



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Report to Clarify the Statute Relating to Confinement in New Jersey's Code of Criminal Justice (N.J.S. 2C:44-3)**

**May 11, 2020**

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 *State v. Clarity*,<sup>1</sup> the Appellate Division considered whether a probationary term for a defendant's last prior crime was the equivalent of "confinement" for purposes of sentencing him to an extended term as a persistent offender.

The Court noted that N.J.S. 2C:44-3(a) does not define the term "confinement." The absence of a definition "...[generates] potential uncertainty about its scope when the State seeks a persistent-offender extended term."<sup>2</sup>

After reviewing the opinion in conjunction with the statutory language of N.J.S. 2C:44-3(a), the Commission determined that this provision might benefit from the addition of language to clarify the meaning of the term "confinement."

In accordance with New Jersey Appellate Division holding in *State v. Clarity*, this Report recommends modifications to N.J.S. 2C:44-3(a) to clarify the meaning of "confinement" and the criteria for sentencing a defendant to an extended term of imprisonment as a persistent offender.

## Relevant Statute

The relevant portion of N.J.S. 2C:44-3(a) states:

The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

## Background

N.J.S. 2C:44-3(a) permits a court to impose an extended prison term upon a defendant when the defendant has been convicted of at least two, separate prior crimes. As a condition precedent, the trial court judge shall find that "the latest" of those crimes was committed, or the defendant's "last release from confinement" occurred—"whichever is later"—within ten years of the charged crime.<sup>3</sup>

The statute does not define the term "confinement." The term is not referenced elsewhere in the statute and there is no legislative history addressing the definition of "confinement."

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<sup>1</sup> *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018).

<sup>2</sup> *Id.* at 609.

<sup>3</sup> N.J.S. 2C:44-3(a).

In 2004, Michael Clarity pled guilty to a crime in Florida which was committed on July 26, 2003.<sup>4</sup> For the crime committed in Florida, Clarity was sentenced to a probationary term.<sup>5</sup> He thereafter pled guilty to 3<sup>rd</sup> degree child endangerment in August 2016.<sup>6</sup> The crime took place in New Jersey on August 17-18, 2013.<sup>7,8</sup>

During the sentencing for Clarity's 2013 crime in New Jersey, the trial court interpreted that his release from confinement fell within the ten year limit to be considered a persistent offender under N.J.S. 2C:44-3(a).<sup>9</sup> As a result, he was sentenced to an eight-year extended prison term with four years of parole ineligibility.<sup>10</sup>

Clarity appealed his conviction and argued that he was not "eligible to be sentenced to an extended term as a persistent offender because he neither committed a crime nor was released from confinement imposed for conviction of a crime in the ten years preceding the instant offense."<sup>11</sup>

### Analysis

In the absence of definitive statutory language, the Appellate Division examined the persistent offender statute and reviewed secondary sources to determine the Legislature's intention. The Appellate Division also reviewed two different states' persistent offender statutes, to compare the manner in which other states define "confinement".

The purpose of N.J.S. 2C:44-3(a) is to "create the judicial discretion to impose an extended term on an individual incapable of living a law-abiding life for a significant period of time."<sup>12</sup>

In *Clarity*, the Appellate Division said that the Legislature intended to fix the period of the statute at ten years, "conveying that an individual who is capable of residing in our communities for more than ten years without committing a crime should not be treated as a persistent offender."<sup>13</sup> It is important, therefore, to have a clear understanding of the date on which an individual was released from confinement.

The Appellate Division found that the trial court made two errors. As a preliminary matter the Court found that the trial court erroneously utilized the date of the defendant's initial conviction when performing the extended term eligibility calculation.<sup>14</sup> The trial court also interpreted Clarity's probation in Florida as "confinement."

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<sup>4</sup> *Id.* at 606.

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

<sup>6</sup> *State v. Clarity*, at 606.

<sup>7</sup> *Id.* at 607.

<sup>8</sup> *See* Figure 1.

<sup>9</sup> *Id.* at 607.

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

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

<sup>12</sup> *Id.* at 610.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 608.

The Appellate Division noted that the absence of a statutory definition for the term “confinement” created ambiguity.<sup>15</sup> The Appellate Division consulted both *Black's Law Dictionary* and *Ballentine's Law Dictionary* for a definition of the word “confinement.”<sup>16</sup> *Black's Law Dictionary* defines confinement as a state in which an individual is “deprive[d] ... of ... liberty.”<sup>17</sup> *Ballentine's Law Dictionary* defines it as being “**place[d] in prison or jail.**”<sup>18</sup> In addition to secondary sources, the Court examined the definition of confinement in three other states.<sup>19, 20</sup>

The Court observed that the Wisconsin statutes use the term “actual confinement.” This term is not defined in the Wisconsin statutes.<sup>21</sup> According to the common law in Wisconsin, the term “actual confinement” is defined as “cannot[ing] a time when an individual is off the streets and is no longer able to wreak further criminal havoc against the community.”<sup>22</sup> Missouri defines a person as “in confinement” if they are “**held in a place of confinement pursuant to arrest or order of a court,**” excluding **probation or parole, temporary or otherwise.**”<sup>23</sup> Washington statutes include explicit definitions of the terms “partial confinement”<sup>24</sup> and “total confinement.”<sup>25</sup>

After reviewing the legal dictionary definitions and the definitions used in other states, the Appellate Division held that the trial court incorrectly concluded that the defendant’s “probation[ary sentence was] the same as being ‘confined.’”<sup>26</sup> The Court “recognized that the Legislature did not define the word ‘confinement’, thus generating potential uncertainty about its scope when the State seeks a persistent-offender extended term.”<sup>27</sup> The Appellate Division

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<sup>15</sup> *Id.*

<sup>16</sup> See *Black's Law Dictionary* at 362 (10th ed. 2014); see also *Ballentine's Law Dictionary* 244 (3d ed. 1969).

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

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

<sup>19</sup> Thirty-seven states do not limit the previous convictions of the offenders based on the time period of confinement. Those states are: Ala., Alaska, Ariz., Ark., Colo., Del., Ga., Idaho, Ill., Iowa, Kan., Me., Md., Mass., Mich., Minn., Miss., Mo., Neb., Nev., N. H., N.Y., N.C., N.D., Ohio, Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., and Wyo.

<sup>20</sup> Eleven states explicitly delineate the date the time frame begins and say whether the period includes probation, parole, or other forms of supervised release. Those states are: Cal., Conn., Fla., Haw., Ind., Ky., La., Mont., N. M., Okla., and Or. Only one state, Wisconsin, used the term “confinement” in its persistent-offender statute.

<sup>21</sup> See Wis. Stat. § 939.62(2).

<sup>22</sup> *State v. Clarity* citing *State v. Price*, 231 Wis.2d 229, 604 N.W.2d 898, 901 (Wis. Ct. App. 1999).

<sup>23</sup> See Mo. Rev. Stat. § 556.061(13).

<sup>24</sup> See Wash. Rev. Code Ann. § 9.94A.030 (36) *defining*, “Partial confinement” as confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention, electronic monitoring, or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program or the graduated reentry program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.

<sup>25</sup> See Wash. Rev. Code Ann. § 9.94A.030 (53) “Total confinement” means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

<sup>26</sup> *State v. Clarity* at 609.

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

determined that “confinement” meant that a person shall be “imprisoned” or “restrained.”<sup>28</sup> In the absence of any legislative history, however, it is unclear whether the Legislature intended the term confinement to include probation, parole, or home confinement.

### **Outreach**

In connection with this Report, Staff sought comments from knowledgeable individuals and organizations. These included: the County Prosecutors Association of New Jersey (CPANJ); the New Jersey Attorney General’s Office; the New Jersey Office of the Public Defender; Legal Services of New Jersey; and several private practitioners.

#### *• In Support*

The proposed modifications set forth in the Appendix to this Report received the support of the CPANJ.<sup>29</sup> The CPANJ advised Staff that they, “...generally support[...] the NJLRC’s proposed reorganization of the text of N.J.S. 2C:44-3(a) and the proposed definition of confinement....”<sup>30</sup>

#### *• Modifications*

The CPANJ suggested some modifications to the proposed statutory language.<sup>31</sup> In sections (a)(1), (a)(1)(ii), (a)(2) the stakeholder suggested the word “person” replace the word “individual” in order to maintain consistency with the section’s introductory paragraph.<sup>32</sup> The CPANJ also suggested the removal of the word “and” from the end of the paragraph, insert the word “and” at the end of paragraph (a)(1)(i), and restore the word “if” at the beginning of paragraph (a)(1)(iii), in order to clarify the paragraphs and provide “criteria that must be met regarding the person in question, while paragraph (iii) provides a criterion that must be met regarding that person’s most recent crime or period of confinement.”<sup>33</sup>

The words “penal facility or institution,” in the draft language would also be replaced by “penal or correctional facility or institution.” The CPANJ noted that, the “change is recommended to clarify that ‘confinement’ includes time spent in the custody of the Adult Diagnostic and Treatment Center (ADTC) pursuant to N.J.S. 2C:47-3 or a similar treatment center for sex offenders.”<sup>34</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> E-mail from Angelo J. Onofri, Mercer County Prosecutor, to Mark Ygarza, Legislative Fellow, New Jersey Law Revision Commission (Apr. 26, 2020, 16:35 EST ) (on file with the NJLRC).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

## **Conclusion**

In its current form, N.J.S. 2C:44-3(a) does not define the meaning of “confinement”. In order to help clarify the meaning for both practitioners and the general public, this statute may benefit from the addition of additional language.

The Appendix on the following page proposes a definition for “confinement” to reflect the principles set out in *State v. Clarity* and the recommendations of knowledgeable commenters. This report recommends modifications to N.J.S. 2C:44-3(a) to clarify the meaning of “confinement” and the criteria for sentencing a defendant to an extended term of imprisonment as a persistent offender.

## Appendix

The proposed modifications to N.J.S. 2C:44-3(a) are shown with ~~strike through~~ and underlining:

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. [...]

a. The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender.

(1) A persistent offender is a person who at the time of the commission of the crime:

A. is 21 years of age or over, and

B. ~~who has been~~ was previously convicted on at least two separate occasions of two crimes, committed at different times, when ~~he~~ the person was at least 18 years of age;<sup>2</sup>

C. if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

(2) For purposes of this section, the term "confinement":

A. means that the person is held, pursuant to arrest or order of a court, inside the physical boundaries of:

(i) a penal facility or institution;

(ii) a correctional facility or institution; or

(iii) an Adult Diagnostic and Treatment Center pursuant to N.J.S. 2C:47-3 or a similar facility for sexual offenders; and

B. does not include probation or parole, temporary or otherwise.

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## Comments

The introductory paragraph of N.J.S. 2C:44-3 is included to allow the reader an easy transition from the introduction to section (a) of the statute. The paragraph lays out how subsection (a) shall be applied as a persistent offender statute pertaining to the term "confinement."

Section a. has been divided into two subsections to allow a clearer and more concise reading of the statute. The statute's purpose remains the same for section (a).

Subsection (2) has been added to N.J.S. 2C:44-3. The newly drafted subsection (2), defines the term "confinement" as it pertains to section (a) as discussed in *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018). The language was derived from *State v. Clarity* in which the Court utilized the definition of Wisconsin when interpreting N.J.S. 2C:44-3(a). The *Clarity* Court noted that Missouri and Washington's definitions of "confinement" are consistent with that of New Jersey. The Court also specifically excluded probation or parole as being considered confinement. Lastly, the Court explained that in order to be considered confined, the individual shall be removed from society, pursuant to an arrest or order of a court. Subsection (2) also reflects the input of commenters on the project as explained in the Report.

For ease of review and in an effort to make the language clear, subsection (2) has been divided into subsections.