

MINUTES OF COMMISSION MEETING

March 21, 2019

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi Jr.; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang and Grace Bertone, Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Preliminary Matters

Chairman Gagliardi informed the Commission that at this meeting, he would be signing a letter transitioning Samuel M. Silver from the position of Counsel, to that of Deputy Director of the Law Revision Commission. Mr. Silver thanked the Chairman, members of the Commission and Laura Tharney, for the opportunity to serve the Commission and said that he looked forward to working for the Commission in this new capacity.

Minutes

The Minutes of the February 21, 2019 Commission meeting were unanimously approved on the motion of Commissioner Cornwell, which was seconded by Commissioner Bertone.

Misdemeanor

At the February 21, 2019 meeting of the Commission, Commissioner Bunn recommended that Staff thoroughly review and incorporate as appropriate the comments from the Division of Alcoholic Beverage Control (the "ABC") that were received on February 20, 2019. During that same meeting, Chairman Gagliardi requested that Staff provide a copy of the Report to the New Jersey Chiefs of Police and the New Jersey Police Traffic Officers Association. Both of those recommendations were followed and incorporated into a Revised Draft Final Report that was presented to the Commission.

Samuel Silver noted that this project originated after Staff undertook a review of the Model Entity Transaction Act (META) to determine whether it would be useful to incorporate provisions of the Act into existing New Jersey law. As part of the META project, Staff discovered that it is presently a "misdemeanor" for a partnership to conduct business in New Jersey if the members of the entity have not filed the required paperwork with the County Clerk's Office.

An in-depth search of the New Jersey statutes confirmed the ongoing use of the terms “misdemeanor” and “high misdemeanor” outside of the Code of Criminal Justice (the “Code”). For individuals unfamiliar with the Code, references to “misdemeanors” and “high misdemeanors” in non-Code statutes serve only to complicate the law contained in each statutory title.

Staff undertook a revision of the statutory provisions to eliminate virtually all references to the term “misdemeanor” and replace it, in most instances, with its contemporary Code-based equivalent. Staff also proposed for elimination statutes containing the word misdemeanor that duplicate a crime enumerated in the Code or are archaic by virtue of the subject matter expressed therein. The Commission recognized, however, that certain references to the term misdemeanor, such as those discussing out-of-state criminal activity, are necessary and should therefore remain.

Mr. Silver explained that the Code recognizes that other statutory titles define criminal activity, and that crimes set forth in other statutes may not follow the scheme set forth in N.J.S. 2C:43-1(a). Nevertheless, the Code is responsible for enumerating the penalties and sentences for criminal behavior set forth in other statutes.

In connection with this Report, Staff sought, and received, comments from a number of knowledgeable individuals and organizations. According to Mr. Silver, each response was placed into one of six categories: “objection to the proposed changes”; “no comment”; “no objection”; “support for the proposed, statutory modification”; “adoption of stakeholders recommendation”; and “other.”

Mr. Silver noted that the League of Municipalities (the “League”) entered an objection to Staff’s proposal to repeal of the “licensing of nonresidents to auction jewelry or silverware” in the State of New Jersey. Next, the League disagreed with Staff’s recommendation to make municipal or county officer’s willful violation of a duty pertaining to fiscal administration a fourth degree offense. Finally, Mr. Silver noted that the League did not agree to Staff’s proposal to make it a violation of the Code for a member of the park commission to have an interest in the purchase of real estate.

Mr. Silver advised the Commission that the ABC reviewed 20 of the Commission’s proposed modifications and voiced no objection or opposition to 11 of them. The ABC took no position with respect to two proposed changes to Title 33. With regard to the remaining ABC comments, Staff adopted the recommendations of the ABC regarding the treatment of each statute. Mr. Silver observed that these modifications were consistent with constitutional notions of fundamental fairness and due process.

Finally, Mr. Silver asked for permission to make three modifications to the Revised Final Report. As a result of outreach, the numbers in Figure 2 had been updated and Mr. Silver asked for authorization to insert the new chart in the final report. Next, he noted that on page 9, the first sentence under the heading “adopted recommendations” cited N.J.S. 23:3-18 twice. The second

reference, would properly be changed to N.J.S. 23:3-20. Finally, Mr. Silver observed that on page 10, the second sentence in the second paragraph should read “sentencing range” not “sentencing rage”.

Subject to the modifications proposed by Mr. Silver, and on the motion of Commissioner Cornwell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the Report as a Final Report of the Commission on this subject.

Police Captains as Managerial Executives

Laura Tharney presented a Draft Final Report, prepared by Jennifer Weitz, which set forth a discussion of the New Jersey Appellate Division’s decision in *State, Div. of State Police v. New Jersey State Trooper Captains Ass’n*. This case addressed the question of whether the Public Employment Relations Commission (PERC) acted arbitrarily in utilizing a case-by case approach before concluding that the State Police Captains were not “managerial executives” and could therefore join collective negotiation units.

After this project was authorized by the Commission, Staff engaged in outreach with individuals who previously served, or currently serve, as members of PERC, as well as practicing attorneys. Staff sought to determine whether a proposed revision would adequately address the perceived inconsistency between the plain language of N.J.S. 34:13A-3, and legislative intent to expand participation of public employees in collective negotiation.

As a result of Ms. Weitz’s outreach, she was advised that no revision to the current statute was necessary. It was suggested that any amendment to PERC could be an over-correction to the statute because of the oftentimes dual nature of police captains who, in some circumstances, both patrol and perform executive duties. After reviewing all of the comments from stakeholders, Ms. Weitz’s recommendation was that the Commission take no further action regarding this project.

In an attempt to further clarify one paragraph of the Draft Final Report, Ms. Weitz requested the insertion of the new language that was supplied to the Commission at the time of the meeting. After a brief discussion, the Commission agreed that the “new” language would be substituted for the first full paragraph on page 4 of the Report.

On the motion of Commissioner Cornwell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the Report as a Final Report with the proviso that it contain the new language requested by Jennifer Weitz.

Physical Examination

Joseph Pistritto, discussed with the Commission a Draft Tentative Report seeking to clarify the meaning of “physical examination” in the context of public entity immunity under N.J.S. 59:6-4.

In *Parsons v. Mullica Twp. Bd. of Ed.*, a student underwent several yearly visual acuity tests pursuant to the public health mandates. Despite the student having failed the tests on two occasions, the student’s parents were not informed by the school about the results of the examinations. Subsequently, the student was diagnosed with a vision development disorder.

On the student’s behalf, her parents filed suit against the Board of Education (the “Board”) claiming that the school breached its duty to timely notify them of the test results. In response, the Board moved for summary judgment claiming immunity from suit pursuant to the Torts Claim Act. The trial court found that the Board was not entitled to immunity because a vision test was “an examination or diagnosis for the purpose of treatment.” The Appellate Division held that an eye exam was a physical examination that included a reporting component, and found that the Board was entitled to immunity.

In confronting this issue, the Supreme Court examined the legislative history of the Tort Claim Act. The statute was enacted to compensate victims while preventing interference with governmental functions or placing an undue burden on the taxpayers. The Attorney General’s Task Force Report on sovereign immunity, included in the legislative history, confirmed that public health examinations were covered by the statute. The Court then examined whether reporting the results is included in the definition of an “adequate physical examination.”

The term “adequate physical examination” is not defined in the Tort Claims Act. In order to determine a definition for this term, the Supreme Court looked to materials from the American Medical Association and the Mayo Clinic. Both of those resources embraced the idea that reporting the results of an examination was part of an adequate physical examination. Since an adequate physical examination under the Tort Claims Act includes the reporting of the results, Court determined that the Board was immune from liability for its failure to report the results to the Plaintiff.

The Commission discussed three options presented by Staff to define “adequate physical examination” in order to clarify the statute. Commissioner Cornwell asked why the Commission would favor Option #2, the workers compensation definition, the purpose of which is not in line with the purpose of the Torts Claim Act. The Commission agreed that Option #2 was not the best choice. Then, since Option #3 included a portion of Option #2, the Commissioners similarly agreed that that this was not the best option. After a brief discussion, the Commissioners agreed to remove Options #2 and #3 from the Report, leaving Option # 1 for review and comment by commenters.

Commissioner Bell stated that he was not in favor of expanding the doctrine of sovereign immunity; and, by extension, was not in favor of this project. He suggested that either failing to do an examination or doing it incompetently is different than doing it and not reporting the results. Commissioner Cornwell question whether sovereign immunity is extended in those instances.

Chairman Gagliardi said that since the Supreme Court has found that a failure to report the results of a medical examination is covered by the Tort Claims Act, the Commission is in a position to fashion language that fairly reflects the Supreme Court holding in order to alert the public to the determination in this case without expanding sovereign immunity. He noted that the Supreme Court found refuge in the medical definition of “adequate physical examination” and that, as a result, Option #1 appears to reflect the decision of the Supreme Court. Commissioner Bertone concurred with the Chairman’s analysis.

Commissioner Bell expressed concern that since the Supreme Court has decided the issue, there is no need to codify it, particularly since the Court may revisit this issue in the future and modify its position, which would then be inconsistent with any statutory change made in response. Laura Tharney posited that if you have “x” number of examinations and “y” number are not reported, there may be some number of families who would have to expend time and money pursuing the matter in the courts only to find out that they were not entitled to relief, suggesting that clarification of the statute may prevent some of those unnecessary time and money expenditures.

Chairman Gagliardi suggested that the possibility exists that the Legislature might ultimately question why they would codify this language. At this juncture, it would be beneficial for the Commission to see the feedback the Commission receives to this decision. With the understanding that only Option #1 should be contained in the Report, on the motion of Commissioner Cornwell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the project as a Tentative Report.

Sentencing Factors Requiring Jury Determination

John Cannel discussed a Memorandum identifying statutory provisions that may be appropriate for revision in light of the U.S. Supreme Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). *Apprendi* held that a fact that increases the maximum sentence for an offense is an element of the offense, and therefore must be found by a jury beyond a reasonable doubt. *Alleyne* extended this concept to increases in the minimum allowable sentence. After those cases were decided, the Legislature amended the statutory provisions at issue in *Apprendi*, but no other legislative actions were taken to address statutory provisions impacted by the determinations of unconstitutionality.

The basic rule, according to Mr. Cannel, is that any finding that changes the range of potential sentences available, by raising the maximum lawful sentence or requiring a minimum sentence, is an element of the offense and must be found by the jury beyond a reasonable doubt. Findings of fact by the sentencing judge that are used in exercising discretion as to the particular sentence within the range allowed by statute, however, are permitted. If a particular finding is necessary to justify a minimum sentence that is available or imposition of a sentence at the top of the range set, that finding may be made by the judge. If a particular finding requires the imposition of a minimum sentence or increases the maximum sentence, that finding must be made by the jury. There is one significant exception to the basic rule: findings that the defendant had prior convictions may be made by the judge.

Applying this rule, Staff identified a number of statutes that are unconstitutional and in need of revision. These are statutes that specifically call for a decision by the judge. Mr. Cannel noted that there are many others that specify a fact that affects the range of available sentences but do not indicate how that fact is determined. It can be anticipated that these statutes will be applied constitutionally so that the jury finds the fact in question, so Staff has not gathered these statutes.

Mr. Cannel explained that the choice of revision to make the identified statutes constitutional is not straightforward. In some cases, the fact can be given to the jury, making the crime with the added fact a separate offense. In other cases, where the added sentence is within the ordinary scope, it might be better to give the judge discretion about whether to impose it. After presenting options to the Commission, Mr. Cannel sought Commission input as to which approach it favored.

Commissioner Cornwell noted that Option 1 would track *Apprendi* and noted that courts may already be conducting themselves in accordance with this option. In response, Mr. Cannel said that courts may acknowledge that certain sentencing provisions are unconstitutional and are not enforcing them in light of the United States Supreme Court's holdings.

The Commission expressed its preference for the first option as more closely adhering to the determination of the United States Supreme Court, and asked that Staff draft accordingly.

Charitable Registration and Investigation Act

Samuel Silver discussed with the Commission his Memorandum regarding the Charitable Registration and Investigation Act. For a little more than two decades, New Jersey's "Charitable Fundraising Act of 1971" regulated charitable fund raising and the solicitation of funds by law enforcement organizations. In 1994, the New Jersey Legislature repealed the Charitable Fundraising Act of 1971 and replaced it with the "Charitable Registration and Investigation Act" (the CRI).

According to Mr. Silver, the CRI has a twofold purpose. First, the CRI seeks increase the Attorney General's ability to collect and disseminate information useful to New Jersey contributors. Second, the Act allows the Attorney General to take strong action against those individuals who would defraud or abuse the public's generosity for their own personal gain.

Mr. Silver explained that in New Jersey, the Legislature vested the Attorney General with a broad range of powers believed to be necessary to preserve the integrity of New Jersey's charitable organizations and protect the citizenry from unscrupulous actors. If it is in the public interest to inquire whether a violation may exist, the Attorney General may conduct an investigation to determine the existence of such a transgression. If it appears that an abuse of the CRI has occurred, is occurring, or will occur, the Attorney General may seek and obtain, in a summary proceeding, an injunction prohibiting the act or practice. In addition, the Attorney General may request that a court hold a recalcitrant registrant in contempt.

After providing the parties with notice and an opportunity to be heard, the Attorney General may revoke, or suspend, the registration of a registrant upon a finding that he, or she, has engaged in any one of the forms of misconduct set forth in the statute. In addition to any other relief authorized by the CRI, or any other law, the Attorney General may also seek the imposition of substantial civil penalties against those who violate "any provision of this act."

Mr. Silver explained that The Model Protection of Charitable Assets Act (the "Model Act") is a minimalist or basic statutory platform. The basic approach of this Act is to "create a model, all or part of which would be useful to all of the states." He engaged in a side-by-side comparison of New Jersey's existing law with the Model Act.

Under the Model Act, the onus is on a registrant to notify the Attorney General of events that raise opportunities for the misapplication of charitable assets. The purpose is to provide the Attorney General with the opportunity to "monitor the events in time to prevent problems or to correct problems that have already arisen." The addition of these provisions to New Jersey law is consistent with the general purpose of the CRI.

Absent from both the CRI Act and the Model Act is a provision that requires a fiduciary of a charitable organization to proactively report his or her arrest, or subsequent conviction, to the Attorney General. The absence of such a provision makes it possible for the operator of a charitable organization to be convicted of a crime involving theft, fraud, or deceptive practices and for this crime to go unreported until the next filing of the organization's annual report. The absence of such a proactive reporting requirement subverts the purpose of both Acts.

The Model Act also requires that the Attorney General be notified of civil proceedings that may affect the assets, structure, or governance of a charitable organization. Pursuant to the Model Act, the notification requirement would be triggered in an action by, against, or on behalf of: a person holding a charitable asset in which the relief sought relates to a gift of a charitable asset; concerning the use of a charitable asset or a breach of a fiduciary duty; seeking injunctive

relief, construction, modification, reformation, interpretation, or termination of a record under which a charitable assets is held; matters concerning a trustee of a charitable trust; challenges to the administration or a distribution from the estate or trust in which matters affecting a charitable asset may be decided; and bankruptcy, receivership, or insolvency proceedings.

Since the goals of the CRI and the Model Act are to protect the public from fraud and deceptive practices by providing both the public and the Attorney General with information about charitable organizations, it is necessary for the Attorney General to be in receipt of information the absence of which could compromise the integrity of the charitable process.

The New Jersey Legislature has determined that there are several organizations that are exempt from the registration requirements of the CRI. The exemptions permitted under the Model Act are more generous. Mr. Silver noted that the Model Act, in contrast with the CRI, provides for six additional entities and individuals be granted an exemption from the charitable registration process. For clarity and completeness, it may be worthwhile to discuss the necessity and viability of these exemptions with stakeholders.

The Commission encouraged further research and outreach on this subject to determine whether the addition of Model Act provisions not currently found in New Jersey law would be of use.

Child Endangerment

Joseph Pistritto discussed with the Commission a Memorandum proposing clarification of the standard of harm required to convict a defendant under N.J.S. 2C:24-4(a) as a result of the New Jersey Supreme Court decision in *State v. Fuqua*.

The defendant in *State v. Fuqua* was arrested after the police raided his hotel room and found a large quantity of illicit drugs, many of which were within the reach of minor children. The defendant was subsequently convicted by a jury of endangering the welfare of children, a violation of N.J.S. 2C:24-4(a). In denying the defendant's motion for judgment of acquittal, the trial court held that the State did not have to prove "actual harm"; rather, the State merely had to prove that the defendant subjected the children to a "risk of harm" to secure a conviction. The Appellate Division affirmed the trial courts determination on this issue.

The decision of the court was predicated upon three components: statutory text; the history of judicial opinions on this topic; and, Legislative inaction. Initially, the Court examined the text of the statute and noted that it referenced other provisions which defined child abuse and neglect which include a substantial risk of harm. Along those lines, the Court reasoned that the substantial likelihood of harm was incorporated into the statute. Next, he observed that over the last three decades, state appellate courts have unanimously held that the State is not required to prove actual harm to secure a conviction – a substantial risk of harm has traditionally been sufficient. Finally, Mr. Pistritto stated that the Legislature has not taken any action on this issue

despite amending the statute three times since 1992. The Supreme Court in *Fuqua* interpreted this silence as the Legislature's acquiescence to the judiciary's interpretation of the statute.

Four Justices formed the majority opinion in *Fuqua*. The dissent maintained that the Court's decision was contrary to the text and legislative history of the endangering statute, did not apply the doctrine of lenity and erased the distinction between the civil and criminal statutes on this subject. A second dissenting opinion, drafted by the Chief Justice, concurred that the conviction should not stand when examined under the rule of lenity. The Chief Justice also questioned whether the Legislature intended the narrow definition of actual harm or a broader meaning which included a substantial risk of harm.

Commissioner Cornwell noted the difference of opinions set forth by the Justices expressing concern over whether the Commission should attempt to propose statutory language when such a disagreement exists within the Supreme Court. Laura Tharney explained that, generally, the Commission takes the position that criminal statutes should be drafted as clearly as possible so that they may be understood by the lay people charged with a knowledge of the law.

Chairman Gagliardi noted that if this were a 7-0 opinion, the Commission would be in a position to draft proposed, statutory language that would match the holding of the Court, but asked the Commission whether a 4-3 decision should give the Commission pause. Commissioner Bell suggested that the vote count should not matter, but expressed concern about the codification of a determination as divided as this one. Commissioner Cornwell said that the Supreme Court has decided the meaning of the statute and that, going forward, a defendant can be prosecuted for harm or the substantial risk of harm to another.

John Cannel said that the Commission has worked in this area before. On a previous occasion, the Commission has removed the criminal aspects from abuse and neglect and put it squarely in the New Jersey Code of Criminal Justice - Title 2C. The problem, according to Mr. Cannel exists when a prosecutor can choose which Title to proceed under.

Commissioner Bell opined that "risk of harm" is a capacious term. He continued by stating that the term "substantial risk of harm" should be examined by the Commission. Commissioner Bertone observed that the facts of this case are awful that they could not be considered anything but posing a substantial risk of harm. Laura Tharney suggested that Staff could do additional research to determine the range of behavior that has been considered substantial harm. Commissioner Bell observed that the Supreme Court relied on "something" to come up with a standard and that should be explored by Staff. Commissioner Cornwell stated that the Commission should know whether other jurisdictions that have codified the substantial risk of harm before making a decision on this project. Commissioner Bertone agreed with Commissioner Cornwell.

Within the parameters set by the Commission, Staff was authorized to engage in additional research and outreach regarding the definition of the term "substantial risk of harm."

Miscellaneous

Laura Tharney advised the Annual Report has been completed and has been distributed to the Legislature. She noted that the Commission has received favorable responses to its distribution.

Ms. Tharney advised the Commission that two Legislative Law Clerks have been hired and will join the Commission for the summer of 2019.

Finally, Ms. Tharney noted that two recent judicial opinions cited the work of the Commission in some detail. The first case dealt with oral contracts and the transfer of interest in real estate, and the second pertained to established holders of mortgages.

Adjournment

The meeting was adjourned on the motion of Commissioner Cornwell, seconded by Commissioner Bell. The next Commission meeting is scheduled to be held on April 18, 2019, at 4:30 p.m.