



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

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July 15, 2010

Dermot P. O'Grady, Acting Prosecutor
Hunterdon County Prosecutor's Office
65 Park Avenue, PO Box 756
Flemington, NJ 08822-0756

(via Fax only to 908-806-4618)

RE: Complaint against Municipal Prosecutor of Frenchtown

Dear Acting Prosecutor O'Grady:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project, to complain that Mary Rose Mott, Esq., Municipal Prosecutor in Frenchtown on July 7, 2010 violated a November 18, 1998 Directive by former Attorney General Peter Verniero. A copy of that three-page Directive is enclosed with this letter as Exhibit pages 1-3.

Enclosed is a Complaint-Summons form (Exhibit pages 4-5) in the case of State v. Gennaro J. Mirabella, Complaint No. 1020-S-2010-000044. As you can see on Exhibit page 5, Mirabella was charged with shoplifting, in violation of N.J.S.A. 2C:20-11B(2) but was allowed to plead guilty to a "amended charge" of Frenchtown Borough Code § 60-2B. The code provision that Mirabella was allowed to plead guilty to is part of the Borough's loitering prohibition (Exhibit page 6) , which states:

No person shall loiter in a public place in such a manner as to create or cause to be created any disturbance or annoyance to the comfort and repose of any person.

See also, Exhibit page 7, which is the "Request to Approve Plea Agreement" that Ms. Mott and the defendant signed.

Allowing Title 2C charges to be downgraded to this code provision violates the Directive. First, it should be evident that § 60-2B¹ is preempted by the New Jersey Criminal Code. Any question as to the local code's validity has been resolved by State v. Paserchia, 356 N.J. Super. 461 (App.Div.2003). And, if Ms. Mott wasn't sure whether or not § 60-2B is preempted and invalid, the Directive still requires her to "discuss the matter with the County Prosecutor's Office or . . . the Division of Criminal Justice." She is not permitted to "simply ignore this obligation." Directive, page 2.

Second, even if § 60-2B is not preempted, "there must be a nexus between the original charge and" § 60-2B and "a factual basis for a plea must be placed on the record." Directive, page 2. It is difficult to see how a shoplifting charge can be based upon facts that would also support a § 60-2B charge because nothing in the local code section purports to prohibit the conduct for which Mirabella was charged.

Moreover, we find that Ms. Mott's acceptance an improper plea bargain in this case to be particularly questionable and suspect because of the defendant's impressive political connections: Defendant Gennaro J. Mirabella, who served for seventeen years on the Garwood Police Department until his recent resignation, is the brother of sitting Union County Freeholder Alexander Mirabella and the son of former Elizabeth Police Chief Gene Mirabella.

Mirabella was caught on videotape damaging change machines in a Laundromat on August 18, 2009. The next day he was again caught on videotape entering Garwood's Chief Financial Officer's office without authorization. He was charged with disorderly persons offenses for both incidents but the municipal prosecutor "in the interest of justice" dismissed both of the charges. On September 22, 2009, Mirabella and Garwood Borough entered into an agreement under which Mirabella would resign his position as police officer in exchange for the Borough dismissing all disciplinary charges against him and telling any future, prospective employers that Mirabella resigned his position *in good standing*

Then, with the ink barely dry on this amazingly generous deal, Mirabella was charged with shoplifting in Frenchtown and was, with an assist from the prosecutor, *again* allowed to avoid a Title 2C conviction on his record. Perhaps Ms. Mott wasn't aware of Mirabella's political connections—we have no way of knowing. But, it certainly strikes us as unusual, to say the least, that this politically favored person can be charged with disorderly persons offenses three times in a year, with two of the incidents being recorded on videotape, and not be convicted of anything that will turn up in a Criminal History Background check.

Beyond Mirabella and his political connections, allowing people to plead guilty to superseded municipal ordinances potentially allows repeat offenders to escape accountability for their actions.

¹ Frenchtown Borough Code § 60-2B was recodified in 2002 and is now known as § 3-5.2(b).

For example, a defendant convicted of his or her first statutory offense enjoys a presumption of non-incarceration. If, however, it were the defendant's second, third or greater conviction, he or she no longer enjoys that presumption and will more likely face incarceration. N.J.S.A. 2C:44-1(e) and State v. LeSane, 227 N.J. Super. 276 (Law Div.1987). This is what the Legislature intended: First offenders should receive leniency while those who continue to offend should receive progressively harsher punishments. Yet, Ms. Mott's allowance of guilty pleas to preempted ordinance violations disrupts the Legislature's intent by preventing those who are actually guilty of statutory offenses from being identified in the state's database as previous offenders.

Suppose that a defendant that Ms. Mott allowed to plead guilty to loitering is convicted of a future statutory offense in another municipality. Had Ms. Mott tried and convicted the defendant on the statutory charge, the judge presiding over the second offense's trial would recognize the defendant as being a repeat offender and sentence him or her accordingly. But, because of the improper plea bargain, the judge would treat this defendant as a first offender and confer upon him or her an undeserved presumption of non-incarceration.

The Directive limits municipal prosecutors to three options when dealing with a defendant charged with a statutory disorderly persons or petty disorderly persons offense: a) try the defendant on the charge, b) dismiss the charge outright or c) downgrade the charge to lesser statutory offense or to a violation of a municipal code provision that is not superseded and for which a factual nexus exists². Ms. Mott's practice of pleading defendants down to § 60-2B is not among the options.

It is understandable why Ms. Mott would resort to downgrading statutory charges to § 60-2B violations. The defendants are probably happy to pay a few hundred dollars in fines and costs in exchange for not having their convictions recorded in the State Bureau of Identification's criminal history record database. The defendants are probably also pleased to not have to pay Violent Crime Compensation Board Fund and Safe Neighborhood Fund assessments. The defendants' willingness, perhaps eagerness, to accept such pleas also reduces the frequency of time-consuming trials, thus minimizing Ms. Mott's workload and the length of the court sessions. And, the fines paid by these compliant and agreeable defendants are a lucrative revenue source for the Borough of Frenchtown.

Maintaining the integrity of the criminal justice system, however, is a far more important goal than the municipal court's administrative convenience. Accordingly, I call upon you to give effect to Attorney General Verniero's Directive by instructing Ms. Mott to cease her practice of allowing guilty pleas to Code § 60-2B or other superseded provisions of the Borough's Code.

Thank you for your attention to this matter. I look forward to hearing from you.

² It is unlikely, however, that such valid code provisions exist. See, New Jersey Law Journal, "Yet Another Municipal Ordinance Is Struck Down on Pre-emption Grounds" January 13, 2003, by Mary P. Gallagher. If this is true, then the only downgrade option available to a prosecutor would be to another statutory offense.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Paff', with a large, stylized flourish at the end.

John Paff

- cc. Mayor and Council, Borough of Frenchtown (*e-mail to frenchtownboroclerk@yahoo.com*)
Hon. Robert Schaul, P.J.M.C. (*via Fax only to 908-788-0489*)
Hon. Joseph D. Novak, J.M.C., (*via Fax only to 908-806-0605*)
Mary Rose Mott, Esq. (*via Fax only to 908-996-7265*)
Barbara Lingsch, C.M.C.A. (*via Fax only to 908-995-0900*)
(all with enclosures)



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
CN 080
TRENTON, NJ 08625-0080
(609) 292-4925

CHRISTINE TODD WHITMAN
Governor

PETER VERNIERO
Attorney General

November 18, 1998

TO ALL MUNICIPAL COURT PROSECUTORS

Re: Plea Agreements in Municipal Courts

Dear Municipal Prosecutor:

I have been advised that there is an increasingly widespread practice developing in municipal court where municipal prosecutors are downgrading criminal or traffic offenses from State statutes to municipal ordinance violations where State law has pre-empted the field. For reasons expressed below, this practice should be discontinued immediately.

According to information my office has received regarding this downgrade plea agreement procedure, defendants, in some cases, are assessed fines greater than permitted by State statute. An incentive for some defendants to accept this plea agreement with its increased fines is the fact that the defendants are informed that if they accept the plea offer they will avoid the imposition of other statutory penalties or administrative actions, such as motor vehicle points, *N.J.A.C. 13:19-10 et seq.*, and administrative license supervision, *N.J.A.C. 13:19-11 et seq.*

In most cases, State law has pre-empted the field, thus precluding the municipality from enacting an ordinance that provides for a sanction proscribing certain conduct. Our courts have defined the circumstances when State law pre-empts the authority of a municipality to enact such a municipal ordinance. The essential factors are:

1. Does the ordinance conflict with the state law, either because of conflicting policies, or operation effect, that is, does the ordinance forbid what the Legislature has permitted?
2. Was the state law intended expressly or impliedly to be exclusive in the field?

3. Does the subject matter reflect a need for uniformity?
4. Is the State scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?

Overlook Terrace Management Corp. v. West New York Rent Control Bd., 71 N.J. 451, 460-462 (1976). See also *State v. Crawley*, 90 N.J. 241, 248, 250 (1982); *Summer v. Teaneck Twp.*, 53 N.J. 548, 554-55 (1969); *State v. Ulesky*, 54 N.J. 26, 29 (1969); *Kennedy v. Newark*, 29 N.J. 178 (1959).

If a municipal prosecutor has concerns whether State law has pre-empted a particular area of the law, the municipal prosecutor should discuss the matter with the County Prosecutor's Office or with the Prosecutors and Police Bureau within the Division of Criminal Justice. The municipal prosecutor, as an officer of the court, cannot simply ignore this obligation. The failure of the municipal prosecutor to take appropriate action in these matters may result in disciplinary action and possible sanction by the State Supreme Court. See *In the Matter of Norton and Kress*, 128 N.J. 520 (1992); *In the Matter of Segal*, 140 N.J. 468 (1992).

In addition, there must be a nexus between the original charge and the new charge. The factual basis for the plea must establish that the elements of the offense have been committed by the defendant. Pursuant to R. 7:6-2, a factual basis for a plea must be placed on the record. It is the responsibility of the prosecutor to establish this factual basis on the record. In addition, the prosecutor must state on the record the reasons for the downgraded plea agreement. *State v. Taylor*, 80 N.J. 353, 361-62, 403 A.2d 889 (1979); *State v. Sainz*, 107 N.J. 283, 293 (1987).

The responsibility of offering a plea agreement rests exclusively with the prosecutor. This is not a function of a court. In no case should a blanket plea offer be distributed or mailed to all defendants by either the court or the municipal prosecutor. It is important for the prosecutor to keep in mind that a "prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done" [Comment, *Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey*, Appendix to Part VII court Rules. Guideline].

Pursuant to the provisions of the Criminal Justice Act of 1970, *N.J.S.A.* 52:17B-112, and the provisions of *N.J.S.A.* 2B:12-27, I direct that each of you adhere to the provisions of this letter. Thank you for your continued cooperation.

Sincerely yours,



Peter Verniero
Attorney General

cc: Paul H. Zoubek, Director
Debra L. Stone, Deputy Director
Hon. James Ciancia, Director, Administrative Office of the Courts
Dennis L. Bliss, Assistant Director
Municipal Court Services, Administrative Office of the Courts
All County Prosecutors
DAG Greta Gooden-Brown, Chief
Prosecutors and Police Bureau
William John Kearns, Jr., General Counsel
N.J. State League of Municipalities

COMPLAINT - SUMMONS

COMPLAINT NUMBER				THE STATE OF NEW JERSEY	
1020	S	2010	000044	VS.	
COURT CODE	PREFIX	YEAR	SEQUENCE NO.	GENNARO J MIRABELLA	
JOINT COURT OF DELAWARE VALLEY PO BOX 496 MILFORD NJ 08848 (908) 995-9100 COUNTY OF: HUNTERDON				ADDRESS: 116 BRUNSWICK AVE. BLOOMSBURY NJ 08804	
# of CHARGES 1	CO-DEFTS	POLICE CASE #: 2010-220		DEFENDANT INFORMATION	
COMPLAINANT NAME: EDWARD KRUTSICK 27 SECOND ST FRENCHTOWN NJ 08825				SEX: M EYE COLOR: BROWN DOB: 03-06-1969	OL STATE: NJ
				DRIVER'S LIC. # [REDACTED]	SBI#: [REDACTED]
				SOCIAL SECURITY #: [REDACTED]	TELEPHONE #: (908) 310-[REDACTED]

By certification or on oath, the complainant says that to the best of his/her knowledge, information and belief the named defendant on or about 05-29-2010 in JOINT COURT OF DELAWARE VALLEY, HUNTERDON County, NJ did: WITHIN THE JURISDICTION OF THIS COURT, DID KNOWINGLY SHOPLIFT A BOTTLE OF PEPSI AND AN AXE BODYSPRAY FROM THE FRENCHTOWN MARKET 28 SIXTH STREET FRENCHTOWN, N.J. SPECIFICALLY BY PLACING THEM IN POCKETS OF HIS CARGO SHORTS AND EXIT THE STORE. SAID OFFENSE TOOK PLACE IN THE BOROUGH OF FRENCHTOWN, COUNTY OF HUNTERDON, STATE OF NEW JERSEY. IN VIOLATION OF N.J.S.A. 2C:20-11B(2) THIS CRIME BEING A DISORDERLY PERSONS OFFENSE.

In violation of:

Original Charge	1) 2C:20-11B(2)	2)	3)
Amended Charge			

CERTIFICATION:

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Signed: EDWARD KRUTSICK *[Signature]* Date: 06-01-2010

The complaining witness is a law enforcement officer and a judicial probable cause determination is not required prior to the issuance of this Complaint-Summons.

SUMMONS:

YOU ARE HEREBY SUMMONED to appear before this court to answer this complaint. If you fail to appear on the date and at the time stated below, a warrant may be issued for your arrest.

DATE TO APPEAR: 06-15-2010 TIME: 7:00pm EDWARD KRUTSICK 06-01-2010
Signature of Person issuing Summons Date

- | | | |
|-----------------------------------------------------------|----------------------------------------------------------------------|------------------------------------------------------------------|
| <input type="checkbox"/> Domestic Violence - Confidential | <input type="checkbox"/> Related Traffic Tickets or Other Complaints | <input type="checkbox"/> Serious Personal Injury/ Death involved |
|-----------------------------------------------------------|----------------------------------------------------------------------|------------------------------------------------------------------|

Special conditions of release:
 No phone, mail or other personal contact w/victim
 No possession firearms/weapons
 Other (specify):

ORIGINAL

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COMPLAINT - SUMMONS (Court Action)

COMPLAINT NUMBER				STATE V.
1020	S	2010	000044	
COURT CODE	PREFIX	YEAR	SEQUENCE NO.	GENNARO J MIRABELLA

FTA Bail Information		Date Bail Set:	Amount Bail Set: \$	by:	<input type="checkbox"/> Bail Recog. Attached
Released on Bail	R.O.R.	Committed Default	Committed w/o Bail	Place Committed:	Date Referred to County Prosecutor:

Date of First Appearance:	06-15-2010	<input checked="" type="checkbox"/> Advised of Rights by	JSN	WTEA	Defendant Desires Counsel:
					<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Prosecuting Attorney Information				Defense Counsel Information					
Name:				Name:					
State	County	Municipal	Other	None	Retained	Public Def.	Assigned	Waived	Other

Original Charge	1) 2C:20-11B (2)	2)	3)
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Amended Charge	60-2B		
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Waiver Indt/Jury			
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Plea/Date of Plea	Plea: G Date: 7/7/10	Plea: Date:	Plea: Date:
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Adjudication (* see code)	Finding Code: G Date: 7/7/10	Finding Code: Date:	Finding Code: Date:
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Jail Term	Jail time credit	Susp. Imp.	Jail time credit	Susp. Imp.	Jail time credit	Susp. Imp.
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Probation Term	Susp. Imp.	Susp. Imp.	Susp. Imp.
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Cond. Discharge Term			
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Community Service			
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D/L Suspension Term			
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Fines/Costs	Fines: 185 Costs: 33	Fines: Costs:	Fines: Costs:
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VCCB/SNSF	VCCB: SNSF:	VCCB: SNSF:	VCCB: SNSF:
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DEDR/Lab Fee	DEDR: LAB:	DEDR: LAB:	DEDR: LAB:
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CD Fee/Drug Ed Fnd	CD: DAEF:	CD: DAEF:	CD: DAEF:
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DV Surch/Other Fees	DV: Other:	DV: Other:	DV: Other:
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Restitution			
Beneficiary:			

Miscellaneous Information, Adjournments, Companion Complaints, Co-Defendants, Case Notes:	<p>* Finding Codes</p> <ul style="list-style-type: none"> 1 - Guilty 2 - Not Guilty 3 - Dismissed - Other 4 - Guilty but Merged 5 - Dismissed-Rule 6 - Dismissed Lack of Prosecution 7 - Dismissed - Pros Motion/Vic Req 8 - Conditional Discharge D - Dismissed- Prosecutor Discretion M - Dismissed- Mediation P - Dismissed-Plea Agreement S - Disposed at Superior W - Dismissed-False ID
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JUDGE'S SIGNATURE	DATE <u>7/7/10</u>	ORIGINAL - Court Action	Page 2 of 7 NJCOR1 8/1/2005
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§ 60-2

FRENCHTOWN CODE

§ 60-4

§ 60-2 Certain types of loitering prohibited.

No person shall loiter in a public place in such a manner as to:

- A. Create or cause to be created a danger of a breach of the peace.
- B.** Create or cause to be created any disturbance or annoyance to the comfort and repose of any person.
- C. Obstruct the free passage of pedestrians or vehicles.
- D. Obstruct, molest or interfere with any person lawfully in a public place. This subsection shall include the making of unsolicited remarks of an offensive, disgusting or insulting nature or which are calculated to annoy or disturb the person to whom or in whose hearing they are made.

§ 60-3. Police officer's warning.

Any person violating the provisions of this chapter shall be ordered to move on by a police officer, failing which he shall be guilty of a violation.

§ 60-4. Violations and penalties.¹

Any person violating or failing to comply with any of the provisions of this chapter shall, upon conviction thereof, be subject to a fine of not more than five hundred dollars (\$500.) or may be imprisoned in the county jail for a term not to exceed ninety (90) days, or both. Each day that such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such.

¹ Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. 1.

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REQUEST TO APPROVE PLEA AGREEMENT

DEFENDANT'S NAME: Mirabella

(Please Print)

Complaint #	Original Charge #	Amended To	G/D/M*	Recommended Sentence/Comments
2010-6044	20-2-11(b)(2)	Frenchtown Ord. 60-23	G	to make restoration to market

*G = Guilty; D = Dismissed; M = Guilty But Merged

<p>DEFENDANT'S ACKNOWLEDGEMENT</p> <p>I understand the nature of the amended charge(s) against me and the consequences of my guilty plea. I understand and agree voluntarily to the terms of the plea agreement set forth above.</p> <p>I further understand that if the judge does not accept my guilty plea or agree with the recommended sentence, I can withdraw it and plead not guilty.</p> <p><u>7/7/10</u> Date</p> <p><u>[Signature]</u> Defendant</p>	<p>PROSECUTOR'S ACKNOWLEDGEMENT</p> <p>The defendant and I, as the prosecutor in this case, reached the above plea agreement in accordance with B. 7-6-2 and with the Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey.</p> <p>I represent to the Court that the original charge(s) listed above did not involve an accident resulting in personal injury to any person.</p> <p><u>7/7/10</u> Date</p> <p><u>[Signature]</u> Prosecutor</p>
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Revised Form 09/14/09