

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

December 20, 2017

The monthly meeting of the Committee for Public Counsel Services was held in the Committee's conference room at 40B Bromfield Street, 1st Floor, Boston, MA on Wednesday, December 20, 2017, beginning at 5:34 p.m. Joseph L. Kociubes, Vice-Chairman, presiding.

MEMBERS PRESENT: Ms. Ball, Messrs. Miller, Rosenfeld, Stern, and White

TELECONFERENCING: Messrs. Cinquegrana, Kennedy, Ms. Shah and Ms. Tewksbury

1. **Minutes of November 14, 2017 Meeting**

The minutes of the November 14, 2017 meeting were approved as presented.

2. **Amicus Request(s)**

A. Commonwealth v. R. B., SJC-12415

Pasqua Scibelli, Staff Counsel with the Alternate Commitment and Registration Unit, sought Committee approval to submit an amicus brief on behalf of the plaintiff in the matter of Commonwealth v. R.B., SJC-12415. The Supreme Judicial Court (SJC) has issued the following amicus solicitation:

In the context of the trial of a G.L. c.123A, §9, petition for discharge, where an objection to an alleged trial error was not made in the lower court, whether or in what circumstances appellate review is available; if appellate review is available, what standard of review should apply.

The case has been fully briefed and is likely to be quickly scheduled for oral argument in February 2018. Attorney Patrick Levin of the Appeals Unit would work on the brief.

MOTION: Mr. Rosenfeld. That the Committee approve the submission of an amicus brief in the matter of Commonwealth v. R. B., SJC-12415.

SECOND: Mr. White.

VOTE: Unanimous.

B. Daniel Noe 5340 v. Sex Offender Registry Board, SJC-12447

Ms. Scibelli sought approval to submit an amicus brief on behalf of Daniel Noe No. 5340, in the matter of Daniel Noe 5340 v. Sex Offender Registry Board, SJC-12447. The SJC has not issued an amicus solicitation but transferred the case from the Appeals Court. The issues in the case are:

1. Whether an indigent offender seeking a reclassification hearing before the Sex Offender Registry Board (SORB or Board) to lower his or her classification level is entitled by statute to the appointment of counsel.
2. Whether the Board's current reclassification regulation violates the offender's right to due process when it shifts the burden to a registered sex offender seeking reclassification to prove that his or her risk of re-offense and/or the degree of dangerousness has decreased since the offender's original classification.
3. Whether the case should not be dismissed as moot because, even though the plaintiff died prior to the issuance of the decision, the issues are of public importance and capable of repetition.

Attorney Nancy Dolberg from the Appeals Unit of the Public Defender Division would author the amicus brief.

MOTION: **Ms. Ball. That the Committee approve the submission of an amicus brief in the matter of Daniel Noe 5340 v. Sex Offender Registry Board, SJC-12447.**

SECOND: **Mr. Rosenfeld.**

VOTE: **Unanimous.**

C. Commonwealth v. Gomez, SJC-12437

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, sought Committee approval to submit an amicus brief in the matter of Commonwealth v. Gomez, SJC-12437. The SJC has, sua sponte, granted review in this matter, which presents a question reported by the Superior Court:

To avoid a trial that is otherwise only required to preserve appellate review of the denial of a dispositive pretrial motion, may the Superior Court, with the Commonwealth's agreement or over the Commonwealth's objection, accept a defendant's guilty plea and sentence the defendant expressly conditioned on defendant's rights to appeal the denial of the specific dispositive pretrial motion and to withdraw his/her plea if the defendant prevails on appeal?

This case will give the SJC an opportunity to make a major change in the law in Massachusetts.

The issue is whether or not Massachusetts should join the majority of states in the federal court in allowing a conditional plea of guilty. This will allow a defendant to plead guilty without waiving their appellate rights to challenge a pretrial dispositive motion to suppress or motion to dismiss.

Attorney Rebecca Kiley from the Appeals Unit of the Public Defender Division would author the amicus brief.

Discussion ensued.

MOTION: Mr. Miller. That the Committee approve the submission of an Amicus brief in the matter of Commonwealth v. Gomez, SJC-12437.

SECOND: Ms. Ball.

VOTE: Unanimous.

3. CY 2018 Committee Meeting Dates

The members were provided with the meeting dates for calendar year 2018.

4. Assigned Counsel Manual – Proposed Changes

Chief Counsel Anthony Benedetti and General Counsel Lisa Hewitt acknowledged Bonnie Mullen for her hours of excellent work on the Assigned Counsel Manual (ACM).

Ms. Hewitt then explained the process that went into making the changes to the manual. After several meetings with division heads, Ms. Hewitt, Ms. Mullen and each department or division head met with the subcommittee, Mr. White and Ms. Shah, and outlined the process the staff took to update and streamline the manual.

Mr. White noted the hard work put into the presentation by all department heads. He expressed that it is the subcommittee's recommendation that the proposed amendments to the ACM be accepted and also recommends that in the future any amendments to ACM may be authorized by the Chief Counsel who would then report any changes on a quarterly basis.

Ms. Shah reiterated what was expressed regarding the hard work done by staff to get the AMC to the final product. In terms of the proposal delegating to the Chief Counsel the ability to approve future amendments, she indicated that a review of the AMC was made by the subcommittee and it was determined that it makes sense to delegate to the Chief Counsel any future amendments.

A section-by-section analysis of the proposed amendments was provided to all the members as well as a CD of the full manual. It was requested members provide questions or feedback to Ms.

Hewitt no later than January 10, 2018, with a vote on the ACM to be held at the January 17, 2018 meeting.

5. Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. He anticipates a projected deficit of approximately \$61M in the 0321-1510 and 0321-1520 line item accounts. As was mentioned during the prior two meetings, Mr. Lucchetti reminded the members about the reserve account to supplement funds for CPCS in these accounts.

The run out dates for the following line items 0321-1510 (attorney payment line) and 0321-1520 (court costs/experts line) is estimated to be after March of 2018.

6. Commitments \$10,000 and Over Report

Mr. Lucchetti presented the commitments of \$10,000 and over report to the Committee for review. There was one new commitment to report for Granite Telecommunications, LLC. The contract is for moving the analog fax line to Granite Telecommunications.

7. Sentencing Guidelines Update

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, provided an update on the sentencing commission work. In November, the commission approved a major revision to the sentencing guidelines. This was the first revision since the guidelines went into effect in 1996. Attorney Shira Diner, staff attorney in the training unit, is the CPCS representative on the commission. The major points are:

- Guidelines will remain advisory
- Criminal history calculations
 - A decay provision (a conviction older than 9 years will not be looked at by the judge)
 - Shorter terms of probation
- Caution to people using guidelines on the racial, ethnic and socioeconomic impact of sentencing
- Caution on using guidelines on juveniles and emerging adults
- Bias checklist for judges to avoid racial, ethnic, gender identity, sexual orientation or age group bias

Discussion ensued.

8. Criminal Justice Report Legislation Update

Ms. Hewitt provided the members with a comparison chart of the Senate and House Criminal Justice Reform Bills and gave them a brief update on the versions between the Senate and House.

The Conference Committee has been appointed and its members have begun meeting. The Conference Committee consists of the following members: Representative Claire Cronin, Representative Ronald Mariano, Representative Sheila Harrington, Senator William Brownsberger, Senator Cynthia Creem, and Senator Bruce Tarr.

9. Chief Counsel Report

Rebecca Jacobstein, staff attorney in the Appeals Unit, provided an update on the Farak litigation. Since the last update, CPCS had filed the petition asking for dismissal of all cases where chemist Sonja Farak was involved. The district attorneys have responded in three ways: 1) Bristol County wants to save 20-21 cases and wants to do case by case litigation; 2) Berkshire County is keeping approximately 11 cases; and 3) all other District Attorney offices agree to the Bridgeman II protocol.

The district attorneys started compiling the lists of defendants affected and it is estimated that approximately 8,000 will be dismissed. Essex, Middlesex, Suffolk, Cape & Islands, Norfolk, Worcester and Northwestern Counties have preliminary lists and are dismissing all of their Farak cases.

The Attorney General's office filed a response indicating they did not have any Farak related cases.

The Single Justice of the Supreme Judicial Court asked the parties to submit questions from the petition that remain unanswered and what should be proposed to the full court. CPCS reported two questions: 1) who is a Farak defendant (which convictions arising from Sonja Farak's work at the Amherst Lab, if any, should the court vacate and dismiss with prejudice; 2) what other remedies, orders or sanctions should the court issue in response to the egregious prosecutorial misconduct.

The Attorney General's office filed its response basically agreeing to report similar questions. They agree to a Bridgeman plus solution but do not specify what that means.

The District Attorneys indicate that nothing needs to be reported because there are only approximately 40 cases.

A working group has been put together to discuss: 1) the lists of Farak defendants; 2) missed defendants – what relief should they receive.

For the purpose of this litigation, the Attorney General's office is not contesting Judge Carey's finding of prosecutorial misconduct.

Discussion ensued.

Mr. Benedetti concluded the meeting in memory of David Hallinan, Executive Director of the Essex County Bar Association Advocates, Inc. (ECBAA) who passed recently after an illness. David has been an incredible part of the CPCS team, since 1989, providing outstanding leadership to the ECBAA. David and the ECBAA were awarded the American Bar Association Harrison Tweed Award back in August of this year. The Harrison Tweed Award recognizes the extraordinary achievements of state and local bar associations that develop or significantly expand projects or programs to increase access to civil legal services for persons living in poverty or criminal defense services for indigents. Under David's leadership, the ECBAA has been providing services to indigent clients at a level of excellence that makes its program one of our best in Massachusetts and it is also a model for the nation.

There being no further business to come before the meeting, the meeting adjourned into Executive Session at approximately 6:51 p.m.

Respectfully submitted,

Joseph L. Kociubes/ds/

Joseph L. Kociubes, Vice-Chairman