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March 17, 2005

Honorable Chief Justice and
Associate Justices
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State v. Michael J. Natale
Docket No. 57,143

Your Honors:

This office is in receipt of defendant's letter, submitted pursuant to Rule 2:6-11(d), to bring to this Court's attention the recent decision of the Indiana Supreme Court in Smylie v. State, ___ N.E. 2d ___ (Ind. 2005).

In Smylie, the Court held that Indiana's sentencing scheme was unconstitutional in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). (slip op. at 2-6). The Indiana statutory system provides a "fixed term" presumptive sentence for each class of felonies. (slip op. at 3). The provision applicable to Smylie's crime provided: "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances." Ind. Code Ann. § 35-50-2-7(a) (West 2004). The Indiana Supreme Court found that Indiana's "fixed term" was the functional equivalent of Washington's standard sentencing range in Blakely. (slip op. at 3). The Court rejected the State's argument that the scheme was a "simple range system," pointing out that the trial court was required to engage in fact-finding when deviating from the fixed term. (slip op. at 3-5).

In determining the constitutionality of the sentencing scheme before it, the Indiana Supreme Court did not account for the United States Supreme Court's most recent pronouncement on

the Apprendi[1] rule in United States v. Booker, 543 U.S. ___, 125 S. Ct. 738, 756 (2005). The Smylie court did not discuss Booker until the remedy section of its opinion, and even then, it dealt with only Justice Breyer's majority opinion, avoiding entirely Justice Stevens' majority opinion. The court looked at Blakely without consideration of the Supreme Court's explanation of its precedents in Booker.

Significantly, in Booker, in the opinion authored by Justice Stevens, the Supreme Court clarified that in referring to "additional" fact-finding in Blakely, it was referring to fact-finding to raise the "ceiling" of the sentence range authorized by the jury verdict, and even then, only when such fact-finding "requires" or "mandates" that the judge move upward to a different range and impose sentence from within that enhanced range. Booker, 125 S. Ct. at 745-48. To quote Justice Stevens' majority opinion:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act (SRA)] the provisions that make the Guidelines binding on district judges. . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.
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> [Id. at 750 (emphasis added).]

Justice Stevens specified that the federal guidelines violated the Sixth Amendment because they "required" or "mandated" that the trial court, based on its finding of facts, impose an "enhanced" sentence, above the maximum of the standard sentence range supported by the jury verdict. Id. at 745-47. Justice Stevens also observed that there was "no distinction of constitutional significance" between the Federal Guidelines and

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[1]Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000).

the Washington sentencing guidelines struck down in Blakely because, under both systems, "the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." Id. at 749-50.

In the second majority opinion authored by Justice Breyer, the remaining four justices plus Justice Ginsburg cured the unconstitutionality by severing the provisions of the SRA that made the Guidelines mandatory and declaring that the Guidelines are to be read as advisory. Id. at 764-65. Justice Breyer explicitly stated that the statutory provision which made the Guidelines mandatory and binding on district court judges, "is a necessary condition of the constitutional violation. That is to say, without this provision . . . the statute falls outside the scope of Apprendi's requirement." Id. at 764.

Thus, the Indiana Supreme Court in Smylie ignored the critical fact that Booker contains an important clarification, agreed upon by all nine justices: The Sixth Amendment is not implicated in a sentencing scheme where the judge has discretion, but is not required, to impose an increased sentence after making a particular finding of fact. In New Jersey, judges have broad discretion to determine an appropriate sentence within a defined range. Finding an aggravating factor does not permit the trial judge to impose sentence outside the range, nor does it require the judge to sentence above the presumptive term.

Furthermore, Smylie has no relevance because New Jersey's ordinary term sentencing system is different from Indiana's for several key reasons. First, Indiana's scheme is quantitative and involves the counting of one fixed-value factor against the other. In sharp contrast, in New Jersey, the judge's sentencing decision follows from a qualitative, not quantitative, analysis of the aggravating and mitigating factors, State v. Kruse, 105 N.J. 354, 363 (1987), wherein the factors are not interchangeable and each is not to be accorded equal value, State v. Roth, 95 N.J. 334, 367-68 (1984), and which "contemplates a thoughtful weighing of the aggravating and mitigating factors, not a mere counting of one against the other." State v. Denmon, 347 N.J. Super. 457, 467-68 (App. Div.), certif. denied, 174 N.J. 41 (2002).

Second, Indiana does not have a true range system. In order to determine the range for a Class D felony, one must add and subtract. Only by finding specified factors may a court move from one fixed point to another, from 6 months to 3 years in the case of a Class D felony. In New Jersey, our statute clearly spells out the range for each degree of offense, e.g., 5 to 10 years for a second degree crime, and the court has complete discretion in selecting any sentence within the range. N.J.S.A. 2C:43-6a.

Third, and significantly, in Indiana, a sentencing judge may

impose the presumptive fixed term, based on the jury verdict alone, without engaging in any fact-finding at all. Smylie v. State, ___ N.E. 2d at ___ (slip op. at 3). The judge is required to identify the aggravating and mitigating factors and articulate reasons for the sentence only when deviating from the presumptive term. (slip op. at 4).

Very differently, in New Jersey, whether imposing the presumptive term, or a sentence above or below that point, our judges are required to consider the aggravating and mitigating factors, identify the applicable ones, weigh them, and state on the record the reasons for imposing the sentence. State v. Dalziel, ___ N.J. ___ (2005); State v. Kruse, 105 N.J. 354, 359-60 (1987); N.J.S.A. 2C:44-1a; N.J.S.A. 2C:44-7; N.J.S.A. 2C:43-2e; R. 3:21-4(g). In other words, unlike in Indiana where the jury verdict alone without any fact-finding authorizes the presumptive term, in New Jersey, the maximum sentence that the judge may impose based on the jury verdict alone without making any factual findings is no sentence at all. The jury verdict or guilty plea simply takes the judge to the corresponding range, and then the judge must weigh the aggravating and mitigating factors to set a precise term. The judge is drawn to the presumptive term within that range only upon finding an equipoise of aggravating and mitigating factors. To put it bluntly, we have never seen a case were a court articulated that no aggravating or mitigating factors existed, and a failure to articulate the facts justifying the sentence would require that an appellate court reverse the sentence as an arbitrary exercise of judicial power. N.J.S.A. 2C:44-7.

The Supreme Court in Blakely distinguished between judicial fact-finding pertaining to the exercise of sentencing discretion within a statutory range, and judicial fact-finding that elevated punishment beyond the sentence to which the defendant would otherwise have a right, explaining:

> Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to

> lawful imposition of the penalty. Of course indeterminate [sentencing] schemes involve judicial factfinding, in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts [properly subject to the court's discretion] do not pertain to whether the defendant has a legal right to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.
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> [Blakely, 124 S.Ct. at 2540 (emphasis added).]

Our aggravating factors under N.J.S.A. 2C:44-1a are facts the judge "deems important to the exercise of his sentencing discretion," but "do not pertain to whether the defendant has a legal right to a lesser sentence." Ibid. In New Jersey, if the judge were to impose a term above the presumptive without an adequate finding of aggravating factors, the sentence would not be illegal, State v. Murray, 162 N.J. 240, 247 (2000), but would be subject to reversal, if challenged on direct appeal, only as excessive pursuant to N.J.S.A. 2C:44-7. This is entirely consonant with the Supreme Court's "reasonableness" standard of appellate review established in Booker. Booker, 125 S. Ct. at 766.

Finally, the Indiana Supreme Court opted to modify its system to require jury findings on the aggravating factors, rather than impose the remedy invoked in Booker, which would have entailed construing the fixed term as discretionary, rather than mandatory.[2] (slip op. at 5). In Booker, rather than declaring "total invalidation" of the federal guidelines or engrafting onto them the "jury trial requirement," by "looking to legislative intent," the Supreme Court decided that "Congress would have preferred" the remedy of excising the provisions of the statute to "make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct--a connection important to the increased uniformity of sentencing Congress intended its Guidelines system to achieve." Booker, 125 S. Ct. at 757-59. The Indiana Supreme

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[2] Notably, the dissenter in Smylie would impose a Booker remedy: "The presumptive sentences identified by statute would serve as non-binding recommendations, with our trial courts nevertheless empowered to exercise their sound discretion to fix the sentence at any point within the designated range, upon consideration of the aggravating and mitigating factors as found by the judge." Smylie v. State, ___ N.E. 2d at ___ (Dickson, J., dissenting).

Court rejected the Booker remedy for the sole reason of remaining "faithful" to the perceived intent of the Indiana Legislature in its 1977 sentencing reform "to abandon indeterminate sentencing in favor of fixed and predictable terms." (slip op. at 5).

Quite to the contrary, as explained by this Court in 1984, our Legislature, in enacting the sentencing provisions of Title 2C, "has for the most part rejected determinate or flat-time sentencing," in favor of a system of structured judicial discretion, "repos[ing] the deepest trust in the judiciary." State v. Hodge, 95 N.J. 369, 379-80 (1984). "[T]he weighing process envisioned by the Code's provisions necessarily reflects the seasoning and experience of the . . . sentencing judge." State v. Flores, 228 N.J. Super. 586, 595 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989). One of the major goals of sentencing reform embodied in Title 2C was to "[p]rovide a range of authorized punishment for each degree of crime broad enough to account for differences in individual cases but narrow enough to avoid unjustified disparity between the sentences of persons convicted of similar crimes." Final Report of the New Jersey Sentencing Policy Study Commission, at 83, January 1994. Thus, if our scheme were found to be unconstitutional, the most appropriate remedy would be to construe the "shall" as a "may" in N.J.S.A. 2C:44-1f(1), and thus, our presumptive terms become discretionary rather than mandatory. This construction remains faithful to the legislative intent to avoid sentencing disparities and promote uniformity and rationality, while maintaining flexibility to permit imposition of individualized punishment appropriate to the crime and offender.

In sum, Smylie reflects nothing more than the Indiana Supreme Court's interpretation of its unique sentencing scheme, and has little or no relevance to the issues presented to this Court. Moreover, the Indiana Supreme Court did not interpret Booker, but rather chose not to apply it. The United States Supreme Court's construction of the Sixth Amendment in Booker, however, is binding upon this Court. For these reasons, Smylie v. State provides no useful guidance for this Court.

Respectfully submitted,

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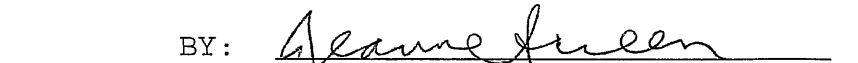
BY: 
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