

No. 21-

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IN THE  
**Supreme Court of the United States**

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PEDRO VASQUEZ, *Petitioner,*

v.

MASSACHUSETTS, *Respondent.*

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**On Petition for Writ of Certiorari  
to the Massachusetts Supreme Judicial Court**

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**PETITION FOR A WRIT OF CERTIORARI**

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March 1, 2021

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## QUESTIONS PRESENTED

1. Whether the Massachusetts Supreme Judicial Court impaired the obligation of a contract in contravention of Article I, sec. 10, cl. 1 of the U.S. Constitution and the Fourteenth Amendment, to pay attorney's fees for an indigent defendant who, while having court-appointed trial counsel, retained private appellate counsel to defend him against an interlocutory appeal brought by the prosecutor, where the state rule of criminal procedure provides payment of attorney's fees for the defendant's choice of counsel and the funds for the interlocutory defense are provided for and appropriated by state statute?

2. Whether the Massachusetts Supreme Judicial Court's new requirement that attorney's fees be advanced to secure a defendant's right to be reimbursed for exercising their right to choose counsel a violation of the Sixth Amendment?

3. Whether the Massachusetts Supreme Judicial Court's new requirement of fee advancements prospectively denies Equal Protection of the Law to the choice of counsel, provided by the Sixth and Fourteenth Amendments, by placing on indigent defendants an undue monetary burden to secure the right to their choice of counsel, where the legislative intent governing payment of fees is contained within the state statute appropriating the payment of legal fees and costs for attorneys defending against interlocutory review brought pursuant to Mass. R. Crim. P. 15 by the prosecutor?

**PARTIES TO THE PROCEEDING AND RULE 29.6  
STATEMENT**

The petitioner herein is Pedro Vasquez, a natural person who was the defendant-appellee below. The respondent herein, which was the appellant below, is the Commonwealth of Massachusetts.

### **RULE 14.1(b)(iii) STATEMENT**

This case arises from the following proceedings in the Supreme Judicial Court of Massachusetts and the Single Justice for Suffolk County:

*Commonwealth v. Pedro Vasquez*, No. 12562

(Mass. Aug. 13, 2020), reconsideration denied Oct. 2, 2020.

*Commonwealth v. Pedro Vasquez*, No. 12562, SJ-2020-M024 (Supreme Judicial Court for Suffolk County. Aug. 14, 2020).

There are no other proceedings pending before this Court nor any state appellate court directly related to this matter.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Pedro Vasquez respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court.

### **OPINION BELOW**

The opinion of the Massachusetts Supreme Judicial Court is reported at 150 N.E.3d. 723 and is reproduced in the appendix to this petition at Pet. App. A, at A 1-A 9. The findings of fact and conclusions of law of the Single Justice petition, SJ-2017-0412, are unpublished, reproduced in Pet. App. C, at C 4—C 5.

### **JURISDICTION**

The Massachusetts Supreme Judicial Court issued its opinion on August 13, 2020. Pet. App. A, at A 1-A 9. The SJC denied a motion for reconsideration on October 2, 2020. Pet. App. C, at C 1. This Court has jurisdiction under 28 U.S.C. § 1257.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

Article I, Section 10, Clause 1 of the U.S. Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The Sixth Amendment of the U.S. Constitution provides:

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

The Fourteenth Amendment, Sec. 1, of the U.S Constitution provides:

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

## **INTRODUCTION**

Massachusetts rules of criminal procedure and state statute provide that judicial decisions on motions to suppress are subject to an interlocutory appeal to a Single Justice of the Supreme Judicial Court by either

party. *See* Mass. R. Crim. P. 15(a)(2) (2017) and M.G.L. ch. 278, sec. 28E. If the Government appeals, they are responsible for the payment of the defendant's attorney's fees and costs. *See* Mass. R. Crim. P. 15(d). The defendant, and his or her attorney, must wait until the end of the appeal to collect payment for the work provided by the attorney. *See Commonwealth v. Ennis*, 808 N.E.2d. at 720.

"The provision for attorney's fees and costs is a hybrid of statute and rule." *Commonwealth v. Gonsalves*, 739 N.E.2d. 1100, 1103 (2000). Massachusetts incorporated the statutory provision regarding attorney's fees in Massachusetts Rules of Criminal Procedure 15(d). *See id.* at 1105; *see also Commonwealth v. Phinney*, 863 N.E.2d. 496, 503 n. 2. "As has been discussed, Rule 15(d) reflects the Legislature's intent, once stated in G.L. c. 278 § 28E, that a "defendant be reimbursed for attorney's fees and costs associated with defending a claim on which he or she has already succeeded." *Gonsalves*, 739 N.E.2d. at 1105. The Massachusetts Legislature appropriates, via specific line item, these specific payments, known as "Rule 15(d) payments." *See* M.G.L. Ste. 2017, c. 47, sec. 2 (line items 0330-0300 and 0340-0500—legislation in effect in 2017). The payment, once approved, is paid by the corresponding county district attorney and the trial court budget in equal parts. *See Phinney*, 863 N.E.2d. at 500. The SJC referred to the most current appropriation statute, and policies and procedures of CPCS for court-appointed counsel, as opposed to those in effect at the time the contract with Mr. Vasquez was made, in 2017.

*See* Pet. App. A at A1-A9; *see also* Pet. App. D, at D 1—D 10 (citing the appropriate statute in effect at the time the contract was made).

Prior to making the agreement with Mr. Vasquez, Atty. Rivera had completed a separate and unrelated appeal utilizing the Rule 15(d) process, where the client in that case, Mr. Alvarez, also did not advance any fees, and had nearly an identical contract as that which Atty. Rivera had with Mr. Vasquez. *See* Pet. App. D at D 13—D 18. The payment ordered by the Single Justice in Mr. Alvarez’s case was made directly to Atty. Rivera by the District Attorney’s office for defending against their appeal. *Id.* at D 11—12. (copy of direct payment to Atty. Rivera by district attorney).

A contract for the payment of attorney’s fees and costs was executed by Mr. Vasquez and Atty. Rivera. *See id.* at D 13—D 15. The SJC disparaged the agreement as “illusory” and less than “bona fide.” *See* Pet. App. A at A 1—A 9. But Mr. Vasquez was made eligible for payment of his counsel fees when the prosecutor used Mass. R. Crim. P. 15, and M.G.L. c. 278, sec. 28E, for the interlocutory appeal of an order favoring Mr. Vasquez after a Motion to Suppress. *See Gonsalves*, 739 N.E.2d at 1105-1106. The prosecutor’s appeal triggered Mr. Vasquez’s eligibility under Rule 15(d) for the payment of his legal fees and costs for his choice of counsel. *Id.*

At the time Mr. Vasquez entered into an agreement with Atty. Rivera for legal services to defend against the state’s interlocutory appeal, Massachusetts case law was clear that those cases where Rule 15(d)

requests for fees were denied were those where there was not an agreement with the client arranging for payment for the services provided, unlike Mr. Vasquez's case. *See Commonwealth v. Sparks*, 727 N.E.2d. 78, 80-81 (2000) and *Commonwealth v. Augustin*, 26 N.E.3d. 709, 715 at fn. 6 and fn. 12 (2013). Mr. Vasquez was relying on payment being made in the same manner already deemed to be legitimate by the Single Justice in Mr. Alvarez's case which had been paid directly to Atty. Rivera for his services in that case less than two months prior to the agreement with Mr. Vasquez. Pet. App. D, at D1—D 10, and Pet. App. G, at G 1—G 2. Mr. Alvarez did not advance payment to Atty. Rivera, either; Atty. Rivera had the same legitimate expectation of payment for his work as when he was paid directly by Massachusetts under a contract nearly identical as that one made with Mr. Vasquez. Pet. App. D, at D 1—D 20. The SJC did not address these facts at all. Pet. App. C, at C 1—C 3.

Instead, the opinion denies the right of compensation in a manner already allowed and judicially approved, thus impairing a contract deemed to be legal at the time it was made. Pet. App. A, at A 1—A 9. The SJC cites the latest appropriation statute as authoritative and applicable; it was not, in fact, the applicable statute at the time the contract was entered into and the services performed by Atty. Rivera for Mr. Vasquez's benefit. *See id.* & Pet. App. D, at D 1—D 10.

Just as compelling as the Contracts Clause of Art. I, Sec. 10, Cl. 1, is the right of a defendant to choose their own counsel as guaranteed by the Sixth and

Fourteenth Amendments to the U.S. Constitution. *See U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006). This right to the choice of counsel is implicit in Rule 15(d)'s right to attorney's fees. *See Phinney*, 863 N.E.2d. at 503 n. 2, and *Commonwealth v. Lopez*, 717 N.E.2d. 254, 255 (1999), *Gonsalves*, 739 N.E.2d at 1105-1106.

A rule providing attorney's fees only to those who have funds to advance is dangerous, if not novel. Such a rule establishes a caste system of criminal justice, where criminal defendants are now required to advance money to exercise what should be the **free** exercise of that right to choose private counsel. Pet. App. A at A1-A9. This is contrary to what is to be provided to defendants under the attorney's fees provision of Rule 15(d) which "states what it means and means what it states." *Lopez*, 717 N.E.2d. at 255-256 fn.2.

Equally dangerous is that the Government now has at its disposal another tool it can use to further oppress individuals accused of crimes when the prosecutor is on the losing end of a favorable judicial decision. In the United States, individuals are entitled to the equal protection of the laws, whether they are rich or poor. Excluding those who are poor from obtaining their choice of counsel, where that choice to obtain private counsel was formerly available them, is also contrary to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See Augustine*, 26 N.E.3d. at 713, 715 at fn. 10 (leaving open and not considering an Equal Protection argument). This is particularly harmful where the right to choose private counsel paid with public funds is granted by the

Massachusetts Legislature to even the playing field for individuals accused of crimes, and presumed to be innocent, in the face of an appeal by prosecutor. *See Lopez*, 717 N.E.2d. at 256 fn.2. There had not been a requirement before, as there is now, that individuals be required to advance funds for their attorneys to obtain payment for their services.

The decision appealed here, if it stands, would allow prosecutors to act opportunistically and with unclean hands in how they might seek to conduct the District Attorney's criminal justice business. *See Augustine*, 26 N.E.3d. at 713, 715 (citing prosecutor's considerations when seeking an interlocutory appeal include budgetary considerations). By seeking to avoid payment of attorney's fees of defendants that are legitimately earned by their lawyers, the prosecutor's office can appeal every case, without regard to budgetary restraints considered to be part of their political decision-making. *See Augustine*, 26 N.E.3d. at 713, 715. This has an unjust impact on indigent defendants, who stand to lose the resources granted to them through the payment provision of Rule 15(d), which allows them to choose private counsel. *See Lopez*, 717 N.E.2d. at 255-256 and Mass. R. Crim. P. 15(d) (2017).

Indeed, this evil has already started, with the participating prosecutor's office already contesting payment in instances where both payments were advanced, and not advanced, using Mr. Vasquez's case as their authoritative precedent, and thus demonstrating bad faith to gain an unfair advantage

over criminal defense attorneys. Pet. App. H, at H 1—H 9.

Equity and Justice should compel this Honorable Court to intervene if the Law is to serve its Purpose.

### STATEMENT OF THE CASE

#### **A. Mr. Vasquez, charged with murder, prevailed on a motion to suppress with CPCS appointed counsel, Atty. Carr, and Massachusetts appealed.**

Mr. Vasquez was indicted in Hampden County Superior Court for murder on April 30, 2015. Pet. App. E, at E1. His CPCS court-appointed murder counsel, Atty. Carr, represented him in the trial court. Pet. App. A, at A 1—A 9. Prior to jury trial and pursuant to Mass. R. Crim. 15(a)(2), the prosecutor appealed a portion of Mr. Vasquez’s motion to suppress where Mr. Vasquez had prevailed with Atty. Carr as counsel. Pet. App. F at F 152. A provision of the same rule used by the prosecutor to appeal, i.e., Rule 15(d), provides for the payment of attorney’s fees for the defendant when the state appeals from a motion to suppress it has lost. *See* Mass. R. Crim. P. 15(d) (2017).

Though all three Rule 15 appeals were prepared by Atty. Rivera for Mr. Vasquez, he entered his appearance for Mr. Vasquez before the Massachusetts Supreme Judicial Court on only the Government’s appeal. Pet. App. F at F 166—F 168, F 178. It is only that work related to Mr. Vasquez’s defense of the government’s Rule 15 appeal, and the subsequent litigation to collect the attorney’s fees sought, which is

the subject of the fees sought in this instant case. Pet. App. A, at A 1—A 9.

**B. Mr. Vasquez and Atty. Rivera entered into a private payment agreement for attorney’s fees and costs for Atty. Rivera’s services to defend Mr. Vasquez against the Government’s interlocutory appeal.**

Atty. Rivera and Mr. Vasquez entered into a written agreement whereby Atty. Rivera agreed to provide his services to defend against the Government’s appeal for payment in exchange for Mr. Vasquez’s grant to Atty. Rivera of his Rule 15(d) attorney’s fees and costs reimbursement rights. Pet. App. D, at D 13—D 15. Both *Augustine* and *Sparks* cases lacked such explicit written agreements. See *Sparks*, 727 N.E.2d at 80-81 and *Augustine*, 26 N.E.3d. at 715. Unlike those cases where the SJC had denied payment, there was in this case a contract signed and executed between Mr. Vasquez and Atty. Rivera. Pet. App. D, at D 13—D 15.

In *Augustine*, the client was explicitly told by the ACLU attorney that he was being represented at no charge to him. *Augustine*, 26 N.E.3d. at 713. The opinions in both *Augustine* and *Sparks* found it factually significant that there was a lack of a written contract between the parties. See *Augustine*, at 26 N.E.3d. at 715 fn. 6, and *Sparks*, 727 N.E.2d. at 80-81. Thus, Mr. Vasquez could reasonably expect that there would be payment for services rendered on his behalf by Atty. Rivera pursuant to their agreement and Rule

15(d). *See Lopez*, 717 N.E.2d. 254 (1999), *Gonsalves*, 739 N.E.2d. 1100 (2000), *Gonsalves*, 773 N.E.2d. 941 (2002), *Gonsalves*, 804 N.E.2d. 910 (2004), and *Phinney*, 863 N.E.2d. 496 (2007).

During the month of October 2017, while the Government was preparing the subject appeal in this case, and prior to any agreement for payment being made for any services rendered under the contract made, Atty. Rivera, *pro bono*, prepared Mr. Vasquez's interlocutory appeal for that portion of the same motion to suppress, litigated by Atty. Carr, and which was denied to Mr. Vasquez. Pet. App. D, at D 1—D 20 and Pet. App. F, at F 1—F 29.

The Single Justice allowed both Mr. Vasquez's petition and the Government's on January 3, 2018. Pet. App. B, at B 2—B 5. Atty. Rivera, again *pro bono*, prepared another interlocutory appeal for Mr. Vasquez, after his trial counsel, Atty. Carr, filed a second motion to suppress which had been denied. *Id.* at B 1. Mr. Vasquez's petition for an interlocutory appeal of his second motion to suppress was granted on March 1, 2018. *Id.* There was no further agreement made between Mr. Vasquez and Atty. Rivera for the performance of any work beyond the state appeal before the Single Justice; their agreement called for a separate agreement for any further services rendered by Atty. Rivera on behalf of Mr. Vasquez. Pet. App. F, at F 1—F 29.

Thereafter, appellate counsel, Atty. Merritt Schnipper, was appointed by CPCS to represent Mr. Vasquez on the three appeals. Pet. App. B, at B 1—B 9.

The appeals were consolidated and litigated by Atty. Schnipper, concluding with a decision by the SJC on July 23, 2019. Pet. App. C, at C 1—C 2. As called for by the prevailing case law, Atty. Rivera then filed a timely request for the attorney’s fees and costs owed for that portion of work performed for the defense against the Government’s appeal for his appearance for Mr. Vasquez on SJ-2017-0412 before the SJC, which had considered Mr. Vasquez’s consolidated appeal. *See* Pet. App. F at F 1—F 444; *see also Commonwealth v. Ennis*, 808 N.E.2d. at 720. The appeal was submitted on September 21, 2019, with a Reply to the Government’s Response on November 2, 2019. *See* Pet. App. F, at F 1—F 444. Atty. Rivera also submitted detailed billing information to the Court. *Id.* at F 399—F 407.

**C. The Massachusetts Supreme Judicial Court referred the matter to the Single Justice, who held a telephonic hearing on June 29, 2020, and who later authored the opinion adopted unanimously by the Court.**

The payment matter was referred to the Single Justice who authored the full court’s opinion in *Commonwealth v. Vasquez*, SJC No. 12562, for recommendation of a decision to the full bench. Pet. App. A at A1-A9; Pet. App. C, at C 1—C 3. The order for the telephonic hearing stated that the parties should be prepared to address their respective positions. *Id.* During a telephonic hearing on June 29, 2020, the Single Justice ordered the production of

emails between Atty. Rivera, Atty. Carr, and CPCS regarding any approval of Atty. Rivera's representation. *Id.* Only Atty. Rivera was required to provide parole evidence to the Single Justice in the form of email communications between him, Atty. Carr, and CPCS, concerning Atty. Rivera's representation of Mr. Vasquez. Pet. App. I ("EYE"), at I ("EYE") 1—I ("EYE") 23. CPCS was not a party to this matter and did not formally address the Court.<sup>1</sup> Furthermore, CPCS declined to address the Court or otherwise take a position on the case after Atty. Rivera contacted CPCS regarding the matter and before filing a Motion for Reconsideration. Pet. App. J, at J 1—J 4.

**D. Mr. Vasquez did not advance fees to Atty. Rivera because payment of his fees and costs were going to be sought at the conclusion of the appeal, pursuant to the applicable state rules of criminal procedure providing for payment of attorney's fees in such instances.**

In the written contract, it was made clear that the payment of Atty. Rivera's fees by Mr. Vasquez would be sought in further litigation pursuant to Rule 15(d).

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<sup>1</sup> The fact that the Director of Operations and Administration for CPCS is the spouse of the Single Justice who presided over the telephonic hearing and authored the Court's opinion in the case was not disclosed to counsel and was discovered by him after the hearing and opinion; this made any objection or request for recusal by the Single Justice based on a conflict of interest or the appearance of impropriety impossible prior to the hearing and issuance of the SJC's opinion.

Pet. App. D, at D 14. The contract limited the extent of Atty. Rivera's representation to the defense of the Government's appeal before the Single Justice. *Id.* Atty. Rivera thereafter performed the work. Pet. App. F, at F 1—F 444. Atty. Rivera also kept contemporaneous records of the time spent on the matter. *Id.*

**E. The Court created a novel requirement that clients must advance attorney's fees to be reimbursed for those fees.**

The Single Justice who presided at the telephonic hearing issued the subject opinion of this Petition on behalf of the full court on August 13, 2020. Pet. App A, at A 1—A 9. As reasons for denying the payment of attorney's fees and costs, the Court created a requirement that money be advanced by the client. *Id.*

The Court viewed Mr. Vasquez as ineligible for the payment of his attorney's fees for his chosen appellate counsel because he already had court-appointed counsel. *Id.* The Court conflated Atty. Rivera's explanation at the telephonic hearing that he had no expectation that the client would pay him because it would be the state, ultimately, who had to pay him pursuant to Rule 15(d), with the idea that Mr. Vasquez would not be responsible for payment. *Id.* This unfairly distorts the facts and, thereafter, the law applied.

**F. The Court denied hearing Mr. Vasquez's federal claims regarding the violation of the Contracts**

**Clause of Art. I, Sec. 10, the Equal Protection Clause, and Mr. Vasquez's Sixth Amendment claim regarding his right to his choice of counsel granted to him by Rule 15(d).**

Mr. Vasquez filed a Motion to Reconsider on September 11, 2020. Pet. App. D, at D 1—D 14. In the Motion to Reconsider, Mr. Vasquez raised the federal claims presented in this Petition, and invoked state law providing for the mandatory review by the full bench of its opinion. *Id.* citing *Lopez*, 717 N.E.2d. 254 (1999). The Court denied hearing how its new requirement that fees be advanced by clients did not apply at the time the contract was executed, neither by custom nor practice, nor by the appropriation statute in effect at the time. *Id.* The Court relied instead on its own fiat, using the newest appropriations statute regulating and setting aside funds for Rule 15(d) payments as its authority, so as to pass and change the intent of a law already deemed to mandate payments of attorney's fees and costs in contravention of the intent of the Massachusetts Legislature and the Contracts Clause of Art. I, Sec. 10, Cl. 1 of the U.S. Constitution. *See Gonsalves*, 739 N.E.2d. at 1105, and Mass. R. Crim. P. 15 (d).

Despite presenting evidence of payment directly made to Atty. Rivera in a similarly constructed agreement, i.e., without advance payments made by the client, the Court refused to grant further appellate review, foreclosing any other remedy, on October 2, 2020. Pet. App. C, at C 1—C 3. This Petition for Writ

of Certiorari before this Honorable Court follows, pursuant to 28 U.S.C. § 1257.

This Petition is filed within 150 days from the date of the judgment denying the Mr. Vasquez's Motion for Reconsideration, as set forth in this Honorable Court's Order List: 589 U.S., Thursday, March 19, 2020, Order, extending deadlines for any petition for a writ of certiorari due.

### **REASONS FOR GRANTING PETITION**

#### **I. THE DECISION BELOW IS A DANGEROUS PRECEDENT DENYING THE FUNDAMENTAL RIGHT TO CONTRACT BETWEEN PRIVATE PARTIES, AND WHICH DOES NOT PROVIDE EQUAL PROTECTION TO THE FREE EXERCISE OF THE CHOICE OF PRIVATELY COMPENSATED COUNSEL.**

This Honorable Court has held contractual rights between individuals as inviolable and enforceable obligations. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). In *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), Daniel Webster stated during argument before this Court, 210 years ago:

Individuals have the right to use their own property for purposes of benevolence, either towards the public, or towards other individuals. They have the right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, *by*

*contracting to give perpetuity to the stipulated manner of exercising it, to rescind this contract, and seize on the property, is not law, but violence. Whether the state will grant these franchises, and under what conditions it will grant them, it decides for itself. But when once granted, the constitution holds them to be sacred, till forfeited for just cause.*<sup>2</sup>

This Court held in *Dartmouth College v. Woodward* that the Contracts Clause applied to protect private corporations chartered under laws existing before the creation of the State. *Dartmouth College*, 17 U.S. 518 (1819). This extended the principles set out ten years prior in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), which stands for the principle of contractual rights that depend on the prevailing law in force at the time agreements are made, and even despite the bribery involved in obtaining the contracts in that case. *Id.*; see also *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

Respecting the Contracts Clause as applied between individuals and the state, this Court, in *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 133-134 (1885), found that the constitutional protections afforded by

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<sup>2</sup> Daniel Webster, *Speeches and Forensic Arguments*, Argument, *Dartmouth College v. Woodward*, 110-137, at 123-124 (Perkins & Marvin 1830) (Emphasis in original).

the obligation of contracts clause covered not just “express contracts” and “specific agreements,” but:

“that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note.”

*Fisk v. Jefferson Police Jury*, 116 U.S. at 133-134.

This Court ordered that Atty. Josiah Fisk be compensated for services he rendered as Parish Prosecutor for Jefferson County in Louisiana, finding that the state supreme court’s conclusion that Atty. Fisk’s employment as attorney for the parish did not constitute a contract, neither through salary nor compensation as fees, was erroneous under the Contracts Clause of Art. I, Sec. 10, Cl. 1 of the U.S. Constitution. *Id.*

*Fisk* relied on prior decisions by this Court in *Hall v. Wisconsin*, 103 U.S. 10 (1880) and *Newton v. Commissioners*, 100 U.S. 559 (1879), both of which point to Justice Story’s venerable opinion in *Dartmouth College*. See *Hall*, 103 U.S. at 10-11, and *Newton*, 100 U.S. at 557, citing *Dartmouth College*. The *Hall* decision applied the protection of the Contracts Clause to a contract made between a state and an individual

where that individual was to perform (and did perform) certain duties for a specified time period at a stipulated compensation, pursuant to an express contract. *Hall*, 103 U.S. at 10-11.

In *Hall*, the legislature repealed the statute upon which Mr. Hall and the governor of the State of Wisconsin relied when they agreed for him to be paid for land surveying duties he had performed for the state's benefit. *Hall*, 103 U.S. at 10-11. *Hall* reaffirmed the state's *pro hac vice* status as a private person when contracting with private persons, citing *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872). Thus, this Honorable Court granted Mr. Hall his payment, holding the status of the contractual obligation no less enforceable as that of one made between two private individuals. *Hall*, 103 U.S. at 11.

In Mr. Vasquez's case, the obligation made was explicit in the form of a written contract. Pet. App. D, at D 14—D 15. Mr. Vasquez's valuable consideration was the grant to Atty. Rivera of those fees recoverable under Rule 15(d). *Id.* A Legislative appropriation was in place to fund Rule 15(d) attorney's fees. See M.G.L. Ste. 2017, c. 47, sec. 2. Atty. Rivera gave valuable consideration providing legal services to Mr. Vasquez under the terms of their contract. Pet. App. D, at D 1—D 14, and Pet. App. F, at F1—F 444.

Mr. Vasquez also timely tendered his request for fees. *Id.* Nevertheless, the SJC ruled the contract to be illusory because of a lack of consideration and because Atty. Rivera "candidly" replied that he expected payment directly from the state and not from Mr.

Vasquez. Pet. App. A, at A 1—A 9. Atty. Rivera’s expectation of payment in that manner was based on prior judicial approval, by a Single Justice, of one hundred percent of his requested fees and costs in a matter where the state, ultimately, made the payment directly to him. Pet. App. D, at D 1—D 14 and Pet. App. J, at J 1—J 2.

The SJC deemed Mr. Vasquez’s status as already having court-appointed counsel as conclusive in determining that he was not eligible to obtain payment for his attorney’s fees, despite Rule 15(d)’s plain language to the contrary. *See* Mass. R. Crim. P. 15(d) (2017). In so doing, the Court fashioned an approach contrary to Rule 15(d)’s purpose to provide funds for a defendant’s appellate counsel of choice when the state has appealed a motion to suppress ruling favorable to that defendant. *Id.* The Court’s conclusion is offensive to the U.S. Constitution because it withholds a right formerly granted by the state through Rule 15(d), here the *free* exercise of choice of appellate counsel as guaranteed by the Sixth Amendment, by requiring the advancement of property in the form of money to secure that right, and in violation of the Fourteenth Amendment’s Equal Protection Clause. Pet. App. A, at A 1—A 9.

*Free* is no longer *free* unless you pay—literally. *Id.* This cannot be the case.

An interlocutory appeal is a “critical stage” of the proceedings against the defendant, and the Sixth Amendment entitles him or her to counsel. *See DiBella v. United States*, 369 U.S. 121, 131 (1962) (finding an

interlocutory appeal is “a step in the criminal case preliminary to the trial thereof”); and, *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (holding defendant is entitled to counsel at every critical stage of the proceeding); *see also Commonwealth v. Neary-French*, 56 N.E.3d 159 (2016) (construing under Massachusetts law “critical stage” events as those where “potential substantial prejudice to the defendant’s rights inheres in the confrontation” and counsel’s participation will help avoid that prejudice). Federal courts have held that a prosecution of an interlocutory appeal is a Sixth Amendment critical stage, and the failure of private counsel to defend an interlocutory appeal is prejudicial *per se*, where the prosecution’s appeal is successful. *See, e.g., Fields v. Bagley*, 275 F3d 478, 483-486 (6th Cir. 2001); *Blankenship v. Johnson*, 118 F3d 312, 317 (5th Cir. 1997); and *United States ex rel. Thomas v. O’Leary*, 856 F2d 1011, 1014 (7th Cir. 1988).

Rule 15(d) protects both the systemic interest in defense counsel’s participation, and the defendant’s constitutional right to representation, when an interlocutory appeal is made by Massachusetts of a decision favorable to him. Where the defendant can arrange to privately retain counsel, the Sixth Amendment entitles them to representation by counsel of their choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-148 (2006); *see also Commonwealth v. Francis*, 147 N.E.3d 491 (2020). Rule 15(d)’s protection extends to this right. *Gonsalves*, 432 Mass. at 617. When administered as designed, Rule 15(d) protects the Appellee’s constitutional right to chosen counsel during the interlocutory appeal.

*Luis v. United States*, 578 U.S. \_\_ (2016), 136 S. Ct. 1083 (2016) (J. Breyer), cited by Mr. Vasquez in his Motion for Reconsideration, concerned the freezing of assets belonging to Ms. Luis, pursuant to a federal criminal statute allowing pre-trial asset seizure upon accusations of violations of federal laws concerning health care and banking. See Pet. App. D, at D 1—D 10. This Honorable Court held the Sixth Amendment choice of counsel right important enough for Ms. Luis to have pre-trial access to as much of her untainted funds to pay for her choice of counsel. *Id.* In so doing, this Court considered “the nature and importance of the constitutional right taken together with the nature of the assets.” *Luis*, 578 U.S. \_\_, 136 S. Ct. at 1087.

The limits of the right to the choice of counsel for indigent defendants is pointed out by this Court in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and in *Luis*. *Luis*, 578 U.S. \_\_, 136 S.Ct. at 1087. However, the Sixth Amendment Right to the choice of counsel for indigent persons exists here where Mr. Vasquez is granted a benefit conferred by the hybrid Massachusetts statute-rule; the hybrid rule expands his Sixth Amendment right to include obtaining his choice of counsel, in the specific instance where the prosecutor appeals a motion to suppress successfully litigated by the defendant, pursuant to Rule 15 and M.G.L. c. 278 sec. 28E. See *Lopez*, 717 N.E.2d. 254 (1999), *Gonsalves*, 739 N.E.2d. 1100 (2000), *Gonsalves*, 773 N.E.2d. 941 (2002), *Gonsalves*, 804 N.E.2d. 910 (2004), *Phinney*, 863 N.E.2d. 496 (2007),

*Murphy*, 668 N.E.2d. 349, and *Commonwealth v. Rosario*, 934 N.E.2d. 807 (2010). The legislative intent is clear that the payment is mandated. *See* Mass. R. Crim. P. 15(d).

The judicial inquiry regarding the review of payment is not meant to question the wisdom of the legislative appropriation, but to address the reasonableness of the time spent by the attorney on the matter, which the Court did not do here. Pet. App. A, at A 1—A 9. Significantly, this Court, in *Caplin & Drysdale*, did not have before it an Equal Protection claim. *Caplin & Drysdale*, 491 U.S. 617 (1989).

This Honorable Court should consider the nature of the assets at issue in this case, the right to Mr. Vasquez's choice of counsel granted by the Massachusetts rule, and its prior application in practice. The nature of the property at issue, i.e., access to those funds appropriated by the Legislature for the payment of defendants' attorney's fees in Rule 15(d) appeals, is untainted. *Luis*, 578 U.S. \_\_\_, 136 S. Ct. at 1087. The untainted asset of public funds, designated and appropriated by the Legislature for the specific benefit of providing payment to attorneys hired by defendants who have prevailed in criminal hearings to respond to the government's appeal, are analogous to the untainted nature of the funds at issue in *Luis. Id.*

Mr. Vasquez belongs to a class of individuals for which payment of his attorney's fees and costs had been mandatory until the decision appealed here denied access to those funds for the payment of his counsel. Pet. App. A, at A 1—A 9. The equitable

application of a rule providing for the payment of attorney's fees for the choice of appellate counsel suggests that this Court should enforce Mr. Vasquez's right to access those public funds appropriated by the Legislature to be used for the purpose for which they are sought, i.e., the right to pay for the defendant's choice of appellate counsel. *See Murphy*, 668 N.E.2d 349.

The SJC's new exclusion of indigent defendants from receiving the right to their choice of counsel from a statute meant to benefit them, and which had benefited them in past practice, violates the Equal Protection Clause of the Fourteenth Amendment. *See Augustine*, 26 N.E.3d. at 713, 715 at fn. 10 (leaving open and not considering an Equal Protection argument). While it is true that the Sixth Amendment does not generally provide for the choice of counsel for indigent defendants, conditioning an indigent defendant's access to appellate counsel of his or her choice on the ability to pay for that counsel, when that same right had formerly been allowed to be exercised freely, has the same unconstitutional effect of requiring payment for a license for liberty, where neither license nor payment for that liberty is required. Moreover, the Court's exclusion of indigent people disparately impacts Black and Hispanic/Latino populations who comprise the majority, per capita, of the criminal defendant population in the Massachusetts criminal justice

system deemed to be indigent and, therefore, eligible for court-appointed counsel.<sup>3</sup>

This is the principal evil against which Mr. Vasquez's Petition directs his Equal Protection claim, because of the plain language of the rule and the SJC's ruling that, with respect the Mass. R. Crim. P. 15(d), "the rule and the governing law establish that payment of the defendant's attorney's fees and costs is mandatory." Pet. App. D, at D 1 citing *Lopez*, 717 N.E.2d. 254.

**II. THIS CASE IS AN IDEAL VEHICLE FROM ALLOWING THE STATE COURT TO ILLEGALLY IMPAIR THE OBLIGATIONS OF A LAWFUL CONTRACT THROUGH THE STATE COURT'S NOVEL REQUIREMENT OF THE ADVANCEMENT OF FEES, THEREBY PREVENTING A CRIMINAL JUSTICE CASTE SYSTEM FROM TAKING ROOT WITHIN THE SIXTH AMENDMENT RIGHT TO THE CHOICE OF COUNSEL, AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED IN THE FOURTEENTH AMENDMENT**

**A. The decision below has grave implications for indigent criminal defendants.**

If the decision below stands, it will eliminate the right to the choice of counsel granted by the state to

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<sup>3</sup> Further support demonstrating the demographic make-up of indigent defendants are set out in *Racial Disparities in the Massachusetts Criminal Justice System*, Harvard Law School Criminal Justice Policy Program (Sept. 2020) available at <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.

defendants, even though that right is guaranteed and funded by the legislature. The prosecutor's exploitation of this decision has already begun. Pet. App. H, at H 1—H 4. This decision would allow a pernicious precedent to lie where the Legislature may expand a right by statute and entrust to the courts, via court rule, its intended application, only to have the Court reach the opposite result. The decision signals to the other States yet another manner the prosecuting authority can further oppress accused indigent defendants by dangling before them a right they can only buy. This decision will result in a 21<sup>st</sup> Century caste system of American criminal justice, where access to justice is bought and sold.

**B. This is the right vehicle for the Court to address the questions presented.**

Without the Court's holding, Mr. Vasquez's contract with Atty. Rivera would have been enforced, and the only proper question by the Court to consider would be the reasonableness of the amount requested.

As it stands, the decision below does not rely on any grounds other than what was presented on the papers and the telephonic hearing. Pet. App. A, at A 1—A 9. Reaching a conclusion based on important factual considerations set forth in its opinion, while not fairly addressing those considerations at the hearing, and then later ignoring a presentation to the Court of facts refuting those found in their opinion with the denial of a full hearing, is an unconscionable abuse of judicial power.

That evil is only compounded where the Court ignores its own precedents in so doing, including the right to Full Court review where a Single Justice denies the payment of any fees, which was denied to Mr. Vasquez. *See Lopez*, 717 N.E.2d. 254.

**C. GVR is appropriate because the underlying decision is clearly erroneous.**

The Court should grant, vacate, and remand the underlying decision because doing so will prevent the clearly erroneous practice of deny to indigent defendants the right to their choice of counsel where state law affords them the funding to exercise that right, while also preserving this Court's limited resources. As explained above, it was clearly erroneous for the Supreme Judicial Court to impair the contract made between an indigent attorney and his private counsel.

A GVR order here is consonant with "conserv[ing] the scarce resources of this Court," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam), and prevent a dangerous practice from taking root and spreading across jurisdictions. This Court would be best served by giving the Supreme Judicial Court the opportunity to revisit its holding now, since the legislative intent and state precedent regarding the mandatory nature of payments is clear that defendants in Massachusetts have the right to choose counsel, and have their counsel

fee's paid, when the state appeals against them a motion a defendant has successfully litigated, even where that defendant is indigent. GVR is therefore warranted here.

### CONCLUSION

For the foregoing reasons, this Honorable Court should grant the petition for writ of certiorari.

Alternatively, this Honorable Court should summarily grant, vacate, and remand.

Respectfully submitted,



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