



NEW JERSEY LAW REVISION COMMISSION

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

February 18, 2021

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 Summary¹

In *State v. Clarity*,² 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."³

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.⁴

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 it.

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

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

³ *Id.* at 609.

⁴ 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, 2003.⁵ For the crime committed in Florida, Clarity was sentenced to a probationary term.⁶ After he returned to New Jersey, he was charged with, and plead guilty to, third degree child endangerment.⁷ It was alleged that this crime took place on August 17 and 18, 2013.⁸

At sentencing, the trial court determined that the defendant was a persistent offender pursuant to N.J.S. 2C:44-3(a).⁹ 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.¹⁰ As a result, he was sentenced to an eight-year extended prison term with four years of parole ineligibility.¹¹

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."¹²

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 other 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."¹³ 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."¹⁴ 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

⁵ *Clarity*, 454 N.J. Super. at 606.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 607.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 610.

¹⁴ *Id.*

initial conviction when performing the extended term eligibility calculation.¹⁵ The trial court also interpreted Clarity’s probation in Florida as “confinement.”

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.¹⁶ The Appellate Division consulted *Black’s Law Dictionary* and *Ballentine’s Law Dictionary* for a definition of the word “confinement.”¹⁷ *Black’s Law Dictionary* defines confinement as a state in which an individual is “deprive[d] ... of ... liberty.”¹⁸ *Ballentine’s Law Dictionary* defines it as being “place[d] in prison or jail.”¹⁹ In addition to secondary sources, the Court examined the definition of confinement used in other state’s persistent offender statutes.²⁰

The Court observed that of the fifty states, only Wisconsin uses the term “actual confinement” in its persistent offender statute.²¹ 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.”²² Missouri and Washington define “confinement” in their criminal codes.²³ Missouri defines a person as “in confinement” if they are “**held in a place of confinement pursuant to arrest or order of a court.**”²⁴ This statute specifically excludes **probation or parole, temporary or otherwise.**²⁵ The state of Washington defines “**total confinement**” as **confinement inside the physical boundaries of a [governmental] facility or institution**.”²⁶

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.’”²⁷ 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.”²⁸ The Appellate Division determined that “confinement” meant that a person is “imprisoned” or “restrained.”²⁹ In the absence of any legislative history, however, it is unclear

¹⁵ *Id.* at 608.

¹⁶ *Clarity*, 454 N.J. Super. at 609.

¹⁷ *Id.*

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

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

²⁰ *Clarity*, 454 N.J. Super. at 611.

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

²² *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)).

²³ *Id.* at 613 n.6.

²⁴ *Id.* (Emphasis added) (citing MO. REV. STAT. § 556.061(13)).

²⁵ *Id.*

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

²⁷ *Clarity*, 454 N.J. Super. at 609.

²⁸ *Id.*

²⁹ *Id.*

whether the Legislature intended the term confinement to include probation, parole, or home confinement.

Outreach

Staff sought comments from knowledgeable individuals and organizations, including: The County Prosecutors Association of New Jersey (CPANJ); the New Jersey Attorney General's Office; the New Jersey State Municipal Prosecutors Association; the Association of Criminal Defense Lawyers; the Office of Public Defender; the leadership of Criminal Practice Section of the New Jersey State Bar Association; New Jersey State League of Municipalities; New Jersey Association of Counties; each of the twenty-one County Prosecutors and several private practitioners.

• *In Support*

The proposed statutory modifications in the Appendix to this Report received the support of the CPANJ.³⁰ The CPANJ noted that a recent Appellate Division's decision echoed *Clarity's* holding - that probation does not constitute "confinement".³¹ Considering this development in case law, CPANJ found that it is pertinent to clarify the definition of the term confinement.³²

• *Modifications*

The CPANJ suggested further modification to the proposed statutory language.³³ In subsection (2), the stakeholder proposed that after the phrase "constrained pursuant to an order of a court" the commission add the language "for criminal behavior."³⁴ The inclusion of such a phrase is consistent with the holding in *Clarity* where the Court held that "[w]e are satisfied that the persistent-offender statute applies to confinement for criminal behavior, not the mere incident of an individual being held briefly in custody."³⁵

Additionally, in subsection (3), it was recommended that after the expression "temporary or otherwise" the Commission include the phrase "civil commitment, or sentences for Not Guilty by Reasons of Insanity."³⁶ The stakeholder reasoned that addition of this language would narrow the scope of the "types of confinement that would qualify a person for an extended term of imprisonment."³⁷

³⁰ Letter from Shaina Brenner, Assistant Sussex County Prosecutor, to John M. Cannel, Retired, Reviser of Statutes and Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Jan. 12, 2021) (on file with the NJLRC).

³¹ *Id.* Citing *State v. Hedgespeth*, 464 N.J. Super. 421.433 (App. Div. 2020).

³² *Id.*

³³ *Id.* at 2.

³⁴ *Id.*

³⁵ *Id.* Quoting *Clarity*, 454 N.J. Super. at 613 (emphasis added).

³⁶ *Id.*

³⁷ *Id.*

The language requested by CPANJ has been included in the Appendix and is shown italicized and in brackets. The language suggested by CPANJ appears consistent with the Commission’s effort to clarify the term “confinement” and addresses concerns previously raised by the Commission.

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.³⁸

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.

³⁸ 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 ~~striketrough~~, 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;

(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" means that a person is held constrained pursuant to an order of a court for criminal behavior, inside the physical boundaries of:

(A) pursuant to arrest or an order of the court; or, a penal facility or institution;

(B) inside the physical boundaries of: a correctional facility or institution;

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

(D) any other location from which the person is not free to depart.

(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.~~

(3) For purposes of this section, confinement does not include:

(A) probation or parole;

(B) civil commitment; or

(C) involuntary commitment resulting from a finding of not guilty by reason of insanity.

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 indicates the manner in which subsection (a) shall be applied as a persistent offender statute pertaining to the term “confinement.”

Subsection a. has been divided into two subsections in an effort to make the statute clearer.

Subsection a.(2) was added to N.J.S. 2C:44-3 to define the term “confinement” 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 the definitions of “confinement” found in the statutes of Missouri and Washington are consistent with the law of New Jersey. The Court specifically indicated that probation and parole are not considered confinement, and explained that in order to be considered confined, an individual must be removed from society, pursuant to an arrest or order of a court.” For ease of access and review, subsection (2) has been divided into subsections.

Comments received from the County Prosecutor Association of New Jersey (“CPANJ”)³⁹ and the Commission have been incorporated in the Appendix. Subsection a.(2)(D) was added to include individuals “confined to a house or a private facility” pursuant to an order of the court.

The term “arrest” was removed from subsection a.(2). The word “arrest” does not appear in the original statute. It was included based on the guidance provided by the court in *Clarity*,⁴⁰ but was removed after additional research and consideration because the term casts a very broad net, and includes custodial situations not associated with a criminal conviction or a determination by the court.

Subsection a.(3) was added to the Appendix at the request of the Commission during the November 19, 2020 meeting.

At the February 18, 2021 meeting, the Commission had no objections to the additional modification suggested by the CPANJ in their January 12, 2021 letter. The language provided by CPANJ has been included in subsection a.(2) and in subsections a.(3)(B) and (C).

³⁹ 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).

⁴⁰ *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)).

The phrase “temporary or otherwise” was removed from subsection a.(3)(A). The term does not appear in the original statute. The term, originally found in the Missouri statute that defines confinement, was adopted by the *Clarity* court. Additional research confirmed that the phrase “temporary or otherwise” is not used in conjunction with parole and probation in New Jersey. The term was removed from the proposed statutory draft to eliminate any ambiguity that the presence of the term would create.

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.⁴¹ 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.⁴² 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 punish.**”⁴³ 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 S2519,⁴⁴ 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 to 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.

⁴¹ N.J. STAT. ANN. 2C:4-4 (West 2020) (Emphasis added).

⁴² N.J. STAT. ANN. 2C:4-8 (West 2020).

⁴³ *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)).

⁴⁴ S.B. 2519, 2020 Leg., 1st Sess. (N.J. 2020) (codified P.L. 2020, c.111).