



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Report Relating to Juvenile Sentencing - N.J.S. 2A:4A-44 d.(3)**

**November 10, 2014**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

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## Executive Summary

This Report recommends adding the term “previously” to N.J.S. 2A:4A-44d.(3), an extended-term sentencing provision for juveniles, to codify the New Jersey Supreme Court’s decision in *State ex rel. K.O.*, 217 N.J. 83 (2014). The Court, in *State ex rel. K.O.*, considered whether N.J.S. 2A:4A-44d.(3) authorizes imposition of an extended-term sentence for a juvenile who was adjudged delinquent on one prior occasion. The Court held that two adjudications of delinquency must be established, separate from the qualifying offense, before imposing an extended-term sentence to a juvenile under N.J.S. 2A:4A-44d.(3).

## Background

This project stems from the New Jersey Supreme Court’s holding in *State ex rel. K.O.*, where the Court considered whether the Code of Juvenile Justice (the Code)<sup>1</sup> authorizes imposition of an extended-term sentence for a juvenile based on the qualifying offense and a prior adjudication.<sup>2</sup>

Beginning in 1982 with a “five-bill package”, the Code was comprehensively revised to “upgrade, modernize and improve” the State’s juvenile justice system.<sup>3</sup> The goal of the reform efforts were to “deal swiftly and sternly with violent young criminals” and in the instances where it was an appropriate and adequate response, to provide counseling and rehabilitation.<sup>4</sup>

The extended-term sentencing statute at issue in *State ex rel. K.O.*, N.J.S. 2A:4A-44d.(3), was a part of the 1982 amendments<sup>5</sup>. The relevant statutory provision states:

Upon application by the prosecutor, the court may sentence a juvenile who has been convicted of a crime of the first, second, or third degree if committed by an adult, to an extended term of incarceration beyond the maximum<sup>6</sup> . . . if it finds that the juvenile was adjudged delinquent *on at least two separate occasions*, for offenses which, if committed by an adult, would constitute a crime of the first or second degree, and *was previously committed to an adult or juvenile facility*. The extended term shall . . . shall not exceed two additional years for all other crimes of the first degree or second degree.<sup>7</sup>

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<sup>1</sup> N.J. STAT. ANN 2A:4A-20–90, et seq. (West 2013).

<sup>2</sup> N.J. STAT. ANN. 2A:4A-44d.(3) (West 2013)(reforming the statute through the following amendments: ; L.1982, c. 77, § 25; L.1993, c. 133, § 2; L.1995, c. 280, § 11; and most recently L.2001, c. 408, § 4) 2002. *State ex rel. K.O.*, 217 N.J. 83, 86 (2014).

<sup>3</sup> Gov. Kean Signing Stat., A 641, A642, A 643, A644, A645 (July 23, 1982).

<sup>4</sup> *Id.*

<sup>5</sup> N.J.S. 2A:4A-44d.(3)

<sup>6</sup> Maximum Sentence: first degree crime - 4 years; second degree crime - 3 years; and third degree crime - 2 years; N.J. STAT. ANN. 2A:4A-44d.(1)(c)-(e) (West 2013).

<sup>7</sup> N.J.S. 2A:4A-44d.(3) (2013).

The defendant in *State ex rel. K.O.* was charged with conduct, that, if committed by an adult, would constitute first-degree robbery.<sup>8</sup> The defendant appealed the decision that ruled the defendant eligible for an extended-term sentence under N.J.S. 2A:4A-44d.(3) based on the qualifying offense and a prior adjudication for second-degree aggravated assault.<sup>9</sup>

Considering the statutory scheme as a whole, and the plain language of N.J.S. 2A:4A-44d.(3), the New Jersey Supreme Court held that the statute requires two prior adjudications of delinquency separate from the qualifying offense for which the juvenile is being sentenced.<sup>10</sup> The Court, considering the plain language of the statute, noted that the past tense was used to describe the previous convictions, in the following phrases - “was adjudged delinquent” and “was previously committed”.<sup>11</sup> In contrast, the Court observed that a different tense was used to describe the present offense - “has been adjudicated”, and concluded that the Legislature intended to distinguish between the present conviction and the qualifying, predicate offenses.<sup>12</sup>

The Court then compared N.J.S. 4A-44d.(3) to the companion section, N.J.S. 4A-44d.(4), which provides for the imposition of an extended-term sentence when a juvenile is sentenced for multiple unrelated crimes in a single sentencing proceeding.<sup>13</sup> <sup>14</sup> The qualifying offenses under subsection d.(4) involve “a spree” of “three or more unrelated offenses”.<sup>15</sup>

The Court observed that while both subsections d.(3) and d.(4) use the same tense - “has been adjudicated” - to refer to the present conviction, subsection d.(3) must be construed in a “common-sense manner” to determine whether the statute authorizes an extended-term sentence based on the present conviction and a prior adjudication.<sup>16</sup> Contrary to the construction of subsection d.(3), the Court noted that subsection d.(4) authorizes an extended-term sentence on the basis of the present conviction “by using language that clearly and unambiguously capture[d] the instant offense”.<sup>17</sup> Furthermore, the Court ruled that subsection d.(3) refers to the previous two convictions in the past tense, creating a condition that must be satisfied in order for an extended-term to be imposed for the present offense.<sup>18</sup>

The Court noted that the issue presented required the Court to “interpret an aspect of the Code affecting the dispensing of justice to juveniles, where rehabilitation concerns are at their highest in the criminal justice sphere”.<sup>19</sup> The Court acknowledged that subsection d.(3) is subject to more than one interpretation, but declined to give the “statute its harshest possible reading”.<sup>20</sup> Instead, the Court concluded that since the legislative history was silent on the specific issue presented, any residual ambiguity should be resolved in favor of the defendant, in accordance

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<sup>8</sup> *State ex rel. K.O.*, 217 N.J. at 87.

<sup>9</sup> *Id.* at 88-89.

<sup>10</sup> *Id.* at 94.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> N.J.S. 2A:4A-44d.(4) (2013).

<sup>14</sup> *State ex rel. K.O.*, 217 N.J. at 95.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 97.

<sup>18</sup> *Id.* 95-96.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

with the doctrine of lenity.<sup>21</sup> The Court held that under N.J.S. 4A-44d.(3), two *prior* adjudications of delinquency, one of which must have resulted in incarceration in a juvenile or adult facility, must be demonstrated to impose an extended-term sentence.<sup>22</sup>

See the Appendix on the following pages for the proposed change to the statute, in **bold, underlined** text, consistent with the determination of the Court in *State ex rel. K.O.*

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 97.

## Appendix—Proposed Change to the Statute

The full text of N.J.S. 2A:4A-44, including the proposed modifications to subsection (d)(4) (shown with underlining>, is as follows:

### **2A:4A-44. Incarceration--Aggravating and mitigating factors**

a. (1) Except as provided in subsections e. and f. of section 24 of P.L.1982, c. 77 (C.2A:4A-43), in determining whether incarceration is an appropriate disposition, the court shall consider the following aggravating circumstances:

(a) The fact that the nature and circumstances of the act, and the role of the juvenile therein, was committed in an especially heinous, cruel, or depraved manner;

(b) The fact that there was grave and serious harm inflicted on the victim and that based upon the juvenile's age or mental capacity the juvenile knew or reasonably should have known that the victim was particularly vulnerable or incapable of resistance due to advanced age, disability, ill-health, or extreme youth, or was for any other reason substantially incapable;

(c) The character and attitude of the juvenile indicate that the juvenile is likely to commit another delinquent or criminal act;

(d) The juvenile's prior record and the seriousness of any acts for which the juvenile has been adjudicated delinquent;

(e) The fact that the juvenile committed the act pursuant to an agreement that the juvenile either pay or be paid for the commission of the act and that the pecuniary incentive was beyond that inherent in the act itself;

(f) The fact that the juvenile committed the act against a policeman or other law enforcement officer, correctional employee or fireman, acting in the performance of his duties while in uniform or exhibiting evidence of his authority, or the juvenile committed the act because of the status of the victim as a public servant;

(g) The need for deterring the juvenile and others from violating the law;

(h) The fact that the juvenile knowingly conspired with others as an organizer, supervisor, or manager to commit continuing criminal activity in concert with two or more persons and the circumstances of the crime show that he has knowingly devoted himself to criminal activity as part of an ongoing business activity;

(i) The fact that the juvenile on two separate occasions was adjudged a delinquent on the basis of acts which if committed by an adult would constitute crimes;

(j) The impact of the offense on the victim or victims;

(k) The impact of the offense on the community; and

(l) The threat to the safety of the public or any individual posed by the child.

(2) In determining whether incarceration is an appropriate disposition the court shall consider the following mitigating circumstances:

(a) The child is under the age of 14;

(b) The juvenile's conduct neither caused nor threatened serious harm;

- (c) The juvenile did not contemplate that the juvenile's conduct would cause or threaten serious harm;
- (d) The juvenile acted under a strong provocation;
- (e) There were substantial grounds tending to excuse or justify the juvenile's conduct, though failing to establish a defense;
- (f) The victim of the juvenile's conduct induced or facilitated its commission;
- (g) The juvenile has compensated or will compensate the victim for the damage or injury that the victim has sustained, or will participate in a program of community service;
- (h) The juvenile has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present act;
- (i) The juvenile's conduct was the result of circumstances unlikely to recur;
- (j) The character and attitude of the juvenile indicate that the juvenile is unlikely to commit another delinquent or criminal act;
- (k) The juvenile is particularly likely to respond affirmatively to noncustodial treatment;
- (l) The separation of the juvenile from the juvenile's family by incarceration of the juvenile would entail excessive hardship to the juvenile or the juvenile's family;
- (m) The willingness of the juvenile to cooperate with law enforcement authorities;
- (n) The conduct of the juvenile was substantially influenced by another person more mature than the juvenile.

b. (1) There shall be a presumption of nonincarceration for any crime or offense of the fourth degree or less committed by a juvenile who has not previously been adjudicated delinquent or convicted of a crime or offense.

(2) Where incarceration is imposed, the court shall consider the juvenile's eligibility for release under the law governing parole.

c. The following juveniles shall not be committed to a State juvenile facility:

(1) Juveniles age 11 or under unless adjudicated delinquent for the crime of arson or a crime which, if committed by an adult, would be a crime of the first or second degree; and

(2) Juveniles who are developmentally disabled as defined in paragraph (1) of subsection a. of section 3 of P.L.1977, c. 82 (C.30:6D-3).

d. (1) When the court determines that, based on the consideration of all the factors set forth in subsection a., the juvenile shall be incarcerated, unless it orders the incarceration pursuant to subsection c. of section 24 of P.L.1982, c. 77 (C.2A:4A-43), it shall state on the record the reasons for imposing incarceration, including any findings with regard to these factors, and commit the juvenile to the custody of the Juvenile Justice Commission which shall provide for the juvenile's placement in a suitable juvenile facility pursuant to the conditions set forth in this subsection and for terms not to exceed the maximum terms as provided herein for what would constitute the following crimes if committed by an adult:

- (a) Murder under 2C:11-3a(1) or (2): 20 years
- (b) Murder under 2C:11-3a(3): 10 years
- (c) Crime of the first degree, except murder: 4 years
- (d) Crime of the second degree: 3 years
- (e) Crime of the third degree: 2 years
- (f) Crime of the fourth degree: 1 year
- (g) Disorderly persons offense: 6 months

(2) Except as provided in subsection e. of section 24 of P.L.1982, c. 77 (C.2A:4A-43), the period of confinement shall continue until the appropriate paroling authority determines that such a person should be paroled; except that in no case shall the period of confinement and parole exceed the maximum provided by law for such offense. However, if a juvenile is approved for parole prior to serving one-third of any term imposed for any crime of the first, second or third degree, including any extended term imposed pursuant to paragraph (3) or (4) of this subsection, or one-fourth of any term imposed for any other crime the granting of parole shall be subject to approval of the sentencing court. Prior to approving parole, the court shall give the prosecuting attorney notice and an opportunity to be heard. If the court denies the parole of a juvenile pursuant to this paragraph it shall state its reasons in writing and notify the parole board, the juvenile and the juvenile's attorney. The court shall have 30 days from the date of notice of the pending parole to exercise the power granted under this paragraph. If the court does not respond within that time period, the parole will be deemed approved.

Any juvenile committed under this act who is released on parole prior to the expiration of the juvenile's maximum term may be retained under parole supervision for a period not exceeding the unserved portion of the term and any term of post-incarceration supervision imposed pursuant to paragraph (5) of this subsection. The Parole Board, the juvenile, the juvenile's attorney, the juvenile's parent or guardian or, with leave of the court any other interested party, may make a motion to the court, with notice to the prosecuting attorney, for the return of the child from a juvenile facility prior to his parole and provide for an alternative disposition which would not exceed the duration of the original time to be served in the facility. Nothing contained in this paragraph shall be construed to limit the authority of the Parole Board as set forth in section 15 of P.L.1979, c. 441 (C.30:4-123.59).

(3) Upon application by the prosecutor, the court may sentence a juvenile who has been convicted of a crime of the first, second, or third degree if committed by an adult, to an extended term of incarceration beyond the maximum set forth in paragraph (1) of this subsection, if it finds that the juvenile was **previously** adjudged delinquent on at least two separate occasions, for offenses which, if committed by an adult, would constitute a crime of the first or second degree, and was previously committed to an adult or juvenile facility. The extended term shall not exceed five additional years for an act which would constitute murder and shall not exceed two additional years for all other crimes of the first degree or second degree, if committed by an adult, and one additional year for a crime of the third degree, if committed by an adult.

(4) Upon application by the prosecutor, when a juvenile is before the court at one time for disposition of three or more unrelated offenses which, if committed by an adult, would constitute crimes of the first, second or third degree and which are not part of the same transaction, the

court may sentence the juvenile to an extended term of incarceration not to exceed the maximum of the permissible term for the most serious offense for which the juvenile has been adjudicated plus two additional years.

(5) Every disposition that includes a term of incarceration shall include a term of post-incarceration supervision equivalent to one-third of the term of incarceration imposed. During the term of post-incarceration supervision the juvenile shall remain in the community and in the legal custody of the Juvenile Justice Commission established pursuant to section 2 of P.L.1995, c. 284 (C.52:17B-170) in accordance with the rules of the parole board, unless the appropriate parole board panel determines that post-incarceration supervision should be revoked and the juvenile returned to custody in accordance with the procedures and standards set forth in sections 15 through 21 of P.L.1979, c. 441 (C.30:4-123.59 through C.30:4-123.65). The term of post-incarceration supervision shall commence upon release from incarceration or parole, whichever is later. A term of post-incarceration supervision imposed pursuant to this paragraph may be terminated by the appropriate parole board panel if the juvenile has made a satisfactory adjustment in the community while on parole or under such supervision, if continued supervision is not required and if the juvenile has made full payment of any fine or restitution.