

To: Commission
From: Frank N. Ricigliani
Re: *State in Interest of K.O. – Juvenile sentencing*
Date: April 7, 2014

MEMORANDUM

This potential project arose as a result of the New Jersey Supreme Court's recent determination 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

The Court, following traditional canons of statutory interpretation, first analyzed the statute's plain language. 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 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

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.*, 2014 WL 701771 (N.J. Feb. 24, 2014).

³ *In re K.O.*, at *1.

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 K.O.*, at *5–6.

⁷ *Id.* at *5.

⁸ *Id.* at *6

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 rejected the State’s argument that the Legislature’s failure to include the word “previously” before the phrase “on at least two separate occasions” in (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. 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.¹¹ The Court noted that the “principle [of lenity] is founded upon society’s instinctive distaste against men and women languishing in prison unless the L[egislature] has clearly said they should.”¹²

Chief Justice Rabner, however, wrote separately in a concurring opinion that he would not reach a decision based on the plain language of the statute, but rather on resolving the issue in favor of the defendant based solely on the rule of lenity.¹³ Chief Justice Rabner reasoned that “because both [the defendant’s and the State’s] interpretations of this criminal statute are reasonable, and because the legislative history does not resolve this dispute,” the doctrine of lenity controls and is dispositive.¹⁴

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.¹⁵ The majority interpreted the statute, considering the statutory scheme as a whole, to require two prior adjudications for extended-term sentencing. Chief Justice Rabner, on the other hand, reasoned that the statute was sufficiently ambiguous to invoke the doctrine of lenity. None of the Justices suggested that the plain language of the statute offered a clear indication of the legislature’s intent.

Staff is seeking authorization from the Commission to pursue a project to help clarify this particular statute. Unless otherwise directed by the Commission, Staff would draft a revision to the statute in accordance with the guidance provided by the New Jersey Supreme Court. Commission work in this area would represent an opportunity to bring this issue to the attention of the Legislature, which could modify the law to comport with the decision of the Supreme Court, or to allow the present qualifying offense to be considered one of the two separate offenses necessary for extended-term sentencing.

⁹ 2A:4A-44(d)(4) (2013).

¹⁰ *In re K.O.* at *6.

¹¹ *Id.* at *7.

¹² *Id.* (internal quotations omitted)

¹³ *Id.* at *8 (Rabner, C.J., concurring).

¹⁴ *In re Interest of K.O.*, 2014 WL 701771 (N.J. Feb. 24, 2014) (majority opinion).

¹⁵ *Id.* at *7.