STATE OF MINNESOTA

IN SUPREME COURT

A17-1135

Court of Appeals

McKeig, J.
Concurring, Chutich, Hudson, Thissen, JJ.

Shonwta D. Jackson,

Appellant

vs.

Filed: September 18, 2019
Office of Appellate Courts

Commissioner of Human Services,

Respondent.

Mary F. Moriarty, Chief Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota, for appellant.

Keith Ellison, Attorney General, Scott H. Ikeda, Assistant Attorney General, Heather Kjos, Assistant Attorney General, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

1. The Department of Human Services Background Studies Act, Minn. Stat. ch. 245C (2018), as applied to appellant's case, does not create an irrebuttable presumption in violation of the Due Process Clause.

2. The Department provided appellant sufficient notice of his rights under the Background Studies Act.

3. Appellant's challenge to the issue of the constitutionality of the preponderance of the evidence standard in the Background Studies Act was forfeited.

Affirmed.

O P I N I O N

MCKEIG, Justice.

Appellant Shonwta D. Jackson challenges the constitutionality of the Department of Human Services (DHS) Background Studies Act (the Act) as applied to his case. Minn. Stat. ch. 245C (2018). Chapter 245C governs background studies that DHS performs to regulate which workers may interact with vulnerable populations in DHS-licensed facilities. Respondent, the Commissioner of DHS, determined that Jackson is permanently disqualified from working in a capacity where he may have contact with people who access services from a DHS-licensed program because of the information gathered during a 2002 child-protection investigation and assessment. Jackson argues that the intersection of three sections of chapter 245C creates an "irrebuttable presumption" in violation of his due process rights. Jackson also argues that he should be granted relief because of alleged errors by the Commissioner. Finally, he argues that the preponderance of evidence standard used in chapter 245C fails to provide sufficient procedural protections for a disqualified individual.

Jackson filed a petition for a writ of certiorari to the court of appeals, which affirmed the decision of the Commissioner. We affirm.

FACTS

Jackson sought employment as a residence manager at a DHS-licensed substance abuse treatment program. As a condition of employment, he was required to undergo a background study. Before discussing the facts, we begin with the statutory framework at issue. Chapter 245C governs background studies performed by DHS for individuals who seek employment in certain licensed facilities where the employee may have contact with people accessing services at that facility. Minn. Stat. §§ 245C.01–.34 (2018).

The purpose of the background studies conducted by DHS is to ensure the safety of the people who use DHS-licensed facilities. The Act gives the Commissioner the authority to disqualify an individual from employment in certain positions if that individual has a background that indicates a potential risk to people accessing services. "The commissioner shall disqualify an individual . . . from any position allowing direct contact with persons receiving services from the license holder" if the Commissioner determines that "a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15 [of the Act.]" Minn. Stat. § 245C.14, subd. 1(a)(2). As part of the background study, the Commissioner "shall review" information from a variety of locations, including the Bureau of Criminal Apprehension and the social service information system, which holds records about "findings of maltreatment of minors." Minn. Stat. § 245C.08, subd. 1.

An individual who has been determined, by a preponderance of evidence, to have committed acts that meet the definition of criminal sexual conduct in the first degree is permanently disqualified, meaning the disqualification may not be "set aside" for any

reason or after any period of time. Minn. Stat. §§ 245C.14, subd. 1(a)(2), .15, subd. 1, .24, subd. 2. A person who is disqualified for any reason may request reconsideration, in writing, by submitting information showing that the Commissioner relied on incorrect information. Minn. Stat. § 245C.21, subds. 1, 3(a)(1). "The commissioner shall rescind the disqualification if the commissioner finds that the information relied upon to disqualify the subject is incorrect." Minn. Stat. § 245C.22, subd. 2. In cases where a person is disqualified for less serious conduct, "[t]he commissioner may set aside the disqualification" upon a showing that "the individual does not pose a risk of harm." Minn. Stat. § 245C.22, subd. 4.

In order to preserve the right to a hearing, a disqualified person must challenge the disqualification within the statutory time period. Minn. Stat. §§ 245C.21, subd. 2; .27, subd. 1(a); .29, subd. 2(a)(2). A person who is disqualified because DHS determined by a preponderance of the evidence that the person committed acts that constitute a crime listed in section 245C.15 (a "preponderance of the evidence disqualification") may request a "fair hearing" after a reconsideration decision. Minn. Stat. § 245C.27, subd. 1(a). But if that disqualification is "conclusive" under section 245C.29, the person does not have the right to request a fair hearing. *Id.*, subd. 1(e). "A disqualification is conclusive for purposes of current and future background studies if: . . . the individual did not request reconsideration under section 245C.21 . . . ." Minn. Stat. § 245C.29, subd. 2(a)(2).

In Jackson's case, his first background study was performed after a 2010 request by his employer. In this background study, DHS discovered a 2002 child-protection report that Jackson had sexually abused his son during an incident sometime around 1998. The

report stated that Jackson inserted an object into his son's anus as a punishment for his son's alleged sexual misconduct with another family member. The case notes from that report conclude that "[t]here was a preponderance of evidence to substantiate both [physical and sexual abuse] by both parents," and the caseworker made a maltreatment determination.

Following the child-protection report, in 2003, the Hennepin County Attorney's Office filed a Petition to Terminate Parental Rights or Transfer Permanent Legal and Physical Custody of Jackson's six children, including his son. Under the heading "Maltreatment Substantiated," the County stated that it had received a report that "[a] CornerHouse interview determined [Jackson's son] was sexually and physically abused by his parents . . . ." Jackson and the children's mother voluntarily terminated their parental rights to five of their children (but not the son), and the judge entered an order to that effect in 2004. The district court made no findings about abuse because the parents agreed to a voluntary termination of their rights and waived the right to a trial. Jackson testified that he believed it was in the best interests of the children to have his parental rights terminated, and the court stated that good cause was shown. The son who had been sexually abused was placed in long-term foster care, at the age of 14, but parental rights to him were not terminated.

On July 15, 2010, DHS sent its response to a second request for a background study on Jackson. In its letter to Jackson, it stated that it had determined that his "parental rights were terminated" in 2004 and "there is a preponderance of evidence that on or around 1998, [Jackson] committed an act which meets the definition of a disqualifying characteristic

(§609.342-felony first degree criminal sexual conduct)." It stated that "this conviction and act" disqualified Jackson from working in "any position allowing direct contact with, or access to, persons receiving services from programs licensed by" DHS, among other agencies. The letter also stated that "[t]he Commissioner has determined that you pose an imminent risk of harm to persons receiving services" from the licensed facility, and listed several factors that went into that determination. One such factor was that Jackson had "a disqualification which may not be set aside regardless of how much time has passed." The letter informed Jackson that his employer was told to immediately remove him from his position but was not told why.

In a section titled, "Permanent Bar to Set Aside Disqualification," the letter stated that no "variance" could be granted, no matter how much time had passed, and that Jackson may ask for reconsideration within 30 days of receiving the letter if "the information used to disqualify [him was] incorrect." The letter explained that if he did request reconsideration, the disqualification either could be "rescinded" or he would continue to be disqualified. If he did not request reconsideration or if the disqualification was affirmed, "subsequent background studies [would] result in an order for [his] immediate removal from any position allowing direct contact with, or access to, persons receiving services."

On February 16, 2012, and again on May 31, 2012, after Jackson applied for other jobs requiring background studies, DHS sent letters to Jackson, informing him of the same information in the 2010 letter. Then, after a final background study was requested, Jackson received a letter, on February 28, 2017, again explaining the same disqualification, but this time citing the domestic-assault statute instead of the criminal-sexual-conduct statute. The

letter explained the same reconsideration process to him and, through counsel, Jackson requested reconsideration. With this request, Jackson submitted evidence that his termination of parental rights had been voluntary and he argued that the alleged criminal sexual conduct referred to a conviction for misdemeanor domestic assault, which was not a crime that required disqualification.

DHS sent two responses to Jackson's request for reconsideration. In its initial response, on June 15, 2017, DHS did not discuss Jackson's disqualification for termination of parental rights but reaffirmed its belief in the correctness of his disqualification for criminal sexual conduct in the first degree and DHS corrected the statute it referenced.

On July 21, 2017, Jackson filed a petition for a writ of certiorari with the court of appeals. Four days later, DHS sent another letter that it asserted superseded the June 15 letter. In this letter, DHS rescinded his disqualification for termination of his parental rights. But it determined that his permanent disqualification for an alleged criminal sexual conduct offense was correct and stated that "the correctness of [his] disqualification became conclusive under Minnesota Statutes, section 245C.29, subdivision 2" because Jackson had not challenged it within 30 days of receipt of the 2010 or 2012 letters.

The court of appeals affirmed DHS's decision in an unpublished opinion. *Jackson v. Comm'r of Human Servs.*, No. A17-1135, 2018 WL 2470681 (Minn. App. June 4, 2018). Jackson argued that the decision was arbitrary and capricious and without sufficient evidence, and that the Background Studies Act violates his due process rights, the rules of evidence, and the separation of powers doctrine. *Id.* at *1. The court of appeals held that:

(1) Jackson's 2010 disqualification became conclusive when he failed to timely challenge it; (2) the DHS decision was supported by substantial evidence and was not arbitrary or capricious; (3) his due process rights were not violated because Jackson was presented with an opportunity to rebut DHS's determination that he was permanently disqualified from working with vulnerable people, and he chose not to do so; (4) the Background Studies Act does not violate the separation of powers doctrine; and (5) DHS was permitted to rely on hearsay evidence because Jackson did not oppose its decision. *Id.* at *3–6.

We granted Jackson's petition for review as to the third issue.

ANALYSIS

Neither party disputes that the Commissioner's decision is a quasi-judicial agency decision that is not subject to the Administrative Procedure Act (APA), Minn. Stat. ch. 14 (2018). "[J]udicial review of the quasi-judicial decisions of administrative bodies" is limited to review by certiorari, in which the court's inspection of the record is "necessarily confined to questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (citation omitted) (internal quotation marks omitted).

Jackson challenges the procedures under the Background Studies Act (the Act), arguing that, as applied to his case, they do not provide sufficient protections to safeguard an individual's due process rights. Both the United States and the Minnesota Constitutions provide that no person shall be deprived of life, liberty, or property without due process of

law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. We review de novo questions of the constitutionality of a state statute, "proceed[ing] on the presumption that Minnesota statutes are constitutional . . . ." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 298–99 (Minn. 2000).

Jackson raises three alleged due process violations in his case. First, he argues that the Act creates an unconstitutional irrebuttable presumption. Second, Jackson contends that the Commissioner's letters communicating his disqualification provided insufficient notice.[1] Finally, he argues that the preponderance of the evidence standard used by DHS to disqualify him is not sufficient to protect against an erroneous deprivation of his constitutionally protected rights. For the reasons described below, we hold that Jackson's right to due process was not violated.

I.

Jackson argues that the Act is unconstitutional because sections 245C.24, .27, and .29 of the Act create an irrebuttable presumption that DHS's decision is correct. DHS responds that the statute does not create an irrebuttable presumption because subjects of background studies always retain the ability to challenge the correctness of the factual basis for a disqualification, even after a disqualification has become conclusive under the statute. After a close examination, we agree with DHS that the statute does not create an irrebuttable presumption.

[1] Although Jackson did not argue that the Commissioner's letters provided constitutionally inadequate notice, he did raise a collateral estoppel claim, arguing that he was misled by the letters. We address the question of the accuracy of the letters, through our constitutional analysis.

The parties dispute the meaning of certain provisions of chapter 245C, which "presents a question of statutory interpretation that we review de novo." *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). The goal of all statutory interpretation is to determine legislative intent. Minn. Stat. § 645.16 (2018). "Every law shall be construed, if possible, to give effect to all its provisions." *Id.* "Sometimes the operation of a statutory provision 'only becomes clear when it is read in conjunction with the rest of' the legislative act of which it is a part." *Cent. Hous. Assocs., LP v. Olson*, 929 N.W.2d 398, 402 (Minn. 2019) (quoting *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000)). When the language of the statute is free from ambiguity, we look no further than the plain meaning. *Id.*

When evaluating the statute as a whole, we find no ambiguity. There are multiple options for a disqualified person to seek review of a disqualification. The first step is requesting reconsideration, under section 245C.21, subdivision 1. The statute does not limit who may seek reconsideration, so long as the individual complies with the time limits for such a request. Upon reconsideration, the statute allows DHS to either "set aside" a disqualification if the Commissioner determines that the individual does not present a risk to those who receive services, or "rescind" a disqualification if the factual basis for the disqualification was incorrect. *Compare* Minn. Stat. § 245C.22, subd. 4, *with* Minn. Stat. § 245C.22, subd. 2. If a disqualified person does not agree with the Commissioner's decision on reconsideration, the person may request a fair hearing. Minn. Stat. § 245C.27, subd. 1. The ability to request a fair hearing after reconsideration by the Commissioner applies to any basis for reconsideration. *See* Minn. Stat. § 245C.27. In sum, if Jackson

had requested reconsideration after he received notice of his initial disqualification, in 2010, then he would have been eligible to request a fair hearing if DHS had declined to rescind that disqualification.

Because he missed the deadline to request reconsideration, Jackson is not eligible for a fair hearing. The Commissioner argues, though, that nothing in the statute prohibited Jackson from submitting evidence to DHS and requesting reconsideration of the correctness of the 2010 decision within 30 days of his 2017 disqualification letter. *See* Minn. Stat. §§ 245C. .21, subd. 1, .27, subd. 1(a). In fact, that is what happened. Jackson, through an attorney, argued that the Commissioner's decision was incorrect, and DHS rescinded one of the grounds for disqualification. At oral argument, the Commissioner argued that, if Jackson were to have another employer request a background study, he could again submit a request to reconsider the factual correctness of the disqualification decision. We agree with the Commissioner's interpretation.

The intersection of three sections of the Act indicates that the Legislature did not intend to foreclose a challenge to the evidentiary basis for conclusive disqualifications. First, the Act does not limit who may seek reconsideration. It states that "[a]n individual who is the subject of a disqualification may request a reconsideration of the disqualification pursuant to this section. The individual must submit the request for reconsideration to the commissioner in writing." Minn. Stat. § 245C.21, subd. 1. Conversely, a disqualified individual may request a fair hearing after a reconsideration decision has been issued, "unless the disqualification is deemed conclusive . . . ." Minn. Stat. § 245C.27, subd. 1(a). The Legislature could have limited reconsiderations, as it did with "fair hearings," but

chose not to do so. *See Seagate Tech., LLC v. W. Dig. Corp.*, 854 N.W.2d 750, 759 (Minn. 2014) (stating that "a condition expressly mentioned in one clause of a subdivision provides evidence that the Legislature did not intend for the condition to apply to other clauses in which the condition is not stated" and this court "cannot add words or meaning to a statute that were intentionally or inadvertently omitted" (citation omitted) (internal quotation marks omitted)). Finally, the section of the Act that describes when a disqualification becomes conclusive expressly limits the ability to seek reconsideration for certain purposes. Minn. Stat. § 245C.29, subd. 2(c). The Act would not limit the ability to seek reconsideration of conclusive disqualifications if a conclusive disqualification could never be reconsidered.

Our interpretation of section 24C.21 is consistent with the language of section 245C.29, subdivision 2(a). The relevant portion of subdivision 2(a) states, "[a] disqualification is conclusive for purposes of current and future background studies if" the disqualified person "did not request reconsideration of the disqualification under section 245C.21 on the basis that the information relied upon to disqualify the individual was incorrect." Minn. Stat. § 245C.29, subd. 2(a)(2). The purpose of this section is to explain when a disqualification becomes conclusive, but it does not provide guidance on what it means when a disqualification is conclusive. So we compare sections 245C.21 and 245C.27, which indicate that only a fair hearing is foreclosed by a conclusive determination. Nothing in the Act states that a conclusive disqualification forecloses the ability to request reconsideration on the basis that the information relied upon to disqualify the individual was incorrect.

Because Jackson has the ability to seek reconsideration on the basis of a factual error, the correctness of DHS's decision is not irrebuttable. Therefore, the Act does not create a permanent, irrebuttable presumption.[2]

II.

We turn next to Jackson's argument that he is entitled to relief because the Commissioner's letters were misleading. We construe this as a notice argument. "The right to a hearing is meaningless without notice." *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). "The notice must be of such nature as reasonably to convey the required information . . . ." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

In 2010, Jackson was notified through a letter that he could not work for a DHS-licensed employer because DHS believed that he had committed acts that meet the definition of criminal sexual conduct in the first degree. Given the seriousness of that allegation, and the deprivation of employment opportunity at stake, it was important that he be notified of the procedure he would need to follow in order to challenge his disqualification. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("[T]he timing and content of

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[2] The statute does create a presumption of correctness once a disqualification becomes conclusive because the reconsideration process puts the evidentiary burden on the disqualified individual to put forth evidence of the incorrectness of the decision. Minn. Stat. § 245C.21, subd. 3(a). And because no fair hearing is provided, the only avenue for review of a subsequent denial of reconsideration is a petition for writ of certiorari. Minn. Stat. ch. 606 (2018). The practical effect is that, for conclusively disqualified individuals, DHS is not required to prove to a neutral decision-maker that a preponderance of evidence supports its decision. But because the individual may submit evidence, it is not an *irrebuttable* presumption, as Jackson argues, but a rebuttable one. And, as Jackson concedes, a rebuttable presumption "poses no problem under the Due Process Clauses."

the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved.").

Jackson argues that the end of the July 15, 2010 letter, where the Commissioner described Jackson's ability to challenge his disqualification, was misleading. The letter stated that he was permanently disqualified and not eligible to have his disqualification "set[] aside." Jackson conceded at oral argument that this was an accurate explanation of the law. Then, the letter stated that he may ask for reconsideration within 30 days of receiving the letter if "the information used to disqualify [him was] incorrect." The letter explained that if he did request reconsideration, the disqualification could either be "rescinded" or he would continue to be disqualified. As we explained above, this was also an accurate description of Jackson's rights under the Act. The letter accurately described the law to Jackson and informed him of the consequences of missing the deadline to challenge the decision. *See Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 835 (Minn. 1984) (holding that a letter failed to provide adequate notice when it did not inform the recipient of the consequences of a failure to appear).

For these reasons, we hold that DHS's letter provided constitutionally sufficient notice to Jackson of his rights under the Act.

III.

Jackson also raises the issue of whether the preponderance of evidence standard is unconstitutional because it allows "a disqualification from employment to flow from predicate facts not sufficiently proven." This issue was not addressed by the court of appeals, and Jackson's petition for review did not discuss the preponderance standard. We

generally do not address constitutional questions that are raised for the first time in a petitioner's opening brief. *Wheeler v. State*, 909 N.W.2d 558, 569 n.8 (Minn. 2018) (holding that an issue was forfeited when it was not raised before the court of appeals or in the appellant's petition for review); *Figgins v. Wilcox*, 879 N.W.2d 653, 658 (Minn. 2016) ("Appellant did not raise this argument before the court of appeals. More significantly, he also failed to raise the argument when he petitioned our court for review."); s*ee also State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal."). Because this issue was not addressed by the court of appeals and Jackson failed to raise it in his petition for review, it was forfeited.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

C O N C U R R E N C E

CHUTICH, Justice (concurring).

I agree with the majority that the Background Studies Act (the Act) does not create an irrebuttable presumption that a disqualification decision is correct. *See* Minn. Stat. ch. 245C (2018). Because subjects of background studies always retain the ability to challenge the correctness of the factual basis for a disqualification, even after a disqualification has become "conclusive" under the statute, they retain the ability to challenge the correctness of each disqualification. I write separately, however, to note my concern about the quality and effectiveness of the disqualification notices that the Department of Human Services (Department) sent to Jackson, and the difficulty that lay people like Jackson would have in understanding what they must do to timely challenge the disqualification and the consequences that follow if they fail to act within the required time limits.

At the outset, I recognize that summarizing in plain English the various pertinent provisions of the complex Act is no easy task.[1] And I am concurring, instead of dissenting, because I agree that the Department's notice was technically accurate and "convey[ed] the required information" to narrowly survive a Due Process Clause challenge. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (internal citation omitted).

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[1] The Act governs background studies for people employed with facilities licensed by the Department. It requires the Department to notify the disqualified individual, in writing, of the basis for the disqualification, information about "how to request a reconsideration of the disqualification," and any restrictions on the ability of the disqualified individual to receive a "set-aside" of the disqualification. Minn. Stat. § 245C.17, subd. 2(a). It also requires that the letter explain its analysis of the individual's risk of harm under section 245C.16. *Id.*, subd. 2(a)–(b).

But, for the reasons that follow, I believe that the Department can and should do better in helping Minnesotans, who are typically unrepresented by attorneys, know what is at stake if they do not challenge the Department's action within the required 30-day deadline.

First, the notice could be markedly improved by containing a separate heading about the ability to ask for reconsideration of the disqualification and moving the information toward the top of the letter to give it more prominence. Although the necessary information on requesting reconsideration of a disqualification was present in the July 15, 2010 letter from the Department, it appeared in an unexpected place—on the second page of a dense letter under the heading entitled "PERMANENT BAR TO SET ASIDE DISQUALIFICATION."

The first paragraph under the "PERMANENT BAR" heading informed Jackson that the Department could not "set[] aside" the disqualification or grant a "variance," no matter how much time had passed since his disqualifying acts. Only at the top of the next page, under the same heading entitled "PERMANENT BAR," was a paragraph that told Jackson that he may ask for reconsideration within 30 days of receiving the letter if he believed that the disqualifying information was incorrect.[2] Given the placement of the ability to request reconsideration under the "PERMANENT BAR" paragraph and *after* the information that said that the Department could not "set[] aside" Jackson's disqualification or grant a "variance," the letter could be read by a lay person as informing Jackson that the

[2] That paragraph was followed by a clear heading entitled: "WHAT WILL HAPPEN IF YOU DO REQUEST RECONSIDERATION."

Department could *not* change its disqualification decision even if Jackson did request reconsideration.

Second, the 2010 letter did not mention the fair hearing process at all, although Jackson would have been eligible to request one had he made a timely request for reconsideration that was then denied by the Department. Minn. Stat. § 245C.27, subd. 1(a). Because Jackson took no action after receiving the 2010 letter, he is no longer able to receive a "fair hearing" in any later background study requests and determinations. Of course, access to a fair hearing is a key procedural right in which the Department would be required to prove to a neutral decision-maker that the disqualification decision was justified by the evidence. Minn. Stat. § 256.045, subd. 3b(a) (2018).

In sum, Jackson's 2010 letter was technically correct on the reconsideration provisions of the complex Background Studies Act, meeting the minimum requirements of the Due Process Clause. I urge the Department, however, to revise the notice in plain English so that Jackson and other disqualified Minnesotans will know that requesting reconsideration might not be futile and, in fact, would allow them to challenge future disqualifications. Accordingly, I respectfully concur with the opinion of the court on the notice issue.

HUDSON, Justice (concurring).

I join in the concurrence of Justice Chutich.

THISSEN, Justice (concurring).

I join in the concurrence of Justice Chutich.