SUPREME COURT OF NEW JERSEY
DOCKET NO. 57,143

STATE OF NEW JERSEY, **Plaintiff-Appellant/ Cross-Respondent,** **v.** **MICHAEL NATALE,** **Defendant-Respondent/ Cross-Appellant.**	**Criminal Action** **On Cross-Petitions for Certification from a Judgment of the Superior Court of New Jersey, Appellate Division, Vacating Defendant's Sentence and Remanding for Resentencing** **SAT BELOW:** **Edwin H. Stern, P.J.A.D.** **Donald S. Coburn, J.A.D.** **Barbara Byrd Wecker, J.A.D.**

JOINT SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AND THE OFFICE OF THE PUBLIC DEFENDER

ARSENEAULT, FASSETT & MARIANO, LLP
560 Main Street
Chatham, New Jersey 07928

STEVEN G. SANDERS, Esq.
Counsel to ACDL-NJ
Of Counsel and
On the Brief

YVONNE SMITH SEGARS
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, New Jersey 07102

LINDA MEHLING
MARCIA BLUM
Assistant Deputy Public Defenders
Of Counsel and
On the Brief

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PRELIMINARY STATEMENT

Pursuant to this Court's January 20, 2005, directive, the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") and the Office of the Public Defender ("OPD") respectfully submit this Joint Supplemental Brief Amicus Curiae to address, inter alia, the impact of United States v. Booker, 125 S. Ct. 738 (2005), on the questions presented in this appeal.

PROCEDURAL HISTORY

Amici adopt and incorporate by reference the Procedural History section contained in their Appellate Division Brief and add the following.

On October 12, 2004, a panel of the Appellate Division concluded that N.J.S.A. 2C:44-1f(1) does not violate the Sixth Amendment principle set forth in Blakely v. Washington, 124 S. Ct. 2531 (2004). State v. Abdullah, 372 N.J. Super. 252 (App. Div. 2004).

On November 17, 2004, a different panel of the Appellate Division came to the opposite conclusion. State v. Natale, 373 N.J. Super. 226 (App. Div. 2004).

On December 9, 2004, this Court granted Abdul Abdullah's petition for certification. State v. Abdullah, 182 N.J. 208 (2004).

On January 20, 2005, this Court granted the State's and Michael Natale's cross-petitions for certification. State v. Natale, ___ N.J. ___ (2005).

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of Facts section contained in their Appellate Division Brief.

ARGUMENT

I. BY REAFFIRMING THE HOLDING OF BLAKELY V. WASHINGTON, UNITED STATES V. BOOKER CONFIRMS THAT NEW JERSEY'S ORDINARY SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT

The Appellate Division agreed with Defendant and Amici that N.J.S.A. 2C:44-1f(1) violates the principal holding of Blakely v. Washington, 124 S. Ct. 2531 (2004). Under that statute, a judge must impose the presumptive sentence unless: (1) at least one 2C:44-1a aggravating factor exists, and (2) any such aggravating factor outweighs any applicable mitigating factor(s). Following Blakely, the Appellate Division correctly held that the presumptive term was the "prescribed statutory maximum" for Sixth Amendment purposes, since that is the only sentence a judge may impose based upon the jury verdict alone:

> There is no doubt that the New Jersey Code of Criminal Justice permits only the presumptive sentence embodied in N.J.S.A. 2C:44-1f(1) to be imposed based on the jury's verdict. The presumptive sentence embodied in that section "shall" be imposed unless the sentencing judge finds that an aggravating or mitigating factor or factors exist and weigh "in favor of a higher or lower term within the limits provided in N.J.S.A. 2C:43-6." Therefore, the presumptive sentence, on its face, "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict." Stated differently, in the words of Blakely, the "presumptive sentence" is "the maximum [the judge] may impose without [making] any additional findings" not made by the jury. "[T]he jury's verdict alone does not authorize the [enhanced] sentence" above the presumptive."

State v. Natale, 373 N.J. Super. 226, 235-36 (App. Div. 2004) (citations omitted), certif. granted, ___ N.J. ___ (Jan. 20, 2005).

By requiring judges to find the 2C:44-1a aggravators, New Jersey's scheme — as currently drafted and implemented — violates the Sixth Amendment. Id. at 236 ("Accordingly, we find N.J.S.A. 2C:44-1f(1) unconstitutional to the extent that it permits the trial judge to increase the presumptive sentence in the absence of jury fact-finding, based on proof beyond a reasonable doubt, of the aggravating factors on a basis other than relating to a prior conviction.") (citations omitted).

Other courts have applied Blakely's holding to sentencing schemes similar to New Jersey's and have come to the same conclusion. People v. Barton, ___ P.3d ___, 2004 WL 2903510 (Colo. Ct. App. 2004) ("under Apprendi and Blakely, the statutory maximum authorized by a jury verdict or a guilty plea is the maximum in the presumptive range for the class of felony"); Krebs v. State, 816 N.E.2d 469 (Ind. App. 2004) ("the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature"); State v. Walters, 2004 WL 2726034 (Tenn. Crim. App. Nov. 30, 2004) ("According to Blakely, the 'prescribed statutory maximum' equates to the presumptive sentence, not the maximum sentence in the range."); People v. Butler, 19 Cal.Rptr.3d 310 (Cal. App. 1st Dist. 2004) ("Under California law, the maximum sentence a judge may impose without any additional findings is the middle term.").

The holding of the U.S. Supreme Court in United States v. Booker, 125 S. Ct. 738 (2005), only reinforces Blakely's (and, hence, Natale's) constitutional holding. Booker involved a Blakely-based challenge to the federal Sentencing Guidelines. Whereas each federal statute defining a criminal offense prescribes the maximum punishment allowable by law, the Sentencing Guidelines specify a sentence below that statutory maximum based on the jury verdict alone. The Guidelines then permitted (and in many cases required) judges to impose a higher sentence based on judicial fact-finding under the preponderance standard. See id. at 751 (Opinion of Stevens, J.) ("Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury. . . ."); id. at 755 (Opinion of Stevens, J.) ("All of the foregoing support our conclusion that our holding in Blakely applies to the Sentencing Guidelines."). Booker thus reaffirms that a Sixth Amendment violation occurs whenever judicial fact-finding permits or requires a judge to impose a sentence not authorized by the jury verdict alone.

Many state courts have adjudicated Blakely-based challenges to various state sentencing schemes. Few have had the opportunity to address the effect, if any, of Booker on their prior holdings. In Ohio, however, the Ohio Court of Appeals only recently explained why Booker required it to reexamine its prior conclusion that

Blakely did not invalidate Ohio's sentencing regime. The court first explained the legal error that informed its earlier conclusion:

> Unlike the sentencing guidelines in the state of Washington and the federal criminal system, Ohio's scheme does not permit a sentencing court to deviate from a prescribed range of sentences for any felony. Thus, the term "statutory maximum" was believed to be synonymous with "statutory range," or the range of years of imprisonment set by the General Assembly for each felony punishment. Since a sentencing court cannot exceed "the statutory range authorized by law," the consensus then was that the Sixth Amendment was not implicated by Ohio's sentencing statutes.

State v. Bruce, 2005 WL 267668, at *1 (Ohio App. 1 Dist. Feb. 4, 2005) (per curiam) (footnote omitted). The Ohio Court of Appeals then explained the relevance of its mistaken understanding of the law to the facts before it:

> The statutory range for a first-degree felony is three to ten years. Under our previous reasoning, the sentencing court would have discretion to impose the longest sentence within that range as long as it made the factual finding that the defendant was an offender who had committed the "worst form[]" of the offense or posed the greatest likelihood of recidivism. The sentencing statutes "vest the exclusive responsibility to make th[is] determination[] in the court and not in a jury." Unlike the additional findings made by the sentencing courts in Apprendi or Blakely, we reasoned, the finding that a defendant had committed the worst form of the offense did not increase the sentence beyond the statutory range.

Id. (footnote omitted).[1] The court went on to describe why Booker

[1] Notably, the State relied on that same flawed reasoning in its opening brief below, State's App. Div. Br. at 34; in its reply brief below, State's Reply Br. at 2, 5-6; and again in its petition for certification in this Court. State's Pet. for Certif. at 10-12.

compelled it to conclude that Ohio's sentencing scheme violated the Sixth Amendment:

> In light of the recent decision of the United States Supreme Court in United States v. Booker, it is clear that [our] interpretation was wrong. . . . The prescribed statutory maximum sentence is not "the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."
>
> The holding, as reaffirmed in Booker, applies to "all cases on direct review or not yet final." Accordingly, the Blakely definition of "prescribed maximum sentence" applies to this case. Here, the trial court imposed a sentence upon Bruce that was within the statutory range authorized by the Ohio General Assembly for first-degree felonies. But the maximum sentence the trial court could impose without additional facts proved to a jury or admitted to by Bruce was nine years, not ten. The additional fact necessary to impose the tenth year of imprisonment — that Bruce was among those offenders "who [had] committed the worst forms of the offense" — was found by the trial court at the sentencing hearing, after Bruce's plea had been accepted. Therefore, the Sixth Amendment prohibited the imposition of the longest term of imprisonment. R.C. 2929.14(A)(1) and 2929.14(C) are unconstitutional to the extent that they permit a sentencing court to impose a sentence exceeding the maximum term authorized by the facts admitted by the defendant or proved to a jury beyond a reasonable doubt.

Id. at *2 (footnotes omitted) (emphasis in original).

The decision in Bruce makes clear that Booker only reinforces Blakely's constitutional holding. In those states where the legislature has specified a maximum sentence for a particular degree of crime, but has created a lower, statutorily mandated presumptive term that must be imposed in the absence of additional fact-finding (i.e., based on the jury verdict alone), that presumptive term is the "prescribed statutory maximum" for Sixth

Amendment purposes. So understood, the Appellate Division was correct when it held that the presumptive term specified in N.J.S.A. 2C:44-1f(1), and not the top of the range set out in N.J.S.A. 2C:43-6a, constitutes the "prescribed statutory maximum" within the meaning of Apprendi and Blakely.[2] Accordingly, the Appellate Division's judgment should be affirmed to that extent.

[2]To avoid needless repetition, Amici rely on the arguments contained in Points I.B and I.C of their Appellate Division Brief to explain why judicial fact-finding under N.J.S.A. 2C:43-6b (parole ineligibility), and State v. Yarbough, 100 N.J. 627 (1985) (consecutive sentences), violates Blakely's Sixth Amendment holding. The Appellate Division disagreed with the former, relying in part on this Court's holding in State v. Stanton, 176 N.J. 75 (2003). Natale, 326 N.J. Super. at 237-38. Stanton, however, relied on an understanding of the Sixth Amendment uninformed by Blakely's subsequent clarification of the term "prescribed statutory maximum." After Blakely, the "prescribed statutory maximum" is the sentence a court must impose based on the jury verdict alone. But N.J.S.A. 2C:43-6b makes clear on its face that a jury verdict, standing alone, does not authorize the imposition of a parole ineligibility period. In the language of Harris v. United States, the fact-finding compelled by 2C:43-6b "extend[s] the power of the judge" rather than "restrain[ing] the judge's power[by] limiting his or her choices within the authorized range." 536 U.S. 545, 567 (2002).

II. WELL-SETTLED FEDERALISM PRINCIPLES CONFIRM THAT BOOKER'S REMEDIAL MAJORITY CANNOT AND DOES NOT CONTROL THE QUESTION WHETHER, AND TO WHAT EXTENT, N.J.S.A. 2C:44-1f(1) IS SEVERABLE

If New Jersey's ordinary sentencing scheme runs afoul of the Sixth Amendment principle articulated in Blakely, then this Court must address whether, and to what extent, N.J.S.A. 2C:44-1f(1) is severable. The Appellate Division never addressed that question. Instead, it remanded this case to the Law Division in order to afford the State the option of securing the jury findings necessary to sustain the relevant 2C:44-1a aggravators. Natale, 373 N.J. Super. at 237. Accordingly, without saying so in haec verba, the Appellate Division concluded that, in a post-Blakely world, our Legislature would prefer 2C:44-1f(1) to function with a jury-trial procedure engrafted onto it over other potential remedies (including being declared unconstitutional).

Notably, the Appellate Division did not acknowledge, let alone discuss, other possible severability options. Nor did it address the myriad issues raised by its chosen remedy, except to note that a jury trial on the 2C:44-1a aggravators in this case would not violate double jeopardy principles. Natale, 373 N.J. Super. at 237 ("We find no double jeopardy concern in these circumstances so long as the sentence is not increased.") (citations omitted).

Two months after the Appellate Division issued its opinion, the U.S. Supreme Court issued Booker. As set forth in Point I, supra, a five-Justice majority in Booker found the federal

Sentencing Guidelines unconstitutional. A different five-Justice majority remedied the Guidelines' constitutional defect by excising a provision of the Sentencing Reform Act of 1984 that was not unconstitutional in and of itself, but that made use of the Guidelines mandatory. 18 U.S.C. § 3553(b)(1). In so doing, the High Court effectively rendered the Guidelines advisory. Booker, 125 S. Ct. at 756-57 (Opinion of Breyer, J.).

After Booker issued, this Court explicitly directed the parties and Amici to address the impact of Booker on the questions presented in this appeal. One week later, the author of the panel decision below stated that "[t]his is not the occasion to reconsider the remedy imposed by [Natale] and determine whether the presumptive term in N.J.S.A. 2C:44-1f(1) should be severed or read to be advisory." State v. Anderson, ___ N.J. Super. ___, ___ n.3, 2005 WL 167269, at *3 n.3 (App. Div. 2005) (citing Justice Breyer's remedial majority opinion in Booker). In so doing, the Appellate Division appeared to suggest that Booker somehow should control this Court's severability analysis.

Amici respectfully submit that Booker's remedial majority cannot and does not control this Court's severability analysis, and for several reasons. First, well-settled federalism principles confirm that how a federal court severs an unconstitutional federal statute is a matter of federal law. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) ("[W]henever an act of Congress contains

unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.") (internal quotation marks and citations omitted). Accord Denver Area Ed. Telecom. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) ("Would Congress still have passed [the statute] had it known that the remaining "provision[s were] invalid?") (internal quotation marks and citation omitted).

The same federalism principles dictate that how a federal court severs an unconstitutional state statute "is of course a matter of state law." Leavitt v. Jane, 518 U.S. 137, 139 (1996) (per curiam). The fact that a state statute violates the federal constitution does not alter that basic reality. Indeed, "[f]ederal courts are ... bound by the constraints of federalism to defer to state law severability doctrine--even if that doctrine may appear to violate a state's own system of separated powers." Shumsky, Severability, Inseverability, and the Rule of Law, 41 HARV. J. ON LEGIS. 227, 247 n.97 (2004). See In re Princeton-New York Investors Inc., 255 B.R. 366 (Bankr. D.N.J. 2000) (applying New Jersey severability principles to determine whether remainder of fraudulent conveyance statute survived a determination that bankruptcy law preempted one part of it); see also National Advertising Company v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991) (stating that "[s]everability is a question of state law" and

applying New York severability precedent to determine whether valid aspects of sign ordinance could survive).

The corollary is true as well. How a state court severs an unconstitutional state statute is a matter of state law. As the Supreme Court of Pennsylvania explained, "[t]he question whether a state statute is capable of a severable construction is a question of state law, and the United States Supreme Court is bound by our determination on the question of the severability of a state statute." Commonwealth of Pa. Dep't of Ed. v. The First School, 370 A.2d 702, 707 (Pa. 1977) (footnote omitted). Accord People v. Mancuso, 175 N.E. 177, 180 (N.Y. 1931) ("To what extent a severance of good from bad is permissible with a view to the preservation of a statute is a question of construction as to which the courts of the state, and not the federal courts, must speak with ultimate authority.").

Second, differences in the sentencing statutes themselves militate against this Court blindly following Booker's severability analysis. Prior to Booker, the federal sentencing regime functioned differently from New Jersey's ordinary sentencing scheme. While both violated the Sixth Amendment's jury-trial guaranty, the fact that two materially different statutory schemes violate the same constitutional principle does not compel an identical severability analysis (so long as the statute, if severed, removes the constitutional infirmity). Compare United States v. Jackson, 390

U.S. 570 (1968) (severing death penalty as available punishment from federal kidnaping statute that impermissibly burdened right to trial and encouraged guilty pleas to avoid death penalty) with State v. Forcella, 52 N.J. 263, 280-83 (1968) (finding no similar defect in New Jersey's homicide statute but conditionally severing plea provision and leaving death penalty intact should the U.S. Supreme Court ultimately come to a contrary conclusion), overruled in part on other grounds sub nom. Funicello v. New Jersey, 403 U.S. 948 (1971) (mem.).[3] Cf. The First School, 370 A.2d at 707 (noting that since the two U.S. Supreme Court cases addressing the severability of Pennsylvania statutes "arose in federal district court, the United States Supreme Court had no guidance from this Court on the severability of the Parent Reimbursement Act or Acts 194 and 195.").

Finally, apart from differences between federal and New Jersey severability principles, and apart from significant differences in the statutes at issue, the Booker Court was deeply fractured on the severability issue. Notably, that division centered on whether the remedial majority's severability analysis was even supported by existing federal precedent. See, e.g., Booker, 125 S. Ct. at 777

[3]The summary reversal of Forcella in Funicello v. New Jersey was not a criticism of this Court's severability analysis vel non, but rather a signal that this Court had not considered whether the statute, as severed, passed constitutional muster. Indeed, this Court was forced to speculate as to the precise reason why the U.S. Supreme Court had summarily reversed numerous death sentences imposed under the New Jersey statute. State v. Funicello, 60 N.J. 60 (1972) (per curiam).

(Stevens, J., dissenting in part) ("Our 'severability' precedents ... cannot support the Court's remedy because there is no provision of the [Sentencing Reform Act] or the Guidelines that falls outside of Congress' power."); id. ("There is no case ... in which this Court has used "severability" analysis to do what the majority does today: determine that **some** unconstitutional applications of a statute, when viewed in light of the Court's reading of 'likely' legislative intent, justifies the invalidation of certain statutory sections in their entirety, their constitutionality notwithstanding, in order to save the parts of the statute the Court deemed most important."); id. at 800 n.10 (Thomas, J., dissenting in part) ("I ... agree with Justice Stevens that Justice Breyer grossly distorts severability analysis by using severability principles to determine which provisions the Court should strike as unconstitutional.").

Indeed, the dissenters openly accused the majority of usurping legislative authority by rewriting the Sentencing Reform Act to resemble the very sentencing regime Congress had attempted to replace. Id. at 772 (Stevens, J., dissenting in part) ("it is therefore clear that the Court's creative remedy is an exercise of legislative, rather than judicial, power"); id. at 793 (Scalia, J., dissenting in part) ("The Court's need to supplement the text that remains after severance suggests that it is engaged in 'redraft[ing] the statute' rather than just implementing the valid

portions of it.").

Thus, even if federal severability precedent could be considered persuasive under the best of circumstances, this Court should not defer to a holding and methodology that is controversial at best, and a raw judicial exercise of legislative authority at worst. In short, Booker was not intended to be, and should not be viewed as, a one-size-fits-all severability blueprint for those states (like New Jersey) with sentencing statutes that violate Blakely's Sixth Amendment holding.

Amici, therefore, continue to rely on the severability arguments advanced in Point II of their Appellate Division Brief. As set forth therein, N.J.S.A. 2C:44-1f(1) and 2C:43-6b are severable to the extent of excising sentences in excess of the presumptive terms and parole-ineligibility terms. Accordingly, Amici respectfully submit that the proper remedy in this case is to vacate the portion of Defendant's sentence that exceeds the amount of punishment authorized solely by the jury's verdict and remand for the imposition of the flat presumptive term. See, e.g., State ex rel. Mason v. Griffin, 819 N.E.2d 644, 648 (Ohio 2004) ("Judge Griffin had two choices: (1) apply the statutes as if Blakely did not render them unconstitutional and conduct a sentencing hearing without a jury or (2) find the statutes unconstitutional under Blakely and refuse to impose those enhancement provisions he deemed unconstitutional. By choosing neither, he proceeded in a manner in

which he patently and unambiguously lacked jurisdiction to act."); Bruce, 2005 WL 267668, at *2 (relying on Mason and stating that, "[a]s the sentence imposed on Bruce is contrary to law, this court is authorized to modify and reduce the sentence imposed. Accordingly, Bruce's first assignment of error is sustained, and we hereby modify his sentence to nine years' incarceration.")[4]

[4]As of this writing, the State has not formally abandoned the severability position it persuaded the Appellate Division to adopt. In the event the State's Supplemental Brief urges a Booker-type severance for N.J.S.A. 2C:44-1f(1), Amici's Reply Brief will explain in detail why such a severance is inappropriate.

III. EVEN IF CORRECT, THE APPELLATE DIVISION'S REMEDY CANNOT BE APPLIED TO ALREADY-SENTENCED DEFENDANTS WITHOUT WORKING ADDITIONAL CONSTITUTIONAL VIOLATIONS

A. Blakely Errors Are Per Se Reversible As A Matter Of New Jersey Law

In reversing and remanding, the Appellate Division said that, "[g]iven the factors **used here**, we decline to consider that the judge's findings are subject to a harmless error analysis." Natale, 327 N.J. Super. at 236 (emphasis added). To the extent the Appellate Division meant that Blakely errors are "structural," such that the aggravating facts have to be implicit in the verdict in order to be harmless error, its analysis was correct. In Point III.A of the Brief Amicus Curiae it filed in State v. Franklin, Docket No. 56,569, the ACDL-NJ explained (1) why Blakley errors are structural as a matter of federal and state constitutional law, and (2) that the proper standard of review is whether the jury implicitly found (and not whether the evidence of record supports) the omitted sentence-enhancing fact.[5]

Although the Appellate Division correctly invoked structural-error analysis in affording Defendant a remedy, it appeared to limit its analysis to the particular aggravating factors used in this case. In reality, however, in no case can a N.J.S.A. 2C:44-1a aggravator be implicit in a jury verdict since, as argued in Point

[5]Amici respectfully request that this Court take judicial notice of those arguments. State v. Biegenwald, 126 N.J. 1, 16 (1991) (taking judicial notice of brief filed in separate case raising similar legal issues).

III.A of Amici's Appellate Division brief in this case, New Jersey precedent forbids a trial court from relying on a 2C:44-1a aggravator that overlaps with an element of the offense. See State v. Carey, 168 N.J. 413, 425 (2001) (impermissible to double count element of the offense as aggravating factor); State v. Miller, 108 N.J. 112, 122 (1987) ("the factors invoked by the Legislature to establish the degree of the crime should not be double counted when calculating the length of the sentence").

Accordingly, this Court should make clear that a Blakely error like the one that occurred in this case can never be considered harmless error.

B. Allowing The State To Try The 2C:44-1a Aggravators To A Jury On Remand Would Violate Federal And State Double Jeopardy Principles

As Amici argued in Point III.B.2 of their Appellate Division brief, a jury trial on aggravators necessary to justify the imposition of additional punishment beyond the amount authorized by the jury verdict would violate double jeopardy principles. Citing this Court's summary affirmance in State v. Natale, 178 N.J. 51 (2003) (per curiam) ("Natale I"), which allowed a remand for a jury trial on a No Early Release Act ("NERA") predicate, the Appellate Division disagreed. Natale, 373 N.J. Super. at 237.

To the extent that the Appellate Division viewed Natale I as having rejected on the merits a double jeopardy challenge to the remedy, it was mistaken. At the time of Natale I, this Court likely

did not view the NERA predicate as an "element" for Sixth Amendment purposes. Rather, it was a sentence-enhancing fact that, by virtue of judicial gloss alone, State v. Johnson, 166 N.J. 523 (2001), was entitled to jury findings under the reasonable doubt burden of proof. Supreme Court precedent makes clear, however, that double jeopardy principles do not apply to trials on facts that are not "elements." Monge v. California, 524 U.S. 721 (1998) (allowing retrial on "prior conviction" fact despite appellate court reversal for legal insufficiency). As such, this Court presumably saw no double jeopardy bar to a retrial on the NERA predicate.

But speculation as to what Natale I did or did not decide is unnecessary, and for two reasons. First, the aggravating facts listed in 2C:44-1a **are** elements as a matter of Sixth Amendment law. Thus, they trigger the protections of the Double Jeopardy Clause. Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). Second, Blakely confirms that the pre-2001 version of NERA also contained elements for Sixth Amendment purposes, because an 85% parole ineligibility period is not authorized by a jury's verdict. See supra n.2. Thus, in hindsight, the remedy approved in Natale I would have violated double jeopardy principles had the State not waived its right to seek a sentencing jury to determine the NERA predicate.

The same holds true with the Appellate Division's remedy in this case, which not only allowed the State to reconsider its NERA waiver, but allowed the State to seek an additional two years of

punishment in excess of the presumptive term. For the reasons advanced in Amici's Appellate Division brief, and in the ACDL-NJ's Brief Amicus Curiae in Natale I, allowing the trial court to convene a new jury in order to determine the elements that separate a lesser-included offense from a greater-included offense would violate settled double jeopardy principles.

CONCLUSION

For the foregoing reasons, this Court should declare that N.J.S.A. 2C:44-1f(1), 2C:43-6b and 2C:44-5 are unconstitutional, and it should vacate Defendant's sentence and remand with instructions to reduce the sentence to no more than the presumptive term without the discretionary parole bar and the consecutive term.

Respectfully submitted:

ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

By: s/
Steven G. Sanders
Arseneault, Fassett & Mariano, LLP
560 Main Street
Chatham, NJ 07928
Counsel for Amicus ACDL-NJ

OFFICE OF THE PUBLIC DEFENDER

By: s/
Linda Mehling
Assistant Deputy
Public Defender

By: s/
Marcia Blum
Assistant Deputy
Public Defender

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