

MINUTES OF COMMISSION MEETING

September 16, 2021

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Preliminary Matters

Ms. Tharney advised the Commission that Angela Febres and Lauren Haberstroh, both from the Seton Hall University School of Law, are continuing their work with the Commission for the fall semester, and that Volney Stefflre and Andreea Chirica, from the New Jersey Institute of Technology, are working with the Commission for the semester as well. Chairman Gagliardi, on behalf of the Commission, welcomed the incoming and returning students to the Commission.

Minutes

On page twelve of the Minutes, Chairman Gagliardi requested that the court designation be added to the *Jackson Twp. v. Paolin* citation. With this modification, the Minutes of the July 15, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Bertone.

Jessica Lunsford Act

Generally, a defendant convicted of an aggravated sexual assault in which the victim is less than thirteen years old will be sentenced to life imprisonment and must serve a minimum of twenty-five years of the sentence. After considering the interests of the victim, a prosecutor may offer the defendant a negotiated plea agreement of fifteen years during which the defendant is not eligible for parole.

Samuel Silver explained that the Jessica Lunsford Act (JLA) does not require that the State present a sentencing court with its reasons for a departure from the mandatory minimum sentence or an opportunity to review the sentencing recommendation. The absence of these safeguards formed the basis of a constitutional challenge in *State v. A.T.C.*, 239 N.J. 450 (2019).

The New Jersey Supreme Court granted certification in *A.T.C.* for the limited purpose of addressing the facial challenge to the constitutionality of the JLA. The Court determined that the JLA does not violate the separation of powers doctrine if the State provides the sentencing court with a statement of reasons explaining its decision to depart from the twenty-five-year mandatory minimum sentence and the Court has the opportunity to review the prosecutor's exercise of discretion to determine whether it was arbitrary or capricious.

Mr. Silver noted that the Appendix in the Draft Final Report contains proposed revisions designed to address the issues identified by the New Jersey Supreme Court in *State v. A.T.C.*

He advised the Commission that outreach was conducted, and the County Prosecutors' Association of New Jersey (CPANJ) stated that the proposed modifications bring the JLA into compliance with *A.T.C.*, safeguarding the interest of victims and their families without imposing additional burdens on the State. The CPANJ advised the Commission that it supported the Commission's proposed modifications.

Chairman Gagliardi expressed his appreciation for the work that was done on this project as well as the positive feedback.

On motion by Commissioner Bunn, seconded by Commissioner Long, the Commission unanimously voted to release the work as a Final Report.

Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act

Samuel Silver discussed with the Commission a Revised Draft Tentative Report proposing modifications to the language of New Jersey's Prevention of Domestic Violence Act ("PVDA") to incorporate the protections contained in the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act ("RECDVPOA" or "the Act").

Mr. Silver explained that the RECDVPOA promotes the freedom of movement for victims of domestic violence by enforcing domestic violence protection orders issued by Canadian courts. The Act is focused on "the immediate threat of domestic violence," is limited to civil domestic orders, and has already been enacted in seven states. Staff examined New Jersey statutes which encompass this area of law to determine whether any, or all, portions of the Act would be appropriate for enactment in a manner that is consistent with the New Jersey Legislature's intent to protect the health and welfare of vulnerable persons in the state.

The New Jersey Attorney General expressed support for the Commission's proposed modifications to the PVDA and recommended additional changes to the proposed language that would permit out-of-state victims to register protective orders issued by another state's court, or by the United States government, with the New Jersey Domestic Violence Central Registry. The Attorney General also suggested language intended to remove any ambiguity concerning the enforcement of domestic violence orders issued by another state's court or by the United States government. Mr. Silver noted that the detailed recommendations of the Attorney General and the Commission's responses have been incorporated in the Appendix.

Support for this project was also received from David S. Carton, Esq., a certified matrimonial law attorney. Mr. Carton expressed concern about the intersection of this project with the Hague Abduction Convention and Uniform Child Custody Jurisdiction and Enforcement Act. Mr. Silver stated that the proposed modifications, much like the RECDVPOA, pursue the narrower goal of addressing the emergency of threatened violence.

Mr. Silver advised the Commission that no objections were received to the proposed modifications set forth in N.J.S. 2C:25-18 to 19, N.J.S. 2C:29-3, 2C:29-35 and 2C:29-9. As a result of the inclusion of CDVPO in N.J.S. 2C:29-9, a concern was raised by the Attorney General that the specific reference to these orders in N.J.S. 2C:25-28 and 2C:25-21 might be duplicative or be interpreted to exclude other state domestic violence protection orders not listed in these statutes. In both N.J.S. 2C:25-22 and 2C:25-29, the Attorney General recommended that the word “including” be replaced with the word “or” to ensure that this subsection is not read to the exclusion of other jurisdiction’s court orders. Finally, consistent with the New Jersey Legislature’s intent to protect the health and welfare of vulnerable persons the Attorney General suggest that the language of the PDVA be expanded to include orders issued under the laws of another state and orders issued by the United States government as discussed in N.J.S. 2C:25-24; 2C:25-31 – 34; N.J.S. 2C:39-7 and 2C:58-3. These proposed modifications are included in the Appendix.

Commissioner Bunn asked whether respondents would have an opportunity to challenge the jurisdiction of an issuing court. Mr. Silver answered that an officer does not have to arrest a respondent if there does not appear to be a sufficient basis on which to do so or if the order does not comply with due process. In this way, it is the same as the treatment of a New Jersey order. If a respondent advises the officer that they are unfamiliar with the order upon which the arrest is based, the proposed modifications provide that the absence of due process would form the basis of an affirmative defense. Mr. Silver confirmed that N.J.S. 2C:25-32 contains a provision that protects individuals from being arrested without probable cause.

Commissioner Cornwell asked whether the standards of Canadian protective orders were similar to those of New Jersey protective orders. Mr. Silver stated that he was not certain, noting that the RECDVPOA was premised on the relationship between Canada and the United States, their shared interest in protecting citizens from domestic violence, and Canada’s recognition of New Jersey orders. In addition, the United States has a longstanding history of participating in the Violence Against Women Act and recognizing the domestic violence orders of other states. The RECDVPOA allows for the civil enforcement of Canadian domestic violence orders but is limited solely to enforcement of civil, protective orders in New Jersey.

The Commission unanimously authorized the release of the Revised Tentative Report on motion of Commissioner Cornwell, seconded by Commissioner Rainone.

Freeholder, Chosen Freeholder

Samuel Silver discussed with the Commission a Draft Tentative Report regarding the use of the term “freeholder” in the New Jersey statutes. Amid a statewide and national movement to examine statutory terms rooted in systemic racism, a County Counsel who commented on the Commission’s workhouse project requested that the term “Freeholder” be replaced with “County Commissioner” in the statutes. The term “Freeholder” appears in many of the same statutes as the term “Workhouse.”

In August of 2020, Governor Murphy signed into law a bill that eliminates the title of Freeholder and Chosen Freeholder from county government. This term was replaced with a term

that is used throughout the country—County Commissioner. The Governor explained that the intent is to eliminate an archaic and hurtful term from New Jersey’s statutes. The definition section of New Jersey’s statutes was amended to add a definition of “freeholder” indicating that it means “county commissioner.”

The word “freeholder” appears in 1,253 statutes and, as a result, individuals who access the statutes may still encounter the term, even in light of the recent change. In the governmental context, the term is used 1,132 times. In the non-governmental context, the term is used 41 times. In the organizational context, the term is used once. Among statutes that have been identified as appropriate for repeal by the Commission, or that seem appropriate for repeal, the term is used 85 times. The term is found in 37 titles, appendices, and validating acts.

In preparation of the Appendix, each statute was examined and cross-referenced with other Commission reports that included the term, such as: the public assistance law; magistrate; misdemeanor; pejorative terms; and workhouse. The statutes were also rendered gender neutral where appropriate. Where the use of the term “commissioner” would create confusion because a different commissioner is mentioned in the same statute, additional drafting was done for clarification. Mr. Silver explained that in a statute that references the Commissioner of the Department of Transportation, for example, replacing “freeholder” with “county commissioners,” could result in confusion if both officeholders were referenced solely as “Commissioner.” As such, these statutes were clarified by referencing the appropriate state officer or commissioner.

Chairman Gagliardi noted that this project would touch many statutes. Commissioner Rainone suggested that the term “supervisors” might have been an easier choice to replace “freeholder” because that term is not used in the New Jersey statutes. He said that he frequently attends meetings in which several individuals are designated a commissioner of a governmental entity and that it can be difficult to differentiate between them. Chairman Gagliardi concurred.

Commissioner Bunn moved to release the work as a Tentative Report, which motion was seconded by Commissioner Long. Commissioner Rainone requested that the name of the report be changed to refer to “County Commissioner” rather than “Freeholder.” Chairman Gagliardi asked Commissioners Bunn and Long if they accepted this amendment, and both responded affirmatively. The Commission voted unanimously to release the Tentative Report.

Indemnity

Samuel Silver next discussed a Draft Tentative Report concerning the indemnification of non-state personnel by the State pursuant to the Tort Claims Act (“TCA”). The TCA states that the Attorney General shall, upon the request of a current or former employee of the State, provide for the defense of an action brought against the employee on account of an act or omission in the scope of their employment. Similarly, N.J.S. 40A:14-117 requires the governing body of a county to provide a member of the county police with the necessary means for the defense of any action arising out of, or incidental to, the performance of the officer’s duties.

County employees are, however, sometimes called upon to act as an arm of the State in the prosecution of criminal cases. Mr. Silver explained that the New Jersey statutes do not address a situation in which a County officer is called upon to participate in a State criminal prosecution, is subsequently sued, and both the County and the State decline indemnification. This was the situation before the New Jersey Supreme Court in *Kaminskas v. Office of the Attorney General*, 236 N.J. 415, 417 (2019).

In the *Kaminskas* case, the New Jersey Supreme Court determined that the County officer's work for the State arose out of the performance of his duties and therefore found that N.J.S. 40A:14-117 mandates that the County, not the State, provide indemnification.

Mr. Silver stated that the result is a class of individuals who may not be covered by the TCA or N.J.S. 40A:117 and may find themselves in a situation in which both the State and County decline to assist in the defense of the action.

N.J.S. 59:10A-1 is currently two block paragraphs. The Appendix includes a reformatting for ease of access. References to the TCA have been made more specific to eliminate possible ambiguity regarding the statutory cross-reference. Section have also been modified so that they are gender neutral.

Modifications are proposed to N.J.S. 59:10A-1, subsection b. to eliminate the potential gap in representation for individuals who are employed by a "public entity" and perform work for the sole benefit and at the exclusive direction of the State during a criminal investigation and subsequent prosecution.

In N.J.S. 59:10A-2, subsection a., the reference to the "requesting party" has been added for clarification. Also, subsection b. has been modified to indicate that the Attorney General may refuse to provide for the defense of an action in which the public entity employee's act or omission was neither for the sole benefit of, nor at the exclusive direction of, the State.

Mr. Silver stated that subsections b.(1)-(4) have been added as the inverse of the proposed criteria found in N.J.S. 59:10A-1b.(2)(A)-(D).

Commissioner Rainone asked whether the reference to "requests made," in subsection a. should be repeated in the statute or whether section four covered such requests. Commissioner Bunn raised a question about actions outside the scope of employment and whether that was a reason indemnity was denied.

Commissioner Long asked about the scope of the requesting party's employment. She questioned whether the reading of the subparts in N.J.S. 59:10A-1 subsection b.(2) was conjunctive or disjunctive. She stated that section d. of the statute must always be met, but was unsure about sections a., b., or c. Mr. Silver responded that each section must be met to meet the criteria for indemnity. Commissioner Long also asked about the wording of the first line of subsection b.(2) and Commissioner Bunn suggested that the addition of a comma might clarify this sentence. Chairman Gagliardi agreed, suggesting a comma after the word "New Jersey" in addition to the one after the word "who."

Chairman Gagliardi also questioned the conjunctive/disjunctive nature of the language in the statute and said that he did not want to over-exclude or under-exclude persons from the statute, indicating that the Commission required feedback to appropriately tailor the application of this section. Commissioner Bunn agreed that the statute should not have any gaps in its determination of who was going to pay for the indemnity.

On motion of Commissioner Bunn, seconded by Commissioner Long, the Commission voted unanimously to release the Tentative Report.

Endangering the Welfare of a Child

Samuel Silver discussed a Draft Tentative Report proposing modifications to the child endangerment statute in N.J.S. 2C:24-2(a)(1), specifically the lack of a definition for the term “sexual conduct.” The term is used in the context of behavior that would impair or debauch the morals of the child.

In *State v. Johnson*, 460 N.J. Super. 481 (Law Div. 2019), the defendant, a middle school guidance counselor, was charged with child endangerment under N.J.S. 2C:24-4(a)(1) after he sent a social media message to a high school senior asking her to send him a partially nude photograph. The Court discussed whether sexually suggestive messages sent to a minor by way of social media constituted the type of sexual conduct that would impair or debauch the morals of the child. In the statute, “child” is defined as any person under the age of eighteen.

Mr. Silver noted that, in prior decisions, the common law has determined that specific behaviors are prohibited by the statute. These include displaying explicit nude photos, certain sexual conversations, and certain conduct communicated over the telephone. In the absence of a statutory definition for “sexual conduct”, “impair” and “debauch”, an individual’s behavior is analyzed by the court looking at the effect of the conduct on the child, and whether the conduct would result in the impairing or debauching of “an average child in the community.”

To clarify the scope of the statute and provide a clear definition of the term “sexual conduct,” Staff examined the New Jersey Model Jury Charge and conducted a fifty-state survey, which revealed that the majority of states and the District of Columbia define the term “sexual conduct” and also enumerate prohibited activity. New Jersey is the only state in the country that uses the phrase “impair or debauch the morals” and does not define that phrase.

The statute was enacted in 1898, and, as originally enacted, it prohibited various activities, including allowing or employing children to beg or perform “any immoral conduct or occupation,” without defining those terms. One hundred years later, in 1983, was the first time the statute provided criminal penalties for those engaging in sexual conduct with a child, and it is still unclear what sexual conduct “would impair or debauch the morals” of a child.

Subsection a.(1)

The first-degree crime of causing or permitting a child to engage in a “prohibited sexual act” is set forth in the middle of the definition section and is proposed to be moved to subsection a.(1), which sets forth the most serious offense in the statute.

Subsection a.(2)

The second-degree crime of photographing or filming a child in a prohibited sexual act, or simulation thereof, is also located in the middle of the definition section and is proposed for a move to subsection a.(2).

Subsection a.(3)

This newly-drafted subsection includes proposed language to remove the undefined term “sexual conduct,” as well as the anachronistic reference to “impair[ing] or debauch[ing] the morals” of a child. The proposed new language includes the already-defined term “prohibited sexual acts,” which is defined in subsection f.(8), and incorporates the majority of the acts prohibited by common law.

Subsection a.(4)

Similarly, using parallel language to that in subsection a.(3), subsection a.(4) sets forth the prohibited behavior for those who do not have a legal duty to care for a child and retains the language “any other person” to identify these individuals.

Subsections a.(5) and a.(6)

Mr. Silver indicated that the modifications to these subsections are fully discussed in the Final Report Relating to the Definition of “Harm” in the Child Endangerment States – N.J.S. 2C:24-4(a)[(2)].

Subsections b., c., d., and e.

These sections are referred to as the child pornography section of the child endangerment statute. The substance of these sections is unchanged, although they have been re-lettered and formatted for ease of access.

Subsection f.

The definitions were moved from subsection b. and re-lettered as subsection f., a stand-alone definition section. No change was made to the substance, but the section was reformatted for ease of access.

Commissioner Bunn thanked Mr. Silver for his really good work in a complicated area and the Chair agreed, noting that the work was challenging, and handled well.

On the motion of Commissioner Bunn, seconded by Commissioner Long, the Commission unanimously voted to release the Tentative Report.

Expungement

In New Jersey, a petitioner may present an expungement application to the Superior Court for one or more indictable offenses. If the application involves multiple offenses, they must be interdependent or closely related in circumstances and be committed as part of a sequence of events that took place within a comparatively short period of time, referred to as a “crime spree.”

Samuel Silver explained that, *In the matter of C.P.M.*, 461 N.J. Super. 573 (App. Div. 2019), concerned a defendant who engaged in criminal behavior in April and June of 2005, that he indicated was induced by his consumption of alcohol and controlled dangerous substances. The defendant pled guilty and, 13 years later, filed for expungement with the “crime spree exception” as the basis for his application.

The defendant contended that he was eligible for an expungement because he was under the influence of drugs during the months in which the offenses occurred. The State disagreed and indicated that there was no evidence he was under the influence of drugs during both events, the crimes were not interdependent or closely related in circumstances, and they were not committed during a relatively short period of time.

The trial court stated the “crime spree” was not defined by the statute, found that drug use during the time period of the offenses permitted the court to determine that the two events were closely related, and granted the petitioner’s application.

The Appellate Division considered the meaning of the phrase “closely related circumstances.” The Court noted difficulties in accepting the petitioner’s reading of the expungement statute, including: the need for a court to consider the petitioner’s motivations; inviting the submission of certifications that consist of self-serving statements; the granting of expungements based on statements that establish only a loose and vague nexus between the crimes for which an expungement was sought; and the uneven application that could result. The Appellate Division reversed the trial court’s decision, finding that the crimes were not interdependent or closely related in circumstances, but did not address the “short period of time” component of the statute.

Mr. Silver requested authorization to conduct additional research to determine whether it would be useful to clarify the meaning of “interdependent”; “closely related circumstances”; and “comparatively short period of time.”

Commissioner Long expressed concern about the deeply factual nature of the analysis, but said she did not oppose work in the area. Commissioner Bunn suggested looking into the laws of other states and suggested that there may be circumstances in which the addition of a statutory presumption could be of assistance. He gave the example of crimes occurring within a limited time period. The Commission authorized research and outreach to determine whether work in this area would be of use.

Adjournment

The meeting was adjourned on the motion of Commissioner Rainone, seconded by Commissioner Long.

The next Commission meeting is scheduled for October 21, 2021, at 10:00 a.m.