COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

OCTOBER 15, 2020

The monthly meeting of the Committee for Public Counsel Services was held by video conference on Thursday, October 15, 2020 beginning at 5:37 p.m. Joseph L. Kociubes, Chair, presiding.

MEMBERS PARTICIPATING: Messes. Alvarado, Ball, Chester, and Craven
Messrs. Apfel, Cinquegrana, Demissie, Healy, Kennedy, Miller, Stern, and White

The record will reflect that due to the Coronavirus pandemic, the meeting was held via videoconference.

1. **Minutes of September 15, 2020 Meeting**

The minutes of the September 15, 2020 meeting were approved as presented.

2. **Amicus Request(s)**

Commonwealth v. *Sunil Sharma,* Appeals Court No. 2020-P-0550

Afton Templin, Director of Juvenile Appeals, sought Committee approval to file an amicus letter in support of the application for direct appellate review (DAR) and if granted, to file an amicus brief to the full court in the case of *Commonwealth* v. *Sunil Sharma,* Appeals Court No. 2020-P-0550.

The letter would urge the SJC to take the case to resolve what appears to be the last open juvenile homicide sentencing question: whether juveniles convicted of second degree murder and sentenced to life with parole as well as consecutive terms of years are entitled to the same sentencing protections as juveniles convicted of murder in the first degree and juvenile convicted of non-homicide offenses.

MOTION: Mr. Apfel. That the Committee approve the filing of an amicus letter in support of the application for DAR and if granted, the approval of filing an amicus brief to the full court in the case of *Commonwealth* v. *Sunil Sharma,* Appeals Court No. 2020-P-0550.

SECOND: Mr. Miller.

VOTE: Unanimous.

Commonwealth v. *Hinds*, SJC-12953

Rebecca Kiley, Attorney-in-Charge, Public Defender Division Appeals Unit, sought Committee approval to submit an amicus brief in the case of *Commonwealth* v. *Hinds*, SJC-12953. The Supreme Judicial Court (SJC) issued the following amicus solicitation:

> Whether the trial judge erred in denying the defendant the right to exercise a preemptory challenge after the jurors had been seated in the jury box, but before they sworn, and the juror he sought to challenge deliberated; where prior to empanelment, a judge has not directed the parties to exercise their peremptory challenges at a particular time pursuant to Rule 6 of the Rules of the Superior Court, whether the judge erred in denying the defendant the right to exercise a peremptory challenge after the jurors had been seated in the jury box, but before they were sworn, pursuant to Mass. R. Crim. P. 20(c)(2).

The focus of the brief will be that empanelment is a difficult and stressful part of trial work and the judge must explain the procedure they expect the parties to follow in very clear terms. Also, as long as the law permits the parties in a criminal case to exercise peremptory challenges, the defendant's right to a fair trial mandates that they be allocated fairly.

MOTION: Mr. Cinquegrana. That the Committee approve the filing of an Amicus brief in the case of *Commonwealth* v *Hinds*, SJC-12953.

SECOND: Mr. Demise.

VOTE: Unanimous.

3. **<u>Proposed Temporary Change to Leave Policy</u>**

Lisa Bacon, Director of Human Resources, sought Committee approval for a temporary one-time change to the current CPCS Personal Policies Manual that would extend the deadline for carrying over "use or lose" accrued vacation and personal leave from December 31, 2020 to April 24, 2021. The extension is requested due to the many challenges related to the pandemic. The Executive Branch recently announced a similar extension to their employees and the trial court has also extended the deadline with respect to vacation time.

MOTION: Ms. Alvarado. That the Committee approve the temporary, one-time change extending the deadline for carrying over use or lose accrued vacation and personal leave from December 31, 2020 to April 24, 2021.

SECOND: **Mr. Healy.**

VOTE: **Unanimous.**

4. **Commitments $10,00 and Over Report**

Mr. Lucchetti provided the commitments $10,000 and over report for review. He highlighted three items that deviated more than 10% from the pre-approved amount: Dell Marketing (licensing for Azure and Exchange online), Signet Systems, Inc. (access control, maintenance services agreements), and TBNG, Inc. (security consulting services). Mr. Lucchetti asked for approval of the new amounts for Dell Marketing, Signet Systems, Inc., and TBNG, Inc.

MOTION: **Mr. Demissie. That the Committee approve the current spending estimates for Dell Marketing, Signet Systems, and TBNG, Inc. as presented.**

SECOND: **Mr. Healy.**

VOTE: **Unanimous.**

5. **Monthly Financial Overview Report**

Mr. Lucchetti presented the monthly financial overview report to the Committee for review.

The current year to date overall spending is approximately $36M out of available funds. As a result of the delayed final fiscal year budget, a spending estimate for FY 2021 has not yet been created. Based on the current interim budget, Mr. Lucchetti forecasts a projected total deficit of approximately $23M in the 0321-1510 private counsel line item account. However, overall spending in line item 0321-1510 is expected to be lower due to courts not being fully opened. Finance will be monitoring the 0321-1520 line item and payments to court cost vendors.

6. **Breathalyzer Litigation Update**

Vanessa Velez, Deputy Chief Counsel for the Private Counsel Division, informed the members that the trial court will be mailing out approximately 27,000 notices to defendants whose conviction may be vacated due to faulty calibration of breathalyzer machines during a particular timeframe – June, 2011 through April, 2019.

One training for attorneys on how to represent clients on this matter was held in October and another one is scheduled for November.

7. **Equity and Inclusion Director Update**

John Lozada, Equity and Inclusion Director, informed the Committee that a working group of 28 staff members was formed to work on issues of equity and inclusion across the agency and to give life to the CPCS Equity and Inclusion Mission Statement. The working group consists of a mix of people of color, gender, age, disability and other protected categories, as well as a representation of various job descriptions.

The working group will be split into small groups of four to address individual concerns. The result of this work will be to develop a prioritized set of objectives and strategies for change. The work will be combined with other CPCS efforts to form the agency equity and inclusion plan with timelines and deliverables that will guide efforts into the future.

Mr. Lozada has continued working with the Trial Court Chief Experience and Diversity Officer, John Laing, to inform the trial court on the bias challenges CPCS and our clients face. He was invited to moderate the trial court collaboration with YWBoston to host a "World Café", an interactive dialogue designed to identify challenges and recommendations for change.

The group will continue discussions with trial court leadership, private bar advocates and other stakeholders. Unfortunately, the passing of Chief Justice Gants have challenged the court on moving forward with this initiative, but there is interest from other key court leaders, including Chief Justice Carey and Judges Julie Bernard and Angel Kelley, who have shared in the agencies strategy discussion.

8. **Chief Counsel Report**

Anthony Benedetti, Chief Counsel, provided an update on issues related to the ongoing pandemic. He highlighted three major issues: 1) courthouses are unsafe or people feel they are unsafe – CPCS has been unable to obtain air quality reports despite repeated requests; 2) not all clients have access to court hearings via zoom; and 3) not all jails have zoom to allow for attorney-client communication; many attorneys do not feel safe going into some of the facilities and there is a lack of comprehensive testing being done. These issues continue to cause problems for both staff and clients. Ongoing communication continues with Court leadership on these and other maters of concern and to provide them with information received from the private bar and staff based on their experiences going into courts.

Mr. Benedetti turned it over to the deputies of the various divisions to provide updates.

Josh Dohan, Director of the Youth Advocacy Division (YAD) - informed the members that for juvenile defense, all duty days and cases are currently being covered. The Department of Youth Services (DYS) has been doing a good job at keeping the virus out of facilities and not having juveniles sitting in solitary unlike what adult prisoners are experiencing. They also are doing a good job communicating about testing and positive results. They have made it easy for lawyers to video with clients and also for kids to video with their families.

Pretrial detentions are at historic lows; however it has been increasing due to very little movement in cases. Initially there was a decrease in charges; however a huge backlog is preventing the cases from going forward as the pandemic continues.

One area of concern is that while overall detention is down from last year, the data suggests that there is actually an increase for Black boys. A request for additional data is in to DYS for clarification. Mr. Dohan will provide the Committee with statistics for various demographics when more are available.

With respect to adult parole, at the request of the SJC and the Parole Board, CPCS lawyers helped the Parole Board clear out a nine month backlog of prisoners who had received positive parole votes, but were waiting for home release plans.

Mark Larsen, Director of the Mental Health Division indicated that the substance abuse treatment program in Plymouth had 26 out of 96 people test positive for Covid-19. As a result, new admissions were closed at that facility and are being referred to the Hampden County House of Correction Section 35 program.

There has been a focus group of trial attorneys handling commitment trials since March and the consistent comment is that they are not working well. There are problems with the remote, video hearings. This issue might be resolved by a criminal case that is currently before the SJC. There has been a Covid-19 related push with respect to guardianship cases by health care providers to modify the substituted judgment process for individuals in hospitals suffering from Covid-19. Finally, staff have been having difficulties finding appellate lawyers to take cases at the $53/hour rate.

Randy Gioia, Deputy Chief Counsel for the Public Defender Division provided the following update on staff issues. He is seeing an inverted bell curve with people in custody from April to the present because cases are not moving quickly. There are almost as many people in custody in mid-October as there were in mid-April. The Superior Court has instituted a De Novo pilot project in two counties but there has been limited impact because cases are restricted to only those where the district attorney agrees and there are no civilian witnesses.

There is currently an SJC case pending, Commonwealth v. John W. Vazquez, in which the superior court judge ordered a virtual hearing to be conducted via a Zoom platform on a motion to suppress over the objection of the defense. The issue in the case is whether the right to be present is satisfied by virtual presence and whether virtual hearings violate the right to confrontation, the right to a public hearing and the right to counsel. Additionally, the defendant will raise that the issue that an entirely virtual hearing differs qualitatively from a courtroom proceeding in crucial respects. Staff attorneys Rebecca Kiley and Benjamin Keehn are representing the defendant. Oral argument is scheduled for December.

Staff has proposed a list of cases that they believe could be resolved quickly to each district attorney office with a goal of resolving matters swiftly, where appropriate. There has been a

mixed response from the district attorneys on these matters. Currently, there are no jury trials scheduled.

Mr. Gioia also discussed concerns with various sheriffs not providing zoom calls for confidential attorney/client meetings. The Committee authorized him to continue his efforts with respect to attorney-client virtual visits including approaching the administration for possible assistance and report back to the Committee if litigation is contemplated.

Vanessa Velez, Deputy Chief Counsel for the Private Counsel Division informed the members of private bar issues. There continue to be counsel capacity issues in Hampden County in large part due to attorneys not feeling safe going into court. Currently, nineteen out-of-county attorneys are covering duty days in that county; however there are still several duty days without coverage. In all counties, attorney have been asking for confirmed dates from the courts in order to move cases along, however they are not getting them. The courts are only handling arraignments, bails, 58A hearings, and probation detentions. Finally, the courts have been asked to consider bench trials without a jury waiver; however that request was denied.

Children and Family Law Division (CAFL) – Michael Dsida, Deputy Chief Counsel, provided an update on CAFL issues. Some courts are completely closed for in-person hearings while others are more flexible and are scheduling in-person hearings. There is a concern regarding parents whose cases are in the process of their parental rights being terminated via remote hearings. Cases were not being filed in large numbers at the beginning of the pandemic; however that has changed resulting in a backlog of cases.

There are shortages of attorneys in the following counties: Worcester, Berkshire, Franklin/Hampshire Juvenile Court, and Hampden. Franklin/Hampshire County currently have 11 individuals without counsel and Hampden County currently has 59 individuals without counsel. There has also been delays in temporary custody hearings due to the shortage of attorneys.

A certification training for new lawyers starts on October 16, 2020. Most attendees will be from central and western Massachusetts.

Discussion ensued.

There being no further business to come before the Committee, the Committee adjourned into Executive Session to discuss a litigation issue at approximately 7:20 p.m.

Respectfully submitted

/s/ *Mia Alvarado*

Mia Alvarado, Secretary