

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

June 18, 2024

The monthly meeting of the Committee for Public Counsel Services was held by video conference on June 18th, beginning at 4:32 p.m. Joseph L. Kociubes, Chairman, presiding.

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

Messrs. Apfel, Cinguegrana, Healy, Kociubes, Tennen, White

1. **Minutes of May 22, 2024 Meeting**

The minutes of the May 22, 2024 meeting were approved as presented.

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

a. **Amicus recommendation - Commonwealth v. Pascual Santana, SJC-13597**

Director of Strategic Litigation Rebecca Jacobstein presented an amicus recommendation for Commonwealth v. Pascual Santana, SJC-13597. The amicus was unanimously approved by the Amicus Subcommittee.

The background of this case is that in March 2023, Mr. Pascual Santana was convicted by a New Bedford District Court jury of three counts of indecent assault and battery on a person under 14 years of age. Judge Douglas Darnbrough presided over the trial and sentencing. In September 2023, Mr. Santana's private bar trial attorney received an anonymous letter, alleging that Judge Darnbrough and the trial prosecutor were in a romantic relationship at the time of the trial. Several other people also received the letter, including the Director of the Criminal Trial Support Unit Rose King and the Executive Director of the Bristol County Bar Advocates Kelly Barley. Judge Darnbrough was transferred to the Plymouth District Court and then in November of 2023 he retired.

CPCS believes that the Trial Court did an investigation into the alleged romantic relationship between the Judge and prosecutor, but we do not think there was an investigation by the District Attorney's Office.

Mr. Santana was assigned counsel, his attorney filed a motion for a new trial, and he requested post-conviction discovery. For the most part, those motions were denied.

The amicus brief will focus on the Trial Court's obligation where a judge may have a systemic bias. It is CPCS's position that the Trial Court should be proactive in investigating these types of

matters and should be required to disclose potential bias to defendants. The amicus brief is due in August.

Discussion ensued. It was agreed that the Executive Committee would review the Amicus Brief and if necessary, continue the discussion.

MOTION: Mr. Apfel. That the Committee approve the amicus recommendation for Commonwealth v. Pascual Santana, SJC-13597. The Committee also specified that the amicus brief should 1) Make plain that as a general matter the constitutional guarantees of access to an impartial judge and exculpatory evidence require the Trial Court to disclose evidence of judicial bias and, consistent with the reasoning in Commonwealth v. Santiago, 405 Pa. Super. 56, 84 (1991), also disclose any other “evidence which is necessary to avoid injustice and unfairness to a defendant.” 2) Require that the Trial Court conduct an investigation of the allegation of impropriety that was made here (and whenever allegations of judicial impropriety are alleged); and 3) Require that the Trial Court notify the parties of the scope and results of its investigation.

SECOND: Ms. Ball.

VOTE: Unanimous.

3. Amicus recommendation - Commonwealth v. Anthony Govan, SJC-13600

Public Defender Division Appeals Unit Staff Attorney Matthew Spurlock presented an amicus recommendation for Commonwealth v. Anthony Govan, SJC-13600. The amicus was unanimously approved by the Amicus Subcommittee. This case is an appeal that presents issues that affect many CPCS clients where they are affixed with a GPS as a condition of pretrial release.

In this case, there was a shooting, and the police had no leads. The police called the Probation Department’s electronic monitoring service (ELMO) and asked who was around the shooting location that was affixed with a GPS. When they made the call, the police did not distinguish between people that were affixed with a GPS as a condition of their post-condition punishment and people who were affixed with a GPS as a condition of their pretrial release. GPS as a condition of pretrial release can include staying away from an alleged victim, or a curfew. Police received a list of all the people affixed with a GPS near the location. A Motion to Suppress was denied.

The Supreme Judicial Court (SJC) asks for the amicus brief to address the following question: Where a defendant is subject to GPS monitoring as a condition of pretrial release, whether the defendant has reasonable expectation of privacy in any of the GPS data such that police use of that data for purposes of a new criminal investigation violates the defendant’s constitutional rights. CPCS’s position is that police cannot access that data for any reason without judicial authorization or a warrant to discover where a pretrial releasee is wearing the GPS device. CPCS’s position is

that a warrant is needed when there is an unrelated criminal investigation. CPCS distinguishes and will not argue that pretrial release conditions violations would need a warrant. The question is unanswered in *Norman* where the SJC first started to set constitutional limits on the use of GPS pretrial releasees. In *Perry*, the unanswered question is, how is nexus and particularity established when the police are just asking who was there. What is the warrant going to look like needs to be included.

MOTION: Ms. McKinnon. That the Committee approve the amicus recommendation for Commonwealth v. Anthony Govan, SJC-13600.

SECOND: Mr. Apfel.

VOTE: Unanimous.

4. Amicus recommendation - Commonwealth v. E.D., Appeals Court No. 2023-P-0963, Supreme Judicial Court No. DAR-_____

Youth Advocacy Division Juvenile Appeals Staff Counsel II Sarah LoPresti presented an amicus recommendation for Commonwealth v. E.D., Appeals Court No. 2023-P-0963, Supreme Judicial Court No. DAR-_____. The amicus was unanimously approved by the Amicus Subcommittee. YAD is seeking permission to file an amicus letter in support of the youth's Direct Appellate Review (DAR) and to file an amicus brief if granted.

In 2018, the Legislature amended G.L c. 233 § 20, to prohibit a parent from testifying against their minor child in a trial or any other delinquency or youthful offender proceeding. In this case, the youth moved in limine to preclude the Commonwealth from calling his mother to testify against him in his trial on three possessory firearms offenses. The youth was under age 18 years old at the time of the offense but turned 18 before the trial. The Juvenile Court judge denied the motion.

When the Commonwealth called the mother to testify, she continued to refuse to answer questions. The judge determined that the mother had no valid privilege, held her in contempt, and jailed her overnight. She was a single mother with no criminal history. The judge threatened to bring her back to court every day until she testified. The next morning, she was called to the stand before her attorney was present and she relented and provided material testimony against her son. The jury found the youth guilty and despite no prior record, the judge sentenced him to 6 to 7 years in state prison. On appeal, the youth raised the parent-child disqualification issue, sentencing, and evidential issues and he intends to file for DAR in the coming days.

YAD's amicus letter would focus on the parent-child disqualification issues, and it would ask the SJC to take the case to resolve this novel question: whether the protections afforded to parents and children under the qualification rule endure when a youth has turned 18 before a trial or hearing. Many youths in Juvenile Court turn 18 before their cases are resolved. Deciding the issue would increase efficiency, prevent disparate outcomes, and it would allow for critical strategic decisions such as whether to plea instead of proceeding to trial. If the DAR is granted the amicus brief would argue that the disqualification rule must continue to apply past the eighteenth birthday for 3 reasons

1) it would further the legislative intent of the amendment, which was to protect the parent-child relationship 2) it would further the juvenile court statutory mandate to aid, encourage, and guide; it would be illogical for a youth subject to a Juvenile Court's continuing jurisdiction to receive every other benefit of that mandate while the Commonwealth could still compel a parent to testify against their child 3) a strong positive family engagement is encouraged in the Juvenile Court, and it's frequently cited as a protective factor that can mitigate the risk of recidivism; the SJC has recently recognized that 18-year-olds had the same core neurological characteristics as juveniles in *Mattis* and should receive the same protections.

Committee member Ms. Chester shared that for many years she was very involved in parent-child privilege advocacy. The original parent-child privilege case involved a child under 18 years of age seeking advice from their mother, and then the mother was forced to testify against her own child. A child under 18 years of age cannot sign a legal contract or access an attorney without another adult. A child under 18 years of age is completely dependent on other adults for help in a time of crisis and needs to be able to go to a loving parent or other adult. Also, if the case takes two years to proceed, a child should not be penalized for that. Ms. Chester suggested adding that a child cannot seek help on their own.

MOTION: Ms. Chester. That the Committee approve the amicus recommendation for Commonwealth v. E.D., Appeals Court No. 2023-P-0963, Supreme Judicial Court No. DAR-_____

SECOND: Ms. Alvarado.

VOTE: Unanimous.

- 5. Amicus recommendation - Commonwealth v. Fredrick F., A Juvenile, Appeals Court No. 2022-P-0787, Supreme Judicial Court No. SJC-13606 & Commonwealth v. Angela A., A Juvenile, Appeals Court No. 2022-P-0897 Supreme Judicial Court No. SJC-13607 & Commonwealth v. Manolo M., A Juvenile, Appeals Court No. 2022-P-0888, Supreme Judicial Court No. SJC-13608**

YAD Juvenile Appeals Staff Counsel II Sarah LoPresti presented an amicus recommendation for Commonwealth v. Fredrick F., A Juvenile, Appeals Court No. 2022-P-0787, Supreme Judicial Court No. SJC-13606 and Commonwealth v. Angela A., A Juvenile, Appeals Court No. 2022-P-0897 Supreme Judicial Court No. SJC-13607 and Commonwealth v. Manolo M., A Juvenile, Appeals Court No. 2022-P-0888, Supreme Judicial Court No. SJC-13608. The amicus was unanimously approved by the Amicus Subcommittee. The youths are codefendants involving the same 2019 incident.

In February 2023, the Committee approved filing a letter in the cases for direct appellate review. Facts of the case were reviewed. Frederick F. and Angela A. were both 17-year-old Black high school students who were walking home from school. The police said there was a large crowd of approximately 100 students around them. However, there is a video that shows there are about 10 students in the immediate area. As they neared Angela's home, a police cruiser passed and

Fredrick backtalked and used insulting speech to the police. The police began an encounter. Angela took out her cell phone to record the interaction. The officer slapped it out of her hand three separate times, and each time she picked up her phone and continued recording. The officer arrested her and according to his testimony, she resisted by pulling away from him. He grabbed her by the hair, pushed her to the ground, and pepper sprayed her at close range. A third student, C.C., poked the officer in the shoulder and asked him what he was doing. The officer pushed him with an open hand, and he responded in kind and the two ended up on the ground. Multiple officers arrested him. C.C. entered a plea and is not involved in this litigation. A fourth student, Manolo M., ran toward C.C. during the interaction and was pushed aside by another officer. Manolo swung his fist, and the other officer kicked him in the thigh and the two ended up on the ground. Multiple officers arrested Manolo. Another officer saw Frederick about 10 feet away using his phone to record the scene. Frederick refused to leave, and the officer tried to handcuff Fredrick, but Fredrick would not put his hands behind his back. Another officer shot Fredrick with his taser, and the officers placed him in handcuffs. Each youth was charged with several offenses. All charges were dismissed after a jury trial except for the resisting arrest charges. Each youth was sentenced to three months administrative probation.

In its decision, the Appeals Court found sufficient evidence that the arrests of Angela and Frederick were made in good faith because they refused to stop videotaping and leave the area. The youth were ignoring police commands meant to ensure public safety. The Appeal's Court decision also found sufficient evidence that Manolo and Angela had resisted, citing an officer's testimony that he had assisted another officer arresting Manolo, and Angela's failure to bring her arms out from under her body after she was thrown the ground.

YAD's amicus brief would argue that the case provides an opportunity for the court to define the elements of resisting arrest more clearly. To prove a charge of resisting arrest, the Commonwealth must establish beyond a reasonable doubt that officers acted under color of their official capacity in attempting the arrest and requires good faith. The brief would encourage the Court to examine arrests of those who exercise their First Amendment rights. Criminal statutes in the Commonwealth are well established to exclude protected speech and Angela and Fredrick exercised their First Amendment right to gather information about government officials and record them. When Frederick insulted the arresting officer, he was engaged in political speech critical of the police, an activity unequivocally protected by the First Amendment. The brief would highlight the many profoundly disturbing incidents of police officers, and arresting people for disrespecting, displeasing, or insulting them, known as contempt of cop arrests. Finally, the brief would emphasize that resisting arrest is charged in a racially disproportionate and retaliatory manner and would urge the Court to limit the conduct that rises to the level of resisting arrest where those charges are ripe for abuse, and they exacerbate racial inequality.

MOTION: Mr. Apfel. That the Committee approve the amicus recommendation for Commonwealth v. Fredrick F., A Juvenile, Appeals Court No. 2022-P-0787, Supreme Judicial Court No. SJC-13606 and Commonwealth v. Angela A., A Juvenile, Appeals Court No. 2022-P-0897 Supreme Judicial Court No. SJC-13607 and Commonwealth v. Manolo M., A Juvenile,

Appeals Court No. 2022-P-0888, Supreme Judicial Court No. SJC-13608.

SECOND: Mr. Cinquegrana.

VOTE: Unanimous.

6. IT Overview

Chief Information Officer Jon Bartelson provided an overview of the work of the Information Technology Division. The presentation included the IT Division's mission, goals and accomplishments, and highlights of specific key topics such as security and artificial intelligence.

There was discussion regarding the possibility of distributing security updates to the private bar. Also discussed was a JusticeText pilot program and providing JusticeText to private bar advocates for trials that involve heavy digital evidence. Mr. Bartelson indicated that he would investigate the feasibility of these ideas.

7. Monthly Financial Overview Report

Chief Financial Officer Kevin Lucchetti presented the Monthly Financial Overview Report. CPCS has spent approximately \$269M of the \$355M or 76% of available funds across all accounts. CPCS expects to spend approximately \$337M in FY24.

The FY24 budget forecast projects:

- A surplus of approximately \$200,000 in the Administration/Operations 0321-1500 line.
- A surplus of approximately \$4M in the Private Counsel 0321-1510 line.
- A surplus of approximately \$13M in the Court Costs/Experts 0321-1520 line (that is a conservative estimate).
- Total FY24 expected surplus is approximately \$17.2M across all accounts.

Mr. Lucchetti stated that the FY24 surplus amount will depend on whether projects are completed by June 30th.

8. Commitments \$10,000 and Over Report

CFO Kevin Lucchetti presented the Commitments \$10,000 and Over Report. There are five commitments that need further approval where current estimated spending exceeds the original May 2023 approvals by more than 10%. The total cost is approximately \$3.5M. All commitments are IT related except for Creative Office Pavilion, LLC which is for office furniture.

- Winslow Technology Group LLC - \$1,833,078 for IT hardware/software
- Dell Marketing LP - \$949,636 for Software Licensing including Azure
- Creative Office Pavilion LLC - \$634,445 for Office furniture and planning
- Xerox Corp - \$90,111 for Photocopier leases/document management software, and equipment purchases
- Docushare LLC - \$29,187 for Finance document management with Xerox

MOTION: Ms. Chester. That the Committee approve Winslow Technology Group LLC for \$1,833,078, Dell Marketing LP for \$949,636, Creative Office Pavilion LLC for \$634,445, Xerox Corp for \$90,111, and Docushare LLC for \$29,187.

SECOND: Ms. Ball.

VOTE: Unanimous.

9. FY25 Preapprovals

CFO Kevin Lucchetti presented the FY25 Preapprovals. The history of approximately 45 vendor obligations or contracts where the estimated cost may exceed \$50,000 was presented for annual review and approval. The total cost is approximately \$8.2M. Once approved, obligations exceeding \$10,000 are reported monthly to the Committee. Mr. Lucchetti highlighted Westlaw as a 7-year contract and no cost increase for next year.

MOTION: Mr. Cinquegrana. That the Committee approve the FY25 Preapprovals totaling \$8,147,847.

SECOND: Mr. White.

VOTE: Unanimous.

10. FY25 Budget Update

General Counsel Lisa Hewitt provided an update on the ongoing FY25 Budget process. She stated that the House and Senate are finished with budget deliberations and the FY 2025 Budget Conference Committee is meeting.

The key differences in CPCS line items are as follows:

- The House recommended \$88,828,810 in the Administration/Operations 0321-1500 line, and the Senate recommended \$89,000,000.
- The House recommended \$214,378,853 in the Private Counsel 0321-1510 line, and the Senate recommended \$215,000,000.

CPCS is working with the Executive Office for Administration and Finance (A&F) to try to secure a Prior Appropriation Continued (PAC) for any FY24 remaining funds.

11. Chief Counsel's Report

Chief Counsel Anthony Benedetti provided personnel updates. The Private Counsel Deputy Chief Counsel Search Committee is preparing to conduct the first round of interviews in the coming weeks. Mr. Benedetti introduced Mr. Dan Mahoney as the next Children & Family Law Deputy Chief Counsel. He will start in this role on July 1st. Mr. Mahoney has worked at CPCS since 2011, beginning in the Audit & Oversight Division. He joined the Boston CAFL Trial Office in

2013 and became the Attorney in Charge in 2015. Prior to that Mr. Mahoney worked in private practice.

Massachusetts School of Law will offer a Zealous Advocacy class which will begin in the fall. The Zealous Advocacy class will serve as a potential pipeline for attorneys to join the private bar. We are hopeful that other Zealous Advocacy classes will be offered at UMass Dartmouth Law School and Suffolk Law School in spring 2025.

Mr. Benedetti provided litigation updates. A recent news article reported about Cape and Islands District Attorney Rob Galibois suing the Dukes County Sheriff and Barnstable County Sheriff. Both SJC Complaints relate to trying to get the Dukes County Sheriff and Barnstable County Sheriff to comply with Brady material as it relates to the DA's own obligation to comply. Mr. Benedetti also provided updates regarding the action against the Essex County Sheriff for moving women prisoners down to the Cape. CPCS's request for a Temporary Restraining Order was denied. CPCS is continuing to gather information regarding how the new location is interfering with the women's right to counsel, which will be incorporated into the litigation so as to explain to the court why the jail distance is so problematic for clients.

Mr. Benedetti encouraged Committee members to listen to Hunter Parnell's Public Defenseless Podcast interview with Committee member Lael Chester and Youth Advocacy Division Deputy Chief Duci Goncalves which recently posted. Mr. Parnell's podcast does deep dive interviews with a broad spectrum of individuals who work in indigent defense, criminal justice and advocacy.

Mr. Benedetti stated that the CPCS 40th Anniversary celebration will be on Friday, November 22nd at the UMass Club.

Mr. Benedetti provided an update on council capacity issues indicating that coverage is mostly under control and the various incentives that were implemented have helped. With the new fiscal year beginning on July 1st, attorneys who had reached their annual billing capacity can start taking cases again. Despite the lack of an hourly rate increase for the private bar in FY 25, CPCS continues to work on addressing short- and long-term goals that will improve overall counsel capacity.

The next meeting will be remote or in person and determined by a poll of the Committee members. There being no further business to come before the Committee, the Committee adjourned at approximately 6:43 p.m.

Respectfully submitted

Mia Alvarado

Mia Alvarado, Secretary