

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5622-18**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANA R. JOHNSON,

Defendant-Appellant.

Argued March 30, 2022 – Decided December 1, 2022

Before Judges Gilson, Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-06-1343.

Taylor L. Napolitano, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Taylor L. Napolitano, of counsel and on the brief).

Maura Murphy Sullivan, Assistant Prosecutor, argued the cause for respondent (Grace C. MacAulay, Camden County Prosecutor, attorney; Maura Murphy Sullivan, of counsel and on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

On June 12, 2018, defendant Dana Johnson, a Federal Bureau of Prisons (BOP) employee, was charged in a Camden County indictment with second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count one); second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1) (count two); and fourth-degree aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4) (count three).

Prior to trial, the trial judge denied defendant's motion to dismiss count two pursuant to the Law Enforcement Officers Safety Act of 2004 (LEOSA), 18 U.S.C. § 926B, which permits "a qualified law enforcement officer" to carry a concealed firearm subject to certain conditions. Thereafter, defendant was tried by a jury and convicted of count two but acquitted of counts one and three. After denying defendant's motion for a sentence reduction under the "escape-valve provision" of the Graves Act, N.J.S.A. 2C:43-6.2, the judge sentenced defendant to the mandatory minimum term of five years' imprisonment, with a three-and-one-half-year period of parole ineligibility, pursuant to N.J.S.A. 2C:43-6.

The charges stemmed from an altercation between defendant, her estranged wife, and her wife's then-girlfriend that occurred in the parking lot of her wife's apartment building. According to the girlfriend, defendant pointed a

gun at her during the altercation, then left the scene before police arrived. When police went to defendant's home, they found an unloaded handgun in the console of defendant's vehicle after defendant consented to a search. Although the jury discredited the girlfriend's testimony that defendant had threatened her with a gun, defendant admitted during her trial testimony that the unloaded gun was in her car when she had driven to her wife's apartment and that she did not have a permit to carry the gun.

On appeal, defendant raises the following points¹ for our consideration:

POINT I

BECAUSE [DEFENDANT] WAS AUTHORIZED TO CARRY A FIREARM WITHOUT A PERMIT UNDER FEDERAL LAW, SHE COMMITTED NO CRIME AND THE TRIAL COURT ERRED BY DENYING HER MOTION TO DISMISS COUNT TWO, POSSESSION OF A GUN WITHOUT A PERMIT UNDER N.J.S.A. 2C:39-5(b)(1).

POINT II

THE COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT, UNDER N.J.S.A. 2C:39-6(e), IT IS NOT ILLEGAL TO POSSESS OR CARRY A GUN WITHOUT A PERMIT ON THE PREMISES OF ONE'S OWN HOME AND COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE SAME. (NOT RAISED BELOW).

¹ We have condensed and renumbered the sub-parts in defendant's point headings in the interest of brevity.

[A]. The Trial Court Erred by Failing to Inform the Jury that [Defendant] Did Not Need a Permit to Possess a Gun on the Premises of Her Own Home Under 2C:39-6(e).

[B]. Counsel was Ineffective for Failing to Argue that [Defendant] Possessed the Gun Legally at Her Own Home Under the 2C:39-6(e) Exemption.

POINT III

THE STATE FAILED TO MEET ITS BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT [DEFENDANT] POSSESSED A GUN WITHOUT A PERMIT BECAUSE IT RELIED PRINCIPALLY ON AN AFFIDAVIT FROM A NONTESTIFYING POLICE WITNESS AVERRING THAT HE "CAUSED" A SEARCH FOR A PERMIT USING THE WRONG SOCIAL SECURITY NUMBER FOR [DEFENDANT]. IN THE ALTERNATIVE, ADMISSION OF THAT AFFIDAVIT VIOLATED THE CONFRONTATION CLAUSE AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO ITS ADMISSION. (NOT RAISED BELOW).

[A]. The Affidavit Attesting that Police Searched for the Wrong Person in Permit Records Was Misleading and Insufficient to Support [Defendant's] Conviction.

[B]. In the Alternative, the Trial Court's Admission of the Affidavit Violated the Confrontation Clause and Counsel was Ineffective for Failing to Object.

POINT IV

[DEFENDANT] IS ENTITLED TO A NEW GRAVES ACT WAIVER HEARING BECAUSE[:] (1) THE STATE FAILED TO PROVIDE A LEGITIMATE STATEMENT OF REASONS EXPLAINING ITS REFUSAL TO CONSENT TO A WAIVER OF THE GRAVES ACT TERM OF PAROLE INELIGIBILITY[;] AND (2) THE 2008 [ATTORNEY GENERAL] DIRECTIVE ON WHICH THE STATE RELIED IN ITS REFUSAL IS ARBITRARY AND CAPRICIOUS AND UNFAIRLY BURDENS [DEFENDANT'S] CONSTITUTIONAL RIGHT TO TRIAL.

POINT V

[DEFENDANT] IS ENTITLED TO RESENTENCING BECAUSE THE TRIAL COURT IMPROPERLY FOUND THAT THE CIRCUMSTANCES OF THIS CASE WERE LIKELY TO RECUR BASED SOLELY ON THE FACT OF HER CONVICTION, AND THAT SHE REQUIRED DETERRENCE WHEN SHE IS A LAW-ABIDING CITIZEN.

Because we hold that the trial judge erred in denying defendant's pre-trial motion to dismiss count two, we reverse on that ground and need not address the remaining points challenging purported trial errors and the sentence imposed.

I.

We glean these facts from the five-day trial conducted in February 2019, during which the State produced seven witnesses, including defendant's estranged wife, Jade Johnson; her wife's then-girlfriend, Tamika Boone; the

responding officers; the lead detective; and a ballistics expert. Defendant testified on her own behalf and produced one character witness.

Defendant and Jade² married in 2015. Jade had two teenage children from a previous relationship whom defendant helped raise. In early 2018, defendant and Jade separated, and Jade and the children moved into an apartment with Boone in Gloucester Township. After the separation, on March 26, 2018, defendant received a phone call from Jade's son's school. That evening, defendant went to Jade's home to pick up Jade's son "so [she] could discuss what [had] happened with him in school earlier that day."

Defendant arrived at Jade's apartment complex around 7:00 p.m., as Boone was leaving to go to work. According to Boone, she noticed defendant's black GMC "truck sitting at the end of the parking lot" and then saw defendant "walking in [her] direction," "yell[ing]." As defendant tried to walk around Boone "to go upstairs" to Jade's apartment, defendant continued "yelling" and was acting "aggressive[ly]." Boone testified that she started feeling "threatened" and began recording the encounter on her phone, which was in her pocket. The recording was played for the jury.

² We refer to Jade by her first name to avoid any confusion caused by the common surname and intend no disrespect.

Boone stated that as the interaction escalated, defendant acted "as if she wanted to fight" and repeatedly shoved Boone. When Jade eventually came downstairs, defendant became "increasingly aggressive," "throwing her arms," and "stomping around the parking lot." Boone explained that Jade "got between" her and defendant and asked Boone to "go upstairs for a while," but Boone refused because she was concerned about Jade's safety. Boone testified that "[t]he next thing [she] remember[ed]" was defendant "pulling a gun from her pocket and . . . cock[ing] it and aim[ing] it at [her]." At that point, Boone stopped the recording, "pulled [her] phone out of [her] pocket," and "called 911." Boone testified that "at some point during th[e] call . . . defendant g[ot] in her truck and le[ft]."

Because defendant had already left the scene when police arrived, Gloucester Township Police Detective Dennis Richards, who was the lead detective, testified that he issued a "BOLO" for defendant's vehicle and was notified later that evening that defendant's car was parked in Winslow Township at "defendant's [home] address." Richards stated that sometime after midnight, he and other officers went to defendant's home to take her into custody and recover the firearm. When the officers arrived, defendant had "just got[ten] out of a shower." Richards told defendant that Boone had reported the altercation

and advised her that they "needed to recover the firearm." Defendant informed Richards that the gun was "in the console of her vehicle" and consented to a search of the vehicle. During the search, police recovered an unloaded "Glock Model 26" "semi-automatic handgun in a . . . soft leather holster" from the console of the vehicle. Defendant was then placed under arrest.

During her testimony, defendant denied touching, pushing, or pointing a firearm at Boone. Defendant stated they "had an argument," "[n]othing more, nothing less." Defendant admitted that she had an "unloaded" "9[-]millimeter Glock 26" in her vehicle when she drove to Jade's apartment, but denied removing the gun from her truck during the argument with Boone. Defendant also admitted that she did not have a permit to carry the firearm.³

Jade testified for the State and denied seeing defendant brandish a gun. Although Jade had previously given a conflicting statement to police on the night of the incident, during her trial testimony, Jade maintained that she did not see defendant point a gun at Boone and admitted that she had previously lied to the police because she was "upset" with defendant.

³ During the State's case in chief, the State introduced an affidavit prepared by New Jersey State Police Detective Sergeant Charles Bogdan averring that a search of "the records of the firearms investigation unit . . . failed to reveal . . . defendant making application for or being issued a permit to carry a handgun." Defendant did not object to the affidavit being admitted into evidence.

On February 14, 2019, the jury returned its verdict,⁴ and on May 23, 2019, the judge sentenced defendant. A conforming judgment of conviction was entered on June 3, 2019, and this appeal followed.

II.

In Point I, defendant argues that the trial judge's "flawed interpretation" of LEOSA led to the erroneous denial of her motion to dismiss count two. We agree.

Prior to trial, defendant moved to dismiss count two based on LEOSA, which permits "a qualified law enforcement officer" bearing "photographic identification issued by the governmental agency for which the individual is employed" to "carry a concealed firearm," "[n]otwithstanding any other provision of the law of any State or any political subdivision thereof." 18 U.S.C. § 926B. As a longtime BOP employee at the Federal Detention Center (FDC) in Philadelphia, defendant claimed she was permitted to carry a firearm without a permit in accordance with LEOSA because she was a "qualified law enforcement officer" within the meaning of the statute. Defendant attached a copy of her BOP-issued photographic identification card to her motion, which

⁴ Following the close of the State's case, the judge denied defendant's motion for a judgment of acquittal. See R. 3:18-1.

identified her as a "Law Enforcement Officer." After conducting a two-day evidentiary hearing in early 2019, the judge denied defendant's motion.

At the hearing, Beth Pizzo, a BOP "[h]uman resource manager" testified for the defense. Pizzo stated that defendant's official title was "recreational specialist." According to Pizzo, the duties and responsibilities of a "recreational specialist" included "maintain[ing] security of the institution" and the "custody and supervision of inmates," as well as "authority to enforce criminal statutes." Pizzo explained that a recreational specialist was a "law enforcement position" that required "firearms training," and was authorized to make arrests at the FDC and "off premises" for certain enumerated offenses. Pizzo further testified that recreational specialists were "required to qualify" on "[t]he shotgun, M-16 and a [nine] millimeter." Although defendant was "not issued a duty weapon as part of her employment," Pizzo stated defendant was issued a weapon when it was "directly related to her duties." According to Pizzo, defendant never left "the premises with a weapon" "unless she[was] on an escort trip for the bureau."

Pizzo's description of defendant's job was supported by the position description for a recreational specialist, which provided in pertinent part:

Incumbent has the authority to enforce criminal statutes and/or judicial sanctions, including investigative, arrest and/or detention authority on institution property. When necessary, incumbent also

has the authority to carry firearms and exercise appropriate force to establish and/or maintain control over individuals

Incumbent must successfully complete specialized training in firearms proficiency, self defense, management of medical emergencies, safety management and interpersonal communication skills.

. . . .

. . . [T]he incumbent is covered under the special retirement provisions for law enforcement officers contained in Chapters 83 and 84 of Title 5, United States Code.^[5]

For the State, Richards testified that on March 26, 2018, he recovered a firearm "[f]rom the center console of [defendant's] vehicle," which was located at defendant's residence in Winslow Township. He further stated that "defendant never presented [him] with any identification," but did identify herself as "an employee of the [FDC] in Philadelphia." Richards did not remember whether he had "look[ed] in [defendant's] wallet" for any form of identification when he placed defendant under arrest.

⁵ Under that title, "'law enforcement officer' means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position." 5 U.S.C. § 8331(20).

The State also introduced a February 27, 2006 BOP Guidance Memorandum regarding LEOSA. Pizzo confirmed that the memorandum was disseminated to all staff by the BOP Director. The memorandum, which was admitted into evidence, provided in pertinent part:

This memorandum provides updated guidance regarding the Law Enforcement Officers Safety Act of 2004 . . . as it pertains to [BOP] staff

LEOSA exempts qualified current and retired law enforcement officers from State and local laws that prohibit carrying concealed firearms Most BOP staff who have primary or secondary law enforcement status are "law enforcement" officers as defined in LEOSA, because most of these staff are "authorized by the agency to carry a firearm," as required by the law (see 18 U.S.C. § 926B (c)(2)). . . .

. . . .

Personal Responsibility of Off-Duty Employees for Carrying/Using Concealed Personal Firearms Under LEOSA[:] The carrying of concealed personal firearms by off-duty staff pursuant to LEOSA is not an extension of official [BOP] duties. Any actions taken by off-duty staff involving personal firearms will not be considered actions within the scope of [BOP] employment, but rather will be considered actions taken as private citizens. Off-duty staff will be individually and personally responsible for any event that may relate to the carrying or use of a concealed personal firearm under LEOSA.

. . . .

[BOP] identification cards or credentials may always be used by staff to verify [BOP] employment to any entity . . . for purposes of explaining your eligibility to carry a concealed personal firearm in public under LEOSA. This situation could arise during a routine traffic stop, while shopping in public, or in other situations.

In these type[s] [of] situations, it is important that off-duty staff not misrepresent that they are acting in furtherance of their official [BOP] duties. There should never be a time when off-duty staff claim to be carrying a concealed personal firearm as part of their [BOP] employment or in furtherance of their official [BOP] duties.

In denying defendant's motion to dismiss count two, the judge credited Pizzo's uncontested testimony and found that "defendant [was] a qualified law enforcement offic[er]" within the meaning of LEOSA "while on duty at the [FDC]" and was not "the subject to any disciplinary action" that obviated the statutory exemption. However, the judge concluded that defendant did "not fall under the exception[] allowed under LEOSA for the carrying of an unlicensed personal firearm while off duty in the [S]tate of New Jersey."

Relying on the BOP memorandum, the judge explained:

The carrying of a concealed personal firearm by off[-]duty staff pursuant to LEOSA is not an extension of official [BOP] duties. The memo clearly states that any actions taken by off[-]duty staff involving personal firearms will not be considered actions within the scope

of [BOP] employment but, rather, will be considered actions taken as private citizens.

I find absolutely no evidence that . . . defendant was authorized by the agency to carry a firearm under [18 U.S.C. § 926B(c)(2)] at the time of this incident.

Emphasizing that this was defendant's "personal firearm" for which defendant did not "ha[ve] a permit to carry," the judge reasoned that "defendant [could not] circumvent state and local laws regarding the registering and licensing of a personal firearm."

On appeal, defendant argues the judge's "distinction between on-duty and off-duty qualified law enforcement officers has no basis in the text of LEOSA, the context of the LEOSA statute, or in the legislative history surrounding LEOSA's passage." She asserts the judge's "reading of the statute as applicable only to on-duty officers would render the statute meaningless." Defendant also contends that the judge's ruling "was inconsistent with the . . . intent of the legislators who advocated for the passage of LEOSA."

We generally review "[a] trial court's denial of a motion to dismiss an indictment . . . for abuse of discretion." State v. Bell, 241 N.J. 552, 561 (2020) (quoting State v. Twiggs, 233 N.J. 513, 544 (2018)). However, "[w]hen the decision to dismiss relies on a purely legal question, . . . we review that determination de novo." Twiggs, 233 N.J. at 532.

When "[t]he outcome of th[e] case depends on the meaning of . . . a statute[,] as here, "we are charged with resolving a strictly legal issue." State v. Ferguson, 238 N.J. 78, 93 (2019). "Because legal issues do not implicate the fact-finding expertise of the trial courts," we construe statutes "'de novo—'with fresh eyes"—owing no deference to the interpretive conclusions' of trial courts, 'unless persuaded by their reasoning.'" State v. S.S., 229 N.J. 360, 380 (2017) (emphasis omitted) (quoting State v. Morrison, 227 N.J. 295, 308 (2016)).

"The goal of all statutory interpretation 'is to give effect to the intent of the Legislature.'" Morrison, 227 N.J. at 308 (quoting Maeker v. Ross, 219 N.J. 565, 575 (2014)). "In doing so, 'we must construe the statute sensibly and consistent with the objectives that the Legislature sought to achieve.'" Ibid. (quoting Nicholas v. Mynster, 213 N.J. 463, 480 (2013)). "[G]enerally, the best indicator of [the Legislature's] intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citing Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)). Thus, "[t]o determine the Legislature's intent, we look to the statute's language and give those terms their plain and ordinary meaning." State v. J.V., 242 N.J. 432, 442 (2020).

"If, based on a plain and ordinary reading of the statute, the statutory terms are clear and unambiguous, then the interpretative process ends, and we 'apply

the law as written.'" Id. at 443 (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). "If, however, the statutory text is ambiguous, we may resort to 'extrinsic interpretative aids, including legislative history,' to determine the statute's meaning." Ibid. (quoting State v. S.B., 230 N.J. 62, 68 (2017)). However, "a court may not rewrite a statute or add language that the Legislature omitted," State v. Munafo, 222 N.J. 480, 488 (2015), and "[w]e will not adopt an interpretation of the statutory language that leads to an absurd result or one that is distinctly at odds with the public-policy objectives of a statutory scheme." Morrison, 227 N.J. at 308.

Turning to the statute at issue, LEOSA on its face preempts state laws by exempting certain law enforcement officers from state firearms restrictions and allowing those individuals to carry concealed firearms. See 18 U.S.C. § 926B. The Court of Appeals for the District of Columbia has interpreted the statutory language to mean that "LEOSA mandates that all active and retired law enforcement officers be able to carry a concealed firearm anywhere in the United States subject to certain conditions, overriding most contrary state and local laws." DuBerry v. District of Columbia (DuBerry IV), 924 F.3d 570, 574 (D.C. Cir. 2019).

Specifically, subsection (a) of LEOSA provides:

Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).^[6]

[18 U.S.C. § 926B(a).]

Thus, to be exempt under LEOSA, an individual must (1) be a qualified law enforcement officer, and (2) carry the necessary identification. Under subsection (c) of LEOSA, a "qualified law enforcement officer" is defined as "an employee of a governmental agency who":

(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest or apprehension under [10 U.S.C. § 807(b)];

(2) is authorized by the agency to carry a firearm;

(3) is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers;

(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

⁶ Subsection (b) is inapplicable here.

(6) is not prohibited by Federal law from receiving a firearm.

[18 U.S.C. § 926B(c) (emphases added).]

Subsection (d) of LEOSA describes the identification required for exemption as "the photographic identification issued by the governmental agency for which the individual is employed that identifies the employee as a police officer or law enforcement officer of the agency." 18 U.S.C. § 926B(d).

Here, as the uncontroverted testimony at the hearing established, defendant was a qualified law enforcement officer within the meaning of LEOSA. Defendant's job description indicated she had "the authority to carry firearms," and Pizzo testified that defendant had undergone yearly training to qualify her in the use of a firearm. See 18 U.S.C. § 926B(c)(2), (4). Her duties included "custody and supervision of inmates"; "maintaining security"; and "enforc[ing] criminal statutes." Moreover, she had "investigative, arrest and/or detention authority on institution property" and arrest powers off-premises for certain enumerated offenses. See DuBerry v. District of Columbia (DuBerry III), 316 F. Supp. 3d 43, 52 (D.D.C. 2018), aff'd, 924 F.3d 570 (D.C. Cir. 2019) (holding "a purported law enforcement officer need not have broad police powers to satisfy the LEOSA 'statutory powers of arrest' requirement").

Furthermore, at the time of her arrest, defendant had no disabling conditions under LEOSA in that she was neither under the influence of alcohol or drugs, nor was she the subject of any disciplinary action by BOP.

Based on her BOP employment, the judge found defendant was a qualified law enforcement officer under LEOSA while on duty. Because the judge found defendant did not qualify for the LEOSA exemption while off duty, other than recounting Richards's testimony, the judge did not make factual findings as to whether defendant carried the necessary identification required under LEOSA.

"Appellate courts are empowered to exercise original jurisdiction within the bounds set forth in our rules." Price v. Himeji, LLC, 214 N.J. 263, 294 (2013). Under Rule 2:10-5, "[t]he appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." See State v. Micelli, 215 N.J. 284, 293 (2013) (acknowledging Rule 2:10-5 "allow[s] [an] appellate court to exercise original jurisdiction to eliminate unnecessary further litigation, but discourag[es] its use if factfinding is involved" (first and second alterations in original) (quoting State v. Santos, 210 N.J. 129, 142 (2012))).

"[T]he exercise of original jurisdiction is appropriate when there is 'public interest in an expeditious disposition of the significant issues raised[.]'" Price,

214 N.J. at 294 (alteration in original) (quoting Karins v. City of Atlantic City, 152 N.J. 532, 540-41 (1998)). "In determining whether to exercise original jurisdiction, an appellate court not only must weigh considerations of efficiency and the public interest that militate in favor of bringing a dispute to a conclusion, but also must evaluate whether the record is adequate to permit the court to conduct its review." Id. at 295.

Here, we are satisfied that the record is adequate to enable us to exercise original jurisdiction and believe that no useful purpose would be served by remanding the matter to the trial court. Based on the record, we conclude that at the time of her arrest, defendant possessed the required identification described in 18 U.S.C. § 926B(d). Defendant alerted the arresting officers to her status as an "employee of the [FDC] in Philadelphia" and had "just got[ten] out of a shower," limiting her ability to carry her identification on her person. Defendant submitted with her motion her BOP identification card, which included her photograph and identified her as a "Law Enforcement Officer," and Richards testified he did not recall whether he looked in defendant's wallet for her identification at the time of her arrest.

Critically, based on Pizzo's uncontested testimony, the judge found that defendant was a law enforcement officer employed by BOP, and the BOP

memorandum indicated that BOP identification credentials issued to employees were intended to verify BOP employment "for purposes of explaining . . . eligibility to carry a concealed personal firearm in public under LEOSA." Thus, this is not a case where there is any dispute regarding defendant's status as a qualified law enforcement officer with the attendant identifying credentials issued by the employing governmental agency. We recognize that original jurisdiction "should not be exercised in the absence of imperative necessity." City of Newark v. Township of West Milford, 9 N.J. 295, 301 (1952). However, "it will be invoked in those situations where the sound administration of justice calls for appellate 'intervention and correction.'" State v. Yough, 49 N.J. 587, 596 (1967) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). This case presents such a situation.

Although we agree with the judge's determination that defendant was a qualified law enforcement officer within the meaning of LEOSA while on duty, we are constrained to part company with the judge's other determinations. Specifically, we disagree with the judge's conclusions that LEOSA did not apply to defendant because she was carrying a personal firearm while off duty, and that defendant could not circumvent state and local laws regarding the registering and licensing of a personal firearm.

First, we consider whether a qualified law enforcement officer with identification as required under LEOSA may carry a concealed firearm notwithstanding contrary New Jersey law. "Under conflict preemption analysis, a court first must consider the purposes of the federal law, and then evaluate the effect of the state law on those purposes." Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 616 (1999). Beginning with the plain language of the statute, the "notwithstanding" clause of subsection (a) indicates Congress's clear intent to preempt state and local laws regulating the ability of qualified law enforcement officers with proper identification to carry concealed firearms. DuBerry v. District of Columbia (DuBerry II), 824 F.3d 1046, 1052 (D.C. Cir. 2016) ("Congress used categorical language in the 'notwithstanding' clause of subsection (a), to preempt state and local law to grant qualified law enforcement officers the right to carry a concealed weapon.").

Additionally, congressional reports show that Congress enacted LEOSA to remedy the "complex patchwork of Federal, state and local laws govern[ing] the carrying of concealed firearms for current and retired law enforcement officers." S. Rep. No. 108-29, at 4 (2003). To that end, the stated "Purpose and Summary" of LEOSA is to "override State laws and mandate that retired and active police officers c[an] carry a concealed weapon anywhere within the

United States." H.R. Rep. No. 108-560, at 3-4 (2004), as reprinted in 2004 U.S.C.C.A.N. 805, 805-06. Likewise, the congressional record states that LEOSA was intended to "create[] a mechanism by which law enforcement officers may travel interstate with a firearm" regardless of any state laws that would otherwise prohibit them from doing so. S. Rep. No. 108-29, at 4. Congress considered "establishing national measures of uniformity and consistency" an important component of achieving that goal. Ibid.

With limited exceptions, New Jersey law subjects "[a]ny person" who carries a concealed weapon without a permit to prosecution. N.J.S.A. 2C:39-5(b).⁷ See In re Preis, 118 N.J. 564, 569 (1990) ("Very few persons are exempt from the criminal provisions for carrying a gun without a permit."). LEOSA authorizes a qualified law enforcement officer with proper identification to carry a concealed firearm. 18 U.S.C. § 926B(a). "Conflict preemption applies 'where "compliance with both federal and state regulations is a physical impossibility," 'or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"" In re Reglan Litig., 226 N.J.

⁷ Under N.J.S.A. 2C:39-6(a)(2), "[f]ederal law enforcement officers, and any other federal officers and employees required to carry firearms in the performance of their official duties" are exempt from the criminal provisions of N.J.S.A. 2C:39-5. Defendant did not rely on that provision in her motion.

315, 329 (2016) (citation omitted) (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)). Given Congress's intent to achieve uniformity among state laws regulating law enforcement officers' ability to carry firearms, New Jersey's broad limitation on the right to carry a concealed weapon frustrates the "full purposes and objectives of Congress" in passing LEOSA. Ibid. (quoting Gade, 505 U.S. at 98).⁸ Thus, we are satisfied that LEOSA preempts N.J.S.A. 2C:39-5(b)(1).

If we were to interpret LEOSA as the judge did, then the statute would serve no purpose. See MasTec Renewables Constr. Co. v. SunLight Gen. Mercer Solar, LLC, 462 N.J. Super. 297, 318 (App. Div. 2020) ("A court must make every effort to avoid rendering any part of a statute inoperative, superfluous or meaningless."). The categorical "notwithstanding" language in subsection (a) of LEOSA is clearly intended to preempt state law and grant

⁸ See 18 U.S.C. § 927, providing:

No provision of this chapter . . . shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

qualified law enforcement officers with the requisite identification the right to carry a concealed firearm without being subject to prosecution under N.J.S.A. 2C:39-5(b)(1). To import an "on-duty" requirement to the statutory text would impose a significant limitation on the rights conferred by LEOSA that would effectively negate the professed goals of enacting it.

Moreover, nowhere in LEOSA's statutory language does it require the firearm to be issued by the law enforcement agency, nor does it require the law enforcement officer to be "on duty." Where specific language is absent, "[w]e must presume that the Legislature intended the words that it chose and the plain and ordinary meaning ascribed to those words." Paff v. Galloway Township, 229 N.J. 340, 353 (2017) (citing DiProspero, 183 N.J. at 492).

Our interpretation is amply supported by LEOSA's legislative history. The Senate report discussing LEOSA states:

A law enforcement officer is a target in uniform and out; active or retired; on duty or off.

[LEOSA] . . . is designed to protect officers . . . and to allow thousands of equipped, trained and certified law enforcement officers, whether on-duty, off-duty or retired, to carry concealed firearms in situations where they can respond immediately to a crime across state and other jurisdictional lines.

[S. Rep. No. 108-29, at 4 (2003).⁹]

In that regard, we believe the judge's reliance on the BOP memorandum in determining that LEOSA did not apply to defendant was misguided. The intent of the BOP memorandum was to make clear that "[t]he carrying of concealed personal firearms by off-duty staff pursuant to LEOSA [was] not an extension of official [BOP] duties." The BOP memorandum was designed to limit any scope-of-employment claims pertaining to "actions taken by off-duty staff involving personal firearms," such as the actions alleged against defendant in counts one and three of the indictment. Any other reading of the memorandum would strip LEOSA of its legislative intent and purpose.

Based on a plain reading of LEOSA, we conclude that defendant qualified for the statutory exemption and was not subject to prosecution under N.J.S.A. 2C:39-5(b)(1) for not having a state-issued carry permit for the gun. When distilled to the salient facts, the evidence presented at the hearing showed that defendant was a qualified law enforcement officer with the requisite photographic identification issued by BOP. Thus, she was entitled to the LEOSA exemption, permitting her to carry a concealed firearm both on and off

⁹ We point out that 18 U.S.C. § 926C provides the same exemption from state firearms restrictions to "qualified retired law enforcement officer[s]" who, by definition, could never be on duty or carry an employer issued firearm.

duty, regardless of whether the firearm was agency-issued or personal. Accordingly, the judge should have granted defendant's motion to dismiss count two charging her with possession of a handgun without a carry permit. We therefore reverse and vacate defendant's conviction and sentence on count two.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION