



## NEW JERSEY LAW REVISION COMMISSION

### Tentative Report

#### Relating to

#### Multiple Extended-Term Sentences

May 23, 2013

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 Draft Tentative Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments regarding this Report should be submitted no later than **July 23, 2013**.

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:

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## I. Introduction

This project 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.

In *Hudson*, the defendant was charged with multiple offenses arising out of assaults upon two victims. The counts were severed with regard to each victim, resulting in two separate trials and two separate sentencing proceedings. Both proceedings resulted in Hudson being sentenced to extended terms of imprisonment. The second conviction and sentence stemmed from offenses committed before the first extended term was imposed. The Court explained that, in the context of this case, it addressed for the first time the N.J.S. 2C:44-5b.(1)'s incorporation of the subsection a. prohibitions "to certain offenses and sentencing proceedings, when sentencing is conducted in separate proceedings". 209 N.J. at 517. Applying N.J.S. 2C:44-5 subsections a. and b. to the facts, the Court held that, in *Hudson*, 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." *Id.*

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." *Id.* at 518.

According to 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" (*Id.* at 535) 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" (*Id.* at 533).

In dissent, Justice Patterson argued 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". *Id.* at 544.

N.J.S. 2C:44-5(a) and (b) together 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, other than an offense committed while in custody:

(1) The multiple sentences imposed shall so far as possible 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.

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]

*State v. Hudson*, 209 N.J. at 535.

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”.

After the Commission authorized work on this project, input was sought from a number of attorneys practicing in the criminal law area. To this time, only one commenter has responded and he opposed proceeding with the project. He explained that since the New Jersey Supreme Court rendered its decision based on the plain language of the statute, a revision is not warranted.

No commenters have thus far indicated a preference for either of the options contained in the prior draft. The Commission preliminarily expressed a preference for the use of the more general “except as otherwise provided by law” language since the Court contemplated the application of the exception in circumstances other than those involving a mandatory extended term.

The Court explained that the “Legislature wanted the limitation *so far as* ‘possible.’ Plainly, the limitation would be excused from application when following its mandate would *not* be possible...the Legislature has made the prohibition the default, unless it is not possible to conform the sentence to subsection a’s prohibition against multiple extended terms.” *Id.* at 534. “The word choice is ‘possible’, not ‘practicable’ or ‘preferable’ or ‘presumptive.’” *Id.*

In light of the foregoing, the draft language below has been rearranged to state the rule first, then the exception, and to replace “except as otherwise provided by law” with “except as otherwise required by law”.

## **II. Draft**

*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...

#### COMMENT

The revision is based on the decision of the New Jersey Supreme Court in *State v. Hudson*, 209 N.J. 513, 517 (2012).