COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

October 19, 2022

The monthly meeting of the Committee for Public Counsel Services was held by video conference on Wednesday, October 19, 2022, beginning at 5:44 p.m. Joseph L. Kociubes, Chairman, presiding.

MEMBERS PARTICIPATING: Messes. Alvarado, Ball, Petropoulos
Messrs. Apfel, Demissie, Kociubes, Miller, White

The record will reflect that due to the Coronavirus pandemic, a Zoom meeting was held with members attending via video conference.

1. **Minutes of September 21, 2022 Meeting**

The minutes of the September 21, 2022, meeting were approved as presented.

2. **Legal – Request for Committee Action**

A. Amicus request, Commonwealth v. Sheldon Mattis SJC-11693, Commonwealth v. Jason Robinson SJC-09265

Liz Dembitzer, Director, Private Counsel Division Criminal Appeals Unit, requests authorization to file an amicus brief as an advocate in the cases of Sheldon Mattis and Jason Robinson. The defendants argue the position that life without parole, for clients convicted of first-degree murder, to anyone who is between the ages of 18-20 years old at the time of crime, is unconstitutional. The Commonwealth does assent and agrees that life without parole should not be mandatory in that age group, but that it can be imposed after an individualized hearing. CPCS argues that based on brain and behavior development of this age group, that it should be unconstitutional in all instances. Brief will be written by Mr. Jake Barter who is extremely experienced in both juvenile life without parole cases and all criminal defense murder cases. CPCS has an opportunity to provide real examples of clients who would be impacted by this ruling, as some have become extraordinary people while incarcerated. No arguments would be made that might limit further extension for 21–25 year-olds.

MOTION: Ms. Alvarado. That the Committee approve amicus request regarding *any* imposition of LWOP on 18-20 year olds and violates art. 26 of the Massachusetts Declaration of Rights.

SECOND: Ms. Petropoulos.

VOTE: Unanimous.

B. Amicus letter in support of application for further appellate review of Commonwealth v. Santana, 101 Mass.App.Ct. 690 (2022)

Ms. Wendy Wayne, CPCS Immigration Impact Unit Director, requested permission from the Committee to join an amicus letter in support of Further Appellate Review; if granted to join an amicus brief in Commonwealth v. Santana, No. 2021-P-0413. Commonwealth v. Santana is a recent appeals court case where the prosecutor elicited testimony from the defendant regarding his lack of lawful immigration status and then proceeded to question him about his English-speaking abilities at trial. The trial court judge did instruct the jury to not consider Mr. Santana's immigration status in their decision but did not tell the jury to disregard Mr. Santana's testimony, nor did the judge strike the testimony.

The Appeals Court found that questions regarding Mr. Santana's immigration status were prejudicial and improper, but that they did not rise to the level of overturning the case. Appeals Court Judge Rubin wrote a very strong dissent, noting in part, that prejudice against undocumented Latin Americans is powerful and widespread in the United States.

Ms. Wayne described part of the content of the draft amicus letter. She explained how research shows that first generation immigrants commit less crime than second, third, and fourth generation immigrants. It is the position of CPCS that there is prejudice in calling someone an illegal immigrant and discussing their inability to speak English alone and that should not be permitted as it plays on the implicit and explicit bias of the jurors.

MOTION: Mr. White. That the Committee approve the request to join amicus letter of support and to join an amicus brief if this case is accepted by the Supreme Judicial Court (SJC).

SECOND: Mr. Demissie.

VOTE: Unanimous.

C. Amicus request, Fonjia v. Garland, No. 22-1625 (1st Circuit)

Ms. Wendy Wayne, CPCS Immigration Impact Unit Director, made a request to join an amicus brief in Fonjia v. Garland pending in the First Circuit. The amicus brief will be primarily authored by the ACLU of New Hampshire. CPCS plans to write a declaration and join in. There are other cases presenting with the exact same issue, such as the recent Bazile v. Garland case filed in Boston, but the judge appeared remotely from the Fifth Circuit in Texas. As a result, CPCS has broadened the scope of request since last week's memo and is requesting to join any similar amicus briefs moving forward.

Fonjia v. Garland is a case that deals with judicial venue, and where a petition for review can be filed. The process that someone goes through during removal proceedings is that the immigration judge orders the person removed, and they are entitled to appeal to the Board of Immigration Appeals (BIA), and then it goes to a Circuit Court. The question is: where the petition for further review should be heard and which Circuit Court it should be filed in. Judicial venue, immigration context, and choice of law have not really been separated in these cases. Concern arises when Fourth or Fifth Circuits issue decisions using Fourth or Fifth Circuit laws from a remote immigration judge. Fourth or Fifth Circuit laws are less favorable to immigrants than First Circuit.

The amicus brief will focus on where the charging documents on notice of indictment are filed so that attorneys know what law to be following. The brief will ask the Court to find venue is proper in the First Circuit, when documents have been filed in the Boston Immigration Court. CPCS strongly believes this position is this fairest for non-citizen clients.

MOTION: Ms. Ball. That the Committee approve request for permission to join an amicus brief in Fonjia v. Garland, pending in the First Circuit, as well as join any similar amicus briefs moving forward.

SECOND: Mr. Miller.

VOTE: Unanimous.

D. Motion to Intervene with Respect to Protective Order in Joined Middlesex "Hinton Whole Lab" cases (Com. v. Reginald Remy, 0681CR00155; Com. v. Justin Deprospro, 0781CR00294; Com. v. Israel Cedeno-Martinez, 0381CR01623; and Com. v. Ricky Simmons, 0481CR01176)

Ms. Tricia Muse, Staff Counsel, Special Projects Unit, Private Counsel Division, presented a Motion to Intervene in the case of Com. V. Reginald Remy, et al. CPCS seeks access to impounded materials as an interested non-party under the Uniform Rules of Impoundment Procedure. The Remy case has been joined with three other cases for discovery purposes related to the Hinton Drug Lab. The consolidated litigation appears to have led to evidence that would be exculpatory to thousands of people with drug convictions and pending cases. CPCS does not know exactly what the evidence is because it is impounded and under protective order. However, the content was referenced in an order that was inadvertently posted on MassCourts online docket in the Remy case and the substance was reported in the NBC news article. Ms. Muse distributed the article "Epic Massachusetts crime lab scandal may involve even broader wrongdoing, judge says" by NBC news.

The inspector general's office referred one matter to the attorney general's office for possible prosecution "based on test results from an independent out-of-state laboratory, which were inconsistent with the Hinton Drug Lab results, suggesting that criminal acts may have been committed by another person at the Hinton Lab," the judge wrote.

"Also, there were other instances where other persons at the lab knew or should have known that certain substances were not considered controlled substances under Massachusetts law but caused certificates of analysis to be issued stating that the substances were illegal, resulting in defendants being wrongfully convicted," the judge wrote.

The judge did not disclose the identities of those people in his ruling, and numerous records remain under seal.

The Office of the Inspector General (OIG) was tasked with investigating the Hinton Drug Lab, and in 2014, after a top to bottom review concluded that Dookhan was the sole bad actor. The OIG has maintained and reasserted that conclusion over the past 8 years. More importantly, prosecutors have relied on that assertion and judges have denied motions of relief. It now appears that that conclusion is inaccurate and perhaps false.

MOTION: Ms. Alvarado. That the Committee approve filing a motion to intervene in these cases so that CPCS can file a motion to lift the protective order since this evidence may be material to the cases of thousands of CPCS clients. This matter is also of great public interest and this information should be accessible to the public.

SECOND: Mr. Miller.

VOTE: Unanimous.

E. Request for Authorization to Settle Class Action Lawsuit, Coe v. SORB

Ms. Nancy Dolberg, Appelante Attorney, and Mr. David Manza, Staff Attorney, have been representing incarcerated classified sex offenders in the class action lawsuit where information has been published on the public website maintained by SORB. After offers and counter offers with CPCS, SORB has agreed to keep incarcerated registrants off the Public Website with publication no sooner than seven days prior to release. The settlement agreement would need to be approved by the Court.

MOTION: Mr. Miller. That the Committee authorize entering into agreement with SORB to keep incarcerated registrants off the Public Website until seven days prior to release.

SECOND: Ms. Petropoulos.

VOTE: Unanimous.

3. **Monthly Financials Overview Report**

Mr. Kevin Lucchetti, Chief Financial Officer, presented the Monthly Financials Overview Report. CPCS has spent about 16% or $52 million of the $330 million that is available across all accounts. There is a surplus in account 1520, the court expert line, as CPCS received a higher ask of about $30 million and the legislature also approved a PAC of approximately $9 million from last year. An examination of the hourly rates is being conducted with a proposal likely later in the fiscal year.

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

Mr. Kevin Lucchetti, Chief Financial Officer, presented items for the Commitments $10,000 and Over Report.

The current estimated spending exceeds preapproval for five vendors, Y&S Technologies, Inc. Tallan, Inc. Granite Telecommunications LLC, Comcast Cable Communication Mgmt LLC, Zoom Video Communications, Inc. with the total of these contracts being approximately $1.5 million.

New vendor New Horizon Communication Corp. spending exceeds $25,000. Cost is about $42,000, and has not been previously approved by the Committee.

Lastly, vendor Benjamin Vivante spending exceeds $10,000 for website and intranet work and this is being reported for information only, not vote.

MOTION: Mr. White. That the Committee approve use of five vendor obligations where estimated spending is more than 10% of preapproval and total of these contracts is $1,543,080 million and for New Horizon Communications Corp. vendor for about $42,379.

SECOND: Mr. Miller.

VOTE: Unanimous.

5. **Human Resources presentation on CPCS recruitment efforts**

Mr. Ted Waterman, Chief Human Resources Officer, Mr. Kevin Ruderman, Recruiting & Hiring Manager, and Mr. Kuda Chidzonga, Talent Outreach Partner, presented on Human Resources recruitment efforts and the steps CPCS is taking to attract people to work here.

Mr. Waterman provided an overview of the challenging hiring market. He stated that the niche is small, and people are retiring and moving out of the field, especially in Western, MA. CPCS does a very good job of bringing people on board regularly with the new fall graduating class, but its more challenging throughout the year. Recently, CPCS has needed to consider candidates with less experience and these attorneys need more mentoring and training and cannot initially take on as many cases. Additionally, the Private Counsel crisis and staff retention efforts remain a priority for CPCS.

Mr. Ruderman shared two basic types of recruitment philosophy: passive recruitment, and active recruitment. Passive recruitment is everyday job postings on websites and job boards. All CPCS postings are posted on our website, Monster, Jobs Direct, Mass Careers, Indeed.com, etc. Attorney and Social Work positions are also shared on specific target boards and websites and occasionally CPCS pays for Senior Management Team and Director level special position postings. Attorney positions are also sent out to area law schools, state law school, Mass Affinity Bar Associations, County Bar Associations, and Bar Advocate Programs. CPCS is challenged with hiring very experienced lawyers, and it is somewhat easier to hire lawyers straight out of law school.

Mr. Ruderman provided summary of the last 18 months of hiring.

- CPCS hired 158 total employees.
- 96 attorneys were hired, approximately 20% of total attorney staff. About 40 out of the 96 attorneys were hired for Worcester and west of Worcester.
- More than half of the newly hired attorneys have less than 5 years' experience, and the majority have less than one- or two-years' experience

Mr. Chidzonga presented active recruitment methods, such as on-campus interviews (OCI) and national law school recruiting events. CPCS has attended over thirty to forty recruiting events over the past year in person, and via Zoom. Technology has helped CPCS expand outreach

capabilities and potential. Mr. Chidzonga shared that planning for the summer internship program is also underway.

6. **Chief Counsel Report**

Mr. Anthony Benedetti, Chief Counsel, stated that challenges continue with not having enough attorneys to represent adult criminal and children and family law, specifically in Western, MA. Currently, about a hundred and thirty clients do not have representation. The CAFL team plans to survey private attorneys and use the results to come up with possible solutions, with a focus on trying to ultimately increase the number of cases taken by attorneys. Mr. Benedetti sent an email to the private bar reminding them about the rate increase, annual cap increase, and advocacy efforts to have private bar members included in federal loan forgiveness problems.

Mr. Benedetti also shared that CPCS sent a letter today to the Woburn Police Chief requesting all information related to Officer John Donnelly and notifying of our intent to seek dismissals of all cases that Office Donnelly has been involved with.

Mr. Benedetti congratulated Mr. Mark Larsen, Director, Mental Health Litigation Division, on retirement. Mr. Larsen has served in the role for 10 years and has become an accomplished respected expert in Massachusetts on mental health law and the mental health system. Mr. Larsen spoke of the changes in the Division during his tenure, how it has grown much larger, and a significant number of cases are now being brought before the appellate courts on important issues. Mr. Larsen discussed the issue of the court expanding use of video trials in civil commitment cases as an important area of work for the future. Despite the current Court order, Judges have continued to hold virtual trials despite defendant objections. CPCS wants clients to be able to have a say regarding whether their case is in person or virtual and CPCS is in the process of disputing this issue to advocate for our clients. Litigation may be necessary in the future.

Mr. Benedetti congratulated Ms. Debra Krupp, Director, Administration & Operations, on retirement. Ms. Krupp has been employed by CPCS for 35 years. Ms. Krupp has served as a Trial Attorney, Appellate Attorney, Training Coordinator, and she was the first Director of the Innocence Program. Ms. Krupp has supported Mr. Benedetti through COVID-19 agency challenges, through oversight of operations, including most recently the agency pandemic response.

Ms. Krupp provided the Committee an update on the agency risk assessment being done by Public Consulting Group. Two high risks recognized are 1. not having enough lawyers to meet client needs and 2. tracking assets, which operations are in the process of already addressing. Other risks identified are failure to document policies and procedures which CPCS has committed to addressing by having this done by the end of FY 23. She stated that an updated internal control plan and a business continuity plan would be completed soon after.

7. **Executive Session** – recorded separately

Executive Session started at 7:08 p.m. and ended at 7:33 p.m.
Returned to Open Session at 7:33 p.m.

MOTION: **Mr. White. That the Committee approve FY23 Salary Increases for CPCS staff.**

SECOND: **Mr. Demissie.**

VOTE: **Unanimous.**

- Personnel matters

Next meeting, November 16, 2022, will be virtual. December meeting will also be virtual.

There being no further business to come before the Committee, the Committee adjourned at approximately 7:35 p.m.

Respectfully submitted

Mia Alvarado

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Mia Alvarado, Secretary