



NEW JERSEY STATE BAR ASSOCIATION

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January 27, 2017

The Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairman
New Jersey Council on Local Mandates
20 West Street, 4th Floor
P.O. Box 627
Trenton, New Jersey 08625-0627

Re: In the Matter of a Complaint Filed by the New Jersey Association of Counties
Challenging Provisions of the Criminal Justice Reform Act as an Unfunded
Mandate
Docket No. COLM-0004-16

Dear Judge Sweeney:

The New Jersey State Bar Association (“NJSBA”) respectfully requests to appear in the above-referenced matter as an *amicus curiae* party to assist the Council in its consideration of the petitioner’s challenge to certain provisions of the Criminal Justice Reform Act (or, the Bail Reform Law), N.J.S.A. 2A:162-15, et seq. (the “Act”). Please accept this letter brief in lieu of a more formal submission in opposition to the complaint and the petitioner’s request to declare the Act, in whole or in part, an unfunded mandate.

Interest of Amicus Curiae

The NJSBA and its members, including leading criminal law practitioners have a significant, meaningful and informed perspective on the issues presented in this matter. For more than two years, the association has brought its expertise to bear on all aspects of

constitutional amendment mandating the pretrial release of certain defendants, and the Criminal Justice Reform Act implementing the amendment. Indeed, the association notes, with due respect to the Council's authority, if it were to declare the Act expired now, at this late point in implementation, the impact on the orderly workings of the state judiciary and legal community would be devastating and would likely pose grave consequences for NJSBA member-attorneys' ability to properly represent their clients and defend their constitutional rights.

While the NJSBA was supportive of the substantive changes presented by the constitutional amendment and implementing Act, it repeatedly expressed concerns to the Legislature, the Administrative Office of the Courts and the Supreme Court about the method of funding those changes provided for in the Act. Even now, the association continues to voice concerns about the funding mechanism for implementation of the pretrial release and speedy trial provisions of the Constitution; however, there can be no question that funding is, indeed provided.

Given its vigorous involvement in the reforms at issue, the NJSBA submits that it has a unique expertise and knowledge about the purposes and provisions of the bill. As such, it can credibly offer insight and guidance to the Council on the pending matter.

For the reasons explained below, the NJSBA believes this matter is beyond the jurisdictional purview of the Council, and, in any event, that the Act does not represent an unfunded mandate. The NJSBA, therefore, respectfully requests the Council dismiss the Complaint and decline to declare the Act expired, in whole or in part.

Summary of Argument

While the Council on Local Mandates enjoys wide latitude in reviewing this state's law, the scope of that consideration is limited under the New Jersey Constitution to preclude the

Council from striking down any law that is necessary to effect state constitutional requirements. New Jersey Const. Art. VIII, §2, ¶15(c)(5) (providing that certain categories of laws "shall not be considered unfunded mandates[,]" including "those which implement the provisions of this Constitution[.]") Moreover, the Council's decisional history has seen it consistently decline to inquire into a law which, on its face, creates an internal funding mechanism. As discussed *infra*, since both of these factors are present in this matter, the NJSBA respectfully requests the Council dismiss the complaint and decline to declare the Act expired, in whole or in part.

Statement of Facts and Procedural History

The NJSBA respectfully refers the Council to the Procedural Posture and Statement of Facts recited in Respondents' December 22, 2016 Letter Brief, and incorporate same herein by reference. Of particular importance is that the legislation being challenged was adopted nearly simultaneously with a November 2014 constitutional amendment that New Jersey voters approved to modify criminal bail requirements in concert with changes to the criminal justice system as provided for in Act.

Legal Argument

Petitioner's Complaint Falls Outside of the Jurisdiction of the Council Because the Criminal Justice Reform Act Implements Provisions of the New Jersey Constitution

The New Jersey Legislature, with the Governor's approval, enacted the Local Mandate Act, N.J.S.A. 52:13H-1 et seq., and created the New Jersey Council on Local Mandates ("Council") therein. The Legislature restated the Council's mandate of the six classes of laws that "shall not be considered unfunded mandates" by expressly restating the six enumerated categories approved by the voters. N.J.S.A. 52:13H-3(a)-(f). N.J.S.A. 52:13H-2, in restating New Jersey Const., Article VIII, Section II, paragraph 5(a) clarifies that, as a condition precedent

to declaring a law or component thereof to be an unfunded mandate, the Council must find that “it does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or regulation.” (Emphasis added).

Even with a political, non-judicial body such as the Council, “[e]very possible resumption favors the validity of an act of the Legislature.” New Jersey Sports & Exposition Auth. v. McCrane 61 N.J. 1,8 appeal dismissed sub nom., Borough of E. Rutherford v. New Jersey Sports & Exposition Auth., 409 U.S. 943 (1972). Indeed, it should be noted that case law supports the very notion of such a strong presumption in favor of dismissal of the petitioner’s complaint by stating that a reviewing body should not second-guess the Legislature’s social policy decisions. Brown v. State, 356 N.J. Super 71, 80 (App. Div. 2002).

Moreover, where a challenged statute “implement[s] the provisions of [the New Jersey] Constitution” it is “within the jurisdiction of the Courts, rather than this Council.” In the Matter of a Complaint Filed by the Township of Medford, Council on Local Mandates, p. 5, decided March 18, 2009, (citing N.J. Const. Art. VIII § 2, ¶ 5(c)(5)).

In this case, in November 2014, New Jersey voters approved an amendment to Article I of the New Jersey Constitution to permit the detention of high-risk defendants before trial. See “Criminal Justice Reform Report to the Governor and the Legislature,” available at: <http://www.njcourts.gov/criminal/cjr/2016cjrannual.pdf> (last visited January 25, 2017).

The amendment, embodied in Article I, paragraph 11 of the New Jersey Constitution, gave express authority to the Legislature to provide implementing legislation. Specifically, the constitutional provision states, “It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.” New Jersey Const. Art. I, §11.

In anticipation of the constitutional amendment gaining voter approval, in the summer of 2014, the Legislature passed and the Governor signed the Criminal Justice Reform Act which included procedural and operational changes to the state's criminal justice system to provide for the pretrial release and pretrial detention of criminal defendants addressed in the amendment.

The Legislature also took the opportunity to provide definitive criteria required to meet the Constitutionally-required speedy trial standard contained in Article I, paragraph 10 of the New Jersey Constitution which provides, "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury. . ." New Jersey Const. Art. I, §10.

Until the Act was passed, a defendant's right to a speedy trial had not been specifically defined by statute. Litigants relied instead upon case law to determine if the speedy trial provisions of the Constitution had been effectuated. See State v. Cahill, 213 N.J. 253 (2013). This has led to inconsistent results in cases where a speedy trial was in issue. The Act establishes stringent timeframes against which a defendant's access to a speedy trial can be measured. L.2014, c.31, s.8.

There can be no doubt that the Act was passed for the sole purpose of implementing these two constitutional provisions. In fact, the Act did not even take effect unless and until the constitutional amendment providing for pretrial release of defendants was approved. L. 2014, c. 31, s. 21. The allegations in the complaint filed by the Association of Counties take issue with the way the provisions were implemented and the timeframes the Legislature determined were necessary for key decisions to be made about the pretrial release of a defendant, but there is no question that the impetus of the Act was to effectuate the constitutional provisions.

Because of this, the NJSBA urges the Council to dismiss the complaint as being beyond the jurisdiction of the Council, and to decline to declare the Act expired, in whole or in part.

Petitioner's Complaint Falls Outside of the Jurisdiction of the Council Because it Includes a Funding Source Among its Provisions

When reviewing matters presented to it and determining if a legislative action creates an unfunded mandate, the New Jersey Council on Local Mandates has long recognized a limitation on the scope of its authority in order to avoid its intrusion on legislative monetary policy decisions. See Shiloh and Rocky Hill, Council on Local Mandates, decided on Oct. 22, 2008, at 11 and In re Ocean Township (Monmouth County) and Frankford Township (“Ocean/Frankford”), Council on Local Mandates, decided on Aug. 2, 2002, at 12 (“The obvious purpose of this legislative provision....is to prevent the Council from becoming involved in fiscal policymaking”). In this matter, it is clear that funding is provided for the implementation of the legislative action complained of; the question is really one about how that funding is to be apportioned.

As discussed above, the Act made a number of changes to the way criminal defendants are treated within the state's judicial system, requiring extensive pretrial assessments to determine whether, and on what conditions, criminal defendants can be released without bail pending trial. While these changes required substantial funding for increased staff and technology upgrades, that funding was achieved by substantial, across-the-board filing fee increases in the state courts.

Sections 12 through 19 of the Act authorized the Supreme Court to develop and maintain a funding source for implementation of the Act; to wit, a “21st Century Justice Improvement Fund,” more specifically described at N.J.S.A. 2B:1-10. The Fund was expressly created as a dedicated, non-lapsing fund in the General Fund, with all monies therein restricted to use for the Criminal Justice Reform-related program costs referenced above. Indeed, under the Act,

expenditures other than those three Reform-related categories are verboten: “monies credited to the fund shall not be used for any purpose other than those purposes set forth in this section..”

N.J.S.A. 2B:1-9.

To ensure that the Act’s funding mechanism, including the 21st Century Justice Improvement Fund, is sufficient to effect successful implementation and operation of criminal justice reform, the Legislature authorized the Court to engage in five-year post-enactment “review [of] all filing fees and other statutory fees revised or supplemented pursuant to [the Act]...which includes a reasonable opportunity for public comment, to determine if the fees should remain unchanged as originally adopted pursuant to those sections or be reduced to reflect the funding needs associated with the purposes set forth in section 14 of P.L.2014, c.31 (C.2B:1-9) for which the “21st Century Justice Improvement Fund” provides monies.”

Moreover, the AOC’s “Criminal Justice Reform Report to the Governor and Legislature,” available at <http://www.judiciary.state.nj.us/criminal/cjr/2016cjrannual.pdf> (last visited January 25, 2017), provides a detailed analysis of the funding derived from the Act and demonstrates that an unfunded mandate concern is not implicated in this matter because the law has delivered funding to meet the requirements of the Act. How the Court determines to best appropriate the money to effectuate the provisions of the Act is, respectfully, not within the Council’s purview.

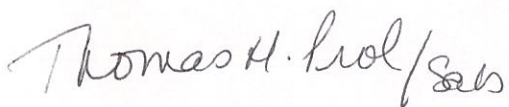
Finally, it should be noted that many of the groundbreaking changes provided for under the Act, such as e-filing and virtual courtrooms, in particular, may actually result in cost savings as well as increased staff productivity and safety at the county and local level, could limit or cancel out the claimed effect of lack of funding.

For these reasons, the NJSBA urges the Council to dismiss the Complaint, as the Act does not amount to an unfunded mandate.

Conclusion

In light of the above, the NJSBA respectfully requests the Council dismiss the petition and decline to declare the Act expired, in whole or in part, as the Criminal Justice Reform Act was passed to implement provisions of the Constitution, and a funding mechanism was provided. The NJSBA notes, however, that it has been and will continue to be an outspoken critic on the issue of the increased court filing fees serving as the Act's funding source. While the law created a mechanism to review those fees and evaluate continuation of the current revenue structure, the NJSBA stands ready to adamantly oppose any future funding schemes under the Act that seek to impose the cost burden of the law on court litigants and those who access the courts in pursuit of their rights. While the association disagrees with the allegations in the Complaint in this matter that no funding was provided for the operational costs of the Act, and believes the Council should decline to declare the Act expired, it firmly believes that the funding currently provided must be transitioned from relying on a user-tax assessed at the courthouse to being provided from the state's general treasury.

Respectfully submitted,

A handwritten signature in cursive script that reads "Thomas H. Prol / sab".

Thomas H. Prol, Esq.
President, New Jersey State Bar Association

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