Chief Justice Hennessey advocated establishing a centrally administered and financed system for providing defense counsel to indigent defendants, with uniform standards and training. See id. This eventually led the Legislature to create CPCS in 1983.[12]

2. CPCS. As provided in its authorizing statute, CPCS is responsible for "plan[ning], oversee[ing], and coordinat[ing] the delivery of criminal and certain noncriminal legal services

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working with the Massachusetts Defenders Committee or its sister organization, the Roxbury Defenders Committee.

[10] Rosenfeld, 74 Mass. L. Rev. at 149.

[11] Committee on the Appointment of Competent Counsel for Indigent Criminal Defendants in the District and Municipal Courts, Interim Report to the Justices of the Supreme Judicial Court, at 2 (Dec. 16, 1976).

[12] See Rosenfeld, 74 Mass. L. Rev. at 151; St. 1983, c. 673.

by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis" on behalf of indigent criminal defendants and other litigants who are entitled to counsel. G. L. c. 211D, § 1. See G. L. c. 211D, § 5. The statute also requires CPCS to establish standards for these legal services, including caseload limitations, and to monitor compliance with these standards. See G. L. c. 211D, §§ 9, 10. CPCS's operations are primarily funded by annual appropriations by the Legislature, although it is also authorized to accept gifts and grants from other public or private sources. See G. L. c. 211D, § 3; St. 2019, c. 41, § 2, line item 0321-1500.

CPCS is comprised of several divisions: the PDD, a private counsel division, and three other divisions that provide representation to indigent parties in certain juvenile, family law, and mental health proceedings.[13] See G. L. c. 211D, § 6.

[13] Specifically, CPCS also has a youth advocacy division that provides staff and private attorneys to indigent juveniles in delinquency and youthful offender proceedings in the Juvenile Court and appellate courts; a children and family law division that provides staff and private attorneys to indigent children and parents in children and family law cases in the Juvenile Court and appellate courts; and a mental health litigation division that provides staff and private attorneys to indigent persons in civil commitment proceedings in the Boston Municipal Court, District Court, and appellate courts, and that also assigns private attorneys only in cases involving guardianships, substituted judgment proceedings, and cases involving the validation of health care proxies in the Probate and Family

The PDD provides salaried staff attorneys to represent indigent defendants in criminal proceedings in the Boston Municipal Court, District Court, Superior Court, and appellate courts. The PDD may not represent more than one defendant in any matter before any court on the same case or arising out of the same incident, or a defendant in any case in which there is a conflict of interest with any of its clients. See G. L. c. 211D, § 6 (a). The Legislature currently requires CPCS to "maintain a system in which not less than [twenty percent] of indigent clients shall be represented by public defenders." St. 2019, c. 41, § 2, line item 0321-1500.

Through the private counsel division, CPCS also enters into contractual agreements with bar advocate groups and other organizations for the purpose of providing private defense

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Court. CPCS also provides other essential services to defense counsel and their clients through ancillary units. The immigration impact unit assists defense attorneys in fulfilling their duty to advise noncitizen clients about the immigration consequences of the clients' criminal cases. See Padilla v. Kentucky, 559 U.S. 356, 368-369 (2010); https://www.publiccounsel.net/iiu [https://perma.cc/3DC2-ZEMR]. The drug lab crisis litigation unit advises persons convicted of drug offenses whose convictions may have been tainted by the misconduct of laboratory chemists Annie Dookhan and Sonja Farak. See, e.g., Commonwealth v. Claudio, 484 Mass. 203 (2020); https://www.publiccounsel.net/dlclu/client-resources [https://perma.cc/6EDN-GJ4S]. The EdLaw Project, a partnership among CPCS's children and family division, its youth advocacy division, and the Children's Law Center of Massachusetts, provides training on education issues for juvenile justice and child welfare attorneys. See https://www.publiccounsel.net/edlaw [https://perma.cc/A8A6-JCNL].

attorneys to indigent persons who are not represented by PDD attorneys. The Legislature has established hourly rates of compensation payable to private attorneys whom the private counsel division assigns to represent indigent persons. See G. L. c. 211D, § 11 (a). The statute also sets a billable hours cap at 1,650 hours annually for those attorneys assigned through the private counsel division, and only attorneys appointed in a homicide case may accept any new appointment or assignment after they have billed 1,350 hours in any fiscal year. See G. L. c. 211D, § 11 (b), (c). For fiscal year 2020, however, the Legislature authorized CPCS to waive these 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 accord with the Legislative mandate in G. L. c. 211D, § 9 (c), CPCS sets caseload limitations for both its PDD staff attorneys and the private bar advocates assigned to cases through the private counsel division. According to CPCS, the caseload capacity for each staff attorney "is an individualized determination based on multiple factors, including but not limited to an attorney's experience, volume of cases, types and

severity of cases . . . , and other case-specific demands of those cases." For private bar advocates, CPCS "has adopted a weighted system of caseload limits, with a particular weight for each type of case assignment and an absolute limit of 250 cases per year," according to its assigned counsel manual.[14]

Rule 7 of the Massachusetts Rules of Criminal Procedure provides that, on the day of a defendant's arraignment, if "the court finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel," the court shall appoint CPCS to represent the defendant under S.J.C. Rule 3:10, as appearing in 475 Mass. 1301 (2016). Mass. R. Crim. P. 7 (b) (2), as appearing in 461 Mass. 1501 (2012). See G. L. c. 211D, § 5. In Hampden County, CPCS endeavors to ensure that counsel are available for such appointments through a "duty day" system. A duty day attorney is a PDD staff attorney or private bar advocate who covers a court session, represents indigent individuals at arraignment, and ordinarily accepts assignment of their cases. In some instances, however, duty day attorneys may represent defendants for purposes of bail only, such as when there are too many arraignments that day or a case involves a felony within the

[14] Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures, at 5.16 (version 1.9, Jan. 1, 2019), https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf [https://perma.cc/X6CT-94M3].

exclusive jurisdiction of the Superior Court that the attorney is not certified to handle. There may be multiple duty day attorneys assigned to courts with a high number of daily arraignments.

3. Shortage of defense counsel in the Springfield District Court and other Hampden County courts. The Springfield PDD office represents indigent persons in criminal proceedings in the Divisions of the District Court and the Superior Court in Hampden County. CPCS's private counsel division also contracts with HCLJ to provide additional private defense attorneys to represent indigent persons in the Hampden County courts. The Springfield PDD office's staff attorneys and private defense attorneys provided through HCLJ are responsible for covering duty days in the Springfield District Court and other courts in Hampden County.

According to the parties, because the Springfield District Court handles so many arraignments, it should, ideally, be covered by five duty day attorneys on Mondays or Tuesdays after holidays, and four duty day attorneys on the other days of the workweek. This would require coverage for approximately eighty to nearly one hundred duty day slots per month. The Springfield PDD office has ordinarily covered ten duty day slots per month in the Springfield District Court, leaving the remaining slots to be covered by HCLJ-supplied bar advocates.

According to HCLJ's bar advocate administrator, the number of duty day slots actually covered by bar advocates in the Springfield District Court has decreased significantly over the last three years, from 1,034 duty day slots (an average of eighty-six per month) in fiscal year 2016, to 992 duty day slots in fiscal year 2017, to 762 duty day slots in fiscal year 2018, and finally to only 442 duty day slots (an average of thirty-seven per month) in fiscal year 2019. This precipitous decline has made it increasingly difficult for HCLJ to provide the necessary duty day coverage, and consequently the Springfield PDD office has had to step in to make up the difference. CPCS reports that the Springfield PDD office's District Court caseload rose from 2,161 cases in fiscal year 2018 to 2,942 cases in fiscal year 2019 -- a thirty-six percent increase. Although this increase was partially offset by a decrease in the number of Superior Court cases handled by the Springfield PDD office at that time, the combined number of District and Superior Court cases in that office was still twenty percent higher in fiscal year 2019 than in the previous fiscal year, according to CPCS.

From June through October 2018, there were a number of days when either no bar advocates or not enough bar advocates signed up to fill duty day slots in the Springfield District Court, and consequently it was a struggle to provide consistent coverage

even by three duty day attorneys. From June through August 2018, for example, there were seventeen court days during which only two duty day attorneys were scheduled, and sixteen court days covered by only one attorney. To make up for these shortfalls, Springfield PDD staff attorneys covered additional duty day slots over and above the usual ten, and as a result they were assigned to handle additional cases.

At a meeting on October 9, 2018, the attorney in charge of the Springfield PDD office informed the First Justice of the Springfield District Court that the staff attorneys' caseloads had exceeded their capacity. Thereafter, the Springfield PDD office stopped taking duty days or accepting cases for the remainder of October and all of November 2018.

From December 2018 through March 2019, Springfield PDD staff attorneys continued to maintain high caseloads and again started covering more than their usual ten duty days in the Springfield District Court. By March 2019, CPCS determined that these attorneys could not take any more cases. Because of the shortage of bar advocates, however, the Springfield PDD office continued to cover the arraignment session in the Springfield District Court, but it did so for purposes of bail only in March, April, and May 2019.

Meanwhile, significant duty day coverage problems were also arising in the other Divisions of the District Court in Hampden

County (Hampden County District Courts). As of June 13, 2019, there were several court days without any scheduled duty day attorney coverage in Chicopee (one day), Holyoke (five days), Palmer (eight days), and Westfield (nine days). In addition, the number of District Court cases in Hampden County for which no defense counsel had been assigned was rising precipitously, jumping from twenty-three in May 2019, to 155 in June, to a high of 169 on July 3, according to HCLJ's bar advocate administrator. As of June 13, five unrepresented defendants were in custody, and four of them had been held on bail for more than seven days without counsel, according to CPCS.

In June 2019, the attorney in charge of the Springfield PDD office determined that the caseload of every staff attorney in that office exceeded his or her capacity. After meeting with the staff attorneys, CPCS's deputy chief counsel agreed with this assessment and concluded that the office could no longer continue staffing the arraignment session in the Springfield District Court.

Accordingly, on June 11, 2019, the attorney in charge and the supervising attorney of the Springfield PDD office met with the First Justice of the Springfield District Court and informed him that the Springfield PDD office could not handle any more duty days, even for purposes of bail only. At that meeting, the First Justice gave the attorney in charge the June 12 order,

requiring him to provide counsel in the Springfield District Court "who shall accept appointment in all cases as ordered by the Court." In a subsequent letter, the First Justice confirmed that he was ordering these appointments for all purposes, not just for bail only. Between June 12 and June 28, the Springfield District Court assigned Springfield PDD staff attorneys, "under protest," to represent the defendants in approximately 113 criminal cases.

On July 12, 2019, in an effort to encourage more duty day coverage in the Hampden County District Courts, CPCS instituted an emergency duty day rate of $424, i.e., fifty-three dollars per hour for eight hours of court time, for those attorneys willing and able to take a duty day and accept assignment of the cases arraigned that day. By August 1, attorneys had stepped forward to cover an additional 241 duty day slots in the Hampden County District Courts, with 134 duty day slots filled by HCLJ attorneys and another 107 slots filled by out-of-county attorneys. As a result, the number of unfilled duty day slots in the Hampden County District Courts through September 30 was greatly reduced.[15]

[15] Since that time, CPCS has repeatedly extended the emergency duty day rate. On January 27, 2020, CPCS reported that, as a result of its extension of the emergency duty day rate through the end of March 2020, most of the previously unfilled duty day slots in the Hampden County District Courts for February and March 2020 had been filled.

CPCS also gradually decreased the number of unassigned cases, including those cases assigned to the Springfield PDD office under protest, by recruiting attorneys from HCLJ, from out-of-county bar advocate programs, and from other CPCS staff offices. As of August 1, 2019, there were eighty District Court defendants without counsel, and none of them was being held pretrial. As of September 6, the Hampden County District Courts reported only three unrepresented defendants, and as of September 10, the cases initially assigned to the Springfield PDD office under protest all had separate counsel.

4. Proceedings below. On June 14, 2019, CPCS filed an emergency petition in the county court pursuant to G. L. c. 211, § 3, seeking to vacate the June 12 order that required the attorney in charge of the Springfield PDD office to provide defense counsel at the arraignment session of the Springfield District Court. That same day, CPCS also appeared before the First Justice of the Springfield District Court and requested that he vacate the June 12 order, or stay it pending appellate review. The First Justice denied those requests. When the Springfield District Court proceeded to appoint Springfield PDD office attorneys as defense counsel, as discussed above, CPCS filed a motion before the single justice in the county court seeking to vacate these appointments.

On June 28, 2019, pursuant to the parties' agreement, the single justice in the county court entered an interim order superseding the June 12 order and adopting the Lavallee protocol in its stead. On July 24, the single justice entered a further order reserving and reporting the entire case for consideration by this court.

Discussion.[16] 1. Right to appointed counsel in criminal proceedings and Lavallee. The constitutional right to counsel in a criminal prosecution, guaranteed by art. 12 and the Sixth and Fourteenth Amendments, entails "the right of indigent defendants charged with serious crimes to have counsel appointed at public expense" (footnote omitted). Commonwealth v. Porter, 462 Mass. 724, 728 (2012). See Gideon, 372 U.S. at 342-345; Lavallee, 442 Mass. at 234. This right to appointed counsel is essential to ensuring fairness in our criminal justice system

[16] The present case is arguably now moot, because the June 12 order has been superseded by the Lavallee protocol under the single justice's interim order on June 28, 2019; because counsel has been assigned to the defendants in all the cases that were initially assigned to the Springfield PDD office "under protest"; and because it appears that the number of unrepresented defendants in Hampden County has been substantially reduced. We nevertheless exercise our discretion to address the issues raised in this case because they are of singular public importance; they have been fully briefed and argued on both sides; they are very likely to arise again in similar factual circumstances; and appellate review may not be obtained in a future case before these recurring issues would again be moot. See Lockhart v. Attorney Gen., 390 Mass. 780, 782-784 (1984).

because it affords defendants, regardless of their financial circumstances, access to the legal assistance they need to assert all their other rights. See United States v. Cronic, 466 U.S. 648, 654 (1984), quoting Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have"). The "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law" would be of little value "if the poor man charged with crime has to face his accusers without a lawyer to assist him," because "'[e]ven the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense.'" Gideon, 372 U.S. at 344-345, quoting Powell v. Alabama, 287 U.S. 45, 69 (1932).

Because the assistance of counsel is so fundamental to the protection of a defendant's rights, the appointment and appearance of a defense attorney to represent an indigent person must take place as promptly as possible. We explained why at length in Lavallee.

First, because bail hearings under G. L. c. 276, §§ 57 and 58, and preventive detention hearings under G. L. c. 276, § 58A, put a defendant's liberty at stake, the defendant has a due

process right under art. 12 to be represented by counsel at these pretrial proceedings. Lavallee, 442 Mass. at 234. "Neither a bail hearing nor a preventive detention hearing may proceed unless and until the defendant is represented by counsel." Id.

Second, "[t]here are myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel under art. 12." Id. at 235. These responsibilities include interviewing the defendant, locating and interviewing other witnesses while their memories are still fresh, and preserving physical evidence. Id. They also include providing "assistance in making decisions about specific defenses and trial strategies, which may rise to the level of [a] 'critical stage' of the process."[17] Id. Without counsel, these "[c]ritical stage opportunities may pass without a defendant's knowledge, and even if they can be revisited, the opportunity to

[17] "The Sixth Amendment and art. 12 provide criminal defendants the right to counsel at all 'critical stages' of the prosecution." Commonwealth v. Neary-French, 475 Mass. 167, 170 (2016). The determination whether an event is a "'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'" Coleman v. Alabama, 399 U.S. 1, 9 (1970), quoting United States v. Wade, 388 U.S. 218, 227 (1967).

develop them as fully had counsel been available may be impaired." Id. at 236.

For these reasons, the assignment and appearance of defense counsel should ordinarily occur at arraignment, as provided in Mass. R. Crim. P. 7 (b) (2) and (c) (1), as appearing in 461 Mass. 1501 (2012), and S.J.C. Rule 3:10. See Lavallee, 442 Mass. at 236-237 (Mass. R. Crim. P. 7 [b] and [c] require appearance of counsel to be filed at arraignment, with some limited exceptions, to ensure assistance of counsel for pretrial investigation and critical stage decisions). See also id. at 234-235 ("right to trial counsel under art. 12 attaches at least by the time of arraignment").[18] Significant delay after

[18] Ideally, the attorney assigned to represent an indigent defendant at arraignment should continue that representation throughout the case. See Mass. R. Crim. P. 7 (c) (2), as appearing in 461 Mass. 1501 (2012) (unless otherwise specified, filing of appearance by attorney "shall constitute a representation that the attorney shall represent the defendant for trial or plea"); American Bar Association, Eight Guidelines of Public Defense Related to Excessive Workloads, at 2 (Aug. 2009) (ABA Guidelines), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf [https://perma.cc/H899-7GT3] (listing, in Guideline 1, "[w]hether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal" as one standard for measuring "whether the performance obligations of lawyers who represent indigent clients are being fulfilled"). Nevertheless, we recognize that, due to scheduling conflicts, varying workloads among available attorneys, and the need to assign more complex cases to attorneys who have the requisite experience and expertise, it may not always be practical for the lawyer who appears at arraignment to continue representing the

arraignment in the assignment and appearance of counsel for an indigent defendant endangers that defendant's right to counsel. See id. at 236-237.

In Lavallee, we had to determine an appropriate remedy for a situation where a shortage of defense attorneys led to a significant delay in the assignment of counsel for a substantial number of defendants. As in the present case, in 2004 there was a shortage of bar advocates willing to take cases in Hampden County, and, due to CPCS's own staffing and funding limitations, PDD staff attorneys could not fill the void. Id. at 230-232. Consequently, on two successive days in May 2004, no bar advocates appeared in the Springfield District Court and many indigent defendants were arraigned and held on bail or subjected to preventive detention without the benefit of counsel. Id. at 232. In response, the presiding judge assigned the chief counsel for CPCS to represent those defendants, and the following day, the judge denied the chief counsel's motions to assign the cases to private counsel at rates exceeding those approved by the Legislature. Id. at 232-233.

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client throughout an entire case. See Mass. R. Crim. P. 7 (c) (2) (authorizing court to permit appearance by attorney for limited time, and allowing attorney who files appearance on or before arraignment to withdraw within fourteen days if successor trial counsel files simultaneous appearance).

When the case came before us via petitions under G. L. c. 211, § 3, filed by unrepresented defendants held in lieu of bail or in preventive detention, we held that the lack of representation deprived these petitioners of their right to counsel under art. 12, resulting in severe restrictions on their liberty and other constitutional interests. Lavallee, 442 Mass. at 232. We concluded that the presiding judge's case assignments to CPCS's chief counsel did not fulfill the defendants' rights to counsel, because no attorney had filed an appearance in any of these cases, and the "constitutional guarantee of the assistance of counsel 'cannot be satisfied by mere formal appointment.'" Id. at 235, quoting Avery v. Alabama, 308 U.S. 444, 446 (1940). See Lavallee, supra at 237. We also concluded that the petitioners were entitled to relief even without a specific showing of harm from the deprivation of counsel. Since the petitioners were unrepresented, they could not be expected by themselves to assess and to demonstrate the seriousness of any harm to them. Id. at 237-238. Instead, we held that, "[b]ecause the petitioners are seeking redress for the ongoing violation of their fundamental constitutional right that affects the manner in which the criminal case against them will be prosecuted and defended, it is enough that they have shown a violation of that right that may likely result in irremediable harm if not corrected." Id. at 238.

To remedy these constitutional violations, we crafted the Lavallee protocol. First, we established presumptive time limits for the assignment of counsel. We ruled that "an indigent defendant who is held in lieu of bail or under an order of preventive detention may not be held for more than seven days without counsel," and that "no defendant entitled to court-appointed counsel may be required to wait more than forty-five days for counsel to file an appearance." Id. at 246.

Second, we outlined a system for implementing these time limits, subject to further refinements by the single justice after consultation with the relevant officials. We ordered the clerk-magistrates of the Hampden County District Courts and Superior Court to compile weekly lists of all unrepresented criminal defendants and forward the lists to the RAJ for the Superior Court, the RAJ for the District Courts, the district attorney, the Attorney General, and the chief counsel for CPCS. Id. at 247. We then provided that the Superior Court RAJ should schedule a prompt status hearing for each unrepresented defendant who had been held in pretrial detention for more than seven days, or whose case had been pending for more than forty-five days. Id. at 247-248. If a defendant was still unrepresented as of the time of the hearing, and if the Superior Court RAJ determined both that CPCS had made a good faith effort to secure representation and that no counsel was willing and

available to represent that defendant, then the Superior Court RAJ was required to order the following: (1) release on personal recognizance of any defendant held in lieu of bail or on preventive detention for more than seven days, subject to probationary conditions under G. L. c. 276, § 87, which could be ordered without the defendant's consent; and (2) dismissal of the charges without prejudice, until such time as counsel was made available, with respect to any defendant 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 unless the judge had declared an intention not to impose a sentence of incarceration, pursuant to G. L. c. 211D, § 2A (now G. L. c. 211D, § 2B). See id. at 247-249. This procedure balanced the constitutional rights of indigent defendants with due concern for public safety,[19] by focusing first on obtaining counsel for unrepresented defendants, and authorizing release from pretrial detention, or dismissal of charges without prejudice, only as a last resort when all efforts to obtain counsel had failed.

[19] We observed that, in fashioning the Lavallee protocol, "[o]ur duty [was] to remedy an ongoing violation of a fundamental constitutional right to counsel consistently with the government's legitimate right to protect the public's safety." Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246 (2004).

With the Lavallee protocol in mind, we now turn to the June 12 order and the subsequent appointments of PDD staff attorneys as counsel for indigent defendants pursuant to that order, which we conclude were invalid.

2. Review of June 12 order and subsequent appointments of CPCS staff attorneys as counsel. We first acknowledge the bedrock principle that "courts of general jurisdiction under [our] Constitution have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake." Crocker v. Justices of the Superior Court, 208 Mass. 162, 179 (1911). Judges have inherent authority "to control and supervise personnel within the judicial system," including the "power . . . 'to control a court's own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court'" (alteration omitted). 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, 397-398 (2003), quoting Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n, 404 Mass. 53, 57 (1989).

We also appreciate the challenging circumstances that the First Justice faced when he issued the June 12 order. He properly recognized that indigent defendants were entitled to

representation for bail and detention hearings and that their criminal cases could not proceed without timely appointment of defense counsel. In the absence of any specified procedure enabling trial court judges to trigger the Lavallee protocol, he issued the June 12 order in an attempt to assure representation for indigent defendants, thereby permitting new criminal cases to continue, while setting the stage for appellate review of the situation.

Nevertheless, we conclude that the First Justice's June 12 order was invalid and overstepped the bounds of his inherent powers because it infringed upon CPCS's statutory authority to control assignments and to limit caseloads for its staff attorneys under G. L. c. 211D. For the same reason, we also conclude that subsequent assignments of cases to CPCS staff attorneys "under protest," pursuant to that order, were also invalid.

a. CPCS's statutory authority. We have held that "CPCS has the sole authority under G. L. c. 211D for the assignment of counsel to indigent criminal defendants," and "a judge may not override that authority." Deputy Chief Counsel, 477 Mass. at 179. General Laws c. 211D, § 5, provides that, after a judge determines that a defendant is indigent, the "justice or associate justice shall assign a case to [CPCS]" (emphasis added). Considering this provision in the context of the entire

statutory scheme and the historical background that led to CPCS's creation, we have interpreted this language to mean that "[t]he judge's role is to determine indigency and to assign the case to CPCS," while "the role of CPCS is to assign the case to an attorney with responsibility to represent the defendant." Deputy Chief Counsel, supra at 186-187. The judge's authority over the initial assignment of defense counsel for an indigent defendant ends once a case has been assigned to CPCS, and the judge does not assign a particular attorney.[20] See id. at 187 (holding that judge's authority to select attorney for drug court team "must give way to the clear statutory duty of CPCS to assign counsel").

Chapter 211D also requires and empowers CPCS to establish "specified caseload limitation levels" for the PDD, as well as the private counsel division, and to "monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants." G. L. c. 211D, §§ 9 (c), 10. Since the statute

[20] We note that this separation of the judiciary from the process of selecting defense counsel for assignment is consistent with American Bar Association (ABA) guidelines. "The ABA endorses complete independence of the defense function, in which the judiciary is [involved neither] in the selection of counsel nor in their supervision. This call for independence applies to public defender programs, as well as to indigent defense programs that furnish private assigned counsel and legal representation through contracts." (Footnotes omitted.) ABA Guidelines, supra at 6, comment to Guideline 2.

expressly delegates this authority to CPCS, and CPCS has experience and expertise in managing the caseloads of its staff attorneys, CPCS's caseload limitations established pursuant to these statutory directives, as well as its resulting determinations as to whether individual staff attorneys have exceeded those limitations, are entitled to appropriate deference when supported by substantial evidence.[21]

That is not to say that CPCS's caseload determinations are exempt from judicial scrutiny.[22] This court, in the exercise of its supervisory authority over the administration of justice, has the power to review CPCS's decisions in that area. See G. L. c. 211, § 3; First Justice of the Bristol Div. of the Juvenile Court Dep't, 438 Mass. at 397 ("The scope of inherent

[21] See ABA Guidelines, supra at 13, comment to Guideline 7 ("When [public defense providers] file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because [p]roviders are in the best position to assess the workloads of their lawyers"). Cf. Massachusetts Elec. Co. v. Department of Pub. Utils., 469 Mass. 553, 565 (2014) ("Because the Legislature delegated the authority to adopt performance standards to the department, we defer to its expertise . . ."). Cf. also State ex rel. Missouri Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 597, 602-603 (Mo. 2012) (holding that caseload protocol promulgated by State public defender commission pursuant to its statutory rulemaking authority must be followed unless it is held invalid or inapplicable).

[22] CPCS's counsel acknowledged at oral argument that CPCS's caseload determinations and good faith efforts to provide defense counsel for eligible defendants are subject to judicial review.

judicial authority reaches beyond traditional adjudicatory powers and encompasses [but is not limited to] the court's power to commit the fiscal resources of the Commonwealth and other governmental agencies necessary to ensure the proper operation of the courts . . ."). Indeed, one reason for establishing a procedure for triggering the Lavallee protocol, as discussed further below, is to create an orderly process for review of CPCS's caseload determinations, with findings and rulings made after an evidentiary hearing, if it becomes necessary in light of an apparent shortage of defense counsel.

But in this case, the June 12 order was not based on any judicial review of CPCS's caseload determinations. The attorney in charge of the Springfield PDD office and the deputy chief counsel of CPCS determined that the staff attorneys in that office had exceeded their caseload capacity and that, consequently, they could not accept any more cases in the Springfield District Court. The First Justice did not make any findings that put in doubt the validity of that determination. Instead, while the First Justice's decision is understandable in light of the lack of appellate guidance and the urgency of the matter at hand, the June 12 order impermissibly overrode CPCS's decision, disregarding CPCS's statutory authority and obligation to control caseloads for its staff attorneys.

Further, insofar as the June 12 order required the attorney in charge of the Springfield PDD office to provide defense counsel for the Springfield District Court, it effectively compelled the attorneys under his direction in that office to appear and accept appointments, and thereby improperly interfered with CPCS's "sole and independent authority to assign counsel for indigent defendants." Deputy Chief Counsel, 477 Mass. at 187. The Attorney General argues on behalf of the respondents that the June 12 order did not trespass on CPCS's authority to assign cases internally because it did not require a particular lawyer to handle a particular case. But the June 12 order had the effect of overriding CPCS's authority to control case assignments by requiring Springfield PDD staff attorneys to appear and accept additional appointments "as ordered by the Court," even though CPCS had already determined that they should not do so due to their existing caseloads, and even though the court had not made any findings showing that CPCS's decision was erroneous. The June 12 order thereby exceeded the limits on judicial authority to assign defense counsel that we delineated in Deputy Chief Counsel, supra.[23]

[23] The Attorney General also argues that the June 12 order was justified by G. L. c. 211D, § 6 (a) (iii), which provides that "notwithstanding any general or special law to the contrary, the [PDD] shall be assigned in any civil or criminal matter" that would otherwise be assigned to private counsel,

For these reasons, we conclude that the June 12 order and subsequent appointments of CPCS staff attorneys pursuant to that order improperly infringed on CPCS's statutory authority to control assignments and set caseload limits for its staff attorneys.[24]

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pursuant to G. L. c. 211D, § 6 (b), "if the chief counsel [for CPCS] determines in writing that insufficient numbers of qualified attorneys are available for assignment by the private counsel division." In support of that proposition, the Attorney General cites a June 13, 2019 letter that the Chief Counsel of CPCS sent to the Chief Justice of the Trial Court, describing the shortage of private bar advocates willing and able to take cases. But this letter was sent after the June 12 order, as the Attorney General acknowledges, and it does not appear to have been intended to trigger the procedure outlined in G. L. c. 211D, § 6 (a) (iii). Moreover, in the circumstances of this case, we decline to interpret this provision in a manner that is at odds with the other provisions of c. 211D regarding the power of CPCS to control case assignments and caseload levels for its attorneys. See L.L. v. Commonwealth, 470 Mass. 169, 179 (2014), quoting Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n, 394 Mass. 233, 240 (1985) ("When the meaning of a statute is brought into question, a court properly should read other sections and should construe them together . . . so as to constitute an harmonious whole consistent with the legislative purpose").

[24] We note that in Lavallee vs. Justices of the Hampden Superior Court, Supreme Judicial Court, Nos. SJ-2004-198 & SJ-2004-199 (Suffolk County Aug. 9, 2004), the single justice vacated a judge's order on similar grounds, where the order required a CPCS staff attorney to file an appearance for certain defendants notwithstanding the attorney's representation that the number of cases assigned to attorneys in the Hampden County public counsel division office had reached the caseload limit established by CPCS. The single justice observed that CPCS was authorized by the Legislature to establish caseload limits "to ensure quality representation for indigent criminal defendants," that CPCS was exercising its discretion in carrying out a legislative function, and that it was presumed to act in good faith in determining caseload limits.

b. Ethical and constitutional concerns. We also take this opportunity to discuss certain ethical and constitutional concerns that are implicated by the First Justice's June 12 order. To be clear, we do not hold that the June 12 order actually resulted in any ethical or constitutional violations. In her reservation and report, the single justice stated that, on the record before her, she was unable to determine definitively whether any defendant was being deprived of the effective assistance of counsel, and we are in no better position to make such a determination. But given the possibility that a shortage of defense counsel may recur in the future, we wish to point out the potential ethical and constitutional pitfalls that may result if CPCS staff attorneys are ordered to accept additional cases over and above the caseloads that they can reasonably handle.

Under Rule 1.3 of the Massachusetts Rules of Professional Conduct, a lawyer must "act with reasonable diligence and promptness in representing a client." Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015). Requiring defense attorneys to take on more clients than they can reasonably handle may impede their ability to meet this obligation. Comment 2 to rule 1.3 points out that a "lawyer's work load must be controlled so that each matter can be handled competently." Id. In addition, having too many clients and matters at once may create

concurrent conflicts of interest, implicating Mass. R. Prof. C. 1.7, if attorneys are then forced to pick and choose between clients who will receive their limited time and attention, and others who will necessarily be neglected. See Mass. R. Prof. C. 1.7, as appearing in 471 Mass. 1335 (2015).[25] For these reasons, the American Bar Association's guidelines for public defense workloads specifically recommend that public defense providers "avoid[] excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients."[26]

Furthermore, the "right to counsel means the right to effective assistance of counsel." Lavallee, 442 Mass. at 235. Ordering assignment of additional cases to public defenders who are already carrying maximum caseloads risks making them ineffective, by hindering them from, among other

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[25] See also State ex rel. Missouri Pub. Defender Comm'n, 370 S.W.3d at 608, quoting In re Edward S., 173 Cal. App. 4th 387, 414 (2009) ("a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing"); ABA Guidelines, supra at 5, comment to Guideline 1 ("an excessive number of cases [can] create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services").

[26] ABA Guidelines, supra at 2, Guideline 1. Of course, we recognize that an excessive workload may have an adverse impact on assistant district attorneys as well.

responsibilities, giving adequate attention to contesting pretrial detention if necessary, investigating their cases, making strategic decisions, filing pretrial motions, and preparing for trial, thereby defeating the very purpose of the right to counsel. In effect, such a solution improperly shifts "the burden of a systemic lapse" in the public defender system to the very defendants the system was intended to protect, transgressing Lavallee's injunction that this burden "is not to be borne by defendants." Id. at 246.

3. Triggering the Lavallee protocol. Before setting out a procedure for triggering the Lavallee protocol in circumstances like those presented here, we emphasize first the importance of flexibility and cooperation among the courts, CPCS, and district attorneys in mitigating the effects of a shortage of available defense counsel whenever it arises. Frequent communication, adjusting scheduling and staffing of court events when appropriate, improving efficiency of operations, and triaging cases to prioritize those involving the most serious charges and those where counsel are most urgently needed (e.g., cases where the defendants are in pretrial detention awaiting a hearing under G. L. c. 276, § 58A), may help to manage the impact of a shortage of defense counsel before it becomes constitutionally intolerable. The Lavallee protocol is strong medicine, involving a considerable administrative burden and the dismissal

of criminal charges and release of defendants who might otherwise be held pretrial. It should therefore be preceded by strenuous and innovative collaborative efforts to find alternative solutions to a shortage of defense counsel whenever possible.

When such efforts fail, and a substantial number of indigent defendants remain unrepresented[27] due to a shortage of defense counsel, CPCS or the RAJ overseeing a court affected by the shortage may seek to trigger the Lavallee protocol by filing a petition requesting such relief in the single justice session of this court under G. L. c. 211, § 3. If filed by CPCS, the petition may be brought on behalf of the unrepresented defendants and name the courts affected by the shortage as respondents. The petition may challenge a particular order

[27] Because circumstances may vary from one situation to another, we are reluctant to set a specific number of unrepresented indigent defendants as a required threshold for filing the petition described herein. The gravity of the situation may depend not only on the absolute number of unrepresented indigent defendants, but also on whether they are in pretrial detention and the seriousness of the charged offenses. We note that the two single justice petitions in Lavallee were filed on behalf of a total of twenty-four defendants who were being held in pretrial detention without counsel, and that CPCS's chief counsel subsequently reported that fifty-eight indigent defendants with pending cases were unrepresented, with thirty-one held in custody. Lavallee, 442 Mass. at 230, 232 n.10. In the present case, it has been reported that 155 defendants were unrepresented in June 2019 and five unrepresented defendants were being held in pretrial detention as of June 13, 2019.

issued by a trial court judge, as in this case, but it need not necessarily do so.[28] If filed by a RAJ, the petition may name CPCS as respondent. In either case, intervention by the district attorney may also be appropriate.

The single justice may then handle the case directly, or transfer it to a trial court department for assignment to a judge serving in the region affected by the shortage of defense counsel for an evidentiary hearing to make factual findings and, if requested by the single justice, recommended rulings, pursuant to G. L. c. 211, § 4A.[29] In either case, the single justice or trial court judge should conduct the evidentiary

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[28] "Where . . . a systemic issue affecting the proper administration of the judiciary has been presented, resolution of the issue by this court [pursuant to G. L. c. 211, § 3,] is appropriate and 'should not await some fortuitous opportunity of report or ordinary appeal.'" Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't, 448 Mass. 57, 61 (2006), quoting A Juvenile v. Commonwealth (No. 1), 380 Mass. 552, 556 (1980).

[29] See G. L. c. 211, § 4A ("The supreme judicial court or a justice thereof may transfer for partial or final disposition in any appropriate lower court any cause or matter which might otherwise be disposed of by a single justice, and said lower court shall thereupon have jurisdiction thereof, subject to appeal, and shall have such assistance from other departments or from the use of writs and process as the law provides shall be available to it or any other court with respect to like causes or matters . . ."). Ordinarily we would expect the Chief Justice of the trial court department to assign the matter to a judge who is familiar with the legal landscape in the region experiencing the shortage of defense counsel.

hearing[30] promptly and make findings regarding the number of unrepresented indigent defendants; the length of time for which they have been unrepresented; the current caseloads of local CPCS staff attorneys and bar advocates; whether CPCS and the local bar advocate organization have engaged in good faith efforts to provide counsel for unrepresented indigent defendants; whether there is a shortage of available defense counsel and, if so, what has caused the shortage; how long the shortage has continued and is likely to continue; the prospects for remedying the problem; and such other issues as the single justice or the presiding judge may deem pertinent. The ultimate decision whether to trigger the Lavallee protocol should then be made by the single justice, on the basis of the record, these findings, and any recommended rulings. Specifically, the single justice must determine whether, despite good faith efforts by CPCS and the local bar advocate organization, there is an ongoing systemic violation of indigent criminal defendants' constitutional rights to effective assistance of counsel due to CPCS's incapacity to provide such assistance through its staff attorneys or through bar advocates. See Lavallee, 442 Mass. at 244 ("our powers of general superintendence require us to fashion an appropriate remedy" where there is a "continuing

[30] The single justice or presiding judge may rely on affidavits or hear testimony as he or she deems appropriate.

constitutional violation suffered by indigent criminal defendants"). If the single justice determines that there is such an ongoing systemic violation, then an order imposing the Lavallee protocol is warranted.

Finally, we note that nothing herein prohibits a judge in his or her court room session from deciding that ordering release of a defendant who has been held in pretrial detention without counsel, or ordering dismissal of the charges without prejudice where a defendant has been unrepresented, is constitutionally required in the particular circumstances of an individual case. We emphasize, however, that the lapse of the time limits for appointment of counsel that we established in Lavallee does not automatically entitle defendants to release or dismissal of the charges,[31] although it is a significant factor to be considered.

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[31] As noted, the Lavallee protocol does not authorize immediate release of an unrepresented defendant who has been held in pretrial detention for more than seven days, or dismissal of charges, without prejudice, against a defendant who has been unrepresented for more than forty-five days. The remedies of release from pretrial detention or dismissal of charges only become available if, at the time of a subsequent status hearing before the regional administrative justice of the Superior Court, the defendant remains unrepresented and, despite the good faith efforts of CPCS, there is no attorney willing and available to represent the defendant. Lavallee, 442 Mass. at 248. We reiterate, however, that a judge in an individual session retains the power and the responsibility to determine whether there has been a constitutional violation in a particular case.

4. Other remedies. The Lavallee protocol is only a temporary remedy, and it is not a panacea for solving the underlying shortage of defense counsel. To do that requires more systemic change. Toward that end, the parties and certain amici have suggested and debated various proposals for increasing the supply of private bar advocates willing and available to take cases in Hampden County. To the extent that these proposals involve disputed recommendations for changes in the internal operations of the Springfield District Court, the district attorney's office, and CPCS, we are not in a position to determine their merits, nor would we presume to impose them, based on the present record.

There is, however, one remedy on which the parties and nearly all the amici appear to agree: increasing the statutory rates of compensation for bar advocates. They have identified low rates of compensation for bar advocates as a major factor in discouraging private attorneys from accepting court appointments, and they argue that increases are urgently needed to encourage greater participation. We also note that the recent report of the Supreme Judicial Court Steering Committee on Lawyer Well-Being identified financial stress as a central issue affecting the well-being of privately assigned counsel,

and it recommended increasing their hourly rates to address this problem.[32]

The bar advocate rates currently established by G. L. c. 211D, § 11, are fifty-three dollars per hour for District Court cases, sixty-eight dollars per hour for Superior Court nonhomicide cases, and one hundred dollars per hour for homicide cases. Despite some increases in recent years,[33] even today these rates still fall short of the rates proposed by a legislative commission created many years ago to study the provision of counsel to indigent persons in the wake of Lavallee. In its April 2005 report, that commission "strongly recommend[ed]" that the hourly rates for private attorneys should be increased to fifty-five dollars per hour for District Court cases, seventy dollars per hour for Superior Court nonhomicide cases, and $110 per hour for murder cases by fiscal

[32] See Supreme Judicial Court Steering Committee on Lawyer Well-Being, Report to the Justices, at 26 (July 15, 2019); id. at Appendix 3 (CPCS Subcommittee Report, at 1, 4).

[33] A 2005 amendment to G. L. c. 211D, § 11, established hourly rates for attorneys appointed by the private counsel division at fifty dollars for District Court cases, sixty dollars for Superior Court nonhomicide cases, and one hundred dollars for homicide cases. See St. 2005, c. 54, § 2. The hourly rates for District Court cases and Superior Court nonhomicide cases were respectively raised to their current levels by amendments that took effect in 2016 and 2018. See St. 2015, c. 46, §§ 119, 212; St. 2018, c. 154, §§ 49, 113.

year 2008.[34] The gap between today's rates and the commission's recommended rates is even greater if the recommended rates are adjusted for inflation since the end of fiscal year 2008, which yields current recommended rates of sixty-five dollars per hour for District Court cases, eighty-two dollars per hour for Superior Court cases, and $129 per hour for murder cases.[35] More recently, the May 2014 report of the Massachusetts Bar Association's Commission on Criminal Justice Attorney Compensation proposed adopting the hourly rate for Federal defenders in noncapital cases, which was $125 at the time, as a benchmark for bar advocate rates in Massachusetts.[36]

Experience demonstrates that increases in compensation do remedy counsel shortages. CPCS addressed the recent crisis in

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[34] Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, at 18-19 (Apr. 2005), http://www.bostonbar.org/prs/nr_0809/cpcs_commreport.pdf [https://perma.cc/8SC6-AEXA].

[35] Inflation-adjusted rates were determined by using the Bureau of Labor Statistics CPI Inflation Calculator, available at https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=110&year1=200806&year2=201910 [https://perma.cc/5SLX-9AQN], to calculate the change in value of the commission's recommended rates from June 2008 to December 2019.

[36] Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation, Doing Right by Those Who Labor for Justice, at 21 (May 2014). The current hourly rate for Criminal Justice Act panel attorneys in Federal noncapital cases is $148. See United States Courts, Defender Services, https://www.uscourts.gov/services-forms/defender-services [https://perma.cc/7653-PJQX].

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.[37] The fact that CPCS was able to remedy these shortages effectively when given the tools to do so also underscores the value of having a centrally administered and financed system for providing defense counsel, as advocated by Chief Justice Hennessey.

As we did in Lavallee, we defer to the Legislature "[a]s the representative branch in charge of making laws and appropriating funds" to determine the best approach to increase compensation rates for bar advocates.[38] Lavallee, 442 Mass. at

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[37] We note, however, that piecemeal regional or temporary solutions may not be sufficient to avoid future instability in providing counsel for indigent defendants. For example, CPCS's emergency duty day rate in Hampden County reportedly drew some bar advocates away from Franklin and Hampshire Counties, and bred dissatisfaction among others over the disparity in rates. There is also evidence in the record of bar advocate shortages in Franklin County and Worcester County, in addition to Hampden County.

[38] We would be remiss if we did not at least make passing reference as well to how underpaid our State prosecutors and CPCS staff attorneys have been for many years. The Governor's Commission to Study Compensation of Assistant District Attorneys and Staff Attorneys for the Committee for Public Counsel

243. We understand that CPCS has discussed the shortage of bar advocates with the Legislature, and we are confident that the Legislature will take additional actions as necessary, "exercis[ing] prudence and flexibility in choosing among competing policy options to address the rights of indigent defendants to counsel." Id. at 243-244. While we have inherent power to ensure the proper operations of the courts and to protect them from impairment resulting from a lack of supporting personnel, O'Coins, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972), "this inherent power is a duty which must be borne responsibly," and "with due consideration for the prerogatives of the executive department and the Legislature, whenever exercise of an inherent judicial power would bring us near the sphere of another department," id. at 515-516.

We take this opportunity, however, to point out that funding appointed counsel for indigent defendants has many important social benefits beyond the constitutional imperative

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Services concluded in its 2014 Report that the starting salaries for assistant district attorneys and CPCS staff counsel in Massachusetts were lower than their counterparts in New York and in every other New England state, and more than $10,000 below the national median for similar entry level public criminal justice attorneys. Id. at 6. Fortunately, the Legislature has recently taken steps to address these disparities. See St. 2018, c. 154, § 2, line item 0321-1500; St. 2019, c. 41, § 2, line item 0340-6653.

of protecting the rights of the accused. Appointment of defense counsel enhances the adversarial process by testing the prosecutor's case, and thereby increasing the likelihood that criminal proceedings will reach a result that is legally and factually correct. See Martinez v. Ryan, 566 U.S. 1, 12 (2012) ("Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence . . ."); Lavallee, 442 Mass. at 238, quoting Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) ("The absence of [defense] counsel for pretrial preparation 'puts at risk . . . the reliability of the adversarial testing process'"); Subilosky v. Commonwealth, 349 Mass. 484, 488 (1965) (applying Gideon right-to-counsel rule retrospectively because criminal judgments obtained against defendant without counsel "lack[ed] reliability"). Thus, by increasing the accuracy of convictions, the appointment of defense counsel promotes public safety and public confidence in the criminal justice system, and helps to avoid not only the personal tragedy suffered by a defendant who is wrongly convicted, but also the related waste of government resources and the social costs incurred when an innocent person is incarcerated and removed from his or her family, community, and workplace.

Furthermore, in protecting the rights of the accused, defense attorneys also help to ensure the integrity of our

justice system and to protect all of the Commonwealth's residents against the dangers of governmental misconduct or overreach. See, e.g., Commonwealth v. Lewin, 405 Mass. 566, 586 (1989), S.C., 407 Mass. 617, 407 Mass. 629, and 408 Mass. 147 (1990), (in carrying out his responsibilities, defense counsel "uncovered contemptible and disgusting misconduct by police officers" whose "criminal and reprehensible behavior intrudes on the constitutional rights of us all by undermining the integrity of our system of constitutional protections"). For example, when a defense attorney succeeds in suppressing evidence gathered in violation of the constitutional protections against unreasonable searches and seizures, it deters future misconduct and thereby protects the rights of the entire populace, not just the attorney's client. See Segura v. United States, 468 U.S. 796, 817 (1984) (Stevens, J., dissenting) ("a primary purpose of the Fourth Amendment's exclusionary rule [is] to ensure that all private citizens -- not just these petitioners -- have some meaningful protection against future violations of their rights"); Commonwealth v. Santiago, 470 Mass. 574, 578 (2015) ("The primary purpose of the exclusionary rule is to deter future police misconduct by barring, in a current prosecution, the admission of evidence that the police have obtained in violation of rights protected by the Federal and State Constitutions"). And when the Commonwealth is vigorously held

to its burden of proof through zealous defense counsel, the quality of police investigations and prosecutions often improve both systemically and in the case at hand.

In sum, by promoting the integrity and accuracy of the government's law enforcement operations, a robust public defender system not only protects the rights of indigent defendants, but also helps to increase public safety, to avoid the costs of wrongful convictions, and to protect the constitutional rights of all of the Commonwealth's residents. And where the public defender system fails to fulfill its mission due to inadequate funding, that failure not only undermines the constitutional rights of indigent defendants, but indirectly injures us all.

Finally, we call upon all members of the bar to consider stepping forward to assist in representing indigent defendants, by undergoing training and certification to become bar advocates. We applaud the lawyers who have already done so, but many more are needed. Providing representation to persons of limited means is both a professional obligation for attorneys and an opportunity. There has been concern in recent years over the disappearance of jury trials and the difficulty of finding

opportunities for new lawyers to gain court room experience.[39] Participating in bar advocate programs offers that experience. There is also a need for more attorneys to participate in the bar advocacy program. As described above, for a century Massachusetts attorneys regularly represented indigent defendants without compensation in capital cases, as a service to the community and the profession. A similar spirit of public service is needed now.

Conclusion. For the reasons stated, we hold that the June 12 order and subsequent appointments of CPCS staff attorneys in the Springfield PDD office pursuant to that order were 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

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[39] See, e.g., United States v. Reid, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002) ("the American jury system is dying out -- more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts -- but dying nonetheless"); Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67 (2006); Sims, A New Experience: As Trials Diminish, New Lawyers Need Additional Options To Hone Courtroom Skills, Mass. Law. J., vol. 25, no. 3, Jan./Feb. 2018, 1. See also Sims, supra at 10, quoting Massachusetts Superior Court Policy Statement, adopted Dec. 1, 2017 ("In our current Superior Court docket, fewer cases go to trial than in the past, thereby reducing the opportunities for less experienced counsel to have an active role in a courtroom. This is especially true in our civil docket. Without the chance to speak in a courtroom -- whether to argue a motion before a judge or to address a jury at trial -- future generations of litigators will be less equipped to represent their clients effectively and to advance in their profession").

County and whether the Lavallee protocol imposed by the single justice is still required.

So ordered.