

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Dep. Dir.
Re: Impact of wrongful or mistaken additional incarceration upon parole supervision as discussed in *State v. Njango*, 247 N.J. 533 (2021).
Date: May 09, 2022

MEMORANDUM

Project Summary

In New Jersey, the term of parole supervision for persons who have been convicted of certain violent crimes begins upon the completion of the sentence of incarceration imposed by the Court.¹ At the time that the statute was enacted, it did not “contemplate whether a defendant wrongfully or mistakenly compelled to remain in prison beyond [their] prescribed sentence should be mandated to serve the entire period of parole supervision without a remedy.”²

In *State v. Njango*, the New Jersey Supreme Court considered whether the period of parole supervision a defendant was required to serve under the No Early Release Act (NERA) should be reduced where the defendant’s time in prison exceeded the permissible custodial term authorized by his sentence.³ The Court determined that a defendant who is kept in prison beyond their release date, without credit for such time, would serve more time in custody than is authorized by their sentence.⁴ Therefore, the Court held that in such instances the excess time that is erroneously served in prison must be credited to reduce the period of parole supervision.⁵

Statute Considered

N.J.S. 2C:43-7.2 provides, in relevant part:

a. A court imposing a sentence of incarceration for a crime of the first or second degree enumerated in subsection d. of this section shall fix a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole.

* * *

c. Notwithstanding any other provision of law to the contrary and in addition to any other sentence imposed, a court imposing a minimum period of parole ineligibility of 85 percent of the sentence pursuant to this section shall also impose a five-year term of parole supervision if the defendant is being sentenced for a crime of the first degree, or a three-year term of parole supervision if the defendant is being sentenced for a crime of the second degree. The term of parole supervision shall

¹ N.J. STAT. ANN. § 2C:43-7.2(a) and (c) (West 2022) (providing that a defendant who is serving a sentence of incarceration for another crime at the same time they complete the sentence of incarceration under this statute shall begin their parole supervision immediately upon their release from incarceration).

² *State v. Njango*, 247 N.J. 533, 548 (2021).

³ *Njango*, 247 N.J. at 537.

⁴ *Id.*

⁵ *Id.*

commence upon the completion of the sentence of incarceration imposed by the court pursuant to subsection a. of this section unless the defendant is serving a sentence of incarceration for another crime at the time he completes the sentence of incarceration imposed pursuant to subsection a., in which case the term of parole supervision shall commence immediately upon the defendant's release from incarceration. During the term of parole supervision[,] the defendant shall remain in release status in the community in the legal custody of the Commissioner of the Department of Corrections and shall be supervised by the State Parole Board as if on parole and shall be subject to the provisions and conditions of section 3 of P.L.1997, c. 117 (C.30:4-123.51b).

Background⁶

On September 24, 2007, Paulino Njango (Defendant), pled guilty to certain violent crimes that were perpetrated against his ex-mother-in-law in June of 2006.⁷ The Defendant also pled guilty to violent crimes that were committed against his ex-wife in 2007 while he was on bail for the charges involving his ex-mother-in law.⁸

On November 30, 2007, the Defendant was sentenced to concurrent, eighteen-year terms of imprisonment, subject to NERA, on the attempted murder charges contained in the 2006 and 2007 indictments and on the kidnapping charge in the 2006 indictment.⁹ This sentence rendered the Defendant parole ineligible until he completed eighty-five percent of that sentence.¹⁰ The Court further ordered the Defendant to serve a five-year term of parole supervision as part of that NERA sentence.¹¹ The parole supervision portion of his sentence was scheduled to commence “as soon as [he] complete[d] the sentence of incarceration.”¹² The overall sentence that Njango was required to serve was “an eighteen-year NERA term with a five-year period of parole supervision.”¹³

While incarcerated, the defendant filed multiple petitions with the court. First, he filed an unsuccessful petition for post-conviction relief (PCR) claiming that he was “under the influence of prescription medication at the time of his plea” and ineffectively assisted by counsel.¹⁴ While the PCR petition was pending, he filed a motion to correct his illegal sentence and advanced what the court characterized as the “surprising argument” that he should have received consecutive sentences because he committed the offenses against his ex-wife while he was on bail for the

⁶ The “strange and tortuous procedural path” of this case is set forth herein to provide the reader with a clear understanding of how the Defendant remained in custody beyond his prescribed sentence. *Id.* at 538.

⁷ *Id.*

⁸ *Id.* The crimes to which the defendant pled guilty did not arise from the same events and were set forth in two separate indictments.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 538-39. N.J. STAT. ANN. § 2C:43-7.2(c). The defendant was also sentenced to additional incarceration which does not impact the upon the instant analysis and has been omitted from this Memorandum.

¹³ *Njango*, 247 N.J. at 539.

¹⁴ *Id.*

offenses he committed against his ex-mother-in-law.¹⁵ The defendant's motion was rejected by the trial court, which found that the sentence was imposed pursuant to a plea agreement.¹⁶ The Appellate Division, remanded the matter to the sentencing court to "either justify the imposition of concurrent sentences or vacate the plea agreement and reinstate charges."¹⁷

In 2015, before the trial court could address the defendant's prior sentence, the State and the Defendant entered into a superseding plea agreement.¹⁸ Under the terms of the "new" plea agreement, the Defendant's aggregate sentence was an "eighteen-year term, with a fifteen-year, three-month, and eighteen-day parole disqualifier pursuant to NERA."¹⁹ In addition, the Defendant was also subject to an eight-year period of parole supervision after completing the custodial portion of his sentence.²⁰ The sentencing court rejected the Defendant's request "to credit him for the time served on each offense during the period the sentences on those offenses ran concurrently."²¹ The court applied "2,692 days (approximately seven-and-a half years) of prior service credits to the front-end of his aggregate eighteen year sentence."²²

The Appellate Division reversed the "trial court's decision not to award prior service credit on the concurrent sentences imposed on the two indictments at the first sentencing."²³ The Appellate Division reasoned that "failing to award [the Defendant] prior service credit from the two vacated concurrent sentences to both of the resentenced consecutive terms would violate [his] Fifth Amendment rights."²⁴ The New Jersey Supreme Court denied the Defendant's petition for certification.²⁵ The trial court subsequently amended the judgments of conviction and awarded the Defendant his service credits on both indictments.²⁶ The defendant was released from prison the next day.²⁷

In a PCR petition, the Defendant proffered that "had he received the proper number of service credits at the time of his second sentencing, he would have been immediately released from prison."²⁸ As a result of the second sentencing court's error he served an additional one year and seven months in prison.²⁹ The defendant, therefore, sought to have the period of parole supervision

¹⁵ *Id.* N.J. STAT. ANN. § 2C:44-5(h) (providing that when a defendant commits an offense while released on bail for a prior offense, sentences for imprisonment shall run consecutively unless the court finds that the imposition of such sentences would be a serious injustice).

¹⁶ *Njango*, 247 N.J. at 539.

¹⁷ *Id.*

¹⁸ *Id.* at 540. N.J. STAT. ANN. § 2C:43-7.2(c).

¹⁹ *Id.* at 540.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* See also note 1 (explaining that service credits are awarded to a defendant for time served on a custodial sentence following the entry of a judgment of conviction and that jail credits are awarded to a defendant for time served in custody prior to the entry of a judgment of conviction – here 660 days).

²³ *Id.*

²⁴ *Id.* at 541.

²⁵ *Id.* 230 N.J. 363 (2017).

²⁶ *Id.*

²⁷ *Id.* The New Jersey Supreme Court denied the State's motion for reconsideration of the order denying certification.

²⁸ *Id.* at 541.

²⁹ *Id.*

reduced by the time he served in prison beyond his prescribed sentence.³⁰ The PCR court concluded that the reality that, “the defendant had to spend more time in custody is unfortunate, but it is sometimes the nature of appeals. And that’s not time that can be given back.”³¹

The Appellate Division, determined that the period of parole supervision is mandatory and the Legislature’s objective in requiring such supervision was to protect the public from violent offenders who have been released from prison.³² In affirming the PCR court, the Appellate Division reasoned that allowing a defendant to use prior service credit to reduce the amount of mandatory parole supervision time on a NERA offense would subvert the Legislative purpose in enacting mandatory parole supervision.³³

The New Jersey Supreme Court granted the Defendant’s petition for certification.³⁴

Analysis

Pursuant to subsection c. of N.J.S. 2C:43:7.2, a defendant’s NERA parole supervision begins “upon the completion of the sentence of incarceration imposed by the court. . . .” The statute further provides that “during the term of parole supervision the defendant shall remain in release status in the community in the legal custody of the Commissioner of the Department of Corrections and is supervised by the Division of Parole of the State Parole board as if on parole.”³⁵ The parole board is vested with the authority to revoke a defendant’s release status and return the defendant to custody for the remainder of the term or until eligible for release.³⁶

The *Njango* Court noted that in New Jersey parole is “in legal effect imprisonment” and therefore a punishment.³⁷ The Court reasoned that if the Defendant does not receive his service credits for the excess time that he was in prison, then he will technically remain in custody for one-year and seven months beyond the sentence imposed by the trial court.³⁸

The Court applied the “fundamental fairness doctrine” to the Defendant’s case and opined that “[c]learly the Legislature did not contemplate whether a defendant wrongly or mistakenly compelled to remain in prison beyond his prescribed sentence should be mandated to serve the entire period of parole supervision without a remedy.”³⁹ In reducing the Defendant’s parole supervision by the excess time that he served in prison, the Court “conform[ed] NERA to [the] State Constitution in a way that the legislature would likely have intended.”⁴⁰

³⁰ *Id.* In the alternative, the defendant argued that he should be permitted to withdraw his plea.

³¹ *Id.* at 542.

³² *Id.*

³³ *Id.*

³⁴ *Id.* 243 N.J. 264 (2020).

³⁵ *Njango*, 247 N.J. at 547. N.J. STAT. ANN. § 30:4-123.51b(a).

³⁶ N.J. STAT. ANN. § 30:4-123.51b(a).

³⁷ *Njango*, 247 N.J. at 547 (internal citations omitted).

³⁸ *Njango*, 247 N.J. at 548.

³⁹ *Id.* at 548.

⁴⁰ *Id.* at 550.

The decision of the Appellate Division was reversed, and the matter remanded to “the New Jersey State Parole Board so that they could calculate the excess time that the Defendant served in prison and credit that time toward the remaining period of his parole supervision.”⁴¹

Pending Legislation

To this date, there is no legislation currently pending regarding N.J.S. 43-7.2 that would modify the statute in the manner set forth by the Court in *Njango*.

Conclusion

Staff requests authorization to conduct additional research to determine whether N.J.S. 43-7.2 would benefit from modification to address the constitutional infirmity discussed in *State v. Njango*.

⁴¹ *Id.* at 551.