SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY **NO. 09268**

NATHANIEL LAVALLEE, et al.

v.

THE JUSTICES OF THE HAMPDEN SUPERIOR COURT, et al.

MICHAEL CARABELLO, et al.

v.

THE JUSTICES OF THE HOLYOKE DISTRICT COURT

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

BRIEF OF AMICUS CURIAE – BOSTON BAR ASSOCIATION

R. J. Cinquegrana (BBO # 084100)
Michelle L. Dineen Jerrett (BBO # 634930)
Terrence M. Schwab (BBO # 650793)
Choate, Hall & Stewart
Exchange Place
53 State Street
Boston, MA 02109
(617)248-5000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Rules

I. INTEREST OF AMICUS

The mission of the Boston Bar Association ("the BBA"), founded in 1761 by lawyers including John Adams, is to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large. The BBA, calling on the vast pool of legal expertise of its members, serves as a resource for all three co-equal branches of government – the judiciary, the legislature and the executive branch.

The interests of the BBA in this case relate most strongly to its goal of promoting access to justice for indigent persons. To that end, the Boston Bar Association believes it can add to the record in this case by presenting a comprehensive review of the evolution of indigent legal defense programs in Massachusetts and the chronic lack of funding suffered at each stage of their development. The BBA published the results of its watershed study in this area in the late 1970s, the Action Plan for Legal Services. Together with the results of the work of the Wilkins Committee sponsored by the Supreme Judicial Court, those efforts predicted the establishment of a statewide agency which would be responsible for all

indigent defense services in the Commonwealth. With the subsequent establishment of the Committee for Public Counsel Services that goal was reached. However, without adequate funding for those services, the constitutional rights of indigent defendants cannot be secured.

II. STATEMENT OF THE ISSUE

The amicus accepts the Statement of the Issue as set forth in the brief of the Petitioners.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The amicus adopts the Statement of the Case and the Statement of the Facts as set forth in the brief of the Petitioners.

IV. SUMMARY OF THE ARGUMENT

The Petitioners have made a showing that a constitutional crisis exists in the Springfield and Holyoke District Courts. The crisis is the result of the inadequate hourly rates offered to private attorneys for the representation of indigent defendants. The petitioners seek a determination that the crisis warrants this Court's intervention by use of its supervisory powers under G.L. Chapter 211, Section 3.

This Court should intervene, as requested by the petitioners, because the present crisis is only the most recent manifestation of the Commonwealth's chronic failure to adequately fund indigent defense services. Without judicial intervention, that failure is likely to continue.

V. ARGUMENT

A. FOR ALMOST FIFTY YEARS, THE COMMONWEALTH HAS RECOGNIZED THE RIGHTS OF INDIGENTS TO DEFENSE COUNSEL BUT FAILED TO PROVIDE ADEQUATE FUNDING TO SECURE THOSE RIGHTS.

1. An Overview of the Provision of Counsel to Indigent Defendants in the Commonwealth

In 1958, five years before the U.S. Supreme Court's landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Judicial Court acted to guarantee the provision of counsel to indigent defendants in certain cases.[1] That year, the Court promulgated Rule 10 of its General Rules which required the appointment of counsel for indigent defendants in Superior Court non-capital felony cases.[2] During the next three decades, the right to counsel

---

[1] See Arnold R. Rosenfeld, The Right to Counsel and Provision of Counsel for Indigents in Massachusetts: The Hennessey Era, 74 Mass. L. Rev. 148, 148 (1989) ("Special Issue: A Tribute to Edward F. Hennessey") [hereinafter Right to Counsel]. **[See ADDENDUM at 00002, hereinafter "ADD. _____"].**

[2] 337 Mass. 813 (1958). See also Right to Counsel at 148-49. **[ADD. 00002-03].**

was extended to virtually all types of criminal cases and to certain non-criminal cases.[3]

Prior to the creation of the Committee for Public Counsel Services ("CPCS"), no single agency had

---

[3] See Right to Counsel at 148-49, 151-52. **[ADD. 00002-03, 00005-06].** In 1962, the Supreme Judicial Court modified Rule 10 to permit the appointment of counsel if a judge, in his discretion, "determines that the gravity of the charge or other circumstances require such representation." 345 Mass. 792 (1962). In 1964, eight years before the U.S. Supreme Court's similar decision in Argersinger v. Hamlin, 407 U.S. 25, 36 (1971), the Supreme Judicial Court again modified Rule 10 to provide for the appointment of counsel in all cases where a defendant faced possible imprisonment. 347 Mass. 809 (1964).

In the late 1970s and early 1980s, the right to counsel was extended to certain non-criminal matters. First, parents were given the right to counsel in cases involving the custody of a child. See Department of Public Welfare v. J.K.B., 379 Mass. 1, 3 (1979) (holding that the right to counsel was constitutionally rooted in the Fourteenth Amendment to the federal Constitution and Article 10 of the Massachusetts Declaration of Rights). Second, a right to counsel for the indigent was recognized in certain mental health matters. See G.L. c. 123, § 5, amended by St. 1986, c. 599, § 38 (requiring the court to appoint counsel in commitment hearings, any further retention hearing, or for medical treatment including treatment with antipsychotic medicine). See also Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 757 (1977) (holding that the appointment of a guardian ad litem was required to represent the interests of an incompetent party to advance arguments in favor of administering treatment to prolong life); In the Matter of Moe, 385 Mass. 555 (1982) (holding that the guardian ad litem has to zealously represent the ward in a proposed sterilization of an incompetent person); Rogers v. Commissioner of the Dep't of Mental Health, 390 Mass. 489 (1983) (holding that a guardian ad litem was required in cases where antipsychotic medication was involved). Third, a right to counsel was recognized for minors seeking abortions. See Baird v. Attorney General, 371 Mass. 741, 762-64 (1977) (holding that the superior court had the power to assign counsel to assist a minor in her constitutionally protected right to an abortion).

The 1990s also have seen a further expansion in the right to counsel. The Legislature now requires that indigents be provided counsel in matters before the Sex Offender Registration Board and in Sexually Dangerous Persons proceedings. See G.L. c. 211D, §16, added by St. 1999, c. 74, §10 (requiring counsel for indigents subject to the sex offender registry system); see also G.L. c. 123A, §§ 13-14, added by St. 1999, c. 74, §8 (requiring that counsel be appointed for indigents in determining whether a youth is a sexually dangerous person).

responsibility for carrying out these mandates for the provision of counsel.[4] Instead, various groups shared the burden of carrying out the state's responsibility in this area. The Massachusetts Defenders Committee ("MDC"), a state-funded public defender agency, provided representation in some courts throughout the Commonwealth. County bar advocate programs, affiliated with local county bar associations, provided the majority of indigent defense representation in all counties except Suffolk and Berkshire. The Roxbury Defenders Committee ("RDC"), established in 1971 to serve Boston's minority neighborhoods,[5] provided indigent representation in the Roxbury District Court and Suffolk Superior Court.[6]

In the late 1970s, the Supreme Judicial Court and the Boston Bar Association commenced studies, which ultimately recommended the reorganization of existing mechanisms for the delivery of legal services to indigent defendants. In 1976 Chief Justice Hennessey

---

[4] Committee for Public Counsel Services, First Annual Report 1 (1985) [hereinafter First Annual Report]. **[ADD. 00014].**

[5] William J. Rose & Robert L. Spangenberg, Action Plan for Legal Services, Part 2: Report on Criminal Defense Services to the Poor in Massachusetts 123 (1978) [hereinafter Action Plan]. **[ADD. 00182].**

[6] First Annual Report at 1. **[ADD. 00014].** The Chief Administrative Judge of the Trial Court administered the funds that provided payment for indigent defense programs, with the exception of the MDC, and private bar appointments. Id. **[ADD. 00014].**

appointed Justice Wilkins to chair a Committee on the Appointment of Competent Counsel For Indigent Criminal Defendants in the District and Municipal Courts ("the Wilkins Committee").[7] At the same time, the BBA established the Action Plan for Legal Services Project ("the Action Plan"), which surveyed the needs of indigents for both civil and criminal legal services.[8] Both of these efforts recommended a centralized system for the provision of indigent defense services, which was implemented in the form of CPCS in 1983. In addition, through a series of amendments the Supreme Judicial Court ultimately revised Rule 10 (presently Rule 3:10 of the Rules of the Supreme Judicial Court resulting from a 1967 repeal, reissue, and renumbering of all rules)[9] to require appointment of CPCS in all but exceptional circumstances.[10]

This reorganization has achieved substantial progress toward satisfying the obligation of the Commonweath to provide indigent defense services. At each turn, change was catalyzed by the recognition

---

[7] Right to Counsel at 149. **[ADD. 00003].**
[8] Action Plan at i. **[ADD. 00061].**
[9] 351 Mass. 731, 791 (1967).
[10] 355 Mass. 803 (1969). See also Rule 3:10, sect. 5 of the Supreme Judicial Court Rules (2004).

that existing structures were inadequate and under-funded.

2. From Their Inception, Organizations Which Provided Indigent Defense Services Were Under-Funded

Even before the Supreme Judicial Court adopted Rule 10 and the U.S. Supreme Court decided Gideon, volunteer organizations existed for the purpose of providing legal services to indigent defendants in Massachusetts. The Voluntary Defenders Committee, a charitable corporation that relied primarily upon charitable contributions to fund its work, was established in 1935 through the efforts of five attorneys who believed that indigents should be entitled to a fair trial.[11] When the Supreme Judicial Court promulgated Rule 10 in 1958, organizations such as the Voluntary Defenders Committee served an important role in the assignment of counsel.[12] After the adoption of Rule 10, however, community funding sources that financed the Voluntary Defenders Committee became increasingly reluctant to continue

[11] Edward J. Duggan, Counsel for the Indigent Defendant in Massachusetts, 2 Boston Bar J. 23, 25 (1958) [hereinafter Counsel for the Indigent]. **[ADD. 00349].** The Voluntary Defenders Committee provided counsel in Suffolk, Middlesex and Norfolk Counties. In 1954, the Springfield Voluntary Defenders Committee opened its doors and supplied counsel for Berkshire, Hampden, Hampshire and Franklin Counties. Id. at 25-26. **[ADD. 00349-50].**

[12] Id. at 26. **[ADD. 00350].**

their support of "what is essentially a state obligation."[13]

In 1956 the Massachusetts Bar Association's Special Committee on Counsel for Indigent Defendants noted the absence of funding for indigent defense and recommended that attempts should be made to finance the Voluntary Defenders Committees through legislation authorizing the expenditure of public funds for that purpose. [14] Notwithstanding Rule 10's mandate and the recognized need for funding for the Voluntary Defenders Committees, the Massachusetts Legislature did not provide any compensation for attorneys assigned to such criminal cases.[15] It was not until 1960 that legislation was enacted to establish and fund the MDC, which was the first state-funded indigent defense agency responsible for providing counsel to indigent defendants charged with felony offenses.[16]

---

[13] Id. **[ADD. 00350].**
[14] Id. at 29 (quoting Special Committee on Counsel for Indigent Defendants of the Massachusetts Bar Association, (June 5, 1956)). **[ADD. 00353].**
[15] Counsel for the Indigent at 28. **[ADD. 00352].**
[16] St. 1960, c. 565; see also Right to Counsel at 149. **[ADD. 00003].**

3. The Massachusetts Defenders Committee and County Bar Advocate Programs

In the years following the establishment of the MDC, the Supreme Judicial Court increasingly recognized the right to counsel for indigents,[17] which ultimately included the right to counsel in all cases "for which a sentence of imprisonment may be imposed."[18] Courts appointed both the MDC and private attorneys in indigent cases, but because there was no uniform system of payment for private attorneys, the Supreme Judicial Court cautioned that judges "should ordinarily assign [MDC] attorneys" and advised that the power to assign non-MDC attorneys be exercised sparingly.[19] In 1969, in an effort to create uniformity in the appointment of counsel to indigents, the Supreme Judicial Court amended Rule 10, now Rule 3:10, to require judges to assign the MDC unless "exceptional circumstances" justified a different appointment.[20]

---

[17] See footnote 3 supra.
[18] Right to Counsel at 149. **[ADD. 00003].** See also 347 Mass. 809 (1964).
[19] Abodeely v. County of Worcester, 352 Mass. 719, 724 (1967).
[20] 355 Mass. 803 (1969). See also Right to Counsel at 149. **[ADD. 00003].**

During the 1970s, the Massachusetts Legislature did not provide sufficient funding for the MDC to handle appointments made under Rule 3:10.[21] Faced with an insufficient budget, between 1973 and 1977 the MDC reduced its caseload in the district courts to "insure quality representation for individual clients" and, consequently, "a transfer of a substantial portion of the burden of financing defender services to the county level."[22] With an increased caseload of indigent defendants,[23] counties also attempted to reduce the expenses of providing representation through the locally-funded private bar and county defender programs.[24]

By 1978, the MDC had not had a significant increase in funding in at least three years.[25] The Legislature's failure to appropriate sufficient funds to the MDC was a significant factor in the MDC's

---

[21] Action Plan at 229. **[ADD. 00287].**
[22] Id. **[ADD. 00287].**
[23] Id. **[ADD. 00287].** The MDC coverage of district courts decreased from a 36% share of all indigent appointments in 1973 to a 16% share in 1977. Id. **[ADD. 00287].** Between 1973 and 1975, private assigned counsel costs for the counties increased by more than 70% from $900,000 in 1973 to almost $1.6 million in 1975. Id. at 175. **[ADD. 00234].**
[24] Id. **[ADD. 00234].** The Action Plan found that "[s]ince a major share of these [indigent defense] costs were financed from local property taxes, county commissioners came under pressure to find cheaper ways to meet county obligations for representation under S.J.C. Rule 3:10." Id. **[ADD. 00234].**
[25] Id. at 232. **[ADD. 00290].** Moreover, in 1978, the total MDC operating funds were reduced. Id. **[ADD. 00290].**

reduction in district court coverage. Without adequate funding, the MDC was unable responsibly to maintain its increasing appointments in indigent cases.[26] In addition, the MDC and RDC had difficulty attracting and retaining qualified lawyers.[27]

In 1978, the BBA's Action Plan recognized the effect of these cost restraints on the quality of services that were being provided to indigent defendants:

> It is wholly inappropriate to evaluate defender systems on the basis of cost alone. The characteristics of cost and quality have been in direct conflict with respect to providing defender services. Ordinarily, cutting costs has only been accomplished by eliminating either essential defense-related services or by dispensing with proper administrative planning and management. Furthermore, it has also resulted in the overburdening of defenders with excessive case loads in an effort to save the expense of hiring a larger staff. These types of economic measures, though common, are unjustifiable since they violate the rights of indigent defendants to quality representation.[28]

---

[26] Id. at 175. **[ADD. 00234].**

[27] The RDC had particular trouble in hiring minority lawyers because the RDC salary of $14,000-16,000 was too low to compete with affirmative action of larger public and private institutions for qualified minority attorneys. Id. at 130. **[ADD. 00189].** "[E]ven though both the MDC and RDC provide some opportunity for career and salary advancement within the respective organizations, given their generally non-competitive salary schedules neither can be rated as a true career service organization." Id. at 219. **[ADD. 00277].**

[28] Id. at 238. **[ADD. 00296].**

In response to the reduced MDC coverage in the district courts, utilization of county defender programs increased in the 1970s.[29] The county defender programs were budgeted on a "salary-only" basis, without funds earmarked for support services.[30] The comparatively low annual salaries offered by local defender systems tended to attract young and inexperienced attorneys.[31] There was no effort to control caseloads.[32] As summarized by the Action Plan,

---

[29] Id. at 133. **[ADD. 00192].** Norfolk County created the first county defender program in 1972, and within 3 years Hampshire and Essex Counties started similar programs. By the end of 1977, locally funded defenders in county defender programs replaced Rule 10 (Rule 3:10) counsel in 8 of Massachusetts' 14 counties. Id. **[ADD. 00192].**

[30] Id. at 134. **[ADD. 00193].** In Middlesex County, the defenders program relied on court personnel to help with their administrative tasks. This system tended to foster an allegiance to the court which negatively effected the commitment that a defense lawyer has to his clients. Id. at 160-61. **[ADD. 00219-20].**

[31] Id. at 134. **[ADD. 00193].** For example, Essex County had twelve defenders in 1975, each paid $12,000 per year to represent indigents on all charges except murder. Id. at 146. **[ADD. 00205].** To persuade lawyers to accept such low salaries, counties permitted county defenders to maintain private law practices in addition to the defender work. Id. at 216, 237. **[ADD. 00274, 00295].** While counties offered lower salaries to the defenders as a result, many defenders faced both a full-time indigent defense caseload on a part-time basis and potential conflicts with the demands of maintaining a private practice. Id. at 216, 163-64 (noting that most defenders had outside practices in places other than their assigned court and frequently left early to handle their private law firm business). **[ADD. 00274, 00222-23].**

[32] Id. at 215. **[ADD. 00273].** The caseloads for county defenders in Essex County were well above the levels recommended by the National Advisory Commission on Criminal Justice. Id. at 155. **[ADD. 00214].** Six of twenty-two defenders (27%) in Middlesex county bear caseloads which exceed manageable levels for misdemeanor representation as prescribed by the National Advisory Commission on Standards and Goals. "The Middlesex County defender program, like its predecessors, was developed to effect

> The private assigned counsel system and the county defender models for the most part include no provisions for training, supervision, caseload control, quality control or defense related support services. These systems largely do not conform to the accepted standards for the organization of a defender system and, as a result, the quality of service which they provide suffers.[33]

The system of assigning private counsel under Rule 10 faced similar funding problems. Rule 10 counsel were permitted to submit a bill for services to the court once the district court proceedings were concluded.[34] Despite the rigid requirements under Rule 10,[35] data collected by the Action Plan suggested that variations in the fee structures existed in the district court system, an apparent reflection of the "pressure to minimize the costs of defending the poor,"[36] especially in the counties with the highest aggregate expenditures.[37] The lack of sufficient funding resulted in less attention to indigent clients

---

a cost savings. Consequently, absent stringent caseload controls, a built-in incentive existed to overload the defenders—to assign to them as many cases as possible." Id. at 166. **[ADD. 00225].**

[33] Id. at 230. **[ADD. 00288].**

[34] Id. at 85. **[ADD. 00146].**

[35] Rule 10 attorneys were to be paid $10 per hour for time spent out-of-court and $15 per hour for in-court time as established under the Rule 10 fee schedule. Id. **[ADD. 00146].**

[36] Id. at 87-88. **[ADD. 00148-49].** The Action Plan found that pressure from locally elected officials resulted in the limitation of Rule 10 fees by some judges. Id. at 88. **[ADD. 00149].**

[37] Id. at 85-88. **[ADD. 00146-49].**

and questions regarding the adequacy of representation.[38] As the Action Plan noted,

> Rule 10 fee schedules are insufficient to ensure the proper degree of effort on the part of private lawyers. For many attorneys, accepting a district court assignment is tantamount to making a pro bono commitment, consequently many capable attorneys avoid accepting indigent cases. Other attorneys either compromise the effort which they devote to their indigent cases or attempt to load up on indigent clients thus establishing a 'volume' practice. . . . [T]he representation which [Rule 10 counsel] offer is frequently of the poorest quality.[39]

4. Recommendations of the Wilkins Committee[40] and the Action Plan

The Wilkins Committee produced an Interim Report to the Justices of the Supreme Judicial Court ("the Interim Report")[41] on December 16, 1976 and a final report on March 21, 1979 ("the Final Report").[42] The Justices of the Supreme Judicial Court subsequently

---

[38] Id. at 74-83, 88. **[ADD. 00135-44, 00149].** Approximately 25% of the sample group of Rule 10 counsel surveyed by the Action Plan admitted that the insufficient fees made it financially necessary to devote less attention to their indigent clients than to private cases. Id. at 89. **[ADD. 00149].**

[39] Id. at 235-36. **[ADD. 00293-94].**

[40] Although the Wilkins Committee submitted an Interim Report and a Final Report to the Justices of the Supreme Judicial Court, see footnotes 41 and 42 infra, it is unclear whether these reports were published in any other way.

[41] See 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 (December 16, 1976) [hereinafter Interim Report]. **[ADD. 00356-59].**

[42] Committee on the Appointment of Competent Counsel for Indigent Criminal Defendants in the District and Municipal Courts, Final Recommendation (March 21, 1979) [hereinafter Final Report]. **[ADD. 00360-67].**

adopted a series of recommendations made by the Wilkins Committee concerning the provision of counsel for indigents.[43] The Interim Report stated certain "broad, tentative conclusions" which the Wilkins Committee "reaffirm[ed], without further specific comment" in its Final Report.[44] Among those conclusions was one which presaged the present debate over the adequacy of approved rates for the private provision of indigent defense.

> The amount of public funds being devoted to the operation of the present system for providing competent counsel to indigents charged with crimes in the District and Municipal Courts is inadequate. We recognize that the expenditure of funds for this purpose is not among the most popular uses of the tax dollar. Nevertheless, providing competent counsel is a constitutional responsibility of the State, and increasing the number of competent private and MDC counsel will enable the system to work more efficiently and economically. Costly delays in criminal proceedings will be obviated, and appeals based on claims of inadequate representation will be minimized. Greater attention to the individual as an individual will permit more constructive and lasting dispositions of criminal charges.[45]

---

[43] Order of the Justices of the Supreme Judicial Court on the Recommendations of the Committee on Counsel for Indigent Defendants in the District and Municipal Courts (April 6, 1979). **[ADD. 00367B].**

[44] See Interim Report, Final Report. **[ADD. 00356, 00360].**

[45] Interim Report at Conclusion 8. **[ADD. 00358-59].**

In its Final Report, the Wilkins Committee recommended that the MDC "assume the major role" of representing indigent defendants, although it recognized that private bar advocacy programs might share that burden, if approved according to standards which the Committee promulgated.[46]

Meanwhile, the Action Plan's Report on Criminal Defense Services was published in 1978. The Action Plan's principal recommendation was the establishment and full funding of a statewide defender agency in Massachusetts.[47] It recommended that counties should be relieved of financial responsibility and the Commonwealth should instead finance indigent defense services, and it outlined an organizational concept for the new agency.[48] Recognizing that the establishment of a new statewide defender agency would be long and difficult, the Action Plan nevertheless concluded that both the creation of the agency and the assumption of its costs "must be adopted to meet the overall needs of the indigents in the Commonwealth. . . . We see no other reasonable alternative."[49]

---

[46] Final Report at Recommendation 1. **[ADD. 00361].**
[47] Action Plan at 243-46. **[ADD. 00300-03].**
[48] Id. **[ADD. 00300-03].**
[49] Id. at 246. **[ADD. 00303].**

In order to ensure adequate funding, the Action Plan recommended that the Commonwealth should expect to appropriate a sum for the MDC "significantly greater than the estimated total of $6.9 million which was spent . . . during fiscal year 1977."[50] Additionally, it recommended that MDC salaries be made competitive with attorney salaries in the district attorneys' offices.[51] This increase in funding was required by the MDC to maintain caseloads at acceptable levels, devote more funds to investigative, social service and supervisory resources, and increase the pay scale for mid-level and experienced trial attorneys in order to begin to create career service opportunities in defender work.[52]

Looking to the county defenders, the Action Plan recommended that all salaried county defenders be hired on a full-time basis and be prohibited from engaging in the private practice of law, and that funds be provided to assure adequate support services.[53] In order to achieve these goals, a new pay

---

[50] Id. **[ADD. 00303].** The Action Plan recommended that the state should double the funds of the MDC in the next two years. Id. at 252. **[ADD. 00309].**
[51] Id. **[ADD. 00309].**
[52] Id. at 2. **[ADD. 00066].**
[53] Id. at 254. **[ADD. 00311].** County defender programs ultimately were eliminated with the establishment of CPCS, replaced by its private counsel division.

scale was recommended that made the salary competitive with other public law positions. In evaluating Rule 10 counsel, the Action Plan acknowledged that some of these recommendations would require additional funds to implement.[54] In particular, it recommended further study of privately assigned counsel to focus on the "proper rate for a fee schedule which will attract competent members of the bar."[55]

5. Even After the Creation of CPCS, Indigent Defense Services Have Not Been Sufficiently Funded

In 1983 the Massachusetts State Legislature established CPCS.[56] The creation of CPCS was a major change in the provision of criminal and certain non-criminal legal services to indigent clients.[57] While the responsibility for assigning counsel remained with the judiciary, the responsibility for training, performance, oversight and payment of counsel was placed squarely within the newly created agency.[58] CPCS became responsible, on a statewide basis, for the planning and coordination of the delivery of criminal

[54] Id. at 256. **[ADD. 00313].**
[55] Id. at 259. **[ADD. 00316].** The Action Plan suggested an hourly fee which would be no less than $20 for out-of-court work and $30 for in-court work. Id. **[ADD. 00316].**
[56] St. 1983, ch. 673, codified in G.L. c. 211D *et seq.*
[57] First Annual Report at 1. **[ADD. 00014].**
[58] See G.L. c. 211D, §§ 1, 5.

legal services by all salaried public counsel, bar advocate programs, and private attorneys serving on a per case basis.[59] While its creation centralized the delivery of legal services to indigent criminal defendants,[60] certain administrative responsibilities, particularly the implementation of rotational assignment systems, were contracted to county bar advocate programs.[61]

Under its enabling statute, CPCS was also charged with the responsibility for setting rates of compensation payable to counsel "appointed or assigned to represent indigents within [CPCS's] private counsel division."[62] While CPCS was responsible for setting the rates, those rates were, by statute, "subject to appropriation" by the Legislature.[63] Within two years, it was evident that CPCS did not have sufficient funds to fulfill its mandate.

---

[59] The National Legal Aid and Defender Association, Statewide Evaluation of the Massachusetts Bar Advocate Program i (Feb. 28, 1986) [hereinafter NLADA Report]. **[ADD. 00371].**

[60] Pursuant to its enabling statute, Mass. General Laws Chapter 211D, CPCS was authorized to 1) establish a definition of "indigency" (G.L. c. 211D, § 2); 2) establish uniform guidelines for the training, qualification and removal of counsel (G.L. c. 211D, § 4); 3) establish, supervise and maintain a system for the appointment or assignment of counsel (G.L. c. 211D, § 5); 4) monitor and evaluate compliance with CPCS standards to ensure competent representation (G.L. c. 211D, § 10); and 5) establish uniform rates of compensation to counsel (G.L. c. 211D, § 11). See also NLADA Report at 1. **[ADD. 00375].**

[61] See NLADA Report at i. **[ADD. 00371].**

[62] G.L. c. 211D, §11.

[63] Id.

In June 1985, CPCS contracted with the National Legal Aid and Defender Association ("NLADA") to conduct a statewide study of the bar advocate programs operating in the district courts throughout the Commonwealth. The major purpose of the study was "to determine the extent to which the Bar Advocate programs were meeting their contractual obligations with the Committee for the delivery of services and to generally assess the quality of representation" provided by attorneys in the bar advocate system.[64] Not surprisingly, NLADA found and highlighted the significant financial constraints facing bar advocates.[65]

> [T]he Bar Advocates are substantially underpaid for the work they do. The "duty day" scheme of compensation operates to create a disincentive for diligence, tenacity, and competent advocacy. Because a Bar Advocate is paid a flat rate per

[64] NLADA Report at i. **[ADD. 00371].**

[65] Inadequate compensation levels contributed to questions about the quality and adequacy of representation. The lack of adequate compensation was perceived to be a significant deterrent in attracting and keeping experienced attorneys in the bar advocate program. Id. at 11. **[ADD. 00385].** Moreover, inadequate compensation negatively impacted the quality of representation in the bar advocate programs. Id. at 11-12. **[ADD. 00385-86].** A significant proportion of bar advocates admitted that they were forced to forego some appropriate defense activities because of the lack of compensation. Thirty six percent of the attorneys surveyed indicated that they had, in fact, neglected to perform an activity in their client's best interest because of the financial considerations. Id. at 12. **[ADD. 00386].** Many bar advocates conducted little or no factual investigation and only the most cursory attempt to identify and produce witnesses for the defense. Id. at 14. **[ADD. 00388].**

> assigned day – regardless of the number of the number of cases assigned or difficulty of the cases – the attorney is forced to make a cost/benefit decision every time he or she considers an additional court appearance or considers how much investigation will be done. The study discovered a disheartening admission by a substantial proportion of Bar Advocate attorneys that there are instances when they forego appropriate defense related activities because the inadequate compensation makes that additional effort economically infeasible.[66]

As of October 1, 1985, the compensation rates for bar advocates ranged from per diem rates ($150 for a District Court assignment for an entire day) to flat rates ($50 flat fee per defendant claiming *de novo* jury-of-six trial) to hourly rates ($25 per hour for out-of-court time and $35 per hour for in-court time for jury trials and evidentiary hearings).[67] As a result of the strong criticism of the per diem payment system in the NLADA Report, hourly compensation rates adopted earlier by the Supreme Judicial Court – $25 per hour for out-of-court time and $35 per hour for in-court time – were implemented statewide, and no

[66] Id. at ii. **[ADD. 00372].** The NLADA study also found that although the quality of representation varied widely among bar advocate attorneys, bar advocates all too often failed to provide a minimally acceptable level of representation to their indigent defendant clients. Id. at 5. **[ADD. 00379].** The NLADA study concluded that the bar advocate system appeared to have been designed to provide only the most minimal levels of representation. Id. at 10. **[ADD. 00384].**

[67] Id. at 28-29. **[ADD. 00402-03].**

differentiation was made between District Court cases and Superior Court cases.[68] No further hourly rate changes occurred during the remainder of the 1980s.

Although these changes were a step in the right direction, they did not go far enough. CPCS continued to receive inadequate funding from the legislature while it was assigned increased responsibilities for the provision of counsel to the indigent.[69]

In December, 1993 the Massachusetts Bar Association created its Commission on Criminal Justice Attorney Compensation ("the MBA Commission")[70] to address its concerns regarding the adequacy and fairness of payment for attorneys working in the Massachusetts criminal justice system. The MBA Commission compared the salaries of Massachusetts criminal justice attorneys (prosecutors, public defenders, and private bar counsel alike), criminal justice attorneys in other jurisdictions, non-criminal

---

[68] See generally Report to the Legislature on the Committee for Pubic Counsel Services, at ¶ (h). **[ADD. 00501]**; Committee for Public Counsel Services, Fiscal Year 2002 Budget Proposal (February 27, 2001) [hereinafter Fiscal Year 2002 Budget Proposal] **[ADD. 00503-08]**; Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation, Striking a Balance: Adequate Compensation – Effective Representation: Fair Compensation for Criminal Justice Attorneys 22, 27-28 (November 1994) [hereinafter Striking a Balance] **[ADD. 00533, 00538-39]**. For murder cases, the hourly rate was set at $50. Fiscal Year 2002 Budget Proposal. **[ADD. 00507]**.

[69] See footnote 3 supra.

[70] Striking a Balance at 1. **[ADD. 00512]**.

justice publicly employed attorneys, and attorneys in private practice, and it issued recommendations with respect to compensation.[71] The MBA Commission compared compensation rates in states with "populations, economies and jurisdictional units similar to Massachusetts."[72]

The MBA Commission found that "the present rate [of compensation] is not only confiscatory but, in fact, casts a chilling effect on an indigent client's right to counsel."[73] It described eloquently the constitutional implications of the under-funded system.

> Public service is a noble undertaking which requires some sacrifice. However, in view of the immense responsibility involved in the prosecution and defense of criminal cases and the skill, integrity and commitment required of prosecutors and defense attorneys, society must pay compensation which is fair and reasonable. The present salaries paid to those attorneys working in our criminal justice system are so inadequate that it is extraordinarily difficult to employ or retain the best lawyers. The cost of living, housing, transportation, medical care and education, makes it impossible for dedicated

[71] Id. at 1, 11-29. **[ADD. 00512, 00522-40].**
[72] Id. at 3. **[ADD. 00514].**
[73] Id. at 23. **[ADD. 00534].** The MBA Commission feared that "[e]ven the most diligent and dedicated attorney, when inadequately compensated, might have to forgo necessary case preparation and consultation with expert witnesses and critical witnesses may be overlooked without proper investigative resources." Id. **[ADD. 00534]** (quoting American Bar Association, The Indigent Defense Crisis 6 (Aug. 1993)**[ADD. 00552]**).

> individuals to remain in positions where the sacrifices on themselves and their families have become so burdensome.
>
> The present rates of compensation paid to . . . public defenders and bar advocates are unfair and unjust to the men and women performing this essential and invaluable public service, and to the citizens of the commonwealth who need and deserve a justice system that works properly as our forebearers [sic] intended.
>
> Inadequate funding for the attorneys handling the prosecution and defense responsibilities within our system presently denies the commonwealth's citizens a criminal justice system that functions properly.[74]

The MBA Commission's conclusion was no different than its predecessors: "The administration of criminal justice is in crisis, and will remain in crisis, until we adequately compensate those attorneys responsible for making the system work. The need to act is obvious, and the time to act is now."[75]

B. CURRENT RATES OF COMPENSATION FOR INDIGENT DEFENSE SERVICES ARE TOO LOW TO ATTRACT A SUFFICIENT NUMBER OF COMPETENT COUNSEL.

CPCS has demonstrated to this Court that there exists a crisis in the Springfield and Holyoke District Courts created by the inadequate rates of compensation offered to private attorneys. The

[74] Striking a Balance at 4-5. **[ADD. 00515-16].**
[75] Id. at 5. **[ADD. 00516].**

problem is demonstrated by a comparison of those rates to recent national averages regarding income levels and overheard costs of attorneys in solo and small firm practices.

In 2002, Altman Weil, Inc., a management consulting organization dedicated exclusively to providing consultation to legal organizations, issued a special report entitled "The 2002 Small Law Firm Economic Survey" ("the 2002 Survey").[76] The 2002 Survey, which was specifically directed toward solo practitioners and lawyers in small firms (firms of 2-5 and 6-12 lawyers) was conducted with the intent of aiding small firms in improving the management of their economic position in the marketplace.[77] The 2002 Survey is based on data provided by 116 participating law firms from various regions across the nation, including hourly rates, billable hours, compensation, gross receipts and overhead expenses.[78]

The 2002 Survey found that the national median hourly billing rate for solo/small firm partners in

[76] Altman Weil, Inc., The 2002 Small Law Firm Economic Survey (2002). **[ADD. 00584-710].**
[77] See id. at 5. **[ADD. 00588].**
[78] Id. **[ADD. 00588].**

2001[79] was $185.[80] The national median hourly billing rate for attorneys with under 2 years of experience was $125, the rate for attorneys with 4-5 years of experience was $140, and the rate for attorneys with 8-10 years of experience was $153.[81]

The national average annual income per lawyer in 2002 was $154,682.[82] The 2002 Survey found that, on average, approximately 46% of gross revenues are spent on overhead expenses associated with maintaining a law practice.[83]

No one expects that lawyers would devote their entire practices to work at the current CPCS rates. Nor is it argued that those rates should be sufficient to sustain a practice. However, compared to these averages, the CPCS rates do not approach covering the cost of operating a solo or small firm practice.

If an attorney were to bill 1,500 hours annually at even the lowest median hourly billing rate reflected in the 2002 Survey - $125 for lawyers with under two years experience - a total of $187,500 in

---

[79] Id. at 9 (noting that earnings and billable hours information was compiled from 2001 statistics for the 2002 Survey). **[ADD. 00592].**
[80] See id. at 49. **[ADD. 00632].**
[81] Id. at 58. **[ADD. 00641].**
[82] Id. at 25. **[ADD. 00608].**
[83] Id. at 23. **[ADD. 00606].**

revenue would be generated. After spending $86,250 on overhead costs (46% of the gross), the average lawyer would earn $101,250 or about $67.50 per hour. Put another way, for every hour this average lawyer works, about $57.50 would be spent on overhead.

The cost of practicing law certainly varies depending on the type of practice. However, a comparison of a hypothetical practice at the CPCS rates reveals that they do not support anything close to the cost of operating an average law practice. The current CPCS rates are $30 per hour for District Court, $39 per hour for Superior Court, and $54 per hour for murder cases. If an attorney were to bill the same 1,500 hours at CPCS rates and spend the same 46% of gross revenue on overhead, the lawyer would earn $24,300 (54% of $45,000) in the District Court; $31,590 (54% of $58,500) in the Superior Court, and $43,740 (54% of $81,000) trying murder cases. Using the same overheard rate as the national average, this translates to income of $16, $21, and $29 per hour. This analysis ignores that all law practice likely requires a minimum fixed level of costs, which would increase the overhead rate for CPCS bar advocates, further reducing their income.

These are gross comparisons, and the costs may widely vary. Once again, no one suggests that compensation rates for indigent defense should be sufficient, by themselves, to support a law practice. However, when it can be demonstrated that existing rates produce earnings less than what is necessary to run a law practice, they are insufficient to attract the number of competent counsel necessary to satisfy the state's obligation to provide these constitutionally mandated services.

VI. CONCLUSION

In 1976, the Wilkins Committee predicted the present crisis when it expressed its reluctance to recommend increased hourly rates. "Until it is clear that the private bar will not come forward in sufficient numbers, either for no compensation or at the present modest hourly charges now in effect, we do not recommend an increase in the allowed hourly rates. Representation of indigent defendants in the District and Municipal Courts is not intended to be a significant portion of a private attorney's income."[84]

No system providing indigent defense services should be designed to produce "a significant portion

[84] Interim Report at Conclusion 5. **[ADD. 00357].**

of a private attorney's income." However, the private bar's pro bono service should not be expected to relieve the state of its obligation to implement this constitutional component of the criminal process. As this Court recognized 36 years ago: "[T]he bar has a duty to undertake the defence of indigents without compensation and . . . that obligation accompanies a license to practice at the bar. But times have changed. We do not deal with a profession where it is commonplace for a lawyer to spend one day at his office and the next in court. . . . [O]f the very small percentage of lawyers who can be said to be trial lawyers an even smaller percentage of them has developed skills in the practice of criminal prosecution and defence. It is unjust that this comparative handful of individuals should alone bear the burdens which are rightly those of all of the bar and indeed of the community and the taxpayers." Abodeely v. County of Worcester, 352 Mass. 7159, 723 (1967).

As the Wilkins Committee stated: "[a] measure of the effectiveness of our constitutional system of government may be the degree to which the public is willing to make sacrifices which permit that system to

work fairly for all, even for those who have no respect for the system." [85] If the system is to work fairly, the Commonwealth must comply with the mandates of Gideon and this Court regarding the provision of indigent defense counsel. For fifty years the Commonwealth's evolving responses to those mandates have been well meaning and important improvements over the status quo. Nevertheless, at each stage sufficient funds were not provided, and they are not being provided today. As a result, it falls to this Court to insist upon what may be a harsh reality: that the system will not work fairly - especially for the defendants - unless defense counsel are paid adequate compensation.

Respectfully submitted,

BOSTON BAR ASSOCIATION
AMICUS CURIAE

By its attorneys,

_____

R. J. Cinquegrana (BBO # 084100)
Michelle L. Dineen Jerrett (BBO # 634930)
Terrence M. Schwab (BBO # 650793)
Choate, Hall & Stewart
Exchange Place
53 State Street
Boston, MA 02109
617)248-5000

[85] Interim Report at Conclusion 8. **[ADD. 00359].**

CERTIFICATE OF SERVICE

I, Michelle L. Dineen Jerrett, certify that on June 29, 2004, I served a copy of the attached Brief *Amicus Curiae* of the Boston Bar Association on the following parties either by hand or overnight mail:

Ronald F. Kehoe
Assistant Attorney General
Government Bureau
One Ashburton Place, Rm. 2019
Boston, MA 02108-1698

William J. Leahy, Esq.
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108

William C. Newman, Esq.
ACLU of Massachusetts
39 Main Street
Northampton, MA 01060

David P. Hoose, Esq.
1145 main Street, Suite #304
Springfield, MA 01103

John Reinstein, Esq.
Civil Liberties Union of Mass
99 Chauncey Street, Suite #310
Boston, MA 02111

_____
Michelle L. Dineen Jerrett(BBO# 634930)