

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

February 20, 2024

The monthly meeting of the Committee for Public Counsel Services was held by video conference on February 20th, beginning at 4:32 p.m. Joseph L. Kociubes, Chairman, presiding.

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

Messrs. Apfel, Cinquegrana, Healy, Kennedy, Kociubes

1. Minutes of January 24, 2024 Meeting

The minutes of the January 24, 2024 meeting were approved as presented.

2. Legal – Request for Committee action

a. Amicus recommendation - Commonwealth v. A Juvenile, SJC-13544

Juvenile Appeals Staff Counsel II Sarah LoPresti presented an amicus recommendation for Commonwealth v. A Juvenile, SJC-13544. The amicus recommendation was approved by the Amicus Subcommittee. The Supreme Judicial Court issued an amicus solicitation and asks, in what manner, if any, the defense of lack of criminal responsibility applies to probation violation proceedings, including as a defense to the violation and as a consideration at the dispositional stage. The amicus is expected to be argued in April.

The facts of this case are that the juvenile was on probation. After being adjudicated a youthful offender, he suffered a mental health episode at his home. Hospital personnel treating him found a firearm in his possession. Clinicians later determined that the Juvenile possessed the gun while suffering from schizophrenia-induced delusions. In a subsequent probation violation hearing based on the conduct of possession of a firearm, the Juvenile Court declined to recognize a lack of criminal responsibility as a defense. The court revoked his probation, and it was appealed.

The amicus brief would argue that lack of criminal responsibility should be considered at both stages. First, lack of criminal responsibility should be considered as a defense to the violation because failure to recognize the defense stands at odds with the principle that a probation violation must be willful. This is particularly important for juvenile and emerging adult probationers, because schizophrenia often manifests in a sudden manner during late adolescence, and often among those with no recognized behavioral health history. Second, lack of criminal responsibility should be considered at the dispositional phase because prison conditions are strongly correlated with emerging and worsening psychiatric symptoms. Those symptoms may be difficult to distinguish from aggressive or deviant behavior, resulting in further punishment. Finally, the amicus brief would argue that the court must account for a probationer's mental health status in

fashioning an appropriate disposition, one that comports with the juvenile court's mandate to aid, encourage, and guide youth.

MOTION: Mr. Cinquegrana. That the Committee approve the amicus recommendation for Commonwealth v. A Juvenile, SJC-13544.

SECOND: Mr. Apfel.

VOTE: Unanimous.

b. Amicus recommendation - Commonwealth v. Daniel Rogers, SJC-13450

Public Defender Division Appeals Attorney Patrick Levin presented an amicus recommendation for Commonwealth v. Daniel Rogers, SJC-13450. The amicus recommendation was approved by the Amicus Subcommittee. Danny Rogers was convicted in 2007 of felony murder in the first degree after shoplifting toothpaste from the Fenway CVS. Three employees caught him shoplifting, chased him down the street and assaulted him while yelling racial slurs. Mr. Rogers is black, and the three CVS employees are not black. The conviction was affirmed on a felony murder theory, and the underlying felony was an armed robbery. The court said the jury could have found that after being attacked Mr. Rogers drew a knife, and that the use of the knife in furtherance of his escape after the shoplifting, converted the case into armed robbery. Mr. Rogers and two of the employees were injured during the fight and one of the employees died from his injuries. It's not clear whether Mr. Rogers had the knife from the beginning, or whether he gained possession of one of the CVS employees' knives during the altercation. The SJC affirmed the conviction in 2011.

Attorney Dave Nathanson was appointed to file a motion for a new trial. Two significant issues presented in the appeal which is now in the SJC. Both parties filed gatekeeper petitions. The single justice reserved one and reported the other, because there are cross appeals in the case. Judge Agostini denied the motion for a new trial but allowed an alternative request that the verdict be reduced.

The defendant's appeal presents a Daubert/Lanigan issue. Mr. Rogers presented a neuropsychologist's expert testimony. Mr. Rogers grew up in rural Alabama, and was subject to horrific abuse and violence, both at the hands of his own family and threats of racial violence. The expert related Mr. Rogers' history to the incident in the case. The expert gave opinion that Mr. Rogers' ability to form the necessary intent was impaired when he was attacked by the three employees yelling racial slurs. Judge Agostini sua sponte decided that testimony would not have been admissible if it had been offered at the trial because it was not reliable based on the judge's own reading of the DSM. The Commonwealth had not raised the Daubert challenge at the motion for a new trial hearing.

The first issue on the defendant's appeal and the proposed amicus brief will argue that the judge was wrong to raise the Daubert challenge himself, and not give the defendant a chance to meaningfully respond. Second, the judge imposed an inappropriate heightened standard for the admissibility of the evidence. The judge basically required a diagnosis when the expert testimony

was that any normal person who had experienced the life history that Mr. Rogers had would have responded in a similar way to the circumstances. Another issue is on the Commonwealth's cross appeal because the judge found that the first-degree murder conviction was not consonant with justice and that a second-degree murder conviction would be more appropriate considering the whole record. The Commonwealth appealed that ruling and their argument is that a judge's authority to reduce a verdict to a lesser included offense under Rule 25 should be extinguished upon the completion of direct review of the conviction. In other words, if the Appellate Court affirms a conviction that is the end for Rule 25 purposes. This would be a huge change in the law, especially considering that the Suffolk County District Attorney's Office has assented to many motions and rectified older cases which involved serious racial justice issues over the past few years. The amicus brief will urge the SJC not to accept the Commonwealth's position on Rule 25.

Discussion ensued.

MOTION: Mr. Apfel. That the Committee approve the amicus recommendation for Commonwealth v. Daniel Rogers, SJC-13450.

SECOND: Ms. Conrad.

VOTE: Unanimous.

3. Monthly Financial Overview Report

Finance Director Karen Souza presented the Monthly Financial Overview Report. CPCS has spent approximately \$167M of the \$355M or 50% of available funds across all accounts. CPCS expects to spend approximately \$342M in FY24. CPCS expects to spend all or nearly all funding available in the 0321-1500 Administration/Operations and 0321-1510 Private Counsel accounts, but expects a surplus of approximately \$13M in the 0321-1520 Court Costs/Experts account.

4. Commitments \$10,000 and Over Report

Karen Souza presented the Commitments \$10,000 and Over Report. There are no new commitments that need approval. The National Association for Public Defense (NAPD) is highlighted as a new contract for approximately \$14,000. The contract is for services provided which are used by the Training Department as part of the learning management system.

5. Chief Counsel's Report

Chief Counsel Anthony Benedetti shared news about CPCS' 40th Anniversary in 2024, which will be celebrated in the fall of 2024. Date, location, and invitation list are pending. There will be entertainment, speakers, and refreshments. An external committee will be created to help raise money. Anthony asked Committee members to consider sitting on the 40th Anniversary Planning Committee. Any Committee member interested in helping should contact the Chief Counsel directly.

Mr. Benedetti reported that a new Chief Human Resources Officer Sandra DeBow has been hired and will begin in late March. Ms. DeBow is familiar with state and local government having worked for the City of Brookline and currently in the Executive Branch. Interim CHRO Mark Conlon will assist during the transition. Mr. Benedetti thanked Mark for his work and the many improvements he has made.

The Children & Family Law Deputy Chief position is posted, and applications continue to be solicited. Mr. Benedetti acknowledged CAFL Deputy Chief Mike Dsida's incredible commitment and progress with regards to the family regulation system during his almost 18-year tenure. Mike thanked the Committee for their overall support, especially throughout the ongoing shortage. Mr. Dsida also spoke about DCF's supported abuse and neglect reversals issue which was recently in the media, and how the reversals often come after court involvement.

Mr. Benedetti reported that the Hampden County District Attorney's Office and the Springfield Police Department has offered free DNA tests to citizens. CPCS and the ACLU have sent a letter asking them to stop and are waiting for a response.

Mr. Benedetti stated that the Berkshire County Superior Court is denying public access to hearings via Zoom. CPCS attorneys have been denied access to various public court events. CPCS has sent a letter to the court to try to remedy the issue and Mr. Benedetti has raised the issue with Superior Court Chief Justice Mike Ricciuti.

Mr. Benedetti reported positive news regarding Federal Loan Forgiveness for private bar advocates. At least ten attorneys have had their loans forgiven. Attorneys have shared numerous positive experiences. Outreach regarding the program continues. Mr. Benedetti thanked Assistant General Counsel Sam Aylesworth and Criminal Trial Support Unit Director Rose King for their work on the project.

6. Executive Session – Personnel matter

Executive Session started at 5:13 p.m. and ended at 5:50 p.m.

Return to Open Session at 5:50 p.m. Mr. Kociubes stated that the Committee met in Executive Session to discuss a compensation issue.

MOTION: Mr. Apfel. That the Committee approve the Executive Session compensation decision in Open Session.

SECOND: Mr. Kennedy.

VOTE: Unanimous.

The next meeting will be remote or in person based on Committee members responses and availability. There being no further business to come before the Committee, the Committee adjourned at approximately 5:51 p.m.

Respectfully submitted

/s/ Mia Alvarado

Mia Alvarado, Secretary