NEW JERSEY LAW REVISION COMMISSION

Tentative Report Addressing the Impact of Wrongful or Mistaken Additional Incarceration Upon Parole Supervision Pursuant to N.J.S. 2C:43-7.2

July 21, 2022

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 **November 07, 2022.**

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:

Samuel M. Silver, Deputy Director
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: sms@njlrc.org
Web site: http://www.njlrc.org

Project Summary

In New Jersey, the term of parole supervision for persons who were 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 the 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]

The Commission recommends the modification of N.J.S. 2C:43-7.2 to ameliorate the constitutional infirmity discussed by the Court in *State v. Njango* and to make the statute easier to read and more accessible.

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 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

[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] *Id.* at 537.
[4] *Id.*
[5] *Id.*

> 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).

Background[6]

On September 24, 2007, Paulino Njango (Defendant), pled guilty to certain violent crimes committed 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 released 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] The Defendant was parole ineligible until he completed eighty-five percent of his sentence.[10] The Court further ordered the Defendant to serve a five-year term of parole supervision as part of the NERA sentence.[11] The parole supervision portion of his sentence was to commence "as soon as [he] complete[d] the sentence of incarceration."[12] The overall sentence 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 offenses he committed against his ex-mother-in-law.[15] The defendant's motion was rejected by the

---

[6] The "strange and tortuous procedural path" of this case is included to explain 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.*
[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).

trial court, which found that the sentence was imposed pursuant to a plea agreement.[16] The Appellate Division, however, 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, consecutive sentence 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] 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] It 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] He claimed that, as a result of the second sentencing court's error, he served an additional one year and seven months in prison.[29] The Defendant sought to have the period of parole supervision reduced by the time he served in prison beyond his prescribed sentence.[30] The

[16] *Njango*, 247 N.J. at 539.
[17] *Id.*
[18] *Id.* at 540. N.J. STAT. ANN. § 2C:43-7.2(c).
[19] *Njango* 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.*
[30] *Id.* In the alternative, the defendant argued that he should be permitted to withdraw his plea.

PCR court said "[T]hat 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 punishment."[37] The Court reasoned that if the Defendant did 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]

---

[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] *Id.* 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 to calculate the excess time Njango served in prison and to credit that time toward the remaining period of his parole supervision."[41]

Pending Bills

To this date, there are no bills currently pending regarding N.J.S. 43-7.2 that would modify the statute to address the issue identified by the Court in *State v. Njango*.

Conclusion

The Commission recommends the modification of N.J.S. 2C:43-7.2 to eliminate the constitutional issue considered by the Court in *State v. Njango*, and to make the statute more accessible.

[41] *Id.* at 551.

Appendix

The relevant text of **N.J.S. 2C:43-7.2**, including proposed modifications (proposed additions are shown with underscore, and proposed deletions with ~~strikethrough~~), follows:

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. (1) 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:

(A) impose a five-year term of parole supervision if the defendant is being sentenced for a crime of the first degree~~,~~; or

(B) a three-year term of parole supervision if the defendant is being sentenced for a crime of the second degree.

(2) The term of parole supervision shall:

(A) 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~~.~~ and

(B) be reduced by any excess time the defendant was compelled to remain in prison beyond the prescribed sentence, through no fault of their own.[42]

(3) During the term of parole supervision, the defendant shall:

(A) remain in release status in the community and in the legal custody of the Commissioner of the Department of Corrections; ~~and shall~~

(B) be supervised by the State Parole Board as if on parole; and ~~shall~~

(C) be subject to the provisions and conditions of section 3 of P.L.1997, c. 117 (C.30:4-123.51b).

[42] *Id.* at 548 (noting 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.").

Comments

Consistent with contemporary legislative drafting practices, the proposed modifications are intended to promote accessibility and eliminate the constitutional issue discussed by the Court in *State v. Njango*.[43]

The proposed modification set forth in subsection c.(2)(B) is based, in part, upon the language of the Court in *State v. Njango*.[44] The Court's explicit references to individuals who have been erroneously detained permeate the opinion. The Court opined that in drafting the original statute "[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."[45] Additionally, the Court noted that "the objective of parole supervision -- to protect the public from the risk from violent offenders -- was certainly satisfied when [a defendant is] mistakenly or erroneously incarcerated beyond the prescribed time for [their] release."[46]

The proposed language is also based in part upon the goal of providing day-for-day credit to individuals who have been held in prison beyond their term of incarceration - through no fault of their own.[47] To accomplish this, the proposed language does not make a direct reference to whether a defendant was wrongfully or mistakenly compelled to remain in prison.[48] Rather, the language explicit provides that the subsection applies to those who have been compelled to remain in prison beyond the prescribed sentence - through no fault of their own.[49]

[43] 247 N.J. 533 (2021).
[44] *Id.*
[45] *Id.* at 548.
[46] *Id.* at 550.
[47] N.J. LAW REVISION COMM'N, 'Impact of Wrongful or Mistaken Additional Incarceration Upon Parole Supervision Pursuant to N.J.S. 2C:43-7.2,' *Minutes of NJLRC Meeting 21 July 2022*, at *3, Newark, New Jersey, www.njlrc.org (last visited Sept. 07, 2022).
[48] *Id.*
[49] *Id.*