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September 30, 2004

BY OVERNIGHT DELIVERY

Honorable Justices of the
Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street
P.O. Box 970
Trenton, NJ 08625-0970

Re: ***State v. Michael Natale***
App. Div. Docket No. A:4289-03

Dear Honorable Justices:

We are counsel to the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ"). This Court granted the ACDL-NJ permission to appear as *Amicus Curiae* during Defendant's first appeal, and on August 16, 2004, the Appellate Division granted the ACDL-NJ's motion to participate as *Amicus Curiae* in Defendant's appeal from the nine-year base term the Law Division Judge imposed on remand from this Court. Kindly accept this letter in support of Defendant's motion, made pursuant to *R.* 2:12-2, for direct certification of his second appeal to this Court.

Defendant's second appeal raises questions of enormous importance for criminal defendants, prosecutors, defense counsel and trial and appellate courts in this State. We respectfully submit that those questions are better answered by this Court, and sooner rather than later. They flow directly from the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Those cases established and then clarified the constitutional rule for identifying what facts are "elements" for purposes of the Sixth Amendment's jury-trial guaranty and the Fourteenth Amendment's requirement of

proof beyond a reasonable doubt on each element of a crime. Defendant's second appeal, therefore, presents the following questions:

1. Is N.J.S.A. 2C:44-1f(1) facially unconstitutional because it mandates imposition of a presumptive term but permits a judge to impose a longer sentence based on aggravating factors that a judge (not a jury) has found by a preponderance of the evidence (not beyond a reasonable doubt)?

2. If so, can a court rescue N.J.S.A. 2C:44-1f(1) from facial invalidation by rewriting the statute to require a jury to find 2C:44-1a's aggravating factors under the "beyond a reasonable doubt" standard?

3. If not, is the only proper remedy to vacate the illegal sentence and remand for imposition of the presumptive term?

4. Does the imposition of a discretionary period of parole ineligibility, based on aggravating facts that a judge (not a jury) has found by a preponderance of the evidence (not beyond a reasonable doubt) violate a defendant's Sixth and Fourteenth Amendment rights?

5. Depending on how the foregoing questions are resolved, what (if any) retroactive effect should this Court give its decision?

Several reasons militate in favor of this Court expeditiously resolving the foregoing questions in the first instance:

First, this case presents a perfect vehicle; Defendant has no prior record, and so none of the aggravators the law Division Judge found involved a prior conviction. *See generally Almendares-Torres v. United States*, 523 U.S. 224 (1998) (prior conviction is a traditional sentence enhancing fact not entitled to trial-type procedural guarantees).

Second, in granting the ACDL-NJ's motion to participate in this appeal, Judge Stern observed that "other perfected cases involving *Blakely* issues may be argued, submitted and/or decided before this case is perfected and calendared." And so Judge Stern directed that "[t]he Clerk shall prepare an accelerated scheduling order . . . ." These statements reflect the reality that the Appellate Division is probably flooded with cases raising *Blakely* issues. We suspect that this Court, too, is inundated with requests that it address and resolve the question whether our sentencing scheme is unconstitutional in light of *Blakely*.

Third, in pending cases Law Division Judges, defense attorneys and prosecutors desperately need this Court's guidance. In an attempt to predict how *Blakely* will apply to New Jersey's sentencing scheme, some courts may be imposing only the presumptive term, whereas other courts may be submitting 2C:44-1a's aggravators for jury findings in order to justify imposing a sentence above the presumptive term. Still others may be concluding that only the presumptive-term aspect of our sentencing scheme is unconstitutional, such that Judges have unfettered discretion to impose a sentence between the statutory minima and maxima set forth in N.J.S.A. 2C:43-6a. Only one of these approaches can be correct; in the meantime, plea bargaining, jury trials and sentencing proceedings occur under a cloud of confusion and doubt.

Fourth, when confronted with the identical issue during its Summer recess, the U.S. Supreme Court immediately granted *certiorari* before judgment in one case, *United States v. Fanfan*, Crim. No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, No. 04-105, 2004 WL 171365 (U.S. Aug. 2, 2004); granted *certiorari* in another case, *United States v. Booker*, 375 F.3d 508 (7th Cir.), *cert. granted*, 04-104, 2004 WL 1713654 (U.S. Aug. 2, 2004); and then expedited briefing and argument on the merits in both. The High Court did so because of the fast-developing split of authority in the courts of appeals over the constitutionality of the U.S. Sentencing Guidelines and the paralyzing effect of that circuit split on the district courts. *See* Tony Mauro, *Justices Launching Headlong Into Blakely Aftermath*, 177 N.J.L.J. 373 (Aug. 2, 2004).

Finally, should it turn out that New Jersey's sentencing scheme violates the Sixth and Fourteenth Amendments, this Court is in the best position to determine the retroactive effect of such a holding.

For the foregoing reasons, we respectfully urge this Court to grant Defendant's motion for certification pursuant to *R.* 2:12-2.

Respectfully submitted,

ARSENEAULT, FASSETT & MARIANO, LLP

By:_____
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