



NEW JERSEY LAW REVISION COMMISSION

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

June 9, 2014

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 **August 30, 2014.**

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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Executive Summary

- The New Jersey Supreme Court, in *In re Interest of K.O.*, 217 N.J. 83, 86 (2014), considered the imposition of an extended-term incarceration pursuant to the Code of Juvenile Justice.
- The Court addressed the question of whether N.J.S. 2A:4A-44 allows extended-term sentencing when the juvenile has only been adjudged delinquent on one prior occasion.
- Court found that the extended-term statute required two prior adjudications of delinquency separate from the qualifying offense for which a juvenile is being sentenced.

Background

This project resulted from the New Jersey Supreme Court's recent holding in *State in Interest of K.O.* In that case, the Court was asked to interpret the necessary conditions predicate to the imposition of an extended-term incarceration pursuant the Code of Juvenile Justice's (the Code)¹ sentencing provisions.² Specifically, the Court considered whether the Code, at 2A:4A-44, allows extended-term sentencing when the juvenile has only been adjudged delinquent on one prior occasion.³

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 maximum⁴ . . . 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.⁵

Considering the statutory scheme as a whole, and the plain language of 2A:4A-44(d)(3), the Court found that the extended-term statute required two prior adjudications of delinquency separate from the qualifying offense for which a juvenile is being sentenced.⁶ The Court found that the plain language of the statute, using the past tense in two phrases—"was adjudged delinquent" and "was previously committed"—indicated that the adjudications must be from the juvenile's past and not the present adjudication.⁷ Furthermore, the Court found a lack of

¹ N.J.S. 2A:4A-20-90 (2013).

² N.J.S. 2A:4A-44(d)(3), (4) (2013); *In re Interest of K.O.*, 217 N.J. 83, 86 (2014).

³ *In re Interest of K.O.*, 217 N.J. at 83.

⁴ For a first degree crime, the normal maximum is 4 years; for a second degree crime, 3 years; for a third degree crime 2 years. N.J.S. 2A:4A-44(d)(1)(c)-(e) (2013).

⁵ N.J.S.A. 2A:4A-44(d)(3) (2013).

⁶ *In re Interest of K.O.*, 217 N.J. at 94-95.

⁷ *Id.* at 94.

guidance from the provision’s legislative history indicating any intent on behalf of the Legislature to include the qualifying offense as one of the two adjudications necessary for extended-term sentencing.⁸

The Court, considering the statutory sentencing scheme as a whole, compared 4A-44(4)(3) to the only other enhanced sentencing provision in the Code. Contrary to the use of the past tense in subsection (d)(3), 2A:4A-44(d)(4) authorizes enhanced sentencing over the maximum limits for qualifying offenses—“three or more unrelated offenses” not part of the same transaction⁹ called “spree” offenses—“by using language that clearly and unambiguously captures the instant offenses with which the disposition court is dealing.”¹⁰ Comparing the “spree” provision, the Court found the Legislature’s failure to include the word “previously” before the phrase “on at least two separate occasions” in subsection (d)(3) did not compel a plain language construction of the statute that would authorize extended sentencing when the juvenile has only one prior offense.¹¹ The Court also considered the relative ambiguity of subsection (d)(3), and decided that any residual ambiguity should be resolved in favor of the defendant, in accordance with the doctrine of lenity.¹² All of the Justices agreed that the statute requires two *prior* adjudications of delinquency, one of which must have resulted in incarceration in a juvenile or adult facility, for the imposition of an extended term of incarceration for a juvenile presently being sentenced.¹³

As currently written, the statute is subject to more than one interpretation and the New Jersey Supreme Court noted the ambiguity. See the Appendix on the following page for the proposed change to the statute consistent with the determination of the Court in *State in Interest of K.O.*.

⁸ *Id.* at 95–96.

⁹ 2A:4A-44(d)(4) (2013).

¹⁰ *In re Interest of K.O.*, 217 N.J. at 95.

¹¹ *Id.*

¹² *Id.* at 97.

¹³ *Id.* at 97, 99.

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 adjudged delinquent previously 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.