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May 24, 2005

Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625

Re: State v. Abdul Abdullah
Docket No. 57,010

State v. Michael Natale
Docket No. 57,143

Your Honors:

The Court heard argument in the companion cases of State v. Abdullah and State v. Natale on March 14. Both cases address the application of the United States Supreme Court decisions in Blakely v. Washington, 124 S.Ct. 2531 (2004), and United States v. Booker, 125 S.Ct. 738 (2005), to the New Jersey sentencing system. The Public Defender represents Mr. Abdullah and, with the New Jersey Association of Criminal Defense Lawyers (NJ-ACDL), serves as amicus curiae in Natale. In accordance with R. 2:6-11(d), the Public Defender and the NJ-ACDL are submitting this letter to bring to the Court's attention yesterday's Colorado Supreme Court decision in Lopez v. People, __ P.3d __, 2005 WL 1204648 (Colo. 2005) (not yet released for publication), which holds that parts of the Colorado sentencing scheme violate Blakely's core holding.

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The New Jersey and Colorado sentencing systems are both based on presumptive terms that cannot be increased unless the trial judge finds at least one aggravating fact. In Lopez, the Colorado Supreme Court explained that (like the New Jersey system), under the Colorado sentencing scheme, "the trial judge[] [has] the discretion to increase or decrease the felony sentence beyond the presumptive range based on the presence of extraordinary mitigating or aggravating circumstances[.]" Id. at *2. The Court concluded that so long as "the trial judge must find additional facts in order to impose a sentence outside of the presumptive range, then the rule in Blakely applies." Id. The Court held that, with the exception of the fact of prior conviction, the judge may not impose more than the presumptive term unless the jury finds aggravating facts or the defendant admits to them or stipulates to judicial factfinding. Id. at *5.

The Colorado Supreme Court also flatly rejected the argument, advanced by the Attorney General in Abdullah and Natale, that the Sixth Amendment applies only if the sentence enhancement is mandatory upon the finding of an aggravating fact. The Colorado Court pointed out that

> the Blakely Court effectively rejected any distinction, for the purposes of Sixth Amendment analysis, between mandatory or discretionary aggravated systems based on judicial factfinding. Under either system, facts supporting increased sentences are subject to the rule. The Court stated that "[w]hether judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence. Id. [124 S.Ct.] at 2538 n.8."

Id. at 22 (emphasis in original).

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In addition, the Colorado Supreme Court also rejected a second claim advanced by the New Jersey Attorney General. The Attorney General contends that, despite the fact that the presumptive term may not be increased without a finding of aggravating facts, as long as the court imposes a sentence within the statutory range, defendants have no right to a jury finding, beyond a reasonable doubt, of facts that warrant a sentence above the presumptive term. The Colorado Court dismissed that argument, as follows:

> [U]nder § 18-1.3-401(6), the trial judge must impose a sentence within the presumptive range unless he or she engages in the extraordinary aggravating or mitigating circumstances analysis. If that analysis requires judicial factfinding to which the defendant has not stipulated, then the rule of Blakely applies and any additional facts used to aggravate the sentence must be Blakely-compliant or Blakely-exempt.

Id. at 13.

Neither can the Attorney General look to the concurring justices in Lopez for support. The concurrence believed that the Colorado system does not violate Blakely because, unlike the Washington system at issue in Blakely, and unlike the New Jersey system, Colorado judges need not find any facts beyond those in the verdict in order to impose more than the presumptive term: "This court has consistently rejected any suggestion that a sentence beyond the presumptive range may not be predicated on the facts proving the elements of the crime alone." Id. at *21. In contrast, this Court has repeatedly held that under the New Jersey sentencing scheme judges may not rely on aggravating facts that duplicate elements of the crime. See State v. Carey, 168

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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").

Respectfully submitted,

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