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April 17, 2019

Honorable Glenn A. Grant, J.A.D.
Acting Admin. Director of the Courts
Rules Comments
Richard J. Hughes Justice Complex
PO Box 037
Trenton, NJ 08625-0037

Dear Judge Grant:

Please accept this letter as official comment on the proposed amendment of Rule 5:20-1(c) included in the Supreme Court's Family Practice Committee ("Family Practice Committee") Report.

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

> Every complaint alleging juvenile delinquency shall be reviewed by court intake services in the manner provided by law for recommendation as to 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.

For purposes of this letter, I refer to the first portion of the rule change as the "First Part of the Rule Change," and the portion that reads "Nothing in this rule precludes the court from diverting any complaint after a hearing wherein all parties have an opportunity to be heard," as the "Second Part of the Rule Change."

For several reasons, I oppose the Second Part of the Rule Change which includes additional language that gives a court absolute discretion to divert any juvenile complaint.

On March 8, 2018, the Appellate Division issued State in the Interest of N.P., 453 N.J. Super. 480 (App. Div. 2018). In N.P., which was written by the Honorable Carmen Messano, P.J.A.D., the court unequivocally rejected "any contention that the Judge's unilateral entry of a Diversion Order, without notice to the state and an opportunity to be heard, is the court action envisioned by Section 71 or the Rule." In each of the several cases consolidated with N.P., the Appellate Division rejected the family court's position that N.J.S.A. 2A:4A-73 vested the family court, not the prosecutor, with the ultimate authority to divert a juvenile complaint regardless of the offense charged. The court's decision in N.P. was unequivocal and settled the question whether the family court or the prosecutor retained the ultimate authority to divert a juvenile complaint.

Despite the clarity of Judge Messano's ruling in N.P., the proposed rule change would eviscerate the thoughtful and constitutionally-guided position in N.P. by divesting the executive branch of all prosecutorial authority and giving unfettered authority to the family court to divert matters. The proposed rule change is not consistent with the relevant statutes, and, more fundamentally, violates the separation of powers doctrine.

The undersigned urges the Supreme Court to recognize the Appellate Division's sound ruling in N.P., wherein the court stated, "we must construe specific provisions of the code and our Court Rules that reflect the rehabilitative and deterrence purposes of the code, and which govern the balance of authority between the prosecutor and the court in attempting to achieve those goals." This balance would be lost under the proposed rule change which would transfer prosecutorial authority to the judiciary. The reasoning underpinning the proposed rule change is unclear. The preamble is silent as to the reasons for the sweeping change contained within the proposed rule amendment. Nor does the preamble explain why the committee's proposed change goes far beyond the scope of the referral suggested by Judge Messano in Footnote 11 of N.P.

The balance struck between the authority and responsibility of the prosecutor and the court was adequately established and refined by the Appellate Division's decision in N.P. and that balance should be respected. Further sweeping change is unnecessary and the motivation is unclear. What is clear is that the Second Part of the Rule Change is a blatant violation of the separation of powers doctrine and strips the executive branch of its prosecutorial charging authority.

Moreover, there has been no indication whatsoever that the executive branch has violated the vested authority and discretion given to it by the Legislature. Yet, the same cannot be said for the judiciary in Middlesex County. Recent decisions rendered by the Appellate Division have exhibited the Family Court's continued exercise of its authority to the exclusion of the other branches of government and the parties appearing before the Court. See State in the Interest of C.F., 2019 N.J. Super. Lexis 18; State in the Interest of N.P., 453 N.J. Super. 480 (2018); State in the Interest of M.P., 450 N.J. Super. 539 (2017). These decisions reflect the appellate courts consistent finding that the Family Court exceeded the bounds of its authority and violated existing laws, statutes, and the rules of court. Yet, it appears that the Family Practice Rules

Committee seeks to vest even more authority to the judicial branch despite the recent findings by the Appellate Division that the family court has overstep its bounds and abused its discretion.

The proposed changes equate to a constitutional attack in violation of the Supreme Court's decision in State in the Interest of P.M.P., 200 NJ 166 (2009). In P.M.P., our Supreme Court held that if the complaint charges the juvenile with a crime, "the prosecutor's consent is needed before the court may divert the complaint." The Second Part of the Rule Change conflicts with the Supreme Court's ruling in P.M.P.

As Judge Messano framed the issue in N.P., "essentially in every appeal, the judge concluded Section 73 vested the court, not the prosecutor with the ultimate authority to divert a juvenile complaint, regardless of the offense charged." The Appellate Division's decision in N.P. rendered a ruling contrary to the position set forth by the trial court in N.P.. Again, the proposed rule amendment set forth by the Family Practice Rules Committee seeks to overturn Judge Messano's decision and propose a rule amendment to allow the trial court to do exactly what the Appellate Court said it could not. That course of action is contrary to our system of justice and should be rejected.

As stated, the proposed rule amendment is the product of a referral by Judge Messano in his opinion in N.P.at 24:

> There remains one more issue to address, and that is the failure to include Title 35 and 36 disorderly persons offenses in the Rule, even though they were added to Section 71 by the Legislature in 1986. The State contends this is mere oversight. The judge, however, specifically concluded that because those offenses were not included in the Rule, the express language of Section 73 permitted her to divert the complaints without the prosecutor's consent. We agree with the judge.
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> Section 71 requires that intake services "refer[ ] for court action" any complaint charging a Title 35 or 36 disorderly persons offense unless the prosecutor consents to diversion. N.J.S.A. 2A:4A–71(b). The statute only limits the authority of intake services. No section of the Code limits the authority of the judge to divert the complaint after it is referred for court action. Indeed, without mention of the prosecutor's role, Section 73 vests the judge with the discretionary authority to divert any juvenile complaint. N.J.S.A. 2A:4A–73(a). Nor does the Rule, which governs the procedure to be followed once the complaint is referred to court, limit the judge's authority to divert a complaint charging a Title 35 or 36 disorderly persons offense.
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> Inadvertence may be, as the State contends, the only reason why Title 35 and 36 disorderly persons offenses are not contained in the Rule. However, "[t]he approach taken in respect of the construction of court rules is the same as that for the construction of statutes." State v. Clark, 191 N.J. 503, 508 (2007) (citations omitted). The plain language of the Rule only prohibits the judge from diverting a

juvenile complaint charging a crime or repetitive disorderly persons offense without the prosecutor's consent.[11] As a result, we affirm the orders entered in A–0308–17.

Judge Messano asked the Rules Committee to consider the limited issue of reconciling R. 5:20-1(c) and N.J.S.A. 2A:4A-73. The referral was limited to those juvenile delinquency complaints alleging a violation of Title 35 and Title 36 of the Criminal Code. The Rules Committee responded to this call for action but greatly exceeded the bounds of the referral made in N.P. by proposing a rule amendment which would vest in the judiciary the complete discretion to divert any juvenile delinquency complaint no matter the degree of the criminal offense charged. Although it appears that the committee considered concerns regarding the impingement upon the separation of powers doctrine between the executive and judicial branches, the Committee gave those considerations short shrift.

It is apparent that the Committee failed to consider the impact of the Second Part of the Rule Change. The Second Part of the Rule Change would simply deprive the executive branch, i.e., prosecutors of carrying out the legislative intent of a multitude of statutes on the books and applicable to juveniles. Once a complaint is diverted from the system, a formal adjudication will never be entered and thereafter, any of the statutorily mandated sanctions, i.e., certain fines and penalties considered and enacted by the legislature, will thereafter not be imposed since no formal adjudication will be entered. See, In re. M.L. 436 N.J. Super. 636 (App. Div. 2013); State ex. rel. N.L., 345 N.J. Super. 25 (App. Div. 2001). The Rules Committee, with the proposed rule amendment has vested the judiciary with the ultimate authority to divert any given case from the system and prevent an adjudication from being entered. That decision is purely an executive branch decision which should be made by specially trained assistant prosecutors who are sworn to enforce the constitution and the law as enacted by our legislature. The law is what should guide these decisions and not social and/or judicial philosophies, i.e., D.E.D.R. fines should not be applicable to juveniles pursuant to N.J.S.A. 2C:35-15, juveniles should not be deprived of their ability to drive a car in the State of New Jersey pursuant to N.J.S.A. 2A:35-16; juveniles should not be subject to the provisions of Meghan's Law pursuant to N.J.S.A. 2C: 7-2b.

The Second Part of the Rule Change echoes the trial court's finding in N.P. which was soundly rejected by the Appellate Division. The trial court in N.P. stated, "it would be in the best interests of justice to vest the juvenile judge, and not the Prosecutor's Office, with the discretion to divert complaints, and it would further the courts' *parens patriae* obligations." This position was flatly rejected by the panel in N.P. and should not now be resurrected in the proposed rule change.

The position adopted by the Rules Committee is unconstitutional and invades the constitutionally-mandated role of both the executive and legislative branches. In N.P., the court cited to the trial court's concern regarding the state having unfettered discretion to decide which complaints to divert and which complaints proceed to the Superior Court. Clearly, this prosecutorial discretion is the same discretion that has been used by prosecutors since the advent of our Criminal and Juvenile Justice Systems. Every day, assistant prosecutors decide whether to present a matter to a grand jury or remand the matter to municipal court. If the Family Practice Rules Committee's logic was to be followed, Title 3 of our Rules of Court should be amended as well to allow for the judicial downgrade of any indictment to municipal court. Such a

proposition would never be contemplated, and it is beyond belief that that is what is being considered in the juvenile justice arena.

Without question, the specially-trained juvenile assistant prosecutor is in the best position to determine if a matter should be diverted from the formal court calendar. The specially-trained juvenile assistant prosecutor has unique access to the victim/complainant and their input, school officials, law enforcement officials, CAD (computer automated dispatch) reports maintained by law enforcement, the results of previously attempted Stationhouse Adjustments utilized by law enforcement, and information provided by parents and guardians at the time the juvenile encountered law enforcement. The family court judge, in contrast, may not have ever handled a criminal or juvenile delinquency matter before and does not have equal access to the same information that the assistant prosecutor does.

Moreover, as was highlighted in the recent published decision issued on February 6, 2019, the Appellate Division in State ex rel. C.F., Nos. A-0326-18T3, A-0329-18T3, A-0330-18T3, 2019 N.J. Super. LEXIS 18, at *1 (App. Div. Feb. 6, 2019), the Family Intake Services Unit rarely if ever employs the provisions of N.J.S.A. 2A:4A-71(b), to provide pertinent information to the state and the court regarding diversion. Consequently, it is the assistant prosecutor who is in the possession of superior information to determine whether diversion is appropriate or not. In addition, that information can be reviewed with defense counsel to get the diversion decision right. Moreover, the Second Part of the Rule Change essentially strips the executive branch of its charging authority and should be rejected.

As stated previously, the trial court in N.P., expressed concern regarding the executive branch's unfettered discretion in charging decisions when it comes to juveniles. However, the diversionary discretion vested in assistant prosecutors, is tempered by the dispositional alternatives made available to the Court by our legislature. More specifically, N.J.S.A. 2A:4A-43(b)(1) allows for the trial court to adjourn formal entry of disposition of a case for a period not to exceed twelve months for the purpose of determining whether the juvenile makes a satisfactory adjustment. If in fact the juvenile does make a satisfactory adjustment, the complaint is then dismissed. There can be no greater check on the charging decision and discretion of any given assistant prosecutor than that which already exists in our law and provided by our legislature in N.J.S.A. 2A:4A-43(b)(1). Consequently, there should be no concern whatsoever regarding the use of prosecutorial discretion and the second proposed rule amendment should be rejected. In point of fact, the proposed rule change places all of the executive and legislative duties and responsibilities in the hands of the judiciary and that reality is a clear violation of the Separation of Powers Doctrine and must be rejected. Placing complete discretion in the judiciary under our system of government must be rejected.

The proposed rule amendment leaves ample room for family courts to use the amendment as a case management tool. For example, if the family court is not in agreement with the state's plea offer in any given case, the second proposed rule amendment would allow the court to divert the case and strip the executive branch of its prosecutorial charging function. In addition, if an adjudication on a specific criminal offense would be an impediment to the placement of a given juvenile, i.e., a sex or arson offense, and the State was unwilling to amend the charge, the judiciary could conceivably divert that case despite the clear intent of the legislature, thereby depriving the state of its ability to enforce the law as enacted by our elected officials.

Moreover, the proposed rule amendment places unfettered discretion in the hands of the judiciary by allowing certain classes of offenses to be diverted from the system based on social and judicial philosophies rather than remaining consistent with the legislature's intent, such as crimes involving under 50 grams of marijuana, which is a recognized gateway drug. This automatic diversion of certain offenses was clearly exhibited in N.P. and C.F.

Prosecutors further fear that the proposed rule change could be used as a case management tool such as disposing of cases at the end of the calendar year. Consistent with this claim, if the proposed rule amendment is adopted, effective September 1, 2019, a trial court could divert a murder charge from the system or divert a complaint that the state has indicated its intention to waive to the Superior Court of New Jersey – Law Division - Criminal Part pursuant to N.J.S.A. 2A:4A-26.1. That reality is untenable and prosecutors on behalf of victims should not be compelled to seek redress in the Appellate Division of the Superior Court.

Prosecutors have also expressed concern regarding the governance of the Family Court Rules Committee. After the decision was rendered in N.P., the undersigned who argued that case before the Appellate Division, referred the decision to the Honorable Bonnie J. Mizdol, J.S.C., chair of the Family Court Practice Rules Committee. Moreover, I offered to appear and give testimony regarding the issue but I did not receive a response to my offer. When the Rules Committee met, Deputy Attorney General Analisa Holmes appeared with Assistant Prosecutor Anthony Pierro. Mr. Pierro is one of the leaders of the New Jersey Juvenile Prosecutors' Leadership Network, which is an association of assistant prosecutors who appear regularly in the juvenile courts of the State of New Jersey. AP Pierro is an expert in the field of Juvenile Justice and has lectured nationally on Juvenile Justice related topics. Despite his experience, Mr. Pierro was excluded from the single meeting discussing the proposed amendment to R. 5:20-1(c). With the exclusion of Mr. Pierro, the only remaining prosecutorial vote was that of DAG Holmes who voted against the proposed rule amendment. The remaining members of the committee consisting of presiding family court judges and matrimonial attorneys voted in favor of the proposed rule amendment. The lack of balance of the committee should cast doubt on the proposed amendment produced by it.

It is clear that diversionary options available to the court are limited and have yet to be proven successful and or effective. For example, the diversionary programs available to Family Court are juvenile conference committees pursuant to N.J.S.A. 2A:4A-75 and Intake Services conferences pursuant to N.J.S.A. 2A:4A-74. In Middlesex County, the research produced by the Disproportionate Minority Concerns Committee has identified several collateral issues which negatively impact juveniles appearing before the Juvenile Conference Committees in Middlesex County. In particular, the Committee identified the following troubling issues:

a. Juveniles are subjected to considerable delays in having matters scheduled before the various Juvenile Conference Committees. In certain cases, it took months for cases to be scheduled.
b. Generally, the Juvenile Conference Committees do not have access to resources in order to assist juveniles and their families.
c. There is a disproportionate impact upon minority juveniles who appear before the Juvenile Conference Committee.

d. The Juvenile Conference Committees fail to reflect the diversified population of the communities in which they operate in violation of Rule 5:25-1(b).

It has been shown that the effectiveness of the conditions placed upon juveniles who appear before the various committees has not been established and, in fact, may be more harmful than helpful. In addition, those conditions may be more onerous than those imposed upon a juvenile appearing in Court and receiving a deferred disposition. N.J.S.A. 2A:4A-43(b)(1).

Moreover, it is clear that Intake Service Conferences that are conducted are not in compliance with the statutory mandate that counselors interacting with juveniles diverted from the formal court calendar to an Intake Service Conference have a master's degree or equivalent experience pursuant to N.J.S.A. 2A:4A-70(a). Despite requests for this documentation from the Family Court in Middlesex County, no such credentials have been provided. More importantly, cases can only be diverted from the system as a result of an analysis conducted by court intake services pursuant to N.J.S.A. 2A:4A-71. The services provided by court intake are statutorily mandated to be reviewed on an annual basis by the Supreme Court pursuant to N.J.S.A. 2A:4A-70(d). In Middlesex County, it has been reported to the undersigned that that review by the Supreme Court has simply not taken place. In essence, pursuant to state law, cases are diverted from the system based upon a process undertaken by court intake services pursuant to N.J.S.A. 2A:4A-70-73. Pursuant to N.J.S.A. 2A:4A-70(d), those processes are to be evaluated on an annual basis by the Supreme Court pursuant to N.J.S.A. 2A:4A-70(d). To my knowledge, that evaluation has not occurred since it's the statute's inception. Therefore, it is not prudent to give unfettered discretion to the judiciary when the discretion already provided to them has yet to be evaluated. N.J.S.A. 2A:4A-70(d).

The granting of unfettered discretion to the judiciary as proposed in the rule change should be rejected by the Supreme Court. The Appellate Division outlined in State in the Interest of C.F. the serious flaws in the diversion process in Middlesex County. The analysis of the eleven statutory factors impacting the diversion determination is rarely if ever undertaken by court intake services. Moreover, as was outlined in C.F., diversions are generally premised upon the nature of the offense and the prior record of the juvenile, i.e., under 50 grams of marijuana with no prior record. The evaluation of the entire juvenile based upon the eleven statutory factors is rarely undertaken. No evaluations or assessments of the juvenile are conducted prior to diversion and uninformed diversions do not allow the court to fulfill its statutory mandate of rehabilitating juveniles while promoting accountability and protecting the community. As was exhibited in C.F., the trial court claimed to have knowledge superior to that of the prosecutor and the juvenile and could act sua sponte in the best interest of the juvenile, without hearing from the juvenile, their parents, the complainant or victim or the juvenile's counsel. Moreover, the court did not have the benefit of a complete assessment pursuant to N.J.S.A. 2A:4A-71(b). Accordingly, the reasoning supporting the Appellate Division's decision in C.F. clearly exhibits why unfettered discretion should not be afforded to the judiciary and the second proposed amendment to the rule should be soundly rejected.

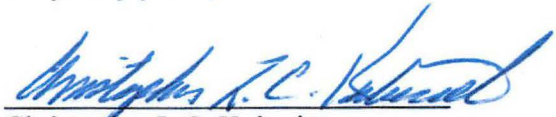
I have reviewed the letter submitted to the Court by the Attorney General and agree with the portion of the letter that analogizes the diversion decision to the Pre-Trial Intervention process for adults. I further agree with the Attorney General's position that the rule amendment

is substantive in nature and not procedural and that N.J.S.A. 2A:4A-71 should control and the procedural references related to Winberry v. Salisbury, 5 N.J. 240 (1950) are inapplicable.

For the foregoing reasons, I oppose the Second Part of the Family Practice Committee's proposed amendment to the Rule. I do not oppose the addition of disorderly persons offenses in chapters 35 or 36 of Title 2C. In such cases, prosecutors should consent before the juvenile is diverted from the counsel mandatory juvenile process. This amendment to the rule ensures that such cases are not diverted automatically, and that the ultimate decision to divert rests with the prosecutor.

Thank you for your consideration of these comments.

Very truly yours,



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