NEW JERSEY LAW REVISION COMMISSION

Draft Final Report to Define the Term "Actor" in the Context of the DNA-tolling Provision of N.J.S. 2C:1-6(c)

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The work of the New Jersey Law Revision Commission is only a recommendation until enacted. Please consult the New Jersey statutes in order to determine the law of the State.

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Executive Summary

In New Jersey, both the Legislature and the Judiciary have recognized that the "public has an undeniable interest in having criminal offenders charged, tried and sanctioned."[1] The power of the Prosecutor to further that interest is not without limitation.[2] The New Jersey Code of Criminal Justice established time limits within which the State must prosecute a defendant or be forever barred from bringing such an action. These statutes of limitation are designed to protect the citizenry from the potential prejudice likely to result when basic facts have been obscured by the passage of time.[3]

In *State v. Twiggs*, the New Jersey Supreme Court was asked to determine whether the statute of limitations should be tolled when a DNA identification does not directly identify the defendant, but rather begins an investigation that ultimately inculpates the defendant.[4] As part of its analysis, the Court examined the Legislature's use of the term "actor" as it appears in the DNA-tolling provision contained in N.J.S. 2C:1-6(c).

The term "actor" is not defined in N.J.S. 2C:1-6(c). As a result, the Court consulted the legislative history and the "general definitions" section of the Code of Criminal Justice. Ultimately, the Court concluded that pursuant to the DNA-tolling provision, a statute may only be "tolled" when the identification of the defendant is achieved directly by DNA evidence rather than DNA evidence in addition to other means.[5]

The NJLRC recommends the modification of N.J.S. 2C:1-6(c) so that it reflects the Supreme Court's decision in *State v. Twiggs.*

Statute

N.J.S. 2C:1-6. Time Limitations.

> c. An offense is committed either when every element occurs or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed, except that when the prosecution is supported by physical evidence that **identifies the actor** by means of DNA testing or fingerprint analysis, time does not start to run until the State is in possession of both the physical evidence and the DNA or fingerprint evidence necessary to establish the **identification of the actor** by means of comparison to the physical evidence. (Emphasis added).

[1] *State v. Diorio*, 216 N.J. 598, 612 (2014).
[2] *State v. Twiggs*, 233 N.J. 513, 533 (2018).
[3] *Id. See State v. Diorio*, 216 N.J. at 612.
[4] *State v. Twiggs*, 233 N.J. 513, 520 (2018).
[5] *Id.* at 536.

Background

• *State v. Twiggs*

On June 16, 2009, the Wildwood Crest Police Department was investigating an alleged robbery.[6] After interviewing the victim, the police recovered a mask from the location where the victim claimed the perpetrators had parked their vehicle.[7] The DNA extracted from the mask was entered into the Combined DNA Information System ("CODIS").[8] At the time, no arrests were made by the police in connection with this robbery.

In July of 2014, Dillon Tracy entered a guilty plea in Drug Court.[9] Subsequently, the police collected his DNA.[10] The DNA provided to the police matched the sample found on the mask used during the 2009 robbery in Wildwood Crest.[11] When confronted with this information Tracy confessed to participating in the robbery and implicated Gary Twiggs.[12]

In December of 2014, both men were indicted for the June 16, 2009 robbery.[13] In response, Twiggs moved to dismiss the indictment pursuant to N.J.S. 2C:1-6(b)(1).[14] The State argued that, "DNA evidence matching one individual can support prosecutions of multiple defendants whose identities and involvement are not known to law enforcement until DNA evidence is obtained."[15] In addition, the stated argued that the definition of "actor," as used defined in N.J.S. 2C:1-14 (general definitions), must be used in when interpreting N.J.S. 2C:1-6(c) absent a definition to the contrary or a legislative caveat.[16]

Both the trial court and a divided appellate panel disagreed with the State's broad definition of "actor."[17] The State appealed.

• *State v. Jones*[18]

During the early morning hours of August 15, 2002, a young girl died under mysterious circumstances.[19] In an attempt to conceal her death, the family disposed her body in a wooded area

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[6] *Id*. *at 521*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id.* at 522.
[14] *Id.*
[15] *Id.* at 528-29.
[16] *Id.*
[17] *Id.* at 522.
[18] *Id.* at 520. The Supreme Court consolidated this appeal with that of *State v. Twiggs* because both matters hinge on the meaning of the term "actor" within in the context of N.J.S. 2C:1-6(c).
[19] *Id.* at 524.

in Central New Jersey.[20] Thereafter, the family entered into a compact to "keep the incident a secret" and to answer any inquiries about the young girl's death by stating "she's with her father."[21] For the next decade the family concealed the information concerning the child's death.[22]

In July of 2012, a family member provided the New York City Administration of Children's Services with information relating to the disappearance of the victim as well as a DNA sample.[23] The police compared family members DNA to the DNA generated from skeletal remains found in New Jersey.[24] Further DNA testing of various family members confirmed the identity of the victim.[25]

Members of the victim's family were indicted in January of 2013 for, among other things, conspiring to tamper with physical evidence and obstructing the administration of law and/or hindering the apprehension of another.[26] In a motion argued before the trial court, the Jones' moved to dismiss the indictment.[27] This motion was predicated upon the fact that the expiration of the statute of limitations barred their prosecution.[28]

After examining the provisions contained in N.J.S. 2C:1-6(c), the trial court denied the defendant's motion.[29] The trial court ruled that, "the statute of limitations tolled under the DNA-tolling provision… because the case was "supported by" physical evidence that identified the actors – defendants – by means of DNA testing."[30] The trial court further held that, the DNA evidence did not need to identify the defendants directly as the 'alleged wrongdoers' as long as it supported the prosecution…"[31] Finally, the trial court reset the statute of limitations to the date that law enforcement came into possession of the DNA evidence.[32] After entering into a conditional plea, the defendants appealed their convictions.[33]

The Appellate Division reversed the trial court's denial of defendant's motion to dismiss the tampering, obstruction and hindering charges.[34] The panel emphasized that when assessing the applicability of the DNA tolling provision set forth in N.J.S. 2C:1-6(c), the primary inquiry was

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[20] *Id.*
[21] *Id.*
[22] *Id.* at 525.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* James and Likisha Jones, along with Godfrey Gibson were charged with conspiracy to commit and the commission of the following: tampering with physical evidence, obstructing the administration of law and/or hindering apprehension of another. The indictment separately charged Gibson with hindering the apprehension of another; and, hindering his own apprehension.
[27] *Id.*
[28] *Id.* at 526.
[29] *Id.*
[30] *Id.* at 526-27.
[31] *Id.*
[32] *Id.* at 527.
[33] *Id.*
[34] *Id.*

"whether the DNA evidence itself identifies the perpetrator."[35] The court, however, affirmed the denial of the motion to dismiss the conspiracy charge.[36] The Supreme Court granted the State's petition for certification and the defendants' cross-petitions for certification.[37]

Analysis

In New Jersey, "an offense is committed either when every element occurs or … at the time when the course of conduct … is terminated."[38] Generally speaking, the time within which the State may prosecute a defendant begins to run the day after the individual commits the offense.[39] The ability of a defendant to locate alibi witnesses and the evidence necessary to defend against the basic allegations diminishes over time.[40] It is generally accepted that the farther in time from the alleged event, the more difficult it becomes to properly sustain a defense.[41]

The primary guarantee against the prosecution of overly stale criminal charges is a statutorily based time limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.[42] This statutorily based proscription, commonly referred to as the "statute of limitations," serves as an absolute bar to the prosecution of a criminal charge that is not filed against an individual within the relevant statutory time-frame.[43] A Court may not unilaterally nullify the protection afforded to a criminal defendant by way of such a statute.[44] Only the Legislature may waive the prohibition of criminal prosecution afforded by a statute of limitations.[45]

Under very limited circumstances, the Legislature has seen fit to lift the time-based bar against criminal prosecution.[46] There are some crimes that are considered so heinous that the Legislature will simply not allow the passage of time to preclude their prosecution.[47] The Legislature has, therefore, determined that there is to be no statutorily based time frame beyond which an individual may not be charged with murder, manslaughter, sexual assault, or causing widespread injury or damage.[48] In recognition of the public's undeniable interest in having criminal offenders charged, tried, and sanctioned, the Legislature has also "tolled" the statute of

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[35] *Id.*
[36] *Id.* The scope of this Memorandum is limited to the definition of the term "actor" as it is used in N.J.S. 2C:1-6(c).
[37] *Id.* at 528. *See* 230 N.J. 361 (2017); 230 N.J. 374 (2017); 230 N.J. 375 (2017).
[38] N.J.S. 2C:1-6(c).
[39] The terms "time" and "time limitation," as used in N.J.S. 2C:1-6 *et seq.*, are commonly referred to as the "statute of limitations."
[40] *State v. Twiggs*, 233 N.J. at 539.
[41] *Id.*
[42] *Id. See United States v. Marion*, 404 U.S. 307, 322 (1971).
[43] *Id. See State v. Short*, 131 N.J. 47 (1993).
[44] *Id.*
[45] See generally, *State v. Twiggs*, 233 N.J. at 534.
[46] *State v. Twiggs*, 233 N.J. at 534.
[47] *Id. See* N.J.S. 2C:11-3 (murder); N.J.S. 2C:11-4 (manslaughter); N.J.S. 2C:14-2 (sexual assault); and, N.J.S. 2C:17-2 (causing or risking widespread injury or damage).
[48] *Id. See* n.43 *supra.*

limitations in instances where the police have collected DNA evidence at a crime scene but have yet to connect this evidence to the alleged perpetrator.

The "DNA-tolling provision," recognizes that at the time a crime is committed the only evidence that the police may possess is the DNA of an unknown perpetrator. Except for identical twins, DNA evidence is unique to each individual and is commonly used to identify criminal perpetrators.[49] DNA evidence has been deemed, by the Judiciary, to be a scientifically reliable and admissible in criminal trials when matched to a specific defendant.[50] When the identity of the individual who committed a crime is unknown and DNA evidence is collected at the crime scene the State may subsequently use this evidence to identify the offender.[51] Whether the DNA collected by the police forms a direct or indirect link to the "actor" is crucial to determine whether a defendant may be prosecuted after the statute of limitations has run.

In *State v. Twiggs,*[52] the Supreme Court was asked to determine whether the term "actor," in N.J.S. 2C:1-6 *et seq.*, refers to a criminal offender who is directly identified by DNA evidence; or, whether the term refers to multiple defendants whose identities and involvement are not known to law enforcement until that DNA evidence is obtained by the police. To answer that question, the Supreme Court considered the ramifications of both a "broad" definition and a "narrow" definition of the term "actor" as it is used in N.J.S. 2C:1-6(c).

• *Broad Definition*

The Code contains a set of general definitions.[53] These definitions provide the meaning of words throughout the Code and "unless a different meaning plainly is required…."[54] As defined in N.J.S. 2C:1-14(g), the term "actor" includes, "any natural person…." Following the mandate set forth in the general definitions, the general definition of "actor" should be employed in the absence of a definition set forth in another statutory code section.

Presently, N.J.S. 2C:1-6 *et seq.* does not contain a definition for the term "actor." Within the context of N.J.S. 2C:1-6(c), such a definition would "toll" the statute of limitations because the prosecution of the defendant can be supported by DNA evidence that identifies a natural person. This "natural person" in turn would forge the investigative chain that leads the police to the co-defendants who were involved in the commission of the crime.

The broader definition of the term "actor" supports the prosecution of multiple defendants whose identities and involvement are not known to law enforcement until DNA evidence is obtained. Such a broad definition is consistent with public's "…undeniable interest in having

[49] *Id.* at 535.
[50] *Id.*
[51] *Sponsor's Statement to* S.1516 (Sept. 14, 2000); *Sponsor's Statement* to A. 2658 (June 29, 2000).
[52] *State v. Twiggs,* 233 N.J. 513, 533 (2018).
[53] *See* N.J.S. 2C:14-1.
[54] *Id.*

criminal offenders charged, tried and sanctioned"[55] and is supported by the Legislature's replacement of the phrase "person who commits a crime" with the word "actor" prior to the enactment of N.J.S. 2C:1-4(c).

• *Narrow Definition*

The DNA-tolling provision is an "exception" to the statute of limitations set forth in N.J.S. 2C:1-6 *et seq.* Traditionally, the New Jersey Supreme Court has narrowly construed the exceptions to general rules.[56] Any interpretation of an exception in a legislative enactment must be "reasonably construed, consistent with the manifest reason and purpose of the law."[57]

In examining the term "actor," the Supreme Court noted that during the drafting process, the Legislature persistently used words and phrases such as, "persons who committed the crime,"[58] "suspect,"[59] "guilty persons."[60] The Court interpreted these words and phrases as indicia that the Legislature intended the term "actor" to mean the "defendant."

After examining the term in both contexts, the Court found N.J.S. 2C:6-1(c) permits tolling "when identification [of the defendant] is achieved directly by DNA evidence rather than DNA evidence in addition to other means."[61] Further, the Court concluded that "the Legislature intended the DNA tolling provision to apply to the sole actor whom the DNA directly identifies."[62] Although the Court chose to define the term narrowly, the Court noted that the clearest way to discern the definition of a term, such as "actor" is for the statute specifically to define one of the terms that appears in N.J.S. 2C:1-14.[63]

Outreach

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These included: The Office of the Attorney General; the Administrative Office the Courts; the New Jersey State Municipal Prosecutor's Association; the Association of Criminal Defense Lawyers; the leadership of the Criminal Practice Section of the New Jersey State Bar Association; the Office of the Public Defender; each of the twenty-one County Prosecutor; several criminal defense attorneys; the New Jersey League of Municipalities; the New Jersey Association of Counties; the Department of the Treasury; the New Jersey State

[55] *State v. Diorio*, 216 N.J. 598, 612 (2014).
[56] *State v. Twiggs*, 233 N.J. at 534.
[57] *Id.* at 534-535.
[58] *Id.* at 536-537, noting that this phrase was used in the earlier draft of the bill S. 1516 and A. 2658 (2000).
[59] Id. (noting that this term was utilized in the final-adopted bill's Sponsors' Statement).
[60] *Id*. (noting that this phrase was used in the final bill's legislative fiscal analysis).
[61] *Id.* at 536.
[62] *Id.*
[63] *Id.* at 537.

Association of Chiefs of Police; and, the New Jersey Police Traffic Officers Association. In addition, members of the public were invited to view this report on the NLRC website.[64]

During the comment period, no objections were received to the modifications proposed by the Commission.

Conclusion

The Appendix, on the following pages, sets forth modifications to clarify that for the DNA-tolling provision of N.J.S. 2C:1-6(c) to apply, the State must have DNA evidence in its possession that establishes a direct link to the defendant it seeks to prosecute.

[64] https://www.njlrc.org/projects/2019/6/11/definition-of-actor-for-purposes-of-njs-2c1-6c?rq=actor (last visited August 28, 2019).

Appendix

The full text of each statute, including proposed modifications (proposed additions are shown with underscore, and proposed deletions with ~~strikethrough~~), follows:

Original Statute

N.J.S. 2C:1-6. Time Limitations.

[…]

c. An offense is committed either when every element occurs or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed, except that when the prosecution is supported by physical evidence that **identifies the actor** by means of DNA testing or fingerprint analysis, time does not start to run until the State is in possession of both the physical evidence and the DNA or fingerprint evidence necessary to establish the **identification of the actor** by means of comparison to the physical evidence. (Emphasis added).

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Proposed Modifications

c. An offense is committed when either every element of the offense occurs; or, if a legislative purpose to prohibit a continuing course of conduct plainly appears at the time when the course of conduct or the defendant's complicity therein is terminated.

(1) Time. Time starts to run on the day after the offense is committed~~,~~.

(2) Exception. ~~Except that~~ ~~w~~When the prosecution is supported by physical evidence that identifies ~~the actor~~ an individual by means of DNA testing or fingerprint analysis, time does not start to run until the State is in possession of both the physical evidence and the DNA or fingerprint evidence ~~necessary~~ sufficient to directly establish the identification of the ~~actor~~ individual by means of comparison to the physical evidence.

(3) Applicability. The tolling provision set forth in subsection (c) applies only to the prosecution of individuals who are the subject of DNA or fingerprint evidence and are directly identified thereby. It does not apply to individuals who are not the subject of DNA or fingerprint evidence but are later identified through an investigation precipitated by the evidence.