



**NEW JERSEY LAW REVISION COMMISSION**  
**Revised Draft Tentative Report to Clarify the Statute**  
**Relating to Confinement in New Jersey's**  
**Code of Criminal Justice (N.J.S. 2C:44-3)**

**November 9, 2020**

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

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **January 18, 2021**.

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

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

In *State v. Clarity*,<sup>2</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" and that the absence of a definition "...[generates] potential uncertainty about its scope when the State seeks a persistent-offender extended term."<sup>3</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 when the defendant has been convicted of at least two, separate, prior crimes. As a condition precedent, the trial court 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>4</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 what is meant by "confinement."

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<sup>1</sup> Preliminary work in this area was performed by Mark D. Ygarza, a former Legislative Fellow with NJLRC.

<sup>2</sup> *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018).

<sup>3</sup> *Id.* at 609.

<sup>4</sup> N.J. STAT. ANN. 2C:44-3(a) (West 2020).

In 2004, Michael Clarity pled guilty to a crime in Florida which was committed on July 26, 2003.<sup>5</sup> For the crime committed in Florida, Clarity was sentenced to a probationary term.<sup>6</sup> After he returned to New Jersey, he was charged with, and plead guilty to, third degree child endangerment.<sup>7</sup> It was alleged that this crime took place on August 17 and 18, 2013.<sup>8</sup>

At sentencing, the trial court determined that the defendant was a persistent offender pursuant to N.J.S. 2C:44-3(a).<sup>9</sup> The Court considered the defendant's probationary term to be "confinement" and his release from "confinement" to be within the ten-year time-frame set forth in the statute.<sup>10</sup> As a result, he was sentenced to an eight-year extended prison term with four years of parole ineligibility.<sup>11</sup>

On appeal, the defendant 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>12</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 intent. The Appellate Division also reviewed 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>13</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>14</sup> It is important, therefore, to have a clear understanding of the date on which an individual was released from confinement.

The Appellate Division concluded that the trial court made two errors. As a preliminary matter, the Court determined that the trial court erroneously utilized the date of the defendant's initial conviction when performing the extended term eligibility calculation.<sup>15</sup> The trial court also interpreted Clarity's probation in Florida as "confinement."

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<sup>5</sup> *Clarity*, 454 N.J. Super. at 606.

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

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

<sup>8</sup> *Id.* at 607.

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

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

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

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

<sup>13</sup> *Id.* at 610.

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

<sup>15</sup> *Id.* at 608.

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

The Court observed that of the fifty states, only Wisconsin uses the term “actual confinement” in its persistent offender statute.<sup>21</sup> According to the common law in Wisconsin, the term “actual confinement” is defined as “connot[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 and Washington define “confinement” within their criminal codes.<sup>23</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.**”<sup>24</sup> In addition, this statute specifically excludes **probation or parole, temporary or otherwise.**<sup>25</sup> The state of Washington defines “**total confinement**” as **confinement inside the physical boundaries of a [governmental] facility or institution**.”<sup>26</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>27</sup> The Court “recognized that the Legislature did not define the word ‘confinement’, thus generating potential uncertainty about its scope when the State seeks to have the defendant sentenced to an extended term as a persistent offender.”<sup>28</sup> The Appellate Division determined that “confinement” meant that a person shall be “imprisoned” or “restrained.”<sup>29</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.

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<sup>16</sup> *Clarity*, 454 N.J. Super. at 609.

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

<sup>18</sup> *Id.* citing *Black’s Law Dictionary* at 362 (10th ed. 2014).

<sup>19</sup> *Id.* citing *Ballentine’s Law Dictionary* 244 (3d ed. 1969).

<sup>20</sup> *Clarity*, 454 N.J. Super. at 611.

<sup>21</sup> *Id.* at 613 n.5 (citing WIS. STAT. § 939.62(2)).

<sup>22</sup> *Clarity*, 454 N.J. Super. at 611 (citing *State v. Price*, 231 Wis.2d 229, 604 N.W.2d 898, 901 (Wis. Ct. App. 1999)).

<sup>23</sup> *Id.* at 613 n.6.

<sup>24</sup> *Id.* (Emphasis added) (citing MO. REV. STAT. § 556.061(13)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 613 n.6 (Emphasis added) (citing WASH. REV. CODE ANN. § 9.94A.030 (52)).

<sup>27</sup> *Clarity*, 454 N.J. Super. at 609.

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

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

### **Pending Legislation**

There is no legislation currently pending regarding N.J.S. 2C:44-3(a) that clarifies the meaning of “confinement” in the statute.<sup>30</sup>

### **Conclusion**

N.J.S. 2C:44-3(a) does not define “confinement”. 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. Proposed statutory language is contained in the Appendix.

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<sup>30</sup> S202, 219th Leg., 2020 Sess. (N.J. 2020) (This bill seeks to impose mandatory term of life imprisonment without eligibility for parole on persons who commit violent sexual assaults).

## 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.

### **Option #1 (contained in draft final report dated 5/11/20)**

(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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**Option #2 (draft language after 5/21/2020 meeting)**

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;

(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; and

(C) if for whom 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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**Option #3 (draft language after 5/21/2020 meeting - allows home confinement to count as confinement)**

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;

~~(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; and

~~(C) if for whom~~ 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~~

(2) For purposes of this section, the term “confinement” means that a person is held:

(A) pursuant to ~~arrest or~~ an order of the court; or,

(B) 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.

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## Comments

### *Modifications before May 2020:*

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.”

Subsection a. has been divided into two subsections to allow a clearer reading of the statute. The statute’s purpose remains the same for section a.



Subsection a.(2) has been added to N.J.S. 2C:44-3. The newly drafted subsection (2) defines the term “confinement” as it applies to subsection a. pursuant to the discussion 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 Wisconsin statutory definition when interpreting N.J.S. 2C:44-3(a). The *Clarity* Court noted that Missouri and Washington’s definitions of “confinement” are consistent with the law of New Jersey. The Court specifically excluded probation or parole from 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. For ease of review and to make the language clear, subsection (2) has been divided into subsections.

Option 1 shows the language from a Draft Final Report dated May 11, 2020, and includes the input of the comments received from the County Prosecutor Association of New Jersey (“CPANJ”).<sup>31</sup>

***Modifications after May 21, 2020:***

Option 2 reflects CPANJ comments and changes requested by the Commission at the May 21, 2020 meeting. Subsection (2)(B) has been stricken from the draft and subsection a.(1) was revised.

Option 3 is similar to Option 2 in that it incorporates the comments received by CPANJ and the Commission. This option, however, subdivides the definition of “confinement” to reflect different methods of confinement. Subsection (2)(A) envisions instances in which an individual is “confined to a house or a private facility”. Subsection (2)(B) addresses the different state-run penal facilities in which an individual may be confined.

Additionally, in Option 3, the term “arrest” was removed from subsection a.(2)(A). The word “arrest” does not appear in the original statute. It was included based on the guidance provided by the court in *Clarity*.<sup>32</sup> It was removed from this draft after additional research and consideration because the term “arrest” casts a very broad net, and includes custodial situations that do not involve a criminal conviction or a determination by the court.

***Supplemental information responsive to questions raised by the Commission at the 5/21/2020 meeting:***

- *Psychiatric Commitment – Mental Incompetence*

The Commission asked the Staff whether this statute will apply when a court determines that an individual is not fit to stand trial and is subsequently committed to a psychiatric hospital. N.J.S. 2C:4-4 provides that a person who lacks the capacity to understand the proceedings against him or to assist in his defense may not be tried, convicted or sentenced for the commission of an offense so long as such incompetency endures.<sup>33</sup> Since a conviction is necessary for this statute to be applicable, it would not apply to an individual has not been convicted.

- *Commitment of a Person Found Not Guilty by Reason of Insanity*

A similar question was raised by the Commission regarding a person found not guilty by reason of insanity. N.J.S. 2C:4-8, governs instances where a defendant in a criminal case is acquitted by reason of insanity and is then civilly committed.<sup>34</sup> In *State v. Krol.*, the court stated that “[c]ommitment following acquittal by reason of insanity is not intended to be punitive, for, although such a verdict implies a finding that defendant has committed the Actus reus, it also constitutes a finding that he did so without a criminal state of mind. **There is, in effect, no crime to**

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<sup>31</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>32</sup> *Clarity*, 454 N.J. Super. at 613 n.6 (Missouri defines a person as “in confinement” if they are “held in a place of confinement pursuant to arrest or order of a court”) (citing MO. REV. STAT. § 556.061(13)).

<sup>33</sup> N.J. STAT. ANN. 2C:4-4 (West 2020) (Emphasis added).

<sup>34</sup> N.J. STAT. ANN. 2C:4-8 (West 2020).

**punish.”**<sup>35</sup> In the absence of a conviction, following the same the reasoning as above, the persistent offender statute would not be applicable to individuals acquitted by reason of insanity and civilly committed.

- *Impact of Covid-19 and Confinement*

The Commission asked that Staff examine the impact of Covid-19 on the issue of confinement. The New Jersey Legislature passed S2519,<sup>36</sup> known as the Public Health Emergency Credit Bill, which requires public health emergency credits to be awarded to certain inmates and parolees during public health emergency.

This legislation allows adult and juvenile inmates receive additional credits from both the maximum and minimum term of the inmates’ sentences at the rate of six months for each month, or a portion of each month, served during the declared emergency with a maximum of 12 months. Inmates convicted of aggravated sexual assault, murder, and repetitive compulsive sex offenders are not eligible for the extra jail credits.

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<sup>35</sup> *State v. Krol*, 68 N.J. 236, 246 (App. Div. 1975). (Emphasis added) (citing *State v. Carter*, 64 N.J. 382, 401, (App. Div. 1974); *State v. Stern*, 40 N.J. Super. 291, 296, (App. Div.1956)).

<sup>36</sup> S.B. 2519, 2020 Leg., 1<sup>st</sup> Sess. (N.J. 2020) (codified P.L. 2020, c.111).