COMMITTEE FOR PUBLIC COUNSSEL SERVICES

MINUTES OF MEETING

JULY 20, 2022

The monthly meeting of the Committee for Public Counsel Services was held by video conference on Wednesday, July 20, 2022 beginning at approximately 5:38 p.m. Joseph L. Kociubes, Chairman, presiding.

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

MEMBERS PARTICIPATING: Messes. Alvarado, Ball, Chester, and Petropoulos
Messrs. Apfel, Cinquegrana, Kennedy, Miller and White

Due to the fact there was not a quorum, at approximately 5:35 p.m. discussion proceeded regarding the first amicus brief; however at approximately 5:38 p.m. a quorum was achieved with eight members attending at which point Mr. Kociubes called the meeting to order.

1. **Minutes of June 14, 2022 Meeting**

The minutes of the June 14, 2022 meeting were approved as presented.

2. **Amicus Requests**

Rebecca Kiley, Attorney-in-Charge, Public Defender Division Appeals Unit, sought Committee approval in the following cases.

a. Commonwealth v. Correia, SJC-13223

The defendant was charged with first-degree murder, and convicted of voluntary manslaughter. During cross-examination the prosecutor began questioning the defendant about lyrics from rap songs he had posted on YouTube before the fight, which referenced guns. A coalition of law professors and legal organizations will file an amicus brief in this case, primarily authored by Citizens for Juvenile Justice. The brief will include a great deal of social scientific research about how rap lyrics are perceived by the public, including at criminal trials and how they make jurors significantly more likely to believe the defendant is capable of committing the crime.

MOTION: **Mr. Miller. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. Correia, SJC-13223.**

SECOND: **Ms. Chester.**

VOTE: **Unanimous.**

b. Commonwealth v. DiBenedetto, SJC-13253

The defendant's appeal involves the denial in Superior Court of his May 2021 motion to enforce a plea offer he attempted to accept in 1994. The Supreme Judicial Court (SJC) solicited amicus briefs on the following question: "[w]hether a 'locked plea' or 'package plea' offer, which made the offer of a plea contingent on its acceptance by all codefendants, violated the right to due process."

A CPCS amicus brief would focus on the problem of "package deals" from the perspective of the defendant who wants to go to trial but might face considerable pressure from his co-defendant to take the deal.

MOTION: **Ms. Ball. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. DiBenedetto, SJC-13253.**

SECOND: **Mr. Miller.**

VOTE **9 votes in favor; 2 members recused themselves. Motion carried.**

c. Commonwealth v. Shiner, FAR-28942

Ms. Kiley is seeking permission to sign on to an amicus letter in support of the defendant's application for further appellate review (FAR) in the SJC. The Massachusetts Association of Criminal Defense Lawyers (MACDL), with possible collaboration by the New England Innocence project, is drafting the letter.

The amicus letter will argue that the trial court improperly permitted a police officer without particular expertise to testify regarding an "experiment" he conducted about the technology underlying the surveillance video admitted at trial, thereby undermining a key piece of exculpatory evidence for the defendant.

MOTION: **Mr. White. That the Committee approve staff to sign on to an amicus letter in support of the defendant's application for further appellate review in the case of Commonwealth v. Shiner, FAR-28942.**

SECOND: **Mr. Miller.**

VOTE: **Unanimous.**

d. **Commonwealth v. Jarrett, SJC-13243**

The defendant was found in violation of his probation based on evidence of a drug transaction in Downtown Crossing. At his final surrender hearing, counsel objected to the police officer being permitted to identify him in court as the man she had seen interacting with the known drug user. The objection was overruled and Mr. Jarrett's probation was revoked. The SJC transferred Mr.

Jarrett's appeal of revocation sua sponte and solicited amicus briefing on "whether the rule established in *Crayton* ... applies in contexts other than a criminal trial."

MOTION: Mr. Apfel. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. Jarrett, SJC-13243.

SECOND: Ms. Chester.

VOTE: Unanimous.

e. Commonwealth v. Watt, SJC-13279

Afton Templin, Director of Juvenile Appeals, sought Committee approval to file an amicus brief in the above case.

The juvenile was convicted of first degree murder. He filed two motions for new trial and had a direct appeal. He filed another motion for new trial after his direct appeal alleging an issue of structural error around the right to counsel. Because the motion was filed after the direct appeal, the juvenile had to file a gatekeeper petition pursuant to G.L. c.278, §33E. The Single Justice reserved and reported the petition and noted "[t]here is a significant question in my view as to whether the defendant has raised a 'new and substantial' issue, as required by § 33E." The Single Justice directed the parties to address the "new and substantial issue" question in briefing, as well as any other arguments they wished to present.

The Youth Advocacy Division's amicus brief would request the SJC clearly hold that Section 33E applies to juvenile first-degree murder appeals. In addition, the brief would argue the SJC should conclude that, under the circumstances here, the issue raised by the juvenile is "new and substantial", and as such satisfies the Section 33E gatekeeper standard.

MOTION: Mr. Miller. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. Watt, SJC-13279.

SECOND: Ms. Chester.

VOTE: Unanimous.

f. James B. Carver v. Carol A. Mici & Another, SJC-13247 and
g. Martin McCauley v. Nelson Alves & Another, SJC-13296

Mara Voukydis, Director of the Parole Advocacy Unit, sought Committee approval to either file or join an amicus brief in support of two medical parole cases listed above. Both cases bring an important part of the medical parole statute: medical parole release due to permanent incapacitation and debilitation. Both assert that the Department of Correction (DOC) fails to properly assess petitioners under G.L. c. 127, § 119A, instead supplanting its own judgment and definitions.

The Carver case is currently in the SJC on an application for Direct Appellate Review following a denial of his civil certiorari petition challenging the DOC's denial of his medical parole petition. The SJC took Mr. McCauley's case sua sponte following the denial of a certiorari petition.

It may be unnecessary for CPCS to author and file its own brief in these matters because colleagues at Prisoners Legal Services (PLS) will write one, which CPCS is likely to join. The brief will focus on showing the two cases are far from exceptional, with many people with severe illness and serious disabilities denied access to medical parole release due to the DOC's unlawfully narrow definition of debilitation.

MOTION: Mr. White. That the Committee approve either the filing or joining An amicus brief in support of James B. Carver v. Carol A. Mici & Another, SJC-13247 and Martin McCauley, v. Nelson Alves & Another, SJC-13296.

SECOND: Mr. Apfel.

VOTE: Unanimous.

Ms. Voukydis mentioned a decision that the Superior Court issued today regarding that mandatory life without parole for 18-20 years is unconstitutional. The SJC remanded the matter on questions of fact. She will provide a copy of the decision to the members.

h. **Haaland v. Brackeen, U.S. Supreme Court No. 21-376**

Katy Krywonis, Children and Family Law Division Training Attorney, sought Committee approval to sign onto an amicus brief in the above case that will be filed by the National Association of Counsel for Children (NACC).

This case is a lawsuit brought by Texas and individual plaintiffs who allege that the Indian Child Welfare Act (ICWA) is unconstitutional. The case has worked its way through the lower courts and will now be reviewed by the U.S. Supreme Court in the fall. The petitioner, Secretary of the Interior Deb Haaland, seeks to overturn a decision by the Fifth Circuit declaring parts of ICWA unconstitutional.

ICWA has long been regarded as the "gold standard" of child welfare policy and practice because it guards against unnecessary government intrusion, protects family relationships, and emphasizes familial and cultural identity.

NACC and partners will be filing an amicus brief in support of ICWA. The brief will offer the Supreme Court a practical perspective and will focus on how ICWA promotes best practices in the field. Supporting ICWA will benefit CPCS's parent and child clients alike and is consistent with CPCS's commitment to anti-racism and its litigation goals.

MOTION: Ms. Chester. That the Committee approve signing on to an amicus

brief in the case of Haaland v. Brackeen, U.S. Supreme Court No. 21-376.

SECOND: Mr. White.

VOTE: Unanimous.

3. Lease Approval

Anthony Benedetti, Chief Counsel, sought Committee approval to enter into a ten year lease agreement with 1350 Main St., LLC for office space for the Springfield office which houses the Public Defender Division, Children and Family Law Division, and Youth Advocacy Division staff. The annual rental rate is $463.383 for 16,220 square feet at an average of $28.57.

MOTION: Ms. Chester. That the Committee approve the ten year lease agreement with 1350 Main St., LLC for office space for the Springfield office for an annual rental rate of 463.383 as presented.

SECOND: Mr. White.

VOTE: Unanimous.

4. **Monthly Financial Overview Report**

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. The fiscal year concluded on June 30, 2022 with the accounts payable period ending August 30, 2022.

At this point in the fiscal year the agency has spent approximately $255M and Mr. Lucchetti is projecting that overall spending will be $275M with an estimated surplus of approximately $17.4M across all three line items.

5. **Commitments $10,000 and Over Report**

Mr. Lucchetti provided the commitments of $10,000 and over report for review, highlighting three vendors that deviated more than 10% from the pre-approval amount and one new vendor where spending exceeds $25,000 but has not been previously approved by the Committee.

- Winslow Technology Group, LLC (IT hardware/software) - $1,507,761
- SHI International Corp (IT hardware/software) - $652,951
- Carahsoft Technology Corporation (vendor application project) - $137,077
- Airthings America, Inc. (air quality monitoring subscription & Equipment) - $28,121

He also highlighted one vendor where spending currently exceeds $10,000 – Pasek Corp. (lock maintenance/keying). This was reported to the Committee as required by the procurement policy.

Mr. Lucchetti requested approval for the adjusted amounts for the three vendors and the one new vendor.

MOTION: **Ms. Ball. That the Committee approve the current spending Estimates for the four vendors as presented.**

SECOND: **Mr. Miller.**

VOTE: **Unanimous.**

6. FY 2023 Budget Update

Lisa Hewitt, General Counsel, provided an update on the FY 2023 budget. The Conference Committee report is now on the Governor's desk. . She gave special thanks to the Senate President, the Speaker of the House, Chairman Day and Chairman Eldridge for their support in recommending our request.

The Conference Committee Report includes the amounts requested in line-item 0321-1500 (operations and administration) of $79M; 0321-1510 (private counsel) $207M and in 0321-1520 (court cost/experts) of $30.2M. It also included language allowing for prior appropriation continued (PAC) in line items 0321-1500 and 0321-1520, which allows the use of remaining funds from the previous fiscal year.

Some highlights of the budget include:

- Rate increases for the private bar
- Title IV-E trust for CPCS (this is a reimbursement process through the Federal Government to pay states for representation of children who are either in foster care or are eligible for foster care)
- The elimination of probation and parole fees
- The requirement of the Department of Corrections, sheriffs and the Department of Youth Services to permit those in custody to make phone calls free of charge
- The requirement that correctional facilities limit the prices of commissary items such as food or hygiene products to no more than three percent over the initial purchase cost
- Increase of funding for reentry programs

7. Counsel Shortage Update

Mr. Benedetti informed the members that there has not been much change across the State. The new fiscal year started and attorneys can start taking cases under the new annual billing capacity.

The new initiative that was put in place paying attorneys $1,500 to take care and protection cases in Hampden County to clear up the backlog has been a success. There were 207 individuals

without counsel and as of Saturday, July 16th all were assigned an attorney to represent them. Mr. Benedetti provided a quick overview of who the attorneys are that took the cases and where they are from. Staff will continue to monitor the situation.

Mr. Benedetti also informed the Committee of an initiative that is being worked on that would reimburse attorneys for the cost of taking the training under the condition that they do a certain amount of work. Logistics are still being considered, but the goal is to implement it in time to encourage attorneys to take trainings in the fall.

8. **Chief Counsel Report**

Mr. Benedetti provided the following updates:

Private Counsel Initiative

Another initiative that Vanessa Velez, Deputy Chief Counsel of the Private Counsel Division and Rose King, Director of Criminal Trials, have been working on is a loan forgiveness program. They have been working with court officials to have the Federal Department of Education to have private attorneys who contract be eligible for loan forgiveness.

Montgomery Commission

Mr. Benedetti reported that the Harmony Montgomery Commission that was included in the FY 2023 budget was not included in the Conference Committee report sent to the Governor.

Chief Justice Locke of the Trial Court has convened a working group composed of representatives from CPCS, Department of Children and Families, and the Court to examine the C&P process and to report back in three months with recommendations for improvements.

Personnel Matters

Denise Simonini, Executive Assistant, is retiring and her last day is August 1st. A small gathering was held today to celebrate her retirement and thank her for her years of service to the agency. She plans on attending the Committee meeting in September to assist her replacement with the transition.

Debra Krupp, Director of Administration and Operations, is retiring at the end of October. Ms. Krupp has been with the agency for many years and has held a number of different roles.

9. **Other Matters**

Election of Officers

Mr. Kociubes reminded the members that the election of officers would take place at the September meeting and anyone who wants to be considered should contact Mr. White.

Review of Chief Counsel

Mr. Kociubes also noted that the Committee has not conducted a 360 review of the Chief Counsel in several years. He indicated that he did not think it was necessary to conduct one now because the pandemic is just ending and there have been several new senior management team member within the last year or so. He did indicate that he believes Mr. Benedetti's performance has been terrific dealing with office moves and the counsel crisis. It is not an agenda item but if anyone would like it to be an agenda item for the September meeting, they should contact him to discuss it, however he does not think it is appropriate to conduct one now.

September Meeting Location

The current plan is to have the September Committee meeting be hybrid with those members able and willing to attend to do so.

There being no further business to come before the Committee, the Committee adjourned at approximately 6:57 p.m.

Respectfully Submitted,

/s/ *Mia Alvarado*

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Mia Alvarado, Secretary