

To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Interpretation of the Household Exception to Inclusion in the Sex Offender Central Registry in N.J.S. 2C:7-13d.(2)
Date: February 6, 2023

Project Summary¹

In New Jersey, the registration records of individuals convicted of a qualifying sex offense are, with limited exception, made available to the public through an internet registry, pursuant to N.J.S. 2C:7-13.² If the “sole sex offense”³ that triggered the registration and notification requirements satisfies one of three exceptions contained in N.J.S. 2C:7-13d, however, the individual’s registration record “shall not be made available to the public on the Internet registry.”⁴

A “sole sex offense” is defined in N.J.S. 2C:7-13d., as “a single conviction . . . for a sex offense which involved no more than one victim, no more than one occurrence or, in the case of an offense which meets the criteria of [the household/incest exception], members of no more than a single household.”⁵ The statutory “household/incest” exception applies to offenders related by at least third-degree blood or affinity to the victim.⁶

In re N.B. is a case in which the New Jersey Supreme Court considered whether the requirement that a “sole sex offense . . . involved no more than one victim, no more than one occurrence” applies to an offense qualifying under the “household/incest” exception.⁷ The defendant in that case pled guilty to one count of sexual contact with his minor half-sister, but admitted during his plea hearing to “several acts of sexual contact” with her.⁸

Based on the decision to “separately address[] the household/incest exception in the final clause of N.J.S. 2C:7-13(d),” the *N.B.* Court found that the Legislature “intended [the household/incest exception] to be less restrictive than the other two exceptions.”⁹ The Court “conclude[d] that the Legislature intended the household/incest exception to apply to a registrant

¹ This Memorandum focuses on the Court’s interpretation of N.J.S. 2C:7-13d. as discussed in *In re N.B.*, 222 N.J. 87 (2015). This issue was brought to Staff’s attention after a review of *State v. H.C.*, 2021 WL 1713300 (N.J. Super. Ct. App. Div. Apr. 30, 2021), which relied on the reasoning and holding of *In re N.B.* to determine whether a similarly situated defendant qualified under the household/incest exception in subsection (d)(2) of N.J.S. 2C:7-13. See discussion *infra* at pp. 4-5.

² N.J. STAT. ANN. § 2C:7-13 (West 2022).

³ N.J. STAT. ANN. § 2C:7-13d. (defining “sole sex offense” as “a single conviction . . . for a sex offense which involved no more than one victim, no more than one occurrence or, in the case of an offense which meets the criteria of [the household/incest exception], members of no more than a single household”).

⁴ N.J. STAT. ANN. § 2C:7-13d.

⁵ N.J. STAT. ANN. § 2C:7-13d.

⁶ N.J. STAT. ANN. § 2C:7-13d.(2) (including those who were “a resource family parent, a guardian, or stood in loco parentis within the household. . .”).

⁷ *In re N.B.*, 222 N.J. at 90 (“Constru[ing the statutory definition of “sole sex offense”] in a manner that gives meaning to all of the words chosen by the Legislature, that provision indicates that N.J.S.A. 2C:7-13(d)(2) applies to the conviction here.”).

⁸ *In re N.B.*, 222 N.J. at 90.

⁹ *Id.* at 100.

[like the defendant] whose single conviction . . . involves more than one instance of sexual contact with a single victim who is within his or her household.”¹⁰

During the July 2022 Commission meeting, Staff was directed to conduct outreach to “practitioners in this area of the law” to ascertain whether “there is confusion that could be clarified by further work in this area.”¹¹ Based on the outreach conducted to criminal law practitioners, there is support for proceeding with additional outreach and research in this area in order to clarify the scope of the household/incest exception in N.J.S. 2C:7-13.

Relevant Statute

N.J.S. 2C:7-13 provides in relevant part:

* * *

- d. The individual registration record of an offender whose risk of re-offense has been determined to be moderate and for whom the court has ordered notification in accordance with paragraph (2) of subsection c. of section 3 of P.L.1994, c.128 (C.2C:7-8) shall not be made available to the public on the Internet registry if the sole sex offense committed by the offender which renders him subject to the requirements of P.L.1994, c.133 (C.2C:7-1 et seq.) is one of the following:
 - (1) An adjudication of delinquency for any sex offense as defined in subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2);
 - (2) A conviction or acquittal by reason of insanity for a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3 under circumstances in which the offender was related to the victim by blood or affinity to the third degree or was a resource family parent, a guardian, or stood in loco parentis within the household; or
 - (3) A conviction or acquittal by reason of insanity for a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3 in any case in which the victim assented to the commission of the offense but by reason of age was not capable of giving lawful consent.

For purposes of this subsection, "sole sex offense" means a single conviction, adjudication of guilty or acquittal by reason of insanity, as the case may be, for a sex offense which involved no more than one victim, no more than one occurrence

¹⁰ *Id.* at 102.

¹¹ N.J. Law Revision Comm’n, *Minutes NJLRC Meeting*, at *7-8, July 21, 2022, www.njlrc.org (last visited Feb. 1, 2023) (“Commissioner Long noted that it would be helpful to hear from practitioners in this area of law on this issue, and Chairman Gagliardi agreed. Commissioner Bell stated that because the issue is not clear, the Commission should reach out to interested parties to determine if there is confusion that could be clarified by further work in this area.”) [hereinafter “July 2022 Minutes NJLRC Meeting”].

or, in the case of an offense which meets the criteria of paragraph (2) of this subsection, members of no more than a single household.¹²

Background

In *N.B.*, the New Jersey Supreme Court addressed whether the defendant in *N.B.*, who was convicted of one count of sexual contact with a minor and admitted during his plea hearing to multiple instances of sexual contact with the victim, was eligible for the household/incest exception in N.J.S. 2C:7-13d.(2).¹³ Following allegations that he sexually assaulted his minor half-sister while they lived in the same household, the nineteen-year-old defendant was indicted on one count of first-degree aggravated sexual assault, two counts of second-degree sexual assault and one count of third-degree endangering a child.¹⁴

Pursuant to a plea agreement “dispos[ing] of all charges in the indictment, as well as any potential charges” arising from the defendant’s sexual abuse of his half-sister before he turned eighteen, the defendant pled guilty to one count of second-degree sexual assault.¹⁵ At the plea hearing, the trial court was “advised . . . that N.B. was not contesting the allegations concerning incidents that occurred when he was a juvenile,” and the defendant “admitted on the record that he had sexual contact with the victim on certain dates . . . when [the defendant] was a juvenile.”¹⁶

Following his conviction and sentencing, the defendant was designated a Tier 2 offender, “presenting a moderate risk of re-offense.”¹⁷ The trial court accepted the State’s argument that the defendant’s admission “to multiple offenses over several years” disqualified the defendant from the household/incest exception.¹⁸

The Appellate Division affirmed the trial court’s interpretation of the statutory language, concluding that “N.B.’s multiple offenses against a single victim at different points in time precluded the application of the household/incest exception.”¹⁹ The defendant appealed, and the Supreme Court granted certification.²⁰

Analysis

- *In re N.B.*

To determine the applicability of the household/incest exception to the defendant in *N.B.*, the Supreme Court analyzed the statutory definition of “sole sex offense.”²¹ The Court found that “the language of the original version of [N.J.S. 2C:7-13d.] is subject to conflicting interpretations,”

¹² N.J. STAT. ANN. § 2C:7-13 (emphasis added).

¹³ *In re N.B.*, 222 N.J. at 91.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (“N.B. did not admit to any offense involving a victim other than his half-sister.”).

¹⁷ *Id.* at 92.

¹⁸ *Id.*

¹⁹ *Id.* at 93.

²⁰ *Id.*

²¹ *Id.* at 97.

but that the “2004 amendment defining sole sex offense . . . provides more compelling evidence of the Legislature’s intent.”²²

The Court explained that the second clause of the 2004 amendment “distinguishes between the exceptions prescribed by N.J.S.A. 2C:7-13(d)(1) and (d)(3), and the household/incest exception.”²³ The second clause in the definition of “sole sex offense . . . excludes an offender who otherwise meets the requirements of [the exceptions in (d)(1) and (d)(3)] if his or her offense involves more than one victim or more than one occurrence.”²⁴ The Court continued that “[b]y contrast, an offender in the household/incest category . . . may qualify for the exception in a broader category of cases: those which involve no more than one victim, no more than one occurrence *or* . . . members of no more than a single household.”²⁵

Concluding that “[t]he statutory text suggests that [the household/incest exception] is intended to be less restrictive than the two other exceptions prescribed by N.J.S.A. 2C:7-13d.,” the *N.B.* Court rejected the interpretation that “none of the statute’s three exceptions are available to an offender whose offenses involved more than one victim and one occurrence.”²⁶ To do otherwise “would contravene the canon of statutory construction that directs courts to interpret laws so as to give meaning to all of the Legislature’s statutory text.”²⁷

Applying this reasoning to the facts in *N.B.*, the Supreme Court held that “the Legislature intended the household/incest exception to apply to a registrant [like *N.B.*] whose single conviction otherwise meets the requirements of [that section] and involves more than one instance of sexual contact with a single victim who is within his . . . household.”²⁸

- *State v. H.C.*

Six years after the decision in *N.B.*, the Appellate Division addressed the applicability of the household/incest exception in *State v. H.C.*²⁹ In *H.C.*, the defendant pled guilty to one count of fourth-degree criminal sexual contact.³⁰ The charges against the defendant stemmed from a police report by his twenty-four-year-old niece that he had sexually abused her when she was between six and twelve years old.³¹ During the investigation, the defendant and his niece “discussed their sexual activities as well as defendant’s sexual conduct with [her] brother . . . and

²² *Id.* at 99.

²³ *Id.*

²⁴ *Id.* at 100.

²⁵ *Id.*

²⁶ *N.B.*, 222 N.J. at 100 - 01.

²⁷ 222 N.J. at 101 (“[i]f, as the State contends, the Legislature intended that none of the three exceptions set forth in N.J.S.A. 2C:7-13(d) are available to a registrant whose sex offense involves more than one victim or more than one occurrence, then it would have left out several of the words that appear in the statute”).

²⁸ *Id.* at 102. The *N.B.* court explicitly declined to “address whether an offender with a single conviction premised upon multiple admitted acts upon multiple victims, all within the household” would be eligible for the household/incest exception in N.J.S. 2C:7-13d.(2)). *Id.* at 102, n.7.

²⁹ 2021 WL 1713300 (N.J. Super. Ct. App. Div. Apr. 30, 2021).

³⁰ *Id.* at *1.

³¹ *Id.*

. . . sister” in a recorded telephone call.³² The defendant and his nieces and nephew did not live in the same household at the time.³³

The trial court found that the “alleged sexual abuse of [the defendant’s other niece and nephew] serves as a basis for more than a ‘sole sex offense’ under N.J.S.A. 2C:7-13 to disqualify him from the household/incest exception.”³⁴ The Appellate Division disagreed with the trial court’s basis for declining to apply the household/incest exception, finding instead that because the defendant “was not convicted of those offenses . . . he only had a sole sex offense.”³⁵

The Appellate Division relied on the Supreme Court’s interpretation of N.J.S. 2C:7-13d.(2) in *In Re N.B.*, and drew a parallel between the two fact patterns.³⁶ The *H.C.* Court described the statutory analysis in *N.B.* as addressing an ambiguity arising from the lack of either “an ‘and’ or an ‘or’ between ‘no more than one victim’ and ‘no more than one occurrence’” in the statutory definition of “sole sex offense.”³⁷ Citing the holding in *N.B.*, the *H.C.* Court held the household/incest exception inapplicable because the “defendant was not a member of the household of the victim.”³⁸

Despite the clarification of N.J.S. 2C:7-13d. by the *N.B.* Court, the meaning of “sole sex offense” in the context of the household/incest exception still may not be sufficiently clear to prevent litigation regarding the scope of the exception.

Outreach

Staff conducted targeted outreach to determine whether modifications to clarify the scope of the household exception to the internet registry requirement would be of assistance to practitioners.³⁹ Outreach was conducted to the New Jersey Public Defender’s Office; the New Jersey County Prosecutor’s Association; James Maynard, Esq., who represented the defendant-appellant in *N.B.*; Joel Silberman, Esq., who represented the defendant-appellant in *H.C.*; and other private criminal defense attorneys.

James Maynard, Esq., counsel for *N.B.*, expressed support for the Commission’s work in this area if there continues to be litigation with respect to the issue raised by the project.⁴⁰ He stated

³² *Id.*

³³ *Id.* at *1.

³⁴ *Id.* at *3.

³⁵ *Id.* at *3 (citing *Hayes v. Delamotte*, 231 N.J. 373, 387 (2018) (applying the “well-settled [principle] that appeals are taken from orders and . . . not . . . opinions,” and that orders may be affirmed for reasons different from those set forth by the trial court)).

³⁶ *Id.* (“Like the registrant in *N.B.*, defendant pled guilty to one count of a sexual offense but admitted to multiple acts.”).

³⁷ *Id.* at *2.

³⁸ *Id.* at *3.

³⁹ *July 2022 Minutes NJLRC Meeting, supra* note 9, at *7-8.

⁴⁰ Memo re: phone call between James H. Maynard, Esq., Maynard Law Office, LLC, and Whitney G. Schlimbach, Counsel, NJLRC (Jan. 20, 2023) [on file with NJLRC].

In addition to *State v. H.C.*, *see supra* note 1, which is the most recent Appellate Division decision to address the household/incest exception, there were two Appellate Division decisions issued in 2020 analyzing whether a defendant falls within the scope of the household/incest exception. *See Matter of J.P.*, 2020 WL 2529522, at *3 (N.J. Super. Ct. App. Div. May 19, 2020) (finding it “cannot be reasonably argued, however, that having pled guilty to two separate

that the household/incest exception in N.J.S. 2C:7-13d. has not been well understood or well litigated.⁴¹ In Mr. Maynard’s opinion, the language in the statute is not as clear as it should be, given the holding in *N.B.*⁴²

The New Jersey Public Defender’s Office (“NJPD”) also replied to Staff’s outreach, explaining that it does “not believe that statutory revisions need to be made to clarify the scope of the household/incest exception along the lines as discussed in your July 11, 2022, memorandum.”⁴³ The NJPD explained that “[t]he vast majority – if not all at this point – of Law Division judges extend the logic of *N.B.* to cases in which there are more than one household victim.”⁴⁴

The NJPD, however, raised additional issues related to the household/incest exception that warrant “revisions to provide clarity and avoid future litigation.”⁴⁵ The NJPD said that “[t]he best example of this would [be] clarifying whether multiple counts in the same Judgment of Conviction is considered a ‘single conviction’ or multiple [] convictions,” and noted that “[t]here is variance throughout the state on this issue.”⁴⁶ The NJPD concluded that “the statutory household/incest exception is in serious need of revision . . . [b]ut . . . not for the reasons currently being explored by the Commission.”⁴⁷

To this time, Staff has not received any additional response to the outreach conducted.

Pending Bills

offenses, each involving a different victim, defendant entered a guilty plea to a ‘single conviction,’ or is guilty of committing only a ‘sole sex offense.’”); *Matter of M.H.*, 2020 WL 2529516, at *4 (N.J. Super. Ct. App. Div. May 19, 2020) (applying the reasoning of *N.B.* where a defendant was convicted of one count against one victim but was charged with numerous counts against two victims).

⁴¹ *Id.*

⁴² *Id.*

⁴³ E-mail from Fletcher Duddy, Deputy Public Defender, Special Litigation Unit, New Jersey Public Defender’s Office, to Whitney G. Schlimbach, Counsel, NJLRC, at *1 (Feb. 3, 2023, 11:04 AM EST) (indicating that “the trial court’s analysis in *H.C.* with respect to whether the registrant had a sole sex offense was something of an outlier.”) (hereinafter “Duddy Email”) [on file with NJLRC].

⁴⁴ *Id.*

⁴⁵ See Duddy Email, *supra* note 1, at *1. The third issue raised by the NJPD relates to its position that “there appears to be no legitimate purpose or policy behind only permitting defendants convicted of sexual assault and sexual contact to get the benefit of the exception, and not those convicted of Endangering the Welfare of a Child.” *Id.*

⁴⁶ *Id.* The NJPD generously offered to provide further information, including examples of conflicting trial court opinions in this area, if the Commission pursues this avenue. *See id.*

⁴⁷ *Id.*

There are two bills pending in the Legislature that seek to amend N.J.S. 2C:7-13. Neither bill addresses the definition of “sole sex offense.”^{48 49}

Conclusion

The responses to the outreach conducted by Staff provide some insight into the positions of practitioners regarding the benefit of modifications to N.J.S. 2C:7-13.

At this juncture, Staff requests guidance from the Commission regarding whether to continue work in this area, and if so, the scope of that work.

⁴⁸ A.B. 2496, 220th Leg., 2022 Sess. (N.J. 2022) (identical to S.B. 1844) (proposes conforming the New Jersey sex offender registration system with the federal Sex Offender Registration and Notification Act). A version of this bill has been introduced in each Legislative session since 2010. *See* A.B. 3252, 219th Leg., 2020 Sess. (N.J. 2020) (identical to S.B. 2111); A.B. 3852, 218th Leg., 2018 Sess. (N.J. 2018) (identical to S.B. 1174); S.B. 1716, 217th Leg., 2016 Sess. (N.J. 2016); S.B. 1702, 216th Leg., 2014 Sess. (N.J. 2014) (identical to A.B. 3832); A.B. 764, 215th Leg., 2012 Sess. (N.J. 2012) (identical to S.B. 850 and A.B. 2952); A.B. 4225, 214th Leg., 2011 Sess. (N.J. 2011) (identical to S.B. 2993).

⁴⁹ A.B. 3456, 220th Leg., 2022 Sess. (N.J. 2022) (proposes requiring publication of additional identifying information of eligible sex offenders).