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NEW JERSEY
JUVENILE PROSECUTORS' LEADERSHIP NETWORK

April 16, 2019

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037



Re: Report of the Supreme Court Family Practice Committee
Proposed Amendment to Rule 5:20-1(c)
Comments of Behalf of the Juvenile Prosecutors' Leadership Network

Dear Judge Grant:

On behalf of the New Jersey Juvenile Prosecutors' Leadership Network (JPLN) please accept this correspondence as public comment regarding the proposed Rule Amendment to New Jersey Court Rule 5:20-1(c) as suggested by the Supreme Court's Family Practice Committee report.

Preliminary, the JPLN's review of the proposed report reveals that a current juvenile prosecutor is not part of the Family Practice Committee. In this instance, a juvenile prosecutor was able to attend an initial meeting as proxy for a sitting member, however was not allowed to vote on the proposed amendment. Thereafter, that same juvenile prosecutor was not permitted to attend the full meeting of the Committee when this matter was discussed. It is imperative to a thoughtful, collaborative process that individuals identified as "subject matter experts" be included in the discussion and debate of these incredibly important issues. As you are aware, juvenile justice is extremely important to this State. We are recognized as a Model State by the Annie E. Casey Foundation and many of our reform efforts are spearheaded and supported by juvenile prosecutors. To suggest changes to the juvenile Rules without a practicing member of the juvenile court bar present for discussions is simply misguided and should be corrected immediately.

The Family Practice Committee has proposed amending Rule 5:20-1(c) to add the following underlined language:

Every complaint alleging juvenile delinquency shall be reviewed by court intake services in the manner provided by law for recommendation as whether the complaint should be dismissed, diverted or referred for further court action. Where the complaint alleges conduct which, if committed by an adult, would constitute a crime as defined by N.J.S. 2C:1-4a or a repetitive disorderly persons offense as defined by N.J.S. 2A:4A-22(h), or any disorderly persons offense as defined in c. 35 or c. 36 of Title 2C, the matter shall not be diverted by the court unless the prosecutor consents thereto. Nothing in this rule precludes the court from diverting any complaint after a hearing wherein all parties have an opportunity to be heard.

In regard to the second proposed amendment, the JPLN vehemently objects to its form as being unconstitutional, representing a violation of the separation of powers doctrine. The JPLN also submits that this proposed amendment relies upon a misstatement of well settled Supreme Court law regarding the role of accountability in the juvenile justice system. Finally the JPLN objects to the second proposed rule amendment as infringing upon substantive rights of juvenile defendants that appear before the courts of this State.

I.

THE PROPOSED AMENDMENT IS UNCONSTITUTIONAL AS IT VIOLATES THE SEPARATION OF POWERS DOCTRINE

The Separation of Powers doctrine is well established and embodied in the New Jersey Constitution. In fact, the doctrine of "trias politica" dates back to the 18th century and was the underlying inspiration to the United States Constitution. This doctrine, which refers to the division of government between three separate but equal branches, sets forth that to most effectively promote liberty, these three powers of Government must be separate and act independently with each responsible for its designated core function while preventing the concentration of power in one branch.¹ The New Jersey Constitution adopted this approach N.J. CONST. art. 3, § 1, ¶ 1 and created three separate branches of government and specifically wrote that "[n]o person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others. . . " Id. In regard to the prosecution of

¹ Id.

offenders, New Jersey law is clear, “the criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors” N.J.S.A. 2A:158-4, both of whom are aligned with the Executive branch of government. N.J. CONST. art.5 §4, ¶3.

This proposed amendment clearly and unequivocally violates this Constitutional mandate. Our Supreme Court has “. . . long held that a prosecutor is vested with broad discretionary powers in the discharge of the manifold responsibilities of his office.” State v. Hermann, 80 N.J. 122, 127 (1979). “This discretion includes both the decision to prosecute an individual whom he has probable cause to believe has violated the law, and the converse decision to refrain from prosecuting such an offender.” Id. And while that authority is “neither unbridled nor absolute, we have also continuously stressed that judicial nullification of prosecutorial determinations is limited to cases of ‘arbitrariness or abuse.’” Id. (citing In re Investigation Regarding Ringwood Fact Finding Comm., 65 N.J. 512, 516 (1974)). This well-established legal principle has been routinely followed by the courts of this State. *See* State v. Mitchell, 164 N.J. Super. 198 (1978); State v. McMahon, 183 N.J. Super. 97 (1981); State v. Telcher, 220 N.J. Super. 54 (1987). In fact, the Telcher Court recognized, in this context, the impropriety of one branch intruding upon the role of another. That Court held that “[i]n view of the balance that should be carefully maintained between governmental branches, it would be highly undesirable and inappropriate for the judicial branch to act at cross purposes to the executive branch, as represented by the prosecutor, where a determination has already been made by the prosecutor. . . .” Id. at 66-67. This authority has also been found to extend to disorderly persons offenses. In State v. Ward, 303 N.J. Super. 47 (1997), the Appellate Division held that “N.J.S.A. 2A:158-4 and 5 give the Attorney General and county prosecutors plenary jurisdiction to prosecute all criminal matters in this State. It is clear from the wording of N.J.S.A. 2A:158-5 that the words ‘criminal business’ in §4 are not limited to crimes, but include the prosecution of ‘offenders against the law.’” Id. at 53 (citing State v. Downie, 229 N.J. Super. 207, 209 (1998)). And while it may be raised that juvenile offenders do not commit crimes, they certainly commit offenses against the law. In fact, this issue was litigated in a juvenile justice context before the Appellate Division in the unpublished opinion, State in the Interest of J.H., 2015 WL 6616298. In that case, the court dismissed a charge at the request of the victim over the objection of the prosecutor. In reversing that order, the Appellate Division held “[t]he judge may well have been swayed by the laudatory goal of resolving this family dispute amicably without further court

intervention. . . Ultimately, [that decision] intruded on the prosecutor's discretion to pursue the charges, which the State deems serious enough to warrant prosecution even absent the victim's cooperation. Nothing in the record supports a finding of abuse of discretion, arbitrariness, or bad faith by the State." *Id.* at *2. Despite this very clear mandate by the Courts of this State, the Family Practice Committee simply ignores established legal doctrine and accepts the trial judge's position in State in the Interest of N.P. that suggests that the Court is in a better position to make these determinations than the prosecutor. That is wholly incorrect and the precise reason the separation of powers doctrine exists.

Pre-Trial Intervention (PTI) in accordance with N.J.S. 2C:43-12, provides comparable guidance. The determination of acceptance into Pretrial Intervention is analogous to the diversion of a juvenile defendant because PTI is "supervisory treatment" ordinarily limited to persons who have not previously been convicted of any criminal offense under the laws . . . when supervisory treatment would: (1) provide applicants with the opportunity to avoid prosecution by obtaining early supervision or rehabilitation services and when the supervision or services can be reasonably expected to prevent future criminal behavior; (2) provide an alternative to prosecution for applicants who might be harmed by the imposition of criminal sanctions when the alternative would be a sufficient sanction to *deter criminal behavior*; (3) provide a mechanism for allowing the least burdensome form of prosecution for defendants charged with "victimless" offenses; (4) provide assistance to criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems; or (5) provide deterrence of future criminal or disorderly behavior by an applicant in a program of supervisory treatment. Furthermore, acceptance into PTI is measured according to the applicant's (1) amenability to correction, (2) responsiveness to rehabilitation, and (3) the nature of the offense. N.J.S.A. 2C:43-12b. In comparison, the Code of Juvenile Justice sets forth that every juvenile complaint shall be reviewed by court intake services for recommendation as to whether the complaint should be dismissed, diverted, or referred to for court action. N.J.S.A. 2A:4A-71b. As written, the prosecutor must consent to diversion where the complaint alleges a crime which, if committed by an adult, would be a crime of the first, second, third, or fourth degree, alleges a repetitive disorderly persons offense, or alleges a disorderly persons offense defined in chapter 35 or chapter 36 of Title 2C. N.J.S.A. 2A:4A-71b. Similar to the juvenile statutes described above, R. 3:28(b) provides that when a defendant has been accepted into PTI, the judge may, on

the recommendation of the criminal division manager and with the consent of the prosecutor and the defendant, postpone all further proceedings against the defendant for a period not to exceed thirty-six months. However, the New Jersey Supreme Court has stated, “While judicial review is consistent with applicable principles under the separation of powers doctrine . . . the scope of such review should be limited. Thus . . . the decision should lie, in the first instance, with the program director and prosecutor.” State v. Leonardis, 73 N.J. 360, 381 (1977). Furthermore, the Court stated that it is “mindful of the prosecutor’s duty to enforce the law and of the Legislature’s authority to proscribe certain conduct and fix penalties for violations.” Id. Accordingly, the Court proclaimed, “Great deference should be given to the prosecutor’s determination not to consent to diversion.” Id.; see also State v. Ward, 303 N.J. Super. 47, 59 App. Div. 1997) (stating that policy determinations, such as which offense to aggressively prosecute, fall within the domain of the prosecutor and that once such a decision has been made as whom to prosecute, it is entitled to great deference). Except where there is such a showing of patent and gross abuse of discretion by the prosecutor, the designated judge is authorized under R. 3:28 to postpone proceedings against a defendant only where the defendant has been recommended for the program by the program director and with the consent of the prosecutor. Id. (citing R. 3:28(b)). If a defendant wishes to challenge denial of acceptance into a PTI program, the challenge is to be “based upon alleged arbitrary or capricious action and the defendant has the burden of showing that the program director or prosecutor abused his discretion in processing the application.” Id. Instead of vesting all authority to divert juvenile matters to the judiciary, the executive power is the appropriate mechanism to check and balance the Court’s authority. The prosecutor is vested with the power of determining who is charged and tried for violations of the law, not the Court. That authority must extend to the determination of which juvenile defendants are required to appear in Court and which juvenile defendants are diverted from Court.

II.

THE SECOND PROPOSED AMENDMENT RELIES UPON A MISSTATEMENT OF WELL SETTLED SUPREME COURT LAW REGARDING THE ROLE OF ACCOUNTABILITY IN THE JUVENILE JUSTICE SYSTEM

The fact that the Family Practice Committee relies upon the statement that the juvenile justice system's *primary* goal is rehabilitation of juvenile offenders is a misstatement of law and should be disregarded. The New Jersey Supreme Court has clearly, repeatedly and unequivocally held that punishment is a core part of the juvenile justice system. The New Jersey Code of Juvenile Justice N.J.S. 2A:4A-20 et seq., enacted in 1982, reflects an approach that embodies rehabilitation, accountability and the protection of the public. Actually, the Code was passed as the result of sweeping national changes expressed concerning the ability of the prior juvenile system to adequately handle serious juvenile offenders. *See State v. R.G.D.*, 108 N.J. 1 (1987). The Legislature was very clear in its' purpose when it published the Senate Judiciary Statement which stated "[t]his bill recognizes that the public welfare and the best interest of juveniles can be served most effectively through an approach which provides for harsher penalties for juveniles who commit serious acts. . . ." *Id.* at 9. In its' first instance to interpret this Code, the New Jersey Supreme Court held, "[t]he goal of the new legislation in this regard was to deal more strictly with serious offenders." *Id.* The Supreme Court continued "[a]lthough juvenile courts may have difficulty at times in balancing the interests of the child and the public; there is no irreconcilable opposition between the two. By formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population." *Id.* at 8 (quoting *In re Seven Minors*, 99 Nev. 427, 432 (1983)). The New Jersey Supreme Court has repeatedly embraced that punishment remains part of the juvenile code. In *State v. Presha*, 163 N.J. 304 (2000), the Supreme Court again held that "punishment has now joined rehabilitation as a component of the State's core mission with respect to juvenile offenders." *Id.* at 314. The Supreme Court continued that "[a]nother explicit purpose of the Code . . . is to enforce the legal obligations of juveniles." *Id.* at 379. Therefore, while rehabilitation is a goal of the juvenile justice system it is not the only goal. Any statement otherwise is contrary to the legal doctrine of this State.

III

THE SECOND PROPOSED RULE AMENDMENT INFRINGES UPON SUBSTANTIVE RIGHTS OF JUVENILE DEFENDANTS AND THE PARTIES THAT APPEAR BEFORE THE COURTS OF THIS STATE

The Family Practice Committee incorrectly states that this proposed Rule amendment is procedural, therefore immune from legislative override. Winberry v. Salisbury, 5 N.J. 240, 255 (1950). This incorrect statement of law is precisely the reason the JPLN seeks experienced juvenile practitioners to participate on the Family Practice Committee and is indicative of our concern. In reality, the substantive rights afforded juvenile defendants that are diverted are markedly different. First and foremost is the right to legal representation. Matters that are diverted by the Court do not require legal representation. *See In re Gault*, 387 U.S. 1 (1967). As such, the court does not appoint counsel through the Office of the Public Defender and legal representation will only occur in those situations where private counsel can be retained. This may be sufficient when the prosecutor's office consents to diversion but should not occur in the face of an objection. As the New Jersey Supreme Court recognized in State ex rel. P.M.P., 200 N.J. 166 (2009), "[a] juvenile delinquency complaint may be filed by anyone, but when a crime is alleged in the complaint, the prosecutor's consent is needed before the court may divert the complaint. R. 5:20-1(c). Thus, the prosecutor plays a heightened role when it is alleged that the juvenile committed conduct that, if committed by an adult, would be a crime. Indeed, when the Prosecutor's Office files a juvenile complaint, it already has determined that it has a prima facie case against the defendant. Consequently, because the juvenile does not have the right to indictment, the filing of the complaint by the Prosecutor's Office takes on added significance. At that point, the prosecutor's role has evolved from investigative to accusatory." *Id.* at 177. The JPLN submits that legal representation is a substantive right, not a procedural one.

In addition, juvenile defendants are entitled to the right to trial. *See N.J.S. 2A:4A-40*. This Rule amendment would essentially strip a juvenile defendant from exercising that right should a juvenile judge divert a matter over that objection and trial demand.

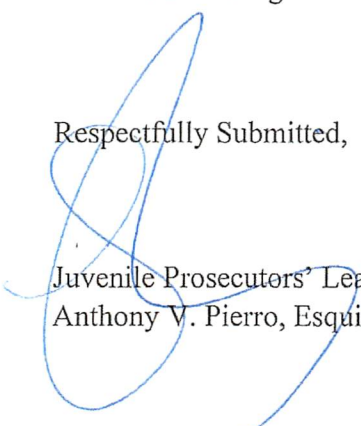
Finally, juvenile defendants are permitted to voluntarily waive jurisdiction in accordance with N.J.S. 2A:4A-27, and the State is permitted to waive matters in accordance with N.J.S. 2A:4A-26.1. This Rule would permit a juvenile court to completely override those substantive rights and divert a juvenile without the consent of either the juvenile or State.

This attack on significant substantive rights is done without a standard of review being written into this Rule amendment. What is an appellate court reviewing when these matters are appealed? Unlike PTI, which has a well-established standard, this Rule amendment simply allows the trial court to take whatever action they deem appropriate. This section cannot be adopted by our Supreme Court

CONCLUSION

Thank you for taking the time to review these comments submitted. Members of the JPLN are available to discuss, in detail, the concerns raised with the committee at your next scheduled meeting. On behalf of the JPLN, I can be reached directly at 732.288-7807.

Respectfully Submitted,



Juvenile Prosecutors' Leadership Network
Anthony V. Pierro, Esquire