COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

JULY 15, 2020

The monthly meeting of the Committee for Public Counsel Services was held by video conference on Wednesday, July 15, 2020 beginning at 5:37 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PARTICIPATING: Messes. Ball, Chester, and Craven
Messrs. Apfel, Demissie, Kociubes, Miller, Stern, and White

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

1. **Minutes of June 18, 2020 Meeting**

The minutes of the June 18, 2020 meeting were approved as presented.

2. **Amicus Request(s)**

Commonwealth v. *Josiah Zachery*, SJC-12952

Matthew Spurlock, Appeals Unit Staff Attorney, sought Committee approval to submit an amicus brief in the case of *Commonwealth* v. *Josiah Zachery*, SJC-12952. The Supreme Judicial Court (SJC) solicited amicus briefs on the following questions:

> Whether a person has a reasonable expectation of privacy in information relating to his or her use of a public transportation card known as a Charlie Card, or in any data the Charlie Card may contain or generate.

The issue is the seizure of a Charlie Card the police obtained without a warrant in a murder case. The defendant moved to suppress the Charlie Card data and evidence obtained from them. There are three issues that will be presented in the amicus brief. 1) The investigative use of the Charlie Card sized following the arrest; 2) The Mosaic theory, which is a method for determining if the particular surveillance technique violates a constitutionally protected expectation of privacy; and 3) Third party doctrine which does not extinguish a rider's reasonable expectation of privacy.

MOTION: Mr. Stern. That the Committee approve the filing of an

amicus brief in the case of *Commonwealth* v. *Josiah Zachery*, SJC-12952.

SECOND: Ms. Ball.

VOTE: Unanimous.

Rebecca Kiley, Attorney-in-Charge, Appeals Unit, sought Committee approval to sign on to two amicus briefs in the case of *Commonwealth* v. *Caliz*, SJC-12932 and *Commonwealth* v. *Jorge Delgado-Rivera*, SJC-12919. The briefs are being prepared by volunteers at Foley Hoag and Morgan Lewis for the Massachusetts Association of Criminal Defense Lawyers (MACDL).

Commonwealth v. *Caliz*, SJC-12932

The SJC solicited amicus briefs on the following question:

> Where the defendant was convicted and sentenced on multiple drug-related charges, he served those sentences and was released; the defendant subsequently pleaded guilty to additional drug-related charges, including as a subsequent and habitual offender, he was sentenced and is currently serving that sentence; and, while serving the current sentence, certain of his prior convictions were vacated for reasons related to misconduct at the State Laboratory Institute in Amherst, whether the defendant is entitled to jail credit for the time he spent incarcerated on the vacated convictions, to be applied to the sentence he is currently serving. Whether the result depends on the date the crimes were committed.

This case involves a debate around when a defendant's dead time credit can be applied to a subsequent sentence.

MOTION: Mr. White. That the Committee approve to sign on to the amicus brief in the case of *Commonwealth* v. *Caliz,* SJC-12932.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

Commonwealth v. *Jorge Delgado-Rivera,* SJC-12919

The SJC solicited amicus briefs on the following question:

> Whether an individual has a reasonable expectation of privacy in the contents of a sent text message received by a third party; whether an individual who sent a text message to a third party has standing to challenge a warrantless search of the third party's cellphone.

The brief will focus on how social mores have changed around how people communicate. The brief will argue that we have a strong privacy interest in a two way text messaging and denying standing to challenge such searches will create incentives for law enforcement to search through messages of the person not the target of the investigation.

MOTION: Mr. Kociubes. That the Committee approve to sign on to the amicus brief in the case of *Commonwealth* v. *Delgado-Rivera,* SJC-12919.

SECOND: Mr. Apfel.

VOTE: Unanimous.

Due to the timing, the next amicus request, *Commonwealth* v. *Francis*, SJC-12683, was not included on the agenda and was not sent in advance with the materials sent to the Committee last week. According to the Rules and Regulations of the Committee, it requires a majority vote of the Committee to entertain consideration of the request.

The following vote was then made.

MOTION: Ms. Ball. That the Committee approve to entertain hearing the request for an amicus brief in the case of *Commonwealth* v. *Francis,* SJC-12683.

SECOND: Mr. Apfel.

VOTE: Unanimous.

Commonwealth v. *Francis*, SJC-12683

Elizabeth Dembitzer, Director, Criminal Appeals, Private Counsel Division, sought Committee approval to submit an amicus letter in support of a pending Motion to Reconsider in *Commonwealth* v. *Francis*, SJC-12683.

In 1991, the defendant filed a pro se motion for new trial, which was denied. In 2015, a second motion for new trial was filed on the defendant's behalf raising the issue of the denial of his right to choice of counsel under the Sixth Amendment and Art. 12. In its June 24, 2020, opinion, the SJC agreed that by failing to alert Mr. Francis that he had the right to choose between a court-appointed, murder-certified CPCS attorney or an attorney who was not on that list and would be representing him pro bono without any compensation, his rights under the Sixth Amendment and Art. 12 were violated. It also held that this error is structural.

A majority of the Court also held that Mr. Francis had waived his right to choose counsel because he failed to raise the issue in his first *pro se* new trial motion and because CPCS had assigned screening counsel to screen his case in 1992 and in 2000 and declined to assign counsel for a new trial motion.

The following issues will be raised in the amicus letter: 1) the opinion in *Francis* misapprehends the CPCS screening process; and 2) the ruling unfairly burdens indigent defendants who cannot afford to pay private counsel to screen their cases.

MOTION: Mr. Kociubes. That the Committee approve the filing of an amicus letter in support of a pending Motion to Reconsider in *Commonwealth* v. *Francis,* SJC-12683.

SECOND: Mr. White.

VOTE: Unanimous.

3. **Contract**

Kevin Lucchetti, Chief Financial Officer, sought Committee approval to extend the term of the contract for two years with Regus (IWG), located at 100 Cambridge Street, Boston. The office space provides private, flexible, shared space with other non-CPCS professionals. This space will house the Boston Children and Family Law Division trial unit as well as the Public Defender Division trial unit. The annual contract is for $876,381($1,752,762 total) from July 1, 2020 through June 30, 2022.

MOTION: Ms. Ball. That the Committee approve the extension of the contract for two years with Regus (IWG), located at 100 Cambridge Street, Boston for the annual cost of $876,381 ($1,752,762 total) from July 1, 2020 through June 30, 2022.

SECOND: Mr. White.

VOTE: Unanimous.

4. **Monthly Financial Overview Report**

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

The fiscal year 2020 has closed but is still in the accounts payable period. Payments to line-items 0321-1510 (private attorneys) and 0321-1520 (court costs/experts) are made during the months of July and August for the previous fiscal year. Spending in all line items is anticipated to be $248M. He is projecting a total surplus in all accounts of approximately $6M.

5. **Election of Officers**

Mr. Cinquegrana reported that the new Rules and Regulations that were voted on at the last meeting changed the election of officers to a two-year cycle. He stated that an election needed to be held and that he appointed Mr. White to serve as a one-person nominating Committee.

Mr. Cinquegrana stated that it had been an honor to serve as Chair of the Committee and one of the greatest of his career. He thanked all the people he had served with over the years for their dedication.

Mr. Benedetti thanked Mr. Cinquegrana for his eight years of leadership and for all he has done for the agency during that period. He spoke of the numerous challenges over the last eight years beginning with Governor Patrick's proposal to eliminate the private bar, the rapid expansion of the agency, the counsel crisis connected with attorney compensation, the IT crisis, and the current pandemic. Mr. Cinquegrana oversaw the rewriting of the personnel policies, and the assigned counsel manual. Mr. Benedetti expressed appreciation for Mr. Cinquegrana's commitment to the agency and the right to counsel. He pointed out that the Chair does not serve on any subcommittees except for the Executive Committee, but that Mr. Cinquegrana would attend subcommittee meetings when he saw that the particular issue was a critical one. Finally, Mr. Benedetti stated that the agency would not be in the generally positive position it is in now without his leadership.

Mr. White thanked Mr. Cinquegrana for his leadership for the past eight years and stated that his service has been incredible. He proceeded to present the nominations for approval by the Committee.

Joseph Kociubes, Chair
Derege Demisse, Vice-Chair
Mia Alvarado, Secretary

MOTION: **Mr. Cinquegrana. That the Committee approve the election of officers: Joseph Kociubes, Chair; Derege Demisse, Vice-Chair; Mia Alvarado, Secretary**

SECOND: **Mr. Apfel.**

VOTE: **Unanimous.**

New Chair Mr. Kociubes thanked and expressed his admiration to Mr. Cinquegrana for his leadership and extraordinary good judgment for the last eight years.

He stated that there have been and always will be challenges for the Committee to address. He said that the clients depend on the staff and the Committee needs to do everything it can to support the staff. The Committee has a record of being engaged and he is committed to ensuring that continues.

Two administrative matters were addressed: 1) the rules provide for an Executive Committee composed of the three officers and several other members appointed by the Chair. Mr. Kociubes said he plans to attend to that quickly; 2) there are four standing subcommittees: budget & fiscal administration, personnel and equal employment opportunities, training and qualifications, and amicus. He asked the members to contact him to let him know which committees they would be interested in serving on so they can be reconstructed.

6. **CPCS Steps to Combat Racial & Ethnic Disparities**

The primary agenda for the monthly meeting was an overview of agency efforts to combat racism and racial and ethnicity disparities at CPCS and in the legal system. Mr. Benedetti began the overview by discussing the creation of an Equity Inclusion and Diversity (EID) Director whose focus would be these important issues and the hiring of John Lozada nine months ago to fill the position. This and other action items emerged as priorities in the agency strategic plan.

Mr. Lozada gave the Committee a brief background on his career and discussed the focus of his work since joining the agency. He stated that his primary focus is to give substance and meaning to the CPCS Equity and Inclusion Mission Statement that was drafted several years ago and to build an effort around an equity and inclusion working group. The working group will design ideas and implement efforts that are the focus of a CPCS Equity and Inclusion Plan, which will be an outline of objectives, strategies, time frames and measurable elements to move the agency forward.

He discussed many of the items he had been working on since he began which include getting feedback from staff across the state; meeting with a range of external stakeholders; planning for anti-racism training across the agency, starting with training for senior leadership and upper level leaders, and recurring training for all staff, as well as building change for equity on matters as diverse and integral as diversity on internships, rotations, performance evaluations, management training, substantive training, the Human Resources hiring process and the agency's Equal Employment Opportunity (EEO) profile.

Debra Krupp, Director of Administration and Operations provided information on the various trainings that have been presented in the past and the plan for future trainings related to equity and inclusion.

Mr. Benedetti mentioned that the agency is also focused on community engagement to help aid the agency understand what is going on in the communities. The agency has partnered with ROCA, UTech, and Families for Justice Healing.

Next, the Deputies from each Division provided highlights on what each division is doing with respect to fighting racism.

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, began by discussing the work of the Strategic Litigation Unit and the formation of a working group to discuss ideas around litigating race. The goal is to identify racial injustices that happen in law enforcement in

the courts that can be attached in individual cases. The hope is to partner with law schools and other big firms to assist in this effort as well as national partners.

Mark Larsen, Director of the Mental Health Litigation Division reported on his Division's work with community groups to address racial disparities. Two current projects are the investigation of the racial demographics of civil commitment cases through Freedom of Information Requests to the Department of Mental Health, and research being conducted by the Director of Social Services on bias in the risk assessment process.

Michael Dsida, Deputy Chief Counsel for the Children and Family Law Division (CAFL) informed the Committee of his recent message to all staff and private attorneys regarding racial justice and racism in the child welfare arena inviting them to participate in a CAFL anti-racism team to develop ideas to address racism in cases as well as developing ideas for addressing racism in the family regulation system through policy advocacy.

Rose King, Director of Criminal Trials discussed the goal of the Private Counsel Division to increase the diversity of the bar advocate panels and the supervising attorneys.

Josh Dohan, Director, Youth Advocacy Division discussed the ongoing work of the Youth Advocacy Foundation to tackle the school to prison pipeline by promoting a positive youth development model which recognizes ways to push back on the other aspects of systemic racism to make sure the needs of clients, the formative developmental needs, are being met. He also discussed the work of the EdLaw Project, whose lawyers provide training, leadership, and mentorship to all YAD lawyers, as well as CAFL lawyers with a goal of having lawyers advocate with schools to meet the needs of the clients. Finally, he talked about the Juvenile Defenders Dismantling Racism (JDDR) initiative whose goal is to educate all YAD staff and private counsel juvenile supervising attorneys on understanding the various ways in which racism is affecting the lives of the clients and to spend time walking through the pathway of cases and thinking about what to about it.

Lisa Hewitt, General Counsel gave an overview of policy and legislative work that has a focus on racial injustice. She reported to the Committee on the many areas in which CPCS offers its expertise including expungement, minimum mandatory abolition, inmate visitations, Cori reform, forfeiture reform, facial recognition, and data collection.

Daniel Saroff, Chief Financial Officer provided an overview of the ongoing work to build a case management system for staff as well as a new external billing system for vendors. Both systems will be used to collect and analyze data to help the agency better understand the racial and demographics of the clients which will inform management decisions as well as our advocacy.

7. **Chief Counsel Report**

Mr. Benedetti congratulated the new officers and is looking forward to working with them. He then invited staff members to report on current matters.

Ms. Hewitt provided the highlights of the proposed legislation that was filed following the death of George Floyd and is being considered by the Legislature. Referred to as the POST bill, the legislation proposes addressing a number of issues including police licensing and decertification, qualified immunity, data collection and the prohibition of certain police tactics. The legislation is currently being examined by the Ways and Means Committees in conjunction with the Judiciary Committee.

Ms. Krupp provided an update on the plan to reopen CPCS offices and the requirement to comply with all the directives by Governor Baker. She informed the Committee that a working group of staff members was tasked with coming up with the plan and policies and procedures for all Attorneys in Charge and staff to follow. The current plan is to have offices begin to open in September but that the actual dates were subject to review.

Mr. Benedetti provided an update on the courts partial reopening and CPCS efforts to ensure the health and safety of advocates and health and safety and due process rights of clients. He reported on efforts to communicate with the Court on issues and concerns and to continue to push for input on furniture Court Standing Orders and policies. He informed the Committee of the progress made and also the numerous problems and concerns that continue to exist.

Mr. Benedetti stated that management continues to focus on balancing the safety of attorneys and other staff, both public and private, with the health and safety and due process rights of the clients. He reported that he expects CPCS will continue to need to be flexible and change its own policies in response to what is happening on the ground in the courts and other external locations.

Mr. Benedetti reported to the committee on the FY 2021 budget following up on an email sent the previous week briefing them on management efforts to be proactive on the upcoming budget year. A mandatory tiered furlough program based on salary was implemented for the month of July for all staff as was a voluntary furlough program. The voluntary program was well received with a number of staff taking advantage. He let the Committee know of the work of Lisa Bacon, Human Resources Director and her staff have been champions in implementing both programs.

Ms. Bacon proceeded to outline the implementation of both programs and the related challenges, specifically with the State Department of Unemployment Insurance (DUA) and the problems staff has been encountering with DUA. She acknowledged the hard work of the HR team in assisting staff throughout this challenging period.

There being no further business to come before the Committee, the Committee adjourned at approximately 8:27 p.m.

Respectfully submitted

/s/ *Joseph L. Kociubes*

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Joseph L. Kociubes, Secretary Pro Temp