

To: Commission
From: Vito J. Petitti
Re: Multiple Extended-Term Sentences
Date: September 8, 2014

Since the release of the Tentative Report, dated May 23, 2013, several commenters provided feedback, some of it substantive and in opposition to the draft language presented in the Tentative Report.

Considering the passage of time since the Commission last considered or discussed this project, I have summarized the key points raised in the Tentative Report and provided the minutes from the May 23, 2013, and September 20, 2012, Commission meetings.

Tentative Report of May 23, 2013

In *State v. Hudson*,¹ the New Jersey Supreme Court considered whether a defendant charged with multiple offenses arising out of assaults upon two victims was properly sentenced to extended terms in two separate proceedings, with the second conviction and sentence stemming from offenses committed before the first extended term had been imposed.

While N.J.S. 2C:43-7 provides that a person convicted of a crime shall be sentenced to an extended term of imprisonment in certain designated cases, N.J.S. 2C:44-5 places restrictions on the imposition of *multiple* extended-term sentences. Subsections a. and b. of N.J.S. 2C:44-5 provide the following:

a. Sentences of imprisonment for more than one offense. When multiple sentences of imprisonment are imposed on a defendant for more than one offense, including an offense for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence, except that:

(1) The aggregate of consecutive terms to a county institution shall not exceed 18 months; and

(2) Not more than one sentence for an extended term shall be imposed.

There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses.

b. Sentences of imprisonment imposed at different times. When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence,

¹ *State v. Hudson*, 209 N.J. 513 (2012).

other than an offense committed while in custody:

(1) The multiple sentences imposed shall **so far as possible** [emphasis added] conform to subsection a. of this section; and

(2) Whether the court determines that the terms shall run concurrently or consecutively, the defendant shall be credited with time served in imprisonment on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served; and

(3) When a new sentence is imposed on a prisoner who is on parole, the balance of the parole term on the former sentence shall not be deemed to run during the period of the new imprisonment unless the court determines otherwise at the time of sentencing.

Applying N.J.S. 2C:44-5 subsections a. and b. to the facts, the Court in *Hudson* held that the “plain language” of subsection b.(1) bars imposition of “a sentence comprised of more than one extended term for the conviction of an offense which was committed prior to the imposition of the defendant's current extended-term sentence but for which defendant is being sentenced after the imposition of the first extended sentence.”²

The Court stated that: “[B]ased on the Legislature's express incorporation in subsection b. of the prohibitions enumerated in subsection a. and its direction that they be given effect ‘so far as possible,’ we conclude that those limitations must be given effect and their application excused only when it is not possible to apply subsection a’s limitations and parameters. That circumstance is not present here.”³

According to the Court, such a circumstance would be present “if the offense for which a defendant (who is already serving a discretionary extended term) is being sentenced, second in time, is one that is subject to a mandatory extended term”⁴ or if the situation involved a cold case and the State did not know, at the time of a first trial and sentencing, of a defendant’s connection with another offense and could not “combine, or consciously coordinate, sentencing in such circumstances in order to fashion an appropriate overall sentence for such multiple offenses.”⁵

Justice Patterson argued in dissent that the Legislature’s choice of language in subsection b.(1) indicates an intent to “leave sentencing judges an essential modicum of discretion to ensure that a given sentence will satisfy the Legislature’s overarching sentencing goals.”⁶

² 209 N.J. at 517.

³ *Id.* at 518.

⁴ *Id.* at 535.

⁵ *Id.* at 533.

⁶ *Id.* at 544.

The question posed by this statute when a court contemplates imposition of a second extended term of imprisonment for an offense committed before the first extended term sentence was imposed is this: What does “so far as possible” mean? In the words of the Court, the

construction given to the qualifying “so far as possible” language does not render the qualifier superfluous. **The qualifier would come into application, certainly, if the offense** for which a defendant (who is already serving a discretionary extended term) is being sentenced, second in time, **is one that is subject to a mandatory extended term.** See, e.g., *N.J.S.A. 2C:43–6(f)*. In such circumstances, the law requiring the mandatory extended term would override the more general sentencing direction contained in *N.J.S.A. 2C:44–5(b)(1)*. See *Trinity Cemetery Ass'n v. Twp. of Wall*, 170 N.J. 39, 46... (2001) (“[I]t is well-established that a specific statutory provision dealing with a particular subject prevails over a general statute on the same subject...**Other potential extenuating examples are possible to envision**, subject to further case development. See, e.g., *supra*, Part IV. A, at 532–33...(discussing “cold case” example as not fitting subsection's purpose of addressing sentences that overlap or combine to be served together). Thus, the qualifying wording has substance and applicability without giving the qualifier so broad a sweep that the clear and plainly included proscription is reduced to a mere preference to be considered in unguided fashion in the discretion of the sentencing court. [Emphasis added]⁷

Meeting Minutes of May 23, 2013

Laura Tharney proposed the release of a Tentative Report on the project that resulted from the decision in *State v. Hudson*, 209 N.J. 513 (2012), in which the New Jersey Supreme Court considered whether and under what circumstances a defendant could be sentenced, pursuant to subsections a. and b. of N.J.S. 2C:44-5, to more than one extended term of imprisonment when the sentences are imposed in separate proceedings and when the second sentence is imposed for an offense committed prior to the imposition of the first sentence.

The initial draft language presented to the Commission provided two alternatives, one was focused on changing the statutory language to incorporate a reference to mandatory extended terms, and the second was more broad – calling for the application of the prohibition on multiple extended term sentences “except as otherwise provided by law.” No commenters have thus far indicated a preference for either of the options contained in the prior draft. Ms. Tharney said that she had revised the Report to include a single provision based on the Commission’s previously expressed preference for the “except as otherwise provided by law” language. She altered the language to substitute “required” for “provided” in an effort to encourage a more limited application of the language in light of the Court’s discussion of the issue.

Ms. Tharney said that that additional outreach would be made to criminal law practitioners and said that she hoped that the release of a Tentative Report will encourage more response from commenters. The Commission voted unanimously to release the Tentative Report on motion of Commissioner Long, seconded by Commissioner Bertone.

⁷ *Id.* at 535.

Meeting Minutes of September 20, 2012

Commissioner Long asked why a change to the statute was necessary since she read the Hudson court decision as articulating what the statute means. Chairman Gagliardi responded that the Commission is charged with the responsibility for making sure the statutory language matches the court determinations in order to eliminate potential confusion.

Chairman Gagliardi gave the example of the pledge of allegiance and Title 18A. Decades ago, the Third Circuit ruled that the statute requiring that a person stand during the pledge of allegiance was unconstitutional. The statute, however, remains unchanged and at least once a year, he is required to address this issue in the course of his representations of school boards. The Commission proposed a revision of the statute to match the case law to avoid the confusion.

Ms. Tharney said that the automatic case law searches established by Staff identify cases in which a court notes an ambiguity or an inconsistency in statutory language to avoid statutes that are traps for the unwary. Commissioner Long noted that the majority in Hudson did not find the language ambiguous, only the dissent did.

Commissioner Long said that in this instance, it is not necessary to read cases to clarify the statutory language. Commissioner Bell said that, in his view, the statute does appear ambiguous. The court gives the example of when a second extended sentence is required and suggests there may be circumstances in which it is not possible for a court to comply with subsection (a), but which would be difficult to anticipate.

Mr. Liston said that clarifying statutory language could avoid a situation in which a similar case comes before the Supreme Court when there are enough factual differences to distinguish that case from Hudson and reach a different outcome. He said that even though the statute was clear enough for a majority of the Supreme Court, it is not as clear as it could be and may not be clear enough for someone who reading the statute without the benefit of the case law.

Ms. Tharney said this was a two-step question for the Commission. The first question was whether this is a project that is necessary and, if so, whether the language as drafted is clear enough. Chairman Gagliardi asked whether the Commission wished to undertake the project, and all agreed that it was appropriate to do so. Mr. Liston said that Staff chose to offer two versions of the language. The first, a more limited version of the language, reflects a belief that there probably are no scenarios other than a mandatory extended-term sentence where compliance with subsection (a) would not be possible. The alternate version is more open-ended and is intended to account for unforeseen sentencing situations. Since the Commission had not yet seen or authorized the project, Staff had not sought comment on the issue of which language might be more appropriate. Ms. Tharney asked if the Commission had thoughts about a direction the project should take. If not, Staff would begin by seeking comment on the issue.

Commissioner Bell said that he preferred the more general language since the Supreme Court did not assert that there was only one situation in which the language in question might apply. He suggested, however, that both versions be distributed for comments. Mr. Liston asked whether the alternate version should say, "except as otherwise provided by statute" or "except as otherwise provided by law." Commissioner Bell said it should say "except as otherwise provided by law." The Commission agreed and unanimously authorized Staff to proceed with the project.

Proposed Draft

Staff initially presented two draft language alternatives to the Commission. As indicated in the meeting minutes, above, the Tentative Report later circulated to potential commenters contained a single version based on the Commission's preference.

Accordingly, the draft language below is intended to reflect the Court's interpretation of the statute, including its determination that the prohibitions enumerated in subsection a. must be given effect with regard to subsection b. and, in the words of the Court, "their application excused only when it is not possible to apply" them.⁸

N.J.S. 2C:44-5. Multiple sentences; concurrent and consecutive terms

a. Sentences of imprisonment for more than one offense. When multiple sentences of imprisonment are imposed on a defendant for more than one offense, including an offense for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence, except that:

(1) The aggregate of consecutive terms to a county institution shall not exceed 18 months; and

(2) Not more than one sentence for an extended term shall be imposed.

There shall be no overall outer limit on the accumulation of consecutive sentences for multiple offenses.

b. Sentences of imprisonment imposed at different times. When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence, other than an offense committed while in custody:

(1) The multiple sentences imposed shall ~~so far as possible conform to be~~ subject to the prohibitions enumerated in subsection a. of this section, except as otherwise required by law; and...

⁸ *Id.* at 518.

Commenters' Feedback

Following the release of the Tentative Report, dated May 23, 2013, Staff reached out to a number of potential commenters in the area of criminal law, including: Office of the Public Defender, Office of the Attorney General, New Jersey State Bar Association (including Criminal Law Section), New Jersey Division of Criminal Justice, Camden and Union County Prosecutor's Offices, New Jersey Parole Board, Administrative Office of the Courts (AOC), and private law practitioners.

One commenter, a prosecutor, expressed to Staff that there is "[n]o problem with the proposed change in language from 'except as otherwise provided by law' to 'except as otherwise required by law' to the extent that it makes the statute somewhat clearer."

While another State office spokesperson conveyed that the proposed revisions would not affect the policies or procedures of his particular office, Staff did receive two communications advising *against* revision (but providing no specific alternative drafting suggestions).

An AOC commenter articulated the belief that the revisions to the statute are unnecessary and "broader than the language in Hudson, unnecessarily placing limitations on judicial discretion in matters that are not covered by Hudson." The analysis continued as follows:

The Hudson Court foreclosed judicial discretion to impose multiple extended terms under N.J.S.A. 2C:44-5(b) in Hudson-type situations. In reaching this conclusion, the Court did not go so far as to limit judicial discretion to impose multiple extended terms in all circumstances that fall within paragraph b. Rather, considering the specific facts in Hudson, the Court stated "we therefore need not consider the potential outer edges to the elasticity permitted by the 'so far as possible' language included by the Legislature." Hudson, 209 N.J. at 533.

While the phrase "so far as possible" in paragraph (b) of N.J.S.A. 2C:44-5 should be narrowly construed to limit the imposition of multiple extended terms, it allows for such terms to be imposed if the defendant is eligible for a mandatory extended term for the second-in-time sentence. The proposed revision to delete the phrase "so far as possible conform to" and to insert the phrase "except as otherwise required by law" allows for the imposition of a second-in-time mandatory extended term, as discussed in Hudson.

In dicta, the Hudson Court also recognized that in other limited circumstances multiple extended terms may be appropriate as "[o]ther potential extenuating examples are possible to envision, subject to further case development," such as a "cold case." Hudson, 209 N.J. at 535. The phrase "except as otherwise required by law" seemingly forecloses judicial discretion to impose a second-in-time discretionary extended term for this category of cases involving "[o]ther potential extenuating examples," such as a "cold case." In that respect, the proposed revision to paragraph (b) places unnecessary constraints on judicial discretion.

In sum, the statute need not be revised. If revisions are proposed, the amendments should more closely comport with the Court's statements in Hudson utilizing language that does not unnecessarily place constraints on judicial discretion in sentencing.

The original stated goal of this project was to modify N.J.S. 2C:44-5(b)(1) "to clarify whether a criminal defendant may be sentenced to more than one extended term of imprisonment where sentencing is conducted in separate proceedings and where the second sentence is imposed for offenses committed prior to the imposition of the first sentence."⁹ The Supreme Court found that a criminal defendant may *not* receive more than one extended term of imprisonment in these circumstances, of course, and this project is actually concerned with making the existing language more precise.

The Court's adherence "to a plain-meaning reading of the language of N.J.S.A. 2C:44-5(b)(1)"¹⁰ notwithstanding, there seems to be a case for clarifying the language in this statute, based on logic articulated by the dissent, discussed below, and on the Plaintiff-Respondent's (i.e., the State's) argument in *Hudson*, that "the word 'shall' is mandatory, but the word 'possible' indicates that conformity to subsection a. is ... less than absolutely required in all situations."¹¹

This commenter's well-taken argument is that the proposed revision places unnecessary constraints on judicial discretion in cases with non-*Hudson* facts. But, as the original language of this 1978 statute predates *Hudson*, it was ostensibly drafted with *all* foreseeable facts in mind. Likewise, a proposed revision purporting to make the original language more precise should be intended to apply in *all* foreseeable scenarios. To this point, Commissioner Bell said at the September 20, 2012, meeting that he preferred the more general language since the Supreme Court did not assert that there was only one situation in which the language in question might apply.

A private criminal defense attorney commenter, likewise opposing revision, urged the Commission to "simply leave the decision in *State v. Hudson* stand," arguing that:

The Supreme Court has rendered a decision based on the plain language of N.J.S. 2C:44-5A and B." Justice Patterson's dissent is far from persuasive, and in my opinion, in no way justifies a revision of the statute. As the majority of the Supreme Court has completely clarified the issue the only possible result from submitting this matter to the legislature would be to an effect overturn the Supreme Court's decision and permit the imposition of multiple extended terms. Quite simply put, the matter does not need clarifying.

This commenter is not alone in questioning the dissenting opinion in *Hudson*, which argues that the legislature failed to use precise language in this case¹² and, as a result, its

⁹ Memorandum to the Commission dated September 10, 2012.

¹⁰ 209 N.J. at 537.

¹¹ *Id.* at 524.

¹² *Id.* at 539.

direction to sentencing courts is not intended to be absolute.¹³ As Commissioner Long noted during the meeting of September 20, 2012, the majority in *Hudson* did not find the language ambiguous, only the dissent did.

In light of the feedback received, Staff seeks guidance as to whether the Commission wishes to proceed with the language as currently drafted or to make any modifications to its prior determinations.

¹³ *Id.* at 540.