

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

November 15, 2023

The monthly meeting of the Committee for Public Counsel Services was held by video conference on November 15, 2023, beginning at 4:34 p.m. Joseph L. Kociubes, Chairman, presiding.

MEMBERS PARTICIPATING: Messes. Ball, Conrad, McKinnon, Petropoulos

Messrs. Apfel, Healy, Kennedy, Kociubes, Stern, White

1. Minutes of October 18, 2023 Meeting

The minutes of the October 18, 2023 meeting were approved as presented.

2. Legal – Request for Committee action

- a. **Commonwealth v. Huacon**, SJC-13466; **Commonwealth v. A Juvenile**, SJC-13476

Juvenile Appeals Staff Counsel Sarah LoPresti presented an amicus recommendation for Commonwealth v. Huacon, SJC-13466; Commonwealth v. A Juvenile, SJC-13476. The amicus was approved by the Amicus Subcommittee. Both cases involve adjudicative incompetency. In both cases the child was found incompetent to stand trial by virtue of a developmental disability and the questions involve what happens next. The amicus is due December 18, 2023 and argument is January 8, 2024. Sarah LoPresti will write the amicus brief.

In Commonwealth v. Huacon the judge found the child incompetent to stand trial and unlikely to be restored to competency in the foreseeable future, but recognized there's no program that currently exists in Massachusetts for juvenile competency remediation. The court reported two questions 1) Whose responsibility is it to propose remediation programming and take financial responsibility for the cost of those services 2) can the court order a juvenile to engage in a remediation program? The amicus solicitation asked whether the court has the authority to order a remediation program, how it should be fashioned, and what the source of funding would be.

In Commonwealth v. A Juvenile the court made the same finding which is incompetent and unlikely to be remediated. The matter was reserved and reported, and the amicus solicitation asks whether the court has the authority to order such a program and who has the burden to show incompetency is remediable, and by what standard?

The amicus would address two issues of great importance to CPCS clients. The first is that competency remediation programming does not exist and has never existed in the Commonwealth and there is no standard by which to gauge the constitutional validity, efficacy, financial viability, or feasibility of a nonexistent program which the court would have to fashion out of whole cloth

and in no other state has a court done so rather than by statute. In addition, CPCS does not know where the funds would properly come from, but it would not be on the defense to secure funds to aid in the client's own prosecution. The second issue is that there is no clear mechanism by which to dispose of a delinquency case in which a youth cannot be remediated in Massachusetts. Adults are entitled to dismissal at half of the time until the date of parole eligibility should they have been convicted, but that doesn't apply to juveniles. G.L. c. 123, § 16(f) allows for a dismissal in the interest of justice and CPCS would argue that should apply in all such cases because charges against incompetent youth can and do remain pending indefinitely otherwise.

In response to a Committee member's question, Ms. LoPresti clarified that while adults do have the opportunity to dismiss a case at a certain date, but because juvenile cases don't have definite sentences, for example DYS to 18 years old, it's been explicitly held that the provision under G.L. c. 123, § 16(f) does not apply to juveniles. Furthermore, CPCS would argue that the dismissal safety valve being the only way to dismiss these cases, should be employed as a matter of due process, where the case could not otherwise be dismissed.

MOTION: Ms. Ball. That the Committee approve the amicus recommendation Commonwealth v. Huacon, SJC-13466; Commonwealth v. A Juvenile, SJC-13476

SECOND: Mr. Stern.

VOTE: Unanimous.

b. Commonwealth v. Barros, Docket No. SJC-13506

Immigration Impact Unit Staff Counsel II Jen Klein presented an amicus recommendation for Commonwealth v. Barros, Docket No. SJC-13506. The amicus was approved by the Amicus Subcommittee. In this case the defendant, Mr. Barros, waived counsel at arraignment without a full colloquy, and he subsequently, later pleaded to an offense that resulted in him being placed into removal proceedings. He filed for direct appellate review, and it was granted.

The SJC issued an amicus request, asking whether under Article 12, the plea judge was obligated to conduct a colloquy with the defendant before accepting his waiver of his right to counsel prior to his guilty plea. CPCS would like to file an amicus to argue that the waiver of counsel colloquy should not be dependent on whether a defendant subsequently pleads guilty or goes to trial. No matter how the case is resolved, the waiver of counsel colloquy must provide that a defendant have knowledge of the seriousness and disadvantages of self-representation before waiving counsel, and that a judge must make an inquiry and have a conversation with the defendant about those disadvantages at the time of waiver. This is particularly important for our immigrant clients because of the potential consequences of criminal convictions. The SJC has spent the last 15 years elaborating on the Sixth Amendment duties of counsel to advise immigrant defendants and a defendant should understand that they're waiving the right to such expert advice as well as assistance in negotiating an immigration safe plea and advocating for an immigration safe disposition at sentencing. Clients are not making a knowing waiver if they're not informed of the rights that they're waiving. The IIU is in conversation with PDD Appeals Rebecca Kiley and

MACDL about thinking of ways to collaborate on these arguments, but the IIU is asking for permission to file either way.

MOTION: Ms. Petropoulos. That the Committee approve the amicus recommendation for Commonwealth v. Barros, Docket No. SJC-13506.

SECOND: Mr. Healy.

VOTE: Unanimous.

c. Commonwealth v. Hairo Baez, SJC-13467

Public Defender Division Appeals Unit Attorney-in-Charge Rebecca Kiley presented an amicus recommendation for Commonwealth v. Hairo Baez, SJC-13467. PDD will work on the case in collaboration with the IIU. The amicus will be jointly filed with the ACLU of Massachusetts and attorneys at the firm Quinn & Packard. This case is before the SJC on the defendant's appeal from the denial of his 211/3 petition.

Mr. Baez won a new trial motion in the trial court based on counsel's failure to provide accurate immigration advice, but the convictions were vacated after he was deported. Mr. Baez is in his home country now and currently unable to return to the United States. Like many CPCS clients, he is in a catch-22 situation, where he can't dispose of the criminal case without returning to the United States and he also can't return because of the open criminal case.

Mr. Baez' attorney asked that he be allowed to appear at trial via video conferencing and the motion was denied. The trial court denied the motion for video appearance and Mr. Baez filed a 211/3 petition which was denied by Justice Lowy. CPCS will not argue in favor of appearance by video conferencing, as this would be inconsistent with positions that CPCS has taken in the past. CPCS will argue that there should be a process by which a judge has discretion to allow a motion to dismiss without prejudice based on arguments that this potentially violates a client's due process rights and speedy trial rights. Furthermore, keeping a case open indefinitely for a defendant who is unable to appear at trial poses constitutional concerns. CPCS will argue that a client should be able to have their case dismissed by a judge who has determined that the client is unable to return to the state, and where the Commonwealth has not tried to secure their return, and then if the client is released from ICE custody or able to return to the United States, the prosecution can move forward.

MOTION: Mr. Apel. That the Committee approve the amicus recommendation for Commonwealth v. Hairo Baez, SJC-13467.

SECOND: Mr. White.

VOTE: Unanimous.

d. Commonwealth v. Victor Arrington, SJC-13499 – report out

Ms. Rebecca Kiley presented report out of amicus Commonwealth v. Victor Arrington, SJC-13499 which was unanimously approved by the Executive Committee. The court solicited an amicus briefing on October 19th and argument is scheduled for December 6th. PDD Appeals Attorney Patrick Levin is writing the brief and secured a one-week extension.

CPCS will answer the first solicited question which asks whether and in what circumstances a request for interlocutory review of the order can proceed pursuant to Rule 15 where a trial court order excludes evidence on a motion in limine as if it were a motion to suppress evidence. The murder case defendant has been held in prison for approximately 5 years. In August and September, a Superior court judge denied the motion to admit cell phone data evidence and the Commonwealth stated their intention to appeal pursuant to Rule 15. The trial judge stated that Rule 15 is for suppression orders, and the trial was stayed for a week so that the Commonwealth could seek c.211, §3 review. The case was reported to the full bench on the procedural issue and underlying cell phone data extraction forensic issue. CPCS' position is that it would cause massive procedural disruption if a prosecutor who loses a motion in limine on a routine evidentiary issue, could then get an automatic 30 day stay under Rule 15.

3. Monthly Financial Overview Report

CFO Kevin Lucchetti presented the Monthly Financials Overview Report. CPCS has spent approximately 23% or \$78M of the \$346M available across all accounts. The 0321-1520 Court Costs/Experts account shows a surplus. All three accounts 0321-1500, 0321-1510, 0321-1520 are trending on target.

CPCS continues to advocate for a PAC of remaining FY2023 0321-1500 funds of \$1.4M and 0321-1510 funds of \$7.8M. The PAC is pending in the House of Representatives and the Senate. Approval of the PAC funds in the 1510 line item would put off any possible future supplemental needs.

4. Commitments \$10,000 and Over Report

Kevin Lucchetti presented the Commitments \$10,000 and Over Report. He highlighted one item, Public Consulting Group, LLC for approximately \$28,000, which does not need Committee approval. Public Consulting Group was hired to work on a contingency operations plan, review our internal control plan, and develop an annual risk assessment. PCG is working with DAO Holly Smith, CIO Jon Bartelson, and Audit, Finance, and HR teams. The project is planned for completion by the end of the fiscal year.

5. New Leases

Kevin Lucchetti presented a new lease for Holyoke PDD, a new lease for Springfield CAFL Conflict and Family Justice Advocates (FJA), and an amended lease for Worcester PDD, CAFL, MHL, and YAD. DCAMM has been highly involved regarding the negotiation of the leases and any necessary waiver requirements.

Mr. Lucchetti reviewed the 3 leases:

- a. Permanent Holyoke PDD 10-year lease with annual rent of approximately \$313,000 for approximately 7600 sq. ft. of space
- b. Permanent Springfield CAFL Conflict and Family Justice Advocates (FJA) 10-year lease with annual rent of approximately \$180,000 for approximately 6000 sq. ft. of space
- c. Adjacent space to CPCS' current Worcester office for training and conference activities for approximately 3500 sq. ft. of additional space with annual rent increase of approximately \$137,000

MOTION: Mr. White. That the Committee approve 3 leases – Holyoke 10-year lease with annual rent of \$313,188 for 7612 sq. ft. of space, Springfield 10-year lease with annual rent of \$180,386 for 5760 sq. ft of space, Worcester amended lease for 3466 sq. ft of additional and adjacent space and with annual rent increase of \$136,815.

SECOND: Mr. Apfel.

VOTE: Unanimous.

6. FY2025 Budget Proposal

Kevin Lucchetti presented the FY 2025 Budget Maintenance Proposal. The total FY25 Maintenance Request is approximately \$351.6M and covers the cost to provide the current year's services in the next fiscal year. Annualized raise proposals, cost of expiring ARPA funded positions, and lease costs were considered in the maintenance request. Two initiatives were undertaken with ARPA funds 1) CAFL Conflict Office 2) PDD Holyoke and those costs will be added to CPCS' main operating budget.

- 0321-1500 Admin/Operations/Oversight is \$10.6M over FY24 estimated spending
- 0321-1510 Private Counsel is \$5.6 over FY 24 estimated spending
- 0321-1520 Court Costs/Experts is \$3M over FY estimated spending

Budget Subcommittee member Mr. Paul White presented the FY25 Budget Initiative Proposal. He stated that the Budget Subcommittee considered what was necessary for CPCS to have the necessary resources to draw people onto each panel in all geographic areas, what the Governor and Legislature would consider, as well as the rapidly changing economy.

Mr. White reviewed the details of the FY25 Budget Initiative:

- FY25 Private Bar rate increase of \$12.3M
- FY25 Additional Crisis Response Staff of \$2.0M for western MA offices where there are challenges
- FY25 Total initiative expansion request of \$14.3M

- A multi-3-year proposal was presented which is largely an \$11/hr or \$12/hr rate increase across most case types with the exception of MH increase of \$20/hr and Juvenile of \$15/hr
- Total cost of the 3-year plan increase is \$30.4M annually, Yr1 cost is \$12.3M, Yr2 cost is \$8.7M, and Yr3 cost is \$9.3M

Mr. Benedetti reviewed what drives the cost of any increase and provided examples:

- District Court case \$1 increase = \$1.2M annually
- Care & Protection case \$1 increase = \$710,000 annually
- Superior Court and murder cases are more hours per case than District Court, but cumulatively there are fewer cases
- District Court cases are 70% of CPCS work

In response to a Committee member's question, a Budget Subcommittee member provided rate increase history of the Superior Court cases as compared to District Court cases. Since July 1, 2016 Superior Court cases have received a 42% or \$25/hr rate increase compared to District Court cases which have received a 22.5% or \$12/hr rate increase since July 1, 2018. Since 2005 there have been 17 increases across all panels and 12 of those increases have been since FY21. Two-thirds of rate increases were received in the last 3 years.

Mr. Benedetti stated that the reason for the bigger Mental Health rate increase is to put the rate back between the Superior Court and District Court rates where it was historically.

Discussion ensued regarding the proposed rates.

Mr. Benedetti and Mr. Kociubes thanked the Budget Subcommittee for their work.

MOTION: Mr. White. That the Committee approve the FY25 Budget Maintenance Request and FY25 Initiative Proposal.

SECOND: Mr. Kennedy.

VOTE: 9 in favor. Ms. Conrad abstained.

7. Chief Counsel Report

Chief Counsel Anthony Benedetti congratulated BettyAnn Linfield for 46 years of dedicated service on her work anniversary.

Mr. Benedetti shared that HR Director Ted Waterman has left his position with CPCS. In the interim, Mr. Mark Conlon is serving in the role of HR Director. Mark has 30 years of experience in the HR Trial Department. The HR Director position has been posted and the hiring process will continue until the post is filled.

Mr. Benedetti provided update regarding ongoing litigation with the Boston Juvenile Court. The policy that has been implemented by the Boston Juvenile Court has resulted in delays for clients and CPCS is seeking relief.

Mr. Benedetti reported on the CAFL Division counsel shortage issues and implementation of the incentive program that has had immediate and positive results.

Mr. Benedetti announced that CAFL Deputy Chief Mr. Mike Dsida is retiring in mid-February. Mr. Benedetti thanked Mike for his work and tireless efforts as Deputy Chief in the CAFL Division. Mr. Dsida thanked the CAFL team for their hard work to try to address the counsel shortage. He shared his hope that the rate increase initiative, recruitment efforts, and Title IV-E funding would help with the counsel crisis so that other CAFL Division work could be focused on with a fresh perspective.

Mr. Benedetti reported recent news press regarding complaints against a New Bedford judge who has resigned. CPCS is investigating whether there may have been due process rights affected for clients who appeared before that judge.

Committee Chair Joe Kociubes announced that Miriam Conrad has agreed to serve on the Personnel Subcommittee replacing Bruce Miller. Mia Alvarado has agreed to Chair the Personnel Subcommittee.

8. Executive Session – Personnel matters

Executive Session started at 5:53 p.m. and ended at 6:29 p.m.

Return to Open Session at 6:29 p.m.

MOTION: Mr. Healy. That the Committee approve personnel salary matters.

SECOND: Ms. Conrad.

VOTE: Unanimous.

The next meeting is planned to be remote. There being no further business to come before the Committee, the Committee adjourned at approximately 6:29 p.m.

Respectfully submitted

Joe Kociubes

Joe Kociubes for
Mia Alvarado, Secretary