



## NEW JERSEY LAW REVISION COMMISSION

### **Tentative Report Regarding the Intent Necessary for the Aggravated Assault Upon an Officer under N.J.S. 2C:12-13**

**May 21, 2020**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **July 10, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary<sup>1</sup>

In the case of *State v. Majewski*<sup>2</sup>, the Appellate Division considered whether N.J.S. 2C:12-13, which prohibits the throwing of bodily fluids at law enforcement officers, required the State to prove that the defendant intended to hit the officer with bodily fluid, or if intent was irrelevant under the doctrine of transferred intent.<sup>3</sup>

The Court decided that both aspects of the statute, including throwing bodily fluids at law enforcement and causing (in some other way) contact of bodily fluid with an officer, call for purposeful conduct in order for a defendant to be considered guilty of aggravated assault.<sup>4</sup> For this reason, the Court reversed the previous decision, vacated the defendant's conviction, and dismissed the indictment without prejudice.<sup>5</sup>

The Commission authorized this project to amend the statute so that the text of the statute would express clearly this judicial interpretation. Staff's work in this area follows, including a mention of the impact of recent developments on this project.

## Background

The underlying incident occurred on June 14, 2015, during a "routine move" of an inmate at the county jail, where the defendant was also an inmate. During this routine move, the defendant allegedly spit in the face of one of the correction's officers, which another officer witnessed.<sup>6</sup> The defendant and other inmate witnesses told the investigating sheriff's officer that the defendant's target was the inmate the officer was escorting, not the officer specifically. The defendant was accused of "throw[ing] bodily fluids at [the correction's officer] ... [while the] said officer...was acting in the performance of her duties while in uniform or exhibiting evidence of her authority," contrary to N.J.S. 2C: 12-13.<sup>7</sup>

The defendant moved to dismiss the indictment, arguing that the statute required the State to prove that the defendant intended to hit the officer with bodily fluid. The defendant said that even if it was an offense, "spitting at someone" should not be elevated into aggravated assault simply because the fluid accidentally hit an officer.<sup>8</sup> The defendant also contended that the Court should dismiss the indictment on the grounds that the State failed to present exculpatory evidence to the jury, which included the investigating sheriff's officer's administrative disciplinary charge and interviews. In this charge, the sheriff's officer concluded that the defendant did, in fact, spit at the other inmate and not the officer, as the other inmates insisted.<sup>9</sup>

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<sup>1</sup> Preliminary work on this subject was performed by Eileen Funnell, a former law clerk to the New Jersey Law Revision Commission.

<sup>2</sup> *State v. Majewski*, 450 N.J. Super. 353 (App. Div. 2017).

<sup>3</sup> *Id.* at 360.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 358.

<sup>7</sup> *Id.* at 359.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

The State acknowledged the statute’s ambiguity regarding the requisite mental state, but argued that the statute explicitly incorporated the doctrine of transferred intent because it criminalized not only the throwing of a bodily fluid at an officer, but also conduct that “otherwise purposely subjected [the officer] to contact with a bodily fluid.”<sup>10</sup> The State also contended that the statements of the other inmates were not clearly exculpatory evidence that negated the defendant’s guilt, and therefore there was no obligation to charge the grand jury “regarding a potential defense.”<sup>11</sup>

The Trial Court concluded that the investigative report and statements from the sheriff’s officer were not clearly exculpatory and therefore the prosecutor did not violate *State v. Hogan* by not producing them before the jury.<sup>12</sup> However, the Court specifically “left for another day” any decision regarding the culpable mental state required by statute, noting there was “some further analysis that need be considered... before the matter is listed for trial.”<sup>13</sup> The Court denied the defendant’s motion. Three days later, the defendant entered her guilty plea and admitted under oath that she had gotten into an altercation with another inmate and spat at her. The defendant also admitted that her spit landed on the corrections officer, who was holding her intended target.<sup>14</sup>

### Statute

#### N.J.S. 2C: 12-13

A person who throws a bodily fluid at a Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, probation officer, any sheriff, undersheriff or sheriff's officer or any municipal, county, or State law enforcement officer while in the performance of the person's duties or otherwise purposely subjects such employee to contact with a bodily fluid commits an aggravated assault. If the victim suffers bodily injury, this shall be a crime of the third degree. Otherwise, this shall be a crime of the fourth degree. A term of imprisonment imposed for this offense shall run consecutively to any term of imprisonment currently being served and to any other term imposed for another offense committed at the time of the assault. Nothing herein shall be deemed to preclude, if the evidence so warrants, an indictment and conviction for a violation or attempted violation of chapter 11 of Title 2C of the New Jersey Statutes or subsection b. of N.J.S.2C:12-1 or any other provision of the criminal laws.<sup>15</sup>

On appeal, the Appellate Division identified the main ambiguity in the plain language of this statute as the lack of clarity regarding whether the Legislature intended the same culpable mental state—“purposely”—that expressly applies to “subject[ing] [an officer] to contact with a

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<sup>10</sup> *Id.* at 360.

<sup>11</sup> *Id.*

<sup>12</sup> *State v. Hogan*, 144 N.J. 216, 237 (1996).

<sup>13</sup> *State v. Majewski*, 450 N.J. Super. 353, 360 (App. Div. 2017).

<sup>14</sup> *Id.*

<sup>15</sup> N.J.S. 2C: 12-13.

bodily fluid” to also apply to “throw[ing] a bodily fluid at” such an officer.<sup>16</sup> The Court noted that since its enactment in 1997, no published decision has construed this specific statute, and therefore the Court turned to the question of statutory construction.<sup>17</sup>

The Appellate Division recognized that “the absence of an explicitly stated culpability requirement in the first portion of the statute could support an argument that knowledge applies under N.J.S. 2C:2-2(c)(3).”<sup>18</sup> However, the Model Criminal Jury Charge Committee explains in a footnote that the subsequent statutory reference to “purpose” requires that “purpose” be applied to all material elements of offense under N.J.S. 2C: 2-C(1).<sup>19</sup>

The Appellate Division determined that in order for a defendant to be found guilty of aggravated assault under N.J.S. 2C: 12-13, the State must prove that: (1) the defendant acted purposely in throwing bodily fluid or otherwise purposely subjected the victim to contact with a bodily fluid; (2) the defendant acted purposely with respect to the nature of his/her conduct or as a result of thereof if it is a person’s conscious object to engage in conduct of that nature or cause such a result; and finally, (3) that one can be deemed to be acting purposely if one acts with design, with a purpose, with a particular object, or if one really means to do what he or she does.<sup>20</sup>

As set forth in N.J.S. 2C: 2-2(c)(3) “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.”<sup>21</sup>

The Court suggested that the scant legislative history of the statute demonstrates that the Legislature intended to broadly criminalize certain conduct specified in the statute, and although the statute does define two different types of aggravated assault, there was nothing to indicate that the Legislature intended two different levels of culpability.<sup>22</sup>

The Appellate Division concluded that N.J.S. 2C: 12-13 does in fact require the State to prove that a defendant acted purposely, whether throwing bodily fluid or otherwise subjecting an officer to it.<sup>23</sup> Additionally, the Court decided that the doctrine of transferred intent does not apply because a defendant does not violate the statute unless the conduct was purposeful and the result was within his or her design.<sup>24</sup> Finally, the Appellate Division concluded that the Trial Court mistakenly exercised its discretion by not dismissing the indictment because the State failed to properly charge the grand jury on the elements of N.J.S. 2C: 12-13.

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<sup>16</sup> *State v. Majewski*, 450 N.J. Super. 353, 361 (App. Div. 2017).

<sup>17</sup> *Id.* at 360.

<sup>18</sup> *Id.* at 361.

<sup>19</sup> *Model Jury Charge (Criminal)*, “Aggravated Assault (Throwing Bodily Fluid at a Corrections Employee) (N.J.S.A. 2C:12-13),” n.1, (June 10, 2002) (the Model Charge).

<sup>20</sup> *Id.* at 1-2.

<sup>21</sup> N.J.S. 2C: 2-2(c)(3).

<sup>22</sup> *State v. Majewski*, 450 N.J. Super. 353, 362 (App. Div. 2017).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 364.

## Recent Developments

The Coronavirus disease 2019 (“COVID-19”) is a contagious, and at times fatal respiratory disease caused by the SARS-CoV-2 virus.<sup>25</sup> On March 9, 2020, as part of New Jersey’s coordinated response to address the Coronavirus, Governor Phil Murphy declared a State of Emergency and a Public Health Emergency.<sup>26</sup> The issuance of Executive Order No. 103 declared that New Jersey was in a state of emergency as a result of a public health emergency across all 21 counties in New Jersey.<sup>27</sup>

During early March 2020, an individual was arrested for coughing at a supermarket employee and claiming to be infected with the corona virus. In addition, individuals, in separate instances, were arrested and charged with aggravated assault – throwing bodily fluid on a police officer.<sup>28</sup> Each of the individuals claimed to be infected with the coronavirus and coughed on the responding police officers.<sup>29</sup>

These recent events demonstrate that a related activity, deliberately coughing or sneezing at another person with the intent of causing that person to believe that he would be infected with a virus, is not included in assault statutes. As a result, Staff has attempted to address this behavior by way of additional modifications to New Jersey’s aggravated assault statute, N.J.S. 2C:12-1.

## Conclusion

In its current form, N.J.S. 2C:12-13 does not clearly set forth that purposeful conduct is required for a defendant to be found guilty of aggravated assault when throwing bodily fluid at certain enumerated law enforcement employees. Recent circumstances have led Staff consider the modification of the aggravated assault statute.

The following pages propose amendatory language for both N.J.S. 2C:12-13 and N.J.S. 2C:12-1 to address these circumstances.

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<sup>25</sup> Exec. Order No. 103, Governor Murphy, (Mar. 09, 2020).

<sup>26</sup> *Id.* See Press Release, Office of the Governor, Governor Murphy Declares State of Emergency, Public Health Emergency to Strengthen State Preparedness to Contain the Spread of COVID-19 (Mar. 09, 2020) (<https://nj.gov/governor/news/news/562020/approved/20200309b.shtml>) (last visited April 03, 2020).

<sup>27</sup> *Id.*

<sup>28</sup> Press Release, Office of the Attorney General, AG Grewal: If You Threaten a Cop with COVID-19, You will Face the Maximum Criminal Charges (Apr. 1, 2020) (<https://www.nj.gov/oag/newsreleases20/pr20200401a.html>) (last visited April 03, 2020). The additional charges filed against each of these individuals are more fully set forth in the Attorney General’s Press Release. References to these charges have been omitted here from because as discussion of them exceed the scope of this Memorandum.

<sup>29</sup> *Id.*

## Appendix

The Commission recommends the following amendment(s) to **N.J.S. 2C:12-13** (new language underlined; deletions indicated by ~~strikeouts~~).

a. ~~A person who throws a bodily fluid at a~~ An actor commits an aggravated assault if the actor purposely subjects any of the following individuals to contact with a bodily fluid while in the performance of the person's [their] duties as a(n):

(1) Department of Corrections employee;

(2) county correctional police officer;

(3) county corrections employee;

(4) juvenile correctional police officer;

(5) State juvenile facility employee;

(6) juvenile detention staff member;

(7) probation officer;

(8) any sheriff, undersheriff or sheriff's officer; ~~or~~

(9) municipal, county, or State law enforcement officer, ~~while in the performance of his duties or otherwise purposely subjects such employee to contact with a bodily fluid commits an aggravated assault;~~

(10) member of the Parole Board; or,

(11) Adult Diagnostic and Treatment Center employee.

b. If the victim suffers bodily injury, this shall be a crime of the third degree. Otherwise, this shall be a crime of the fourth degree.

c. A term of imprisonment imposed for this offense shall run consecutively to any term of imprisonment currently being served and to any other term imposed for another offense committed at the time of the assault.

d. ~~Nothing herein shall be deemed to preclude;~~ ~~if the evidence so warrants,~~

(1) an indictment and conviction for a violation or attempted violation of chapter 11 of Title 2C of the New Jersey Statutes; or,

(2) any other provision of the criminal laws.

## Comments

In newly created section a., the term "a person" has been eliminated from the first sentence and the phrase "an actor" has been inserted in its place. In 2018, the Legislature proposed modifications to N.J.S. 2C:12-13.<sup>30</sup> Although never enacted, the prior legislative work included the removal of the term 'his duties' from what is now

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<sup>30</sup> A3236, 218th Leg., First Annual Sess. (N.J. 2018).

newly modified subsection (a)(9) and replaced it with the phrase ‘the person’s duties’. This portion of the sentence has been moved to the opening sentence of section a. The use of the term ‘person’ twice in one sentence has the potential to cause confusion regarding which individual the statute is referring and has therefore been eliminated from this section.

In addition to “officers”, the plain language of the statute seeks to protect the employees of correctional facilities from contact with the bodily fluids of inmates. The statute explicitly protects “Department of Corrections employees”, and “juvenile detention staff members” from bodily fluid assaults by inmates. County correctional institutions employ more than just corrections officers. These institutions frequently employ individuals such as: clerical staff; pre-trial services officers; medical doctors and nurses; social workers; case workers; substance abuse counselors; members of the clergy; and, psychologists etc. Thus, (a)(3) of the statute has been modified to include county corrections employees in an effort to protect them from the types of attacks set forth in the statute. Finally, other individuals – such as Parole and Probation Officers - may appear in correctional facilities, or annexes, to perform their duties. A reference to these individuals has been added to this section as (a)(7) and (a)(8).<sup>31</sup>

Inmates are not only held in correctional facilities. The court shall, upon the recommendation of the Department of Corrections, sentence an offender to a term of incarceration to be served in the custody of the commissioner at the Adult Diagnostic and Treatment Center for sex offender treatment.<sup>32</sup> Section (a)(1) has been added to this provision to protect the individuals and officers that work in these facilities.

The balance of the statute has been broken down into sections to make it easier to read and understand.

**In addition, the Commission recommends a new section set forth below:**

**2C:12-1. Assault.**

a. Simple assault. ~~A person~~ An actor is guilty of assault if ~~the person~~ he or she:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury;  
or,

(4) Attempts to put a person in reasonable fear of infection by intentionally placing them in contact with bodily fluid or otherwise having physical contact with the person.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense. Assault under paragraph (4) of subsection a. of this section is a crime of the fourth degree if the victim is a(n):

(1) Department of Corrections employee;

(2) county correctional police officer;

(3) county corrections employee;

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<sup>31</sup> See Aggravated Harassment of an Employee by an Inmate, 40 N.Y. Penal, Title N, § 240.32 (2013) (considers individuals from the board of parole or the office of mental health employees for purposes of aggravated harassment by an inmate).

<sup>32</sup> See N.J.S. 2C:47-3.

- (4) juvenile correctional police officer;
- (5) State juvenile facility employee;
- (6) juvenile detention staff member;
- (7) probation officer;
- (8) sheriff, undersheriff or sheriff's officer;
- (9) municipal, county, or State law enforcement officer;
- (10) member of the Parole Board; or,
- (11) Adult Diagnostic and Treatment Center employee.

### **Comments**

The current assault statute already addresses attacks on individuals, including law enforcement officers.<sup>33</sup> In addition, N.J.S. 2C:12-1(b)(5)(h) provides protection for "...any Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer or any sheriff, undersheriff, or sheriff's officer acting in the performance of the person's duties while in uniform or exhibiting evidence of the person's authority or because of the status as a Department of Corrections employee, county correctional police officer, juvenile correctional police officer, State juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer, sheriff, undersheriff, or sheriff's officer..." against being assaulted.

The proposed modification to this statute identifies the same individuals as set forth in the proposed changes to N.J.S. 12-13. *supra*.

*Compare* Pennsylvania Recklessly Endangering Another Person, 18 Pa.C.S. §2705 (2020), provides, "A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." *Commonwealth v. Cordoba*, 902 A.2d 1280 (Sup. Ct. 2006), considered the statute in the context of a defendant infected with HIV at the time he engaged in sexual activity with the victim.

*Compare* Harassment in the First Degree, 11 AK ST. §11.61.118 (2020); Assault in the Fourth Degree, M.S.A. §609.2231 (2016); Battery Defined, 18 LSA-R.S. 14:33 (1978) (defining battery to include the intentional administration of a poison or other noxious liquid or substance to another). Aggravated Harassment of an Employee by an Inmate, 40 N.Y. Penal, Title N, § 240.32 (2013) (making it a class E felony if an inmate causes or attempts to cause such employee to come into contact with blood, seminal fluid, urine, feces, or the contents of a toilet bowl, by throwing, tossing or expelling such fluid or material).

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<sup>33</sup> See N.J.S. 2C:12-1 *et seq.*