

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

October 18, 2023

The monthly meeting of the Committee for Public Counsel Services was held by video conference on October 18, 2023, beginning at 4:32 p.m. Joseph L. Kociubes, Chairman, presiding. Mr. Kociubes and Mr. Benedetti welcomed new Committee members Ms. Dillon and Ms. McKinnon.

MEMBERS PARTICIPATING: Messes. Alvarado, Ball, Chester, Conrad, Dillon,
McKinnon, Petropoulos

Messrs. Apfel, Healy, Kennedy, Kociubes, White

1. Minutes of September 20, 2023 Meeting

The minutes of the September 20, 2023 meeting were approved as presented.

2. Legal – Request for Committee action

a. Mack v. Bristol District Attorney's Office, SJC-13468

Director of Strategic Litigation Rebecca Jacobstein presented an amicus recommendation for Mack v. Bristol District Attorney's Office, SJC-13468. The amicus was approved by the Amicus Subcommittee. The amicus brief will be filed with at least one journalist and the ACLUM.

The case involves Mr. Mack's public records request to the District Attorney's Office. The DAO denied most of the records request citing various exemptions and investigatory materials, which a judge overruled. The DAO is now appealing. The DAO's position is that now that the POST Commission does police misconduct work, all information about misconduct must be handled through the POST Commission and not the DAO. The DAO's argument also dovetails their position that they do not need to provide exculpatory evidence about police except for what is already provided in the POST Commission public database. This is problematic and the court should be made aware. The DAO's argument is nonsensical in that by having an agency which is designed to increase law enforcement transparency, transparency has been reduced in other areas. DAs in some counties are also arguing that they should not have to turn over records through Rule 14 and Rule 17.

MOTION: Ms. Ball. That the Committee approve the amicus recommendation Mack v. Bristol District Attorney's Office, SJC-13468.

SECOND: Mr. White.

VOTE: 13 in favor. Ms. Dillon abstained.

b. Massachusetts State Police lawsuit

Rebecca Jacobstein provided an update regarding the Massachusetts State Police lawsuit. CPCS sent a demand letter to the MSP in the spring of 2023. Multiple meetings regarding many public records requests with the MSP have occurred. Some records requests are dated from two years ago. The MSP has complied with providing some discovery, but often it is not complete. They have withheld covert recordings in at least 250 cases. The lawsuit lists 8 requests CPCS does not have. CPCS is asking the court to order the MSP to provide us with all discovery requested and to order them to comply with future timelines. Committee members previously approved filing the lawsuit if other efforts failed.

MOTION: Ms. Conrad. That the Committee ratify the Complaint for Declaratory and Injunctive Relief and Jury Demand against the Massachusetts State Police.

SECOND: Ms. Petropoulos.

VOTE: 13 in favor. Ms. Dillon abstained.

c. Matter of a Minor, SJC-13492 and Matter of a Minor, SJC-13493

Juvenile Appeals Staff Counsel Sarah LoPresti presented an amicus recommendation for Matter of a Minor, SJC-13492 and Matter of a Minor, SJC-13493. The amicus was approved by the Amicus Subcommittee. The Youth Advocacy Division (YAD) and Mental Health Litigation Division (MHL) are seeking approval to jointly author and file an amicus brief regarding the two juvenile Section 35 appeals pending in the SJC.

Both cases involve petitions to commit youth based on alcohol and/or substance use disorder. The judge heard testimony from the court clinician and petitioning parent. The court clinician opined that the youth did not meet the statutory criteria under Section 35, although the Juvenile Court judge ordered the youth to be committed for up to 90 days. The SJC issued an amicus solicitation, asking whether Section 35 requires that every element of the statutory criteria be supported by expert testimony or whether the court can rely on other evidence.

The amicus brief would highlight four shortcomings of the Section 35 process 1) involuntary treatment for alcohol or substance use disorder is clinically ineffective, particularly for youth, who are typically in the earlier stages of the disorder and that fact makes expert testimony all the more necessary to ensure that involuntary commitment is used only as a tool of last resort 2) involuntary treatment disrupts services and support and results in worse outcomes 3) effectively criminalizes, having all of the trappings of a criminal lock up, making it less likely that youth will actively engage in treatment 4) involuntary commitment for youth may be unnecessary because a parent can admit a youth to a hospital or inpatient treatment center or seek relief under the CRA statute. Therefore, a clinician is needed to opine as to the required nexus between alcohol and/or substance use disorder in the likelihood of serious harm particularly if there is dangerous behavior to require involuntary treatment. An expert must opine that it is not related to the experimental behavior

typical in adolescent development and must be the result of UDSU. Expert testimony is necessary, but not sufficient for commitment. To allow otherwise would improperly vest the judge with clinical expertise, and thereby increase the likelihood of erroneous civil commitment.

In response to Committee members' questions, clarification was provided: A child is held until resolution of the Section 35 hearing. An on-call clinician from the Juvenile Court Clinic usually makes assessment.

MOTION: Ms. Conrad. That the Committee approve the amicus recommendation for Matter of a Minor, SJC-13492 and Matter of a Minor, SJC-13493.

SECOND: Mr. Chester.

VOTE: 12 in favor. Ms. Dillon abstained.

d. Commonwealth v. A Juvenile, Appeals Court No. 2023-P-0213, Supreme Judicial Court No. SJC-13496

Juvenile Appeals Staff Counsel Sarah LoPresti presented an amicus recommendation for Commonwealth v. A Juvenile, Appeals Court No. 2023-P-0213, Supreme Judicial Court No. SJC-13496. The amicus was approved by the Amicus Subcommittee. The SJC transferred this case sua sponte from the Appeals Court and issued an amicus solicitation. Additional briefing was allowed of the Appellate Division of the Superior Court's review of a youthful offender's sentence to State prison. In 2022, the youth appealed his State prison sentence to the Appellate Division under G. L. c. 278, §§ 28A-28C. Under that statute, the Appellate Division reviews sentences to the State prison, imposed by final judgments in criminal cases. At its yearly sitting, the Appellate Division of the Superior Court can modify a sentence upward or downward or leave it unchanged. This is intended as a level of comparative review to other sentences for similar offenses and whether they are excessively long or short.

The solicitation and issue for the amicus is whether a youthful offender's commitment to State prison is a sentence which may be reviewed under G. L. c. 278, §§ 28A-28C. YAD's amicus brief will argue that a State prison sentence imposed on a youthful offender is a sentence which may be reviewed by the Appellate Division rather than the Appeals Court. First, neither that statute nor the youthful offender statute which authorizes state prison sentences for youthful offenders addresses the issue. The Appeals Court does not provide an avenue for consideration of whether a youthful offender's sentence is excessively long or short where the sentence is the result of a plea or is otherwise ineligible for appellate review. There is no existing ground for relief other than the Appellate Division for a subset of youthful offenders. YAD's amicus brief would also support the juvenile's argument that review by the Appellate Division should be held with the Juvenile Court Justices sitting by designation. Although review by the Appellate Division is appropriate, it is inadequate. The Appellate Division can only consider State prison sentences, not House of Correction sentences nor DYS commitments, and therefore it does not have a full picture of whether a State prison sentence is comparatively excessive of other youthful offenders. Designating experienced Juvenile Court Justices to sit in special sessions of the Appellate Division

would cure the inadequacy of the current sentence appeals scheme in two ways 1) it would normalize often widely disparate youthful offender sentences 2) Juvenile Court judges have a facility with an array of juvenile sentencing options and adolescent development expertise.

MOTION: Ms. Ball. That the Committee approve the amicus recommendation for Commonwealth v. A Juvenile, Appeals Court No. 2023-P-0213, Supreme Judicial Court No. SJC-13496.

SECOND: Mr. Miller Conrad.

VOTE: 12 in favor. Ms. Dillon abstained.

e. Commonwealth v. Carlos Muniz Rodriguez, 1481CR00420

PDD Appeals Attorney Matthew Spurlock presented an amicus recommendation for Commonwealth v. Carlos Muniz Rodriguez, 1481CR00420. The amicus was approved by the Amicus Subcommittee. CPCS asks the Committee's permission to submit a letter in support of direct appellate review in this appeal. If the letter is accepted, then a SJC amicus brief will be filed.

Mr. Muniz Rodriguez filed a motion to vacate the condition of his probation requiring GPS monitoring. In 2019, Feliz struck down G.L. 265, § 47 as unconstitutional under article 14, so that the judge would have to conduct a required individualized balancing. The problem is that hundreds of people sentenced for a sex offense prior to 2019 are subject to mandatory GPS probation monitoring conditions and it has become the status quo that the burden is on the defendant to file a motion to vacate that condition. CPCS will be seeking a global vacancy before the SJC of these conditions, so that the burden of proof is appropriately placed on the Commonwealth.

MOTION: Ms. Georgopoulos. That the Committee approves a letter for direct appellate review in Commonwealth v. Carlos Muniz Rodriguez, 1481CR00420 and if the SJC accepts the appeal, that the Committee approves an amicus brief.

SECOND: Ms. Chester.

VOTE: 12 in favor. Ms. Dillon abstained.

f. Commonwealth v. Quasim Hastings, SJC-13495

Parole Advocacy Director Mara Voukydis presented an amicus recommendation for Commonwealth v. Quasim Hastings, SJC-13495. The amicus was approved by the Amicus Subcommittee. The amicus brief will be written by Attorney Ben Keehn. The amicus will seek access to critically needed expert assistance for indigent disabled prisoners at parole hearings through the Indigent Court Costs Law.

The case background is that Mr. Hastings is a mentally disabled person who was referred to CPCS by the Parole Board for counsel. Attorney Sharon Dehmand filed motions for funds for both a forensic psychologist and a social service advocate. The motion for forensic psychologist was approved, but the motion for social worker funds went to a different judge who does not think that the court has the authority to authorize funds from the Indigent Court Cost Act. In 2017, Crowell held that the Parole Board is required to take some measures to accommodate prisoners with disabilities, such as securing experts for parole release hearings. CPCS believes that Crowell requires access to experts, but the problem is that the Parole Board does not have any way to provide funding for them. The court issued an amicus solicitation on direct appellate review asking whether the Superior Court erred in denying the defendants postconviction motion for funds to pay for a social service advocate and specifically if the court can apply the Indigent Court Cost Statue to these cases.

MOTION: Mr. White. That the Committee approve the amicus recommendation for Commonwealth v. Quasim Hastings, SJC-13495.

SECOND: Ms. Chester.

VOTE: 12 in favor. Ms. Dillon abstained.

3. Monthly Financial Overview Report

CFO Kevin Lucchetti presented the Monthly Financials Overview Report. The first financial quarter of fiscal year 24 is finished, with CPCS spending approximately \$55M of the \$346M available across all accounts. Mr. Lucchetti projects that CPCS will spend about \$332M across all accounts and have an operating surplus of approximately \$13M driven by the 1520 account. The first significant forecast revision is expected in January.

The Budget Subcommittee met to consider the FY2025 budget proposal and one more meeting will occur before the end of the month.

CPCS continues to advocate for a PAC of remaining FY2024 0321-1500 funds.

4. Commitments \$10,000 and Over Report

Kevin Lucchetti presented the Commitments \$10,000 and Over Report. He highlighted one item, Gartner, Inc. for \$49,275, which does not need Committee approval under the revised approval threshold. Gartner, Inc. is an advisory subscription for the CIO Jon Bartelson and IT Department.

Mr. Lucchetti reviewed the purpose of the Monthly Financial Overview Report and parameters and approvals of the Commitments \$10,000 and Over Report for new Committee members.

5. Potential Class Action Litigation – EdLaw request

YAD Deputy Chief Counsel Duci Goncalves, together with the EdLaw Project Staff Counsel Elizabeth Levitan and Tim Sindelar, presented the EdLaw class action litigation. Ms. Goncalves is seeking permission to join the Mental Health Legal Advisors Committee to file a class action lawsuit in Superior Court against the Massachusetts Department of Elementary and Secondary Education for their failure to provide special education services to young adults in county Houses of Corrections.

Currently, across Massachusetts, the special education rights of emerging adults in HOCs are being grossly violated. Many, if not most, students receive no special education services whatsoever, and those who do receive services only receive a fraction of what they're entitled to. The vast majority are denied any opportunity to make progress in their general education curriculum or earn a high school diploma. Under Massachusetts special education law, DESE is required to provide special education to school age children with disabilities who are incarcerated in county Houses of Corrections. Additionally, under Federal special education law, DESE has the ultimate responsibility to ensure the provision of special education services for incarcerated youth. They are failing to fulfill these obligations. EdLaw has attempted to work with DESE through individual case representation, and informal conversations, but has seen little to no progress. Because there is not a functional structure for providing special education services to students in HOCs even when representing individual clients, it is difficult to get the services that they are entitled to. Advocating with DESE is not enough. CPCS is looking to work with mental health legal advisors to file this lawsuit. CPCS believes that significant structural change is needed to ensure that the rights of all emerging adults with disabilities in HOCs are provided with their rights, and that this change is not going to happen without significant action.

A Committee member shared her support for this litigation which seeks to address the gap in education in the HOCs and asked if emerging adults serving time in the DOC could be included in the action. Mr. Sindelar explained that CPCS is currently working with individual clients imprisoned in the DOC. The DOC is governed by a different legal framework and an action against the DOC subset may occur in the future. This litigation is being filed as a matter of expediency and because the largest number of affected individuals are in the HOCs.

In response to Committee member's questions, Mr. Sindelar responded that because there is a specific special education statute and an obligation to provide services, a commonality exists that lends itself to injunctive relief. The litigation will begin with an administrative process through the Bureau Special Education Appeals and that must be exhausted first.

MOTION: Ms. Chester. That the Committee approve the Class Action Litigation to resolve system-wide failure by Massachusetts Department of Elementary and Secondary Education to provide appropriate special education services to young adults in the Houses of Corrections.

SECOND: Mr. Apfel.

VOTE: 12 in favor. Ms. Dillon abstained.

6. Child Requiring Assistance New Performance Standards Presentation

CAFL Deputy Chief Mike Dsida introduced CAFL Staff Counsel II Eleanor Wilkinson. Mr. Dsida stated that the Child Requiring Assistance Performance Standards were created to codify CPCS expectations for staff and private attorneys and will be published in the CPCS Assigned Counsel Manual to guide representation.

Ms. Wilkinson reviewed the CRA Performance Standards. CRA cases are known as status offense cases which means that a person's status as a minor makes their actions problematic. There are 5 types of CRA cases: runaway, truancy, school offender, commercially sexually exploited children, and stubborn children. CRA are defined as minors, who repeatedly refuse to obey the lawful and reasonable commands of a parent or caregiver.

The worst-case scenario outcome of a CRA case is family separation with children ending up in DCF custody. DCF custody can be a severe consequence. The constitutional right to family integrity has as much potential to be infringed on here as in a Care and Protection case exposing families to the policing that DCF imposes. When children are removed from their homes in CRA cases and because they tend to be older, they're much more likely to end up in congregate care which can be even more harmful than foster care. The risk of DCF custody also triggers a right to counsel for parents in some cases. Separate certifications distinguish whether an attorney may represent parents and children or children only in CRAs because of the risk of erroneous deprivation of custody for parents.

Another area of law where CRA cases tend to overlap is delinquency. Sometimes the conduct the child is alleged to be engaging in borders on what could be charged as a delinquency and so attorneys need to be mindful of protecting their client's Fifth Amendment and other rights. Counseling teenaged clients can be incredibly difficult, and counsel needs to be familiar with adolescent brain development. Many young people against whom CRA cases are filed receive or are eligible for special educational services and are also involved in other State agencies such as DMH or DDS. Attorneys need to be adept at advocating for community-based services for clients who are willing to participate. Girls, children of color, children who have been adopted out of foster care, children with disabilities, LGBTQ+ youth, and youth who are immigrants are disproportionately likely to have a CRA case filed against them. Most importantly, attorneys should help minimize the trauma inflicted by the legal system.

The new CRA Performance Standards are planned to take effect January 1, 2024.

7. Chief Counsel Report

Chief Counsel Anthony Benedetti shared that HR Director Ted Waterman is leaving his position with CPCS. He thanked Ted for his management and leadership of the department that has moved the department in a very positive direction and for the many work projects he has undertaken. Mr. Benedetti stated that Ted leaves the HR department stronger than when he came.

Mr. Benedetti provided an update related to the Department of Correction attorney mail tracking scheme. The DOC's proposed mail process is very problematic and CPCS is aggressively challenging it. Essentially, the DOC wanted each attorney to sign an affidavit swearing to what

was in each piece of mail. CPCS has communicated concerns to the DOC and the status of the new jail mail process is now on hold.

The New Lawyer Training was just completed for one the largest classes CPCS has had in the last few years. New lawyers will work in office locations across the state, predominantly in the Public Defender Division and Children & Family Law Division.

On Friday, October 13th, CPCS celebrated the Roxbury Defenders 50th Anniversary at the Boston Public Library Roxbury Branch. It was a wonderful event under the leadership of Roxbury Managing Director Allison Cartwright and a volunteer Planning Committee. Mr. Benedetti thanked Mia Alvarado for serving on the Planning Committee and all who contributed. Ret. SJC Chief Justice Hon. Roderick L. Ireland, Ret. SJC Associate Justice Hon. Geraldine S. Hines, and Prince Lobel Partner Walter B. Prince Esq. received awards and shared their Roxbury Defender experiences. Event video and photos will be shared.

The FY2025 budget proposal is being worked on and will be brought under the Budget Subcommittee's guidance. The proposed budget will include private bar hourly rate increases, and attorney incentives to try to address various geographic and practice area counsel shortage hotspots.

Mr. Benedetti reported on the CAFL Division counsel shortage issues. Over 160 people are currently without counsel. A targeted and tiered incentive proposal is being worked on. The incentive proposal is being designed to minimize foreseeable effects to other panels and to discourage attorneys from taking too many cases upfront and curtail overload. The general incentive outline is that an attorney would receive additional funds based on the number of additional cases that they take so that they would receive a certain amount for the first 5 cases, an additional amount for assignments 6 to 10, and an additional amount for assignments 11 to 15. The goal is to draw from counsel in the counties where the counsel shortage is greatest, primarily Hampden and Worcester counties. The Trial Panel Support Unit will prescreen attorneys to help determine their eligibility based on their hours during the previous two fiscal years, whether they are in good standing, what their current caseload is, and to ensure that it is appropriate for them to take additional cases. CPCS is hoping that implementation of the incentive program has immediate and positive results. Once incentive amounts are finalized and input into our billing system the proposal can be rolled out. The plan is for November implementation.

In response to a Committee member's question, Mr. Dsida stated that the focus is always on making sure that people have competent representation and close attention will be paid to attorney caseload. In response to a Committee member's question, Mr. Benedetti stated that past incentive programs have been presented to the Committee to ensure they are informed. Final details will be reported to the Committee in writing. Mr. Benedetti also reviewed that Mike Dsida and team are in the final stages of initial plans for utilizing Title IV E Federal funding, with support for counsel capacity improvement being the top priority. Mr. Benedetti added that Private Attorney Outreach Partners Kateen Kumar and Colleen Brady continue recruitment efforts. Meetings with court officials have also occurred to try to address and improve court conditions.

CPCS employees and private bar are looking forward to a positive shared learning experience in a tour “Discovering Amistad” on October 19th in Mystic, CT.

Mr. Benedetti recognized Committee member Bruce Miller for his service and dedication to CPCS and expressed that staff and the Committee had the opportunity to thank him in person last month. Mr. Benedetti also thanked Ms. Katherine Craven for her years of dedication to the Committee, its mission and clients, and for bringing her extensive knowledge of State government and the State budget as a member. She has been an extremely supportive Committee member since her appointment 2011.

The next meeting is planned to be remote. There being no further business to come before the Committee, the Committee adjourned at approximately 5:57 p.m.

Respectfully submitted

/s/ Mía Alvarado

Mia Alvarado, Secretary