

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

JANUARY 19, 2016

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 Tuesday, January 19, 2016, beginning at 5:40 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Ms. Ball, Mr. Gosselin, Ms. Shah and
Messrs. Watkins and White

TELECONFERENCING: Messrs. Hernando, Kennedy, and Kociubes

Mr. Benedetti welcomed new Committee members Judge Carol Ball and Professor Ragani Shah.

Judge Ball joins the Committee after a 19 year career as an Associate Justice of the Superior Court. Prior to her time on the bench, Judge Ball practiced in the trial and appellate courts doing both criminal and civil work. She has taught Trial Advocacy at the National Institute of Trial Advocacy, Harvard Law School, Northeastern University, and Boston University Law School, and served as a Faculty Member at MCLE for almost 30 years. She fills the position formerly held by former long-time Salem Attorney-in-Charge, Larry McGuire.

Ms. Shah is the Director of Clinical programs at Suffolk University Law School and a Clinical Professor of Law. She has been with Suffolk Law School since 2007 becoming the Director of the Clinical Programs in 2014. She created and taught in the Immigration Law Clinic at Suffolk providing representation to immigrant detainees and unaccompanied minors facing deportation from the United States. Prior to joining Suffolk Law, Professor Shah was a faculty member at Columbia University Law School and Rutgers University. She fills the position left vacant by Professor Carol Steiker.

1. Approval of December 15, 2015 Minutes

The minutes of the December 15, 2015 meeting were approved as submitted.

2. Amicus Request(s)

A. James Green, Petitioner, SJC-12004

Larni Levy, Director of the Alternative Commitment and Registration and Support Unit, sought Committee approval to submit an amicus brief in the matter of James Green, SJC-12004. She explained that Mr. Green was found to be not sexually dangerous following a jury trial and the

Commonwealth moved for a new trial arguing that the trial court erred in its instruction to the jury with respect to the testimony of a representative of the Community Access Board (CAB). The trial court denied the motion. The Commonwealth appealed, and Mr. Green moved for and was granted direct appellate review.

The instruction reflects the Supreme Judicial Court's decision in *Johnstone, Petitioner*, 453 Mass. 544, 552 (2009), in which the Court found that "the CAB's opinion cannot serve as a substitute for those of the qualified examiners under the statutory scheme."

An amicus brief is appropriate because this is a case of first impression: the Supreme Judicial Court has never addressed the propriety of the CAB instruction when the QE's are divided. *Johnstone* makes clear that no person can be found to be sexually dangerous unless at least one QE testifies to that effect. In this case, one QE testified that Mr. Green was sexually dangerous. The trial court properly instructed the jury that it could consider the CAB representative's testimony, but also instructed that said testimony cannot act as a substitute for the QE's determination of sexual dangerousness.

The case is scheduled for argument in the SJC in March, 2016. Attorney Joseph Keanneally has agreed to prepare the amicus brief.

Mr. Watkins mentioned that the amicus subcommittee has reviewed this request and approves the filing of an amicus brief.

MOTION: Ms. Ball. That the Committee approve the submission of an amicus brief in the matter of James Green, Petitioner, SJC-12004.

SECOND: Mr. Watkins.

VOTE: Unanimous.

B. Commonwealth v. Alleyne, SJC-11614

Mr. Gioia, Deputy Chief Counsel for the Public Defender Division, sought Committee approval to submit an amicus brief in the matter of Commonwealth v. Alleyne, SJC-11614.

Mr. Gioia explained that over 11 years ago, in Commonwealth v. DiGiambattista, the SJC held that when the Commonwealth seeks to introduce at trial a defendant's statements made during a custodial interrogation or one conducted at a place of detention but the police failed to record those statements, the defendant, upon request, is entitled to a cautionary jury instruction regarding the alleged statements. The court in DiGiambattista declined to make the recording of the interrogation a prerequisite to the admissibility of a defendant's statement. This practice occurred in Commonwealth v. Alleyne. On appeal, the defendant has asked the SJC to reconsider its decision in DiGiambattista and hold that the failure to record should result in exclusion of the defendant's statements and not a cautionary jury instruction. The Massachusetts Association of Criminal Defense Lawyers (MACDL) filed an amicus brief supporting the adoption of an exclusionary remedy.

Mr. Gioia proposes writing a short amicus brief on behalf of CPCS that will do the following: 1) endorse the position advocated by the defendant and MACDL that the failure to record a custodial interrogation should result in exclusion of any statements the defendant made during such interrogation; and 2) advocate that if the Court adopts a defendant-refusal exception to the rule of exclusion, the Court should limit the exception to cases where the Commonwealth can prove, beyond a reasonable doubt and with recorded evidence, that the defendant initiated the idea of speaking to the police without recording the interview.

Professor David Siegel of the New England Law School has been conferred and would be willing either to co-author a CPCS amicus brief or have the New England Innocence Project join the CPCS amicus brief.

For the reasons stated, he is respectfully requesting the amicus request be approved.

MOTION: Mr. White. That the Committee approve the filing of an amicus brief in the matter of Commonwealth v. Alleyne, SJC- 11614.

SECOND: Ms. Ball.

VOTE: Unanimous.

C. Commonwealth v. Laltaprasad, SJC-11970

Mr. Gioia sought Committee approval to submit an amicus brief in the matter of Commonwealth v. Laltaprasad, SJC-11970. The SJC has issued the following amicus solicitation:

Whether a sentencing judge has discretion to depart from the mandatory minimum terms specified in G.L. c. 94C, § 32A (d), under the sentencing guidelines recommended pursuant to G.L. c. 211E or otherwise.

Mr. Laltaprasad was convicted after trial of possession with intent to distribute heroin, second or subsequent offense, and possession with intent to distribute cocaine, charges each carrying a mandatory minimum sentence of three and one-half years. Rather than imposing the mandatory minimum, the judge (Frison, J.) imposed concurrent sentences of two and one-half years in the house of correction. The Commonwealth filed a petition for relief pursuant to G.L. c. 211, § 3 contending that a judge has no discretion to impose a sentence less punitive than the mandatory minimum, and that the sentences imposed in this case are therefore illegal. The single justice (Cordy, J.) reserved and reported the petition to the full Court, which then issued the above-quoted amicus solicitation.

Mr. Gioia explained that the amicus solicitation in this case may signal the Court's willingness to reconsider whether the Legislature's power to require minimum mandatory sentences in such cases is unlimited. The issue presented has great significance to many of CPCS clients charged with drug offenses and respectfully requests authorization for CPCS to file an amicus brief in support of the defendant.

MOTION: Mr. Watkins. That the Committee approve the filing of an amicus brief in the matter of Commonwealth v. Laltaprasad, SJC-11970.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

3. Contract

Mr. Benedetti sought Committee approval for a contract for continued services from the law firm of Morgan, Brown and Joy. This vendor has and will continue to provide services, including legal advice regarding personnel matters and / or employment law to the Committee, Chief Counsel, and General Counsel. In addition, they have and will provide employment law training for CPCS managers. The estimated obligation for the current fiscal year is \$30,000.

MOTION: Mr. White. That the Committee approve the contract for continued services and employment law training from the law firm of Morgan, Brown and Joy for the current fiscal year in the amount of \$30,000.

SECOND: Mr. Gosselin.

VOTE: Unanimous.

4. Bar Advocate Program Staff Salaries

Nancy Bennett, Deputy Chief Counsel for the Private Counsel Division, sought Committee approval for salary increases for the 12 Bar Advocate Program administrators and seven clerical assistants who operate the programs. She explained that at the November 2015 Committee meeting, the Committee approved salary adjustments for all CPCS employees. She is requesting the equivalent increases for the Bar Advocate Programs, as has been the practice for the past 20 years. The staff salary adjustments required for all 12 programs will total \$34,636.89 in FY 2016, which is an annualized amount of \$69,273.78.

MOTION: Mr. White. That the Committee approve the salary increase for the 12 Bar Advocate Program administrators and seven clerical assistants operating the 12 programs in the amount of \$34,636.89 in FY 2016 for an annualized amount of \$69,273.78.

SECOND: Mr. Watkins.

VOTE: Unanimous.

5. Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the FY 2016 monthly financial overview report to the Committee for review.

Six months into the fiscal year the total spending forecast remains unchanged. Anticipated spending is approximately \$215M. The only change from the previous month is an increase in available funding which is reflected in this month's report by the supplemental funding that was passed by the legislature in late November. He is forecasting a deficit of approximately \$40M in line-items 0321-1510 and 0321-1520.

Mr. Cinquegrana explained to the new members that for as long as he remembers, the agency has been underfunded in the private assigned counsel line item at the beginning of the fiscal year and that towards the end of the fiscal year, CPCS is given supplemental funding.

Two hand-outs were distributed. The first hand-out detailed the forecast of line-item 0321-1510. The second hand-out provided a review of spending from FY 2009 through FY 2015. Total expenses were provided for each fiscal year: expenses based on service dates and accounting expenses from the State accounting system called MMARS.

Mr. Lucchetti reviewed the first hand out and explained that of the \$215M in planned spending, \$139M is for private bar expenses. He explained that he is estimating a growth rate of approximately 3%. The 3% growth is consistent with the growth in FY 2015.

Mr. Lucchetti reviewed the second hand out and explained that the overall expenditure growth based on either measure – service date or accounting date – is extraordinary small: ranging from .9% to 1.2%. Additionally, he indicated that a review of administrative and private bar expenses in FY 2009 versus FY 2015 indicated that a shift in the caseload mandate to 25% validates that a shift in cases from the private bar to CPCS increased overall costs by approximately \$10M.

6. Commitments \$10,000 and Over Report

Mr. Lucchetti presented the commitments over \$10,000 report. There were no new commitments to report this month.

7. Chief Counsel Report

Mr. Benedetti reported on the following items:

1. A salary correction was made in the salary increase proposal: one of the manager's salaries that the Committee approved in November was inaccurate. The Committee approved a new salary of \$81,788 when the correct salary should have been \$82,948. The error was identified and Human Resources Director Donna Leete has made the change.

2. The Council for State Governments is in Massachusetts to do a review of the Massachusetts Criminal Justice System. There is an executive committee composed of the Governor, the SJC Chief, the Lieutenant Governor, the Speaker of the House, and the Senate President. There is also a working group composed of approximately 25-30 individuals representing every agency across the state. CPCS is one of the agencies. The Massachusetts Association for Criminal Defense Lawyers (MACDL) also has a seat and Attorney Leslie Walker is their representative. The first meeting of the working group was held this month. It was an introductory meeting to detail what they plan on accomplishing and what the role of the working group will be. When completed, they will report recommendations for legislation for the next Legislative session. The scope is open with regard to what they will be tackling. He will provide the PowerPoint Overview that was distributed at this meeting to all the members.

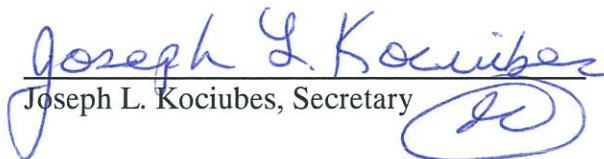
8. Other Business

Mr. Cinquegrana explained to the new members the make-up of the Committee. There are 15 members – nine members appointed by the Supreme Judicial Court (SJC); two members from the House; two members from the Senate; and two members from the Governor. The appointments are for four year terms, but staggered. If a term expires, that member continues to serve until he/she is replaced or reappointed. The SJC and gubernatorial appointments have been made, but the Committee is waiting for both the House and Senate appointments.

In addition, the officers are re-elected each year. There are also several subcommittees. After the election of officers, the appointment of subcommittees is done. The practice has been to have a nominee committee appointed, which solicits interest from among the members for serving as officers and / or on subcommittees. In either February or March, officers will be elected and subcommittees filled.

There being no further business to come before the meeting, the Committee adjourned at approximately 6:48 p.m.

Respectfully submitted,


Joseph L. Kociubes, Secretary