SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4289-03T3

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Final Judgment of Conviction
v.	:	of the Superior Court of New Jersey, Law Division,
MICHAEL J. NATALE,	:	Camden County.
Defendant-Appellant.	:	Sat Below:
	:	Hon. Linda G. Rosenzweig Baxter, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF AMICUS CURIAE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AND THE OFFICE OF THE PUBLIC DEFENDER

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PRELIMINARY STATEMENT

Pursuant to leave granted, the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") and the Office of the Public Defender ("OPD") respectfully submit this Joint Brief Amici Curiae to address several important legal questions foreshadowed by Apprendi v. New Jersey, 530 U.S. 466 (2000), crystallized in Ring v. Arizona, 536 U.S. 584 (2002), and squarely raised by Blakely v. Washington, 124 S.Ct. 2531 (2004):

1. Is N.J.S.A. 2C:44-1f(1) unconstitutional to the extent it permits a judge to impose a sentence above the statutorily mandated presumptive term based on aggravating factors that our Legislature required judges to find by a preponderance of the evidence?

2. Is N.J.S.A. 2C:43-6b unconstitutional to the extent it permits a judge to impose a period of parole ineligibility based on aggravating factors that our Legislature required judges to find by a preponderance of the evidence?

3. Is N.J.S.A. 2C:44-5 unconstitutional to the extent State v. Yarbough, 100 N.J. 627 (1985), permits a judge to find the factors leading to the imposition of consecutive sentences?

4. Do separation of powers principles permit this Court to reconfigure our Code of Criminal Justice so that juries find 2C:44-1a's aggravating factors at a bifurcated sentencing trial?

5. If separation of powers principles preclude this Court from writing a jury trial requirement into the relevant statutes, is the only appropriate remedy to remand for imposition of the presumptive term without any period of parole ineligibility?

6. If separation of powers principles allow this Court to write a jury trial requirement into the relevant statutes, is the failure to obtain jury findings on 2C:44-1a's aggravators reversible error as a matter of law?

7. If the failure to obtain jury findings on 2C:44-1a's aggravators always constitutes reversible error as a

> matter of law, do settled double jeopardy principles preclude a trial court from convening a new jury on remand to obtain findings on aggravators that should have been, but were not, alleged in the indictment and submitted to the first jury?

Amici respectfully submit that N.J.S.A. 2C:44-1f(1), 2C:43-6b and 2C:44-5 are unconstitutional as written because they provide for increasing a defendant's sentence based on the very sort of judicial fact-finding that Apprendi and Blakely proscribe. Amici further submit that those statutes cannot be rescued by judicial draftsmanship. Writing a jury-trial requirement into our statutory sentencing scheme would violate settled separation-of-powers principles and create a regime of jury sentencing our Legislature never envisioned. The only proper remedy, therefore, is to vacate the illegal sentences imposed under the unconstitutional statutes and to remand for imposition of concurrent, presumptive terms without any period of parole ineligibility.

But even were this Court to "save" our sentencing statutes by writing a jury-trial requirement into them, that would simply allow courts to apply those statutes in a constitutional manner on a prospective basis. Already-sentenced defendants (like Michael Natale), however, would still be entitled to the same remedy described above. This is because, as a matter of New Jersey law, 2C:44-1a's aggravators never duplicate an element of the offense and so cannot be implicit in a jury's verdict. Further, double jeopardy principles prohibit a trial court from convening a new jury to determine aggravators that were neither

charged in the indictment nor submitted to the first jury for the purpose of enhancing a defendant's sentence.

PROCEDURAL HISTORY[1]

A jury convicted Defendant of: second-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(1); third-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(2); fourth-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5d; third-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4d; third-degree terroristic threats, in violation of N.J.S.A. 2C:12-3a & -3b; and third-degree criminal restraint, in violation of N.J.S.A. 2C:13-2a.

At the first sentencing hearing, conducted on July 21, 2000, the State asked the Law Division Judge (Hon. Linda P. Baxter, J.S.C.) to apply the version of the No Early Release Act (NERA) in effect at the time. At that time, NERA literally permitted a trial court, at a hearing conducted after trial, to require a defendant to serve 85% of the maximum sentence if he or she had been convicted of a first- or second-degree offense "that is found to constitute a violent crime[,]" that is, "[a]ny crime in which the actor ... uses or threatens the immediate use of a deadly weapon...." Former N.J.S.A. 2C:43-7(d). Judge Baxter

[1]The ACDL-NJ adopts and incorporates the "Factual Background" section contained in Defendant's brief.

applied NERA over Defendant's objection that a jury had not found the NERA predicate fact beyond a reasonable doubt.

After sentencing, but before Defendant had perfected his first direct appeal, the New Jersey Supreme Court made explicit what counsel for Defendant had argued implicitly at sentencing. Specifically, in State v. Johnson, 166 N.J. 523 (2001), the Court employed the doctrine of constitutional doubt to construe NERA as requiring jury findings on the predicate aggravating factors. (The Court did not hold that NERA's predicate facts were "elements" as a matter of Sixth Amendment Law.) Although the trial court in Johnson had not formally submitted the "deadly weapon" issue to the jury, our Supreme Court ultimately declined to disturb the defendant's sentence. It found that the jury had implicitly determined that the defendant had threatened to use a deadly weapon in the course of committing his second-degree offense.

Following Johnson, the Appellate Division reversed defendant's NERA-enhanced sentence in a published opinion. State v. Natale, 348 N.J. Super. 625 (App. Div. 2002). The Appellate Division concluded that the jury's verdict could not be construed as implicitly finding that defendant had used a deadly weapon during the commission of his second-degree offense. The Appellate Division therefore "remand[ed] for a jury trial on the NERA predicate" only, leaving "it to the trial judge, prosecutor, and defense attorney to resolve the parameters of such a trial." Id. at 635-36.

On June 24, 2002, the U.S. Supreme Court issued its opinion in Harris v. United States, 536 U.S. 505 (2002). A four-Justice plurality declined to extend Apprendi's holding to facts that, when found, resulted in the imposition of a mandatory minimum sentence that the judge had discretion to impose by virtue of the jury verdict alone. Justice Breyer concurred in the plurality's holding, but only because he believed that Apprendi had been wrongly decided. Id. at 569-72 (Breyer, J., concurring in part and concurring in the judgment).

The State initially sought, and our Supreme Court granted, certification to review the question whether the Appellate Division properly concluded that the failure to submit the NERA predicate to the jury in connection with the second-degree aggravated assault count constituted reversible error. State v. Natale, 174 N.J. 41 (2002). Ultimately, our Supreme Court granted defendant's later-filed cross-petition for certification to review the potential double jeopardy implications of the Appellate Division's remedy. State v. Natale, 175 N.J. 434 (2003).

After seeking and obtaining leave to appear as amicus curiae, the Attorney General argued that Johnson had been wrongly decided and should be overruled. Invoking the U.S. Supreme Court's decision in Harris (and, later, our Supreme Court's decision in State v. Stanton, 176 N.J. 75 (2003) (adopting Harris plurality's holding as a matter of State constitutional law)), the Attorney General contended that our Supreme Court's

construction of NERA had provided defendants with procedural guarantees that neither the Federal nor the New Jersey Constitution required. The Attorney General also asserted that "[t]he Legislature clearly intended that a judge, not a jury, would impose a NERA sentence" and implored the Court to "honor the Legislature's intention[.]" Brief Amicus Curiae of New Jersey Attorney General at 22, 28, State v. Natale, No. 52,845. The Attorney General therefore argued that our Supreme Court should re-construe NERA as a penalty-enhancing statute, retroactively apply that construction to defendant's appeal, and reverse the Appellate Division's judgment.

In the alternative, the Attorney General argued that, even if Johnson remained good law (such that the trial court had violated defendant's Johnson-created right to jury findings on the "deadly weapon" issue), the Appellate Division's remedy was correct. According to the Attorney General, remanding the case to the Law Division for a jury trial limited to the NERA predicate fact would not violate double jeopardy principles. Without addressing the critical question whether the NERA predicate fact was an "element" for Sixth Amendment purposes, the Attorney General essentially argued that there had been neither a prior conviction nor an acquittal on the "deadly weapon" issue.

The New Jersey Supreme Court summarily affirmed the Appellate Division's judgment, and it afforded the State the option of either submitting the NERA predicate fact to a sentencing jury on remand or allowing the trial court to sentence

Defendant without the NERA parole ineligibility period. State v. Natale, 178 N.J. 51 (2003) (per curiam). In so ruling, our Court neither overruled Johnson nor explained whether it viewed the NERA predicate fact as a formal "element" for Sixth Amendment purposes (as opposed to a pure sentence enhancer that, by judicial construction, was imbued with trial-type procedural guarantees). As such, it is unclear whether the Court accepted the Attorney General's double jeopardy argument on the merits or (more likely) found that the Double Jeopardy Clause inapplicable to the circumstances before it.

On remand to the Law Division, the State opted not to submit the NERA predicate fact to a sentencing jury. Prior to resentencing, however, defendant argued that any sentence longer than the presumptive, seven-year term would violate the U.S. Constitution because New Jersey's sentencing scheme directed judges (not juries) to find the statutory aggravating factors by a preponderance of the evidence (not beyond a reasonable doubt). The State countered that defendant had "waived" this claim by not raising it in his prior direct appeal.[2] The State further argued that the claim was, in any event, "frivolous."

[2]On October 20, 2003, one month before prior to our Supreme Court's summary affirmance of this Court's judgement, the U.S. Supreme Court granted certiorari in Blakely v. Washington, 124 S.Ct. 429 (2003), to review the following question: "Whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by Apprendi v. New Jersey, 530 U.S. 466 (2000)." (Pet. for Cert. at I, Blakely v. Washington, No. 02-1632, 2003 WL 22427993 (U.S. May. 05, 2003).

Judge Baxter rejected the State's contention that Defendant had waived his facial challenge to N.J.S.A. 2C:44-1 and, instead, adjudicated it on the merits. However, she understood the ten-year ceiling prescribed in N.J.S.A. 2C:43-6(a)(2) — and not the presumptive seven-year sentence specified in N.J.S.A. 2C:44-1f(1)(c) — to be the applicable "statutory maximum" for purposes of applying the holding in Apprendi. Invoking Harris, 536 U.S. at 545, Judge Baxter concluded that judicial fact-finding resulting in a sentence lower than ten (but higher than seven) years did not implicate (let alone violate) Apprendi's holding.

Judge Baxter went on to find four statutory aggravating factors and determined that they sufficiently outweighed the single mitigating factor she found. She thus resentenced defendant to a base term of nine years' imprisonment, two years higher than the presumptive term. Relying on the same aggravating and mitigating factors, N.J.S.A. 2C:43-6b, Judge Baxter further ordered that defendant serve fifty percent of the base term without parole eligibility.[3] Undeniably, Judge Baxter (and not a jury) found the aggravating factors under a standard of proof lower than "beyond a reasonable doubt."

On August 16, 2004, this Court granted the ACDL-NJ's and the OPD's motions to participate in this appeal. (Aa1-3)

[3]The Law Division Judge merged Counts Two through Four into Count One and imposed a sentence of five years' imprisonment, consecutive to the sentence imposed on Count One and concurrent with each other, on Counts Five and Six.

LEGAL ARGUMENT

I. NEW JERSEY'S SENTENCING STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY ASSIGN TO JUDGES THE TASK OF FINDING AGGRAVATING FACTORS UNDER THE PREPONDERANCE-OF-THE-EVIDENCE STANDARD IN ORDER TO IMPOSE A SENTENCE HIGHER THAN THE ONE AUTHORIZED SOLELY BY THE JURY'S VERDICT.[4]

In Apprendi, the U.S. Supreme Court held that any fact that subjects a defendant to a sentence longer than that "prescribed by the legislature," or in excess of the "statutory limit[]," must be submitted to a jury and proved beyond a reasonable doubt. Id. at 481-82. See also id. at 490 ("prescribed statutory maximum"). Stated otherwise, Apprendi applies to any fact that, "if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 483. Applying that rule in the case before it, the High Court facially invalidated a New Jersey statute that authorized a ten-year increase in a defendant's maximum punishment based on a sentencing judge's

[4]The State's suggestion that defendant "waived" his constitutional claim is, in a word, meritless. Cf. State v. Patton, 362 N.J. Super. 16, 52 n.8 (App. Div.), certif. denied, 178 N.J. 834 (2003). To press its waiver argument, the State must ignore both R. 3:10-2(d) ("the defense that ... a statute ... is unconstitutional or invalid ... may ... be raised ... on appeal" and R. 3:22-12(a) (petition correct an illegal sentence may be filed at any time). Regardless, Blakely illuminated a fatal defect in New Jersey's (and many other states') sentencing statutes that was not patent after Apprendi, which explains why Defendant did not challenge his base term previously. There simply is no procedural bar to addressing and resolving a facial challenge to our sentencing scheme where, as here, defendant properly raised that claim on remand.

finding — by only a preponderance of the evidence — that the crime had been motivated by "racial bias."

In explaining its holding, the Apprendi majority alternatively referred to the maximum punishment authorized by the jury's verdict and by the legislature. The Court's decision, therefore, created some confusion regarding the relevant "statutory maximum" for Sixth Amendment purposes. Indeed, because the defendant in Apprendi had limited his Sixth Amendment challenge to the increase in his sentencing exposure from ten to twenty years, the Apprendi decision created the misleading impression that New Jersey's ten-year maximum for second-degree offenses was the relevant "statutory maximum" for federal constitutional purposes.

The Court took a substantial step toward resolving the confusion it created in Apprendi with its decision in Ring v. Arizona, 536 U.S. 584 (2002), a death penalty case. In Ring, Arizona argued that the aggravating factors leading to the imposition of a death sentence were mere "sentence enhancers" because, under Arizona law, death was the statutory maximum "exposure" for first-degree murder. The Court rejected the State's position. It said that Arizona's murder statute "authorizes a maximum penalty of death . . . in a formal sense," but only because it notes that death is the maximum sentence available for that crime. 536 U.S. at 604 (quotation omitted). See also id. at 592. But "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum

punishment he could have received was life imprisonment. This was so because, in Arizona, a death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist." Id. at 597 (emphasis added) (quoting State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001)). The High Court in Ring thus held that the procedures for finding such an aggravating factor were subject to Apprendi because otherwise, "Apprendi would be reduced to a 'meaningless and formalistic' rule of statutory drafting." Id. at 604.

In Blakely, 124 S.Ct. 2531, the Supreme Court made clear that state courts may not simply construe their way around Apprendi's holding. In Blakely, the defendant pled guilty to kidnaping and assault (both class "B" felonies) arising out of a domestic violence incident. Although Washington law capped sentences for class "B" felonies at 120 months' imprisonment, Washington's statutory sentencing grid mandated a standard sentencing range of 49 to 57 months' imprisonment for the defendant's kidnaping offense. At sentencing, however, the judge announced his intention to depart upward pursuant to a separate statute that purported to allow a judge to impose a higher, "exceptional" sentence based on aggravating factors neither encompassed by the elements of the offense nor admitted during the defendant's plea allocution. As in Apprendi, that statute directed the judge to find the aggravating factors under the preponderance standard. The Washington courts rejected Blakely's

Apprendi-based attack on the statute that authorized the exceptional sentence.

In the U.S. Supreme Court, the State of Washington made the same argument that the State of Arizona had advanced in Ring. Specifically, Washington contended that the 120-month general statutory maximum for class "B" felonies — and not the standard sentencing range of 47 to 53 months — was the applicable statutory maximum for Apprendi purposes. In an opinion by Justice Scalia, the High Court flatly rejected this argument:

> Our precedents make clear . . . that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra, at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting Apprendi, supra, at 483, 120 S.Ct. 2348)); Harris v. United States, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Blakely, 124 S.Ct. at 2537 (first emphasis in original). Continuing, Justice Scalia explained that the "'maximum sentence' is no more 10 years here than it was 20 years in Apprendi (because that is what the judge could have imposed upon finding a hate crime) or death in Ring (because that is what the judge could have imposed upon finding an aggravator)." Id. at 2538.

Blakely also clarified that it made no difference that the statutory aggravators are illustrative, rather than exhaustive:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring), or any aggravating

> fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [FN8]
>
> > FN8. Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.

Id. at 2538 & n.8 (italics in original). The Supreme Court, therefore, concluded that Washington's sentencing scheme violated the Sixth Amendment because it permitted a judge to increase a defendant's sentence above the range attendant to the facts reflected by a jury verdict (or admitted in a plea allocution) based on judge-made findings under the preponderance standard.

A. N.J.S.A. 2C:44-1(f)(1) Is Unconstitutional Because It Mandates Imposition Of A Presumptive Term But Permits Judges To Impose A Higher Sentence Based On Judicial Fact-Finding Under The Preponderance Of The Evidence Burden Of Proof.

In light of the Sixth Amendment jurisprudence summarized above, this Court must resolve two fundamental questions with respect to 2C:44-1f(1). First, for purposes of New Jersey's statutory sentencing scheme, what is the relevant "statutory maximum" under Apprendi and its progeny? Second, does New Jersey's statutory scheme commit to judges the task of determining (under the preponderance standard) the aggravating factors that raise the sentence beyond the relevant "statutory maximum"?

1. The Presumptive Sentence Specified In N.J.S.A. 2C:44-1f(1) Is The Only One Authorized By A Jury's Verdict.

The New Jersey Code of Criminal Justice establishes four degrees of indictable offenses. For each such degree, a New Jersey sentencing statute (N.J.S.A. 2C:43-6a) prescribes the absolute minimum and maximum term. A different sentencing statute (N.J.S.A. 2C:44-1f(1)) establishes a default or "presumptive" term that lies in the mid-range between the two. N.J.S.A. 2C:44-1 provides as follows:

> f. Presumptive Sentences. (1) Except for the crime of murder, unless the preponderance of aggravating or mitigating factors, as set forth in subsections a. and b., weighs in favor of a higher or lower term within the limits provided in N.J.S.A. 2C:43-6, when a court determines that a sentence of imprisonment is warranted, it shall impose sentence as follows . . . .

N.J.S.A. 2C:44-1f(1) (emphasis added). In the subparts that follow the statute lists, for each degree of indictable offense, a presumptive sentence that lies in the midrange of the absolute minima and maxima set forth in 2C:44-6a.

By using the word "shall," 2C:44-1f(1) makes clear that – in the absence of any additional fact-finding – the only lawful sentence that a New Jersey judge may impose is the presumptive term. "As a general rule, the court is limited to the presumptive terms contained in N.J.S.A. 2C:44-1f(1). However, the Code confers on the court the limited power to depart from these presumptive terms where it finds a 'preponderance of aggravating factors or [a] preponderance of mitigating factors[.]'" State v. O'Connor, 105 N.J. 399, 406-07 (1987). Accord State v. Jabbour,

118 N.J. 1, 5 (1990) ("Although the Code channels the trial court's discretion by establishing presumptive terms based on the degree of the offense, N.J.S.A. 2C:44-1f(1), the court can adjust those terms after balancing the aggravating and mitigating factors.") (emphasis added); State v. Towey, 114 N.J. 69, 79 (1989) ("the Code promotes sentencing uniformity by establishing presumptive terms for each degree of crime, N.J.S.A. 2C:44-1f, within the prescribed sentencing ranges set forth in N.J.S.A. 2C:43-6a. The sentencing court may then adjust the presumptive term upward or downward depending on its evaluation and balancing of the aggravating and mitigating factors....") (emphasis added).

In State v. Roth, 95 N.J. 334 (1984), our Supreme Court's first opportunity to analyze in detail the legislative history leading to the enactment of the sentencing scheme embodied in our Code, the Court well understood that the presumptive term was the only one sentencing judges could impose in the absence of additional fact-finding: "For example, for a crime of the second degree the ordinary sentence is seven years. If there is a preponderance of aggravating factors, the court may sentence a defendant to a term of ten years; if there is a preponderance of mitigating factors, the sentence may be a term of five years." Id. at 349. Law Division Judges came to the same conclusion. See State v. Merlino, 208 N.J. Super. 247, 252 (Law Div. 1984) ("Indeed the statute requires a presumptive sentence of seven years for a crime of the second degree ... unless the preponderance of aggravating factors or preponderance of

mitigating factors ... weighs in favor of higher or lower terms.) (emphasis added) (internal quotation marks omitted).

Notably, the Roth Court repeatedly emphasized the significance of New Jersey's presumptive sentences. For instance, the Court quoted and highlighted Professor Knowlton's observation that "[t]he statute codifies some of the methods of the commission report but with several significant changes and additions. It carries the presumptions one step further by presuming specific terms of incarceration for each category of crime." Id. at 354 (emphasis in original) (quoting Knowlton, Comments Upon the New Jersey Penal Code, 32 Rutgers L. Rev. 1, 15 & n.87 (1979)). Similarly, the Court quoted Governor Byrne's statement upon signing the Code into law: "[In sentencing,] the judge is presumed to impose a mid-range sentence . . . unless he sets down certain specific mitigating or aggravating circumstances." Id. (emphasis in original) (quoting Statement of Gov. Byrne, August 10, 1978).

These decisions confirm that, although New Jersey may provide for a maximum sentence for each degree of indictable offense, courts may not impose that maximum sentence based on the jury verdict alone. Rather, 2C:44-1f(1) — by using the mandatory term "shall" — confirms that the presumptive sentence is the applicable statutory maximum for purposes of Apprendi and Blakely.

2. The Legislature Clearly Intended Judges To Find, By A Preponderance Of The Evidence, The Statutory Aggravating Factors That Result In A Sentence Higher Than The Presumptive Term.

That the Legislature intended judges (not juries) to perform the task of finding 2C:44-1a's aggravators is not seriously debatable. N.J.S.A. 2C:43-2(e) provides that "the court shall state on the record the reasons for imposing the sentence, including ... the factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence."[5] To the same effect is R. 3:21-4(g), which provides that "[a]t the time sentence is imposed the judge shall state reasons for imposing such sentence including the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence." Finally, N.J.S.A. 2C:44-7 refers to this Court's "authority to review findings of fact by the sentencing court in support of its findings of aggravating and mitigating circumstances...."

That judges must find 2C:44-1a's aggravators by a preponderance of the evidence was definitively resolved fifteen years ago: "In general, a trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate

[5]Although this statute uses the term "court" (as do other sections within Chapters 43 and 44), our Legislature, which passed the Code; the Governor, who signed it into law; and the Justices of our Supreme Court, who interpreted the Code when it became effective, all understood the term "court" to mean "judge" (and not "jury").

sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989) (emphasis added). Since our Supreme Court was reviewing sentencing findings made by a Law Division Judge, moreover, it is clear that our Court understood "trial court" to mean "sentencing judge."

O'Donnell's definitive construction of 2C:44-1 confirms that New Jersey's statutory sentencing scheme works a Sixth Amendment violation in each and every case where (as here) a defendant receives punishment in excess of the presumptive term based on judicial fact-finding under the preponderance-of-the-evidence standard. Because 2C:44-1f(1) is not susceptible to any other construction, this Court has no choice but to find it unconstitutional.

3. The State Simply Ignores Blakely's Critical Holding By Focusing On The Maximum Punishment Available After Additional Fact-Finding.

The State predictably argues, without any serious attempt to construe the relevant statutes in pari materia, that N.J.S.A. 2C:43-6a sets forth the "applicable statutory maximum" for Apprendi purposes. Taking the argument a step further, the State identifies the minimum and maximum in 2C:43-6a as the "standard range" for Blakely purposes, contending that a Sixth Amendment violation arises only where judicial fact-finding extends the sentence beyond the standard range for the degree of crime at issue. Since N.J.S.A. 2C:44-1f(1) does no more than channel the exercise of judicial discretion within the standard range, the argument continues, no Sixth Amendment violation arises even when

a judge imposes a sentence longer than the presumptive term set forth in 2C:44-1f(1).

Perhaps the most striking aspect of the State's argument is that it assiduously avoids quoting the mandatory — and constitutionally dispositive — term "shall" in 2C:44-1f(1). For instance, on page 33 of its Brief, the State quotes the first clause of 2C:44-1f(1) but then paraphrases the remainder to avoid quoting the critical statutory language that defeats its argument (i.e., "when a court determines that a sentence of imprisonment is warranted, it shall impose sentence as follows"). Worse, only one page earlier, the State pays lip service to the critical test for determining the true statutory maximum for Apprendi purposes – i.e., does the defendant have "a legal right to a lesser sentence"? (Sb at 32) (quoting Blakely, 124 S.Ct. at 2450).

Only by ignoring the term "shall" (or by interpreting "shall" to mean "may") can the State claim that 2C:44-1f(1) does not create a statutory entitlement to the presumptive sentence, and that the legislatively mandated judicial fact-finding does nothing more than channel the sentencing judge's discretion, which the State characterizes as "legislative grace," and not a Sixth Amendment violation. (Sb at 45) To be sure, 2C:44-1f(1) would pose no Sixth Amendment problem if it did not mandate imposition of a presumptive sentence. After all, a system in which the Legislature has specified a sentence of between 5 and 10 years for a second-degree offense, with the sentencing judge having complete discretion to weigh aggravating and mitigating

factors to determine where in that range the sentence should fall, would be perfectly legal. That, however, is not how New Jersey's sentencing scheme operates.

Instead, our sentencing scheme compels sentencing judges to impose a sentence lower than the maximum prescribed for the degree of indictable offense, and it allows a sentence higher than the presumptive term only if the sentencing judge finds the existence of aggravating factors not reflected by the elements of the offense of conviction, and determines that they outweigh any applicable mitigating factors. The presumptive term, therefore, creates the very sort of "legal right to a lesser sentence" that Justice Scalia said was constitutionally dispositive in Blakely.

The State makes three additional arguments in support of its position, none of which has any merit. First, the State attempts to compare the statutory minima and maxima in 2C:43-6a(2) (five to ten years) to the ordinary range (49-53 months) that Washington's sentencing grid produced in Blakely before any additional fact-finding. The State then compares 2C:44-1f(1)(c)'s directive that judges impose a seven-year presumptive term to a Washington court's exercise of discretion to select a sentence of 51 months (the mid-point of the ordinary range). According to the State, only because Washington had enacted a separate statute authorizing imposition of an "exceptional" sentence above the standard range, and up to the statutory maximum for the degree of crime, did the fact-finding necessary to impose an "exceptional" sentence implicate Sixth Amendment procedural protections.

In making this argument, however, the State relies on labels instead of function, and it elevates form over substance. In fact, the State advances the very same argument that the States of Arizona and Washington made, and that the Court squarely rejected, in Ring and Blakely. That is, the State focuses on the maximum punishment the judge can impose after additional fact-finding, and it relies on labels to contend that 2C:44-1a's aggravating factors are simply "sentencing enhancers" because they result in the imposition of punishment less than the maximum set out in 2C:43-6a. As Justice Scalia explained in Blakely, however, the "'maximum sentence' is no more 10 years here than it was 20 years in Apprendi (because that is what the judge could have imposed upon finding a hate crime) or death in Ring (because that is what the judge could have imposed upon finding an aggravator)." Id. at 2538.

Indeed, were the State's argument correct, then Justice Ginsburg's warning in Ring that "Apprendi would be reduced to a 'meaningless and formalistic' rule of statutory drafting," 536 U.S. at 604, would become a reality. Even worse, that warning would become a reality not through underhanded legislative efforts, but through sinister arguments (like the State's here) that not so subtly invite this Court to adopt a strained and unsupportable construction of our sentencing scheme in order to sidestep Apprendi and Blakely altogether. The State is acutely aware that the U.S. Supreme Court in Ring and Blakely had no choice but to invalidate Arizona's death penalty statute and

Washington's exceptional-sentencing scheme under Apprendi because the state courts had construed state law (honestly) in such a way as to squarely raise a Sixth Amendment question.

This Court should reject the State's cynical attempt to circumvent Blakely and Apprendi in this fashion. As the Oregon Court of Appeals recently reaffirmed, the "Sixth Amendment analysis under Apprendi is not dependent on legislative intent. . . . The Court has made clear in Blakely that a "statutory maximum" sentence for purposes of the Sixth Amendment is not something that, by mere legislative directive, can encompass a sentence enhancement that is based solely on judicial factfinding." State v. Sawatzky, ___ P.3d ___ 2004 WL 1987638 (Or. Ct. App. 2004) (citations and quotation omitted).

Similarly, the California Court of Appeal recently determined that Blakely applied to California's sentencing scheme, rejecting arguments identical to those the State advances here. People v. Butler, 19 Cal.Rptr.3d 310 (Cal. App. 1st Dist. 2004). Under California law, a judge may impose a "lower-", "middle-", or "upper-term" sentence for each offense. However, California law mandates that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Cal. Penal Code § 1170(b) (emphasis added). And a California court rule further provides that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in

aggravation outweigh the circumstances in mitigation." Cal. R. of Ct. 4.420(b).

Like the State here, the State of California argued that "although there is a 'presumptive mid-term sentence,' the upper term is the statutory maximum sentence which the trial court has discretion to impose." Butler, 19 Cal.Rptr.3d at 315. Properly rejecting this argument, the Court of Appeal said that

> [t]he People's argument may have been persuasive before Blakely was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is "not the maximum sentence a judge may impose after finding additional facts," but rather the sentence it may impose without making any additional findings. (Blakely, supra, 124 S.Ct. at p. 2537.) Under California law, the maximum sentence a judge may impose without any additional findings is the middle term.

Id. (emphasis in original). Other state courts have applied Blakely to reach similar results with respect to similar statutes. See generally Indiana v. Krebs, ___ N.E.2d ___ (Ind. Ct. 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"); Tennessee v. Walters, 2004 WL 2246196 (Tenn. Crim. App. 2004) ("According to Blakely, the 'prescribed statutory maximum' equates to the presumptive sentence, not the maximum sentence in the range.").

The State's second attempt to prove that our sentencing scheme poses no Sixth Amendment problem fares even worse. Specifically, the State opportunistically seizes on the confusion that Apprendi initially created over whether the proper focus was

on the maximum punishment authorized "by the verdict" or "by the legislature." Although Ring and Blakely subsequently eliminated that confusion, the State is content to portray Apprendi as having definitively held that 2C:43-6a sets forth the "applicable statutory maximum" in New Jersey as a matter of Sixth Amendment law.

To make this argument, the State observes that the Apprendi majority focused on the increase in the defendant's maximum sentence from 10 to 20 years. (Sb at 36) As set forth previously, however, the defendant in Apprendi did not ask the U.S. Supreme Court to address whether imposing any sentence above the seven-year presumptive term based on judicial fact-finding violated his Sixth Amendment rights. Rather, the defendant had limited his challenge to the increase in his maximum exposure from ten to twenty years. Since that is how both the defendant had framed the constitutional question in his briefing, the U.S. Supreme Court had no reason (and, in fact, lacked jurisdiction) to determine whether, as a matter of New Jersey law, 2C:44-1f (as opposed to 2C:43-6a) reflects the maximum punishment authorized by the verdict alone. The State, therefore, is hard-pressed to read Apprendi as definitively deciding (let alone addressing) whether 2C:43-6a sets forth the applicable statutory maximum.[6]

[6]The State's attempt to portray Apprendi as conclusively holding that 2C:43-6a is the "applicable statutory maximum" in New Jersey is disturbingly reminiscent of Arizona's reliance on Apprendi to argue in State v. Ring, 25 P.3d 1129 (Ariz. 2001), that Arizona's death penalty statute did not violate the Sixth Amendment. Based solely on a mistaken understanding of Arizona law, the Apprendi majority had declined to overrule Walton v. Arizona,

Finally, the State argues that, because New Jersey utilizes an "indeterminate" sentencing regime, and because Blakely expressly reaffirmed the constitutionality of indeterminate sentencing, our sentencing system does not violate the Sixth Amendment. (Sb at 31-33) The most glaring flaw in this argument is that its major premise is simply incorrect. As our Supreme Court recognized in 1989, "[t]he direction toward greater [sentencing] consistency is found in the Code's focus on 'offense-oriented, non-individualized **determinate** sentencing.'" State v. Pillot, 115 N.J. 558, 569 (1989) (emphasis added) (quoting Roth, 95 N.J. at 349). Because the State's major premise is flawed, its conclusion is wrong.

4. State v. Abdullah's Dicta Does Not Bind This Panel And Should Not Be Followed.

In State v. Abdullah, ___ N.J. Super. ___, 2004 WL 2281236 (App. Div. 2004), a panel of this Court addressed whether the defendant's maximum sentence for second-degree burglary, which the trial court had run consecutively to the sentence it had imposed for knowing and purposeful murder, violated the Sixth Amendment because the trial judge (and not a jury) had found the

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497 U.S. 639 (1990) (rejecting Sixth Amendment challenge to Arizona's death penalty statute). Notably, the Arizona Supreme Court admitted that Apprendi had misinterpreted Arizona law in reasoning that Walton's holding did not conflict with Apprendi's. Despite that admission, the Arizona Supreme Court accepted the State's suggestion that it rely on Apprendi's mistaken belief that Walton remained good law to affirm Ring's death sentence. While successful in the short run, that questionable tactic forced the U.S. Supreme Court to grant certiorari, overrule Walton, and reverse Ring's death sentence in Ring v. Arizona, 436 U.S. at 584.

applicable 2C:44-1a aggravating factors.[7] Invoking reasoning similar to the State's, the panel (per Judge Lintner) determined that 2C:43-6a(2) was the "applicable statutory maximum" for Apprendi purposes because our Legislature intended ten years to be the maximum possible punishment for second-degree crimes:

> Unlike the Washington statutes, our statutes relevant to this appeal provide for standard ranges, rather than an enhanced term beyond the maximum, which can only be imposed upon a finding that the offense involved an additional element like "deliberate cruelty". . . . As we have previously stated, our statutory scheme provides a standard range within which aggravating factors are used to determine a term beyond the presumptive. Neither N.J.S.A. 2C:11-3b(1) (providing for a term of thirty years to life for murder) nor N.J.S.A. 2C:43-6a (providing five to ten years for second-degree offenses with a presumptive term of seven years) provides for enhanced terms above the maximum within the standard range. Accordingly, we do not agree with defendant's contention that a presumptive term is the maximum sentence that can be imposed without a jury finding, beyond a reasonable doubt, the existence of certain aggravating factors.

Id. at 14. Judge Lintner, however, never addressed why ten years was the statutory maximum for second-degree offenses in New Jersey when the Blakely Court specifically rejected Washington's argument that ten years was the statutory maximum penalty for kidnaping in Washington. Like the State's argument here, the panel's opinion in Abdullah simply brushes aside, and fails to

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[7] In a different case decided the same day, this Court did not reach the Sixth Amendment question presented here because the Law Division Judge had ordered the sentence for the second-degree offense to run concurrently with the sentence on the murder conviction. State v. King, ___ N.J. Super. ___, 2004 WL 2281127, at *10 (App. Div. 2004)("even if Blakely prohibits the trial judge from using an aggravating factor, or aggravating factors not based on prior convictions, not found by the jury to increase the specific term sentence imposed (an issue we do not decide), it was harmless in this case.").

appreciate the constitutional significance of, 2C:44-1f(1)'s mandatory language.

Regardless, Abdullah's resolution of this issue was unnecessary to the court's judgment and, as such, was arguably dicta. Immediately after concluding that the presumptive term in N.J.S.A. 2C:44-1f(1) is not the "applicable statutory maximum" for Apprendi purposes, Judge Lintner went on to hold that the statutory aggravators the trial court had relied on to impose the maximum sentence fell within the "prior conviction" exception to the Apprendi rule first announced in Almendarez-Torres v. United States, 523 U.S. 224 (1998), and reaffirmed in Blakely. See Abdullah, 2004 WL 2281236, at *15 ("even if we agreed with defendant's contention, there remain other considerations that lead us to the inescapable conclusion that the circumstances here do not justify our intervention on a constitutional basis."). Because the panel in Abdullah could have resolved the case on a narrower basis, as did the panel in King, and because Abdullah only perfunctorily addressed the Sixth Amendment question presented in this appeal, we respectfully submit that Abdullah should not be followed. See generally David v. Government Employees Ins., 360 N.J. Super. 127, 142 (App. Div. 2003) ("We decide cases by panels, not en banc, and the decisions of one panel of the Appellate Division are not binding upon the

remaining panels.") (citing Pressler, Current N.J. Court Rules, comment 3 on R. 1:36-3 (2003)).[8]

B. N.J.S.A. 2C:43-6b Is Unconstitutional Because It Permits A Court To Impose A Period Of Parole Ineligibility Not Authorized By The Verdict Alone Based On Judge-Made Findings.

Relying on the same aggravating factors used to justify raising the presumptive term, and with the additional finding that they outweighed the mitigating, the court imposed a four-and-one-half-year parole disqualifier on the aggravated assault conviction. (8T 28-15 to 34-20) Because the judge, not the jury, made the predicate findings necessary for the imposition of a discretionary parole disqualifier, the imposition of a period of parole ineligibility was contrary to the holding in Blakely.

Judicial authority to impose a discretionary parole disqualifier is contained in N.J.S.A. 2C:43-6b, which provides:

> As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially

[8]Because Defendant has no prior record, his appeal does not raise the question whether aggravators 3, 6 or 9 under 2C:44-1a fit within the "prior conviction" exception recognized by Apprendi and reaffirmed in Blakely. In answering that question affirmatively, however, the Abdullah panel implicitly rejected a facial challenge to 2C:44-1f(1) by holding that the statute can be applied constitutionally in at least some cases where judicial fact-finding produces a sentence above the presumptive term. Because we argue directly to the contrary in Point II, we respectfully must take issue with Abdullah's overly expansive reading of Almendarez-Torres, on the one hand, and unduly narrow construction of aggravators 3, 6 and 9 on the other hand. The U.S. Supreme Court has adhered to its holding that the bare fact of prior conviction can serve as a sentence enhancer because a jury previously established the defendant's guilt beyond a reasonable doubt. But each of the three aggravating factors at issue in Abdullah requires a normative judgment that goes well beyond the mere fact of prior conviction. As such, aggravators 3, 6 and 9 are not "sentence enhancers" as a matter of Sixth Amendment law.

> outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the [base term], during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

Thus, under New Jersey's sentencing scheme, a discretionary parole disqualifier may be included in a sentence only if the court finds that one or more of the aggravators enumerated in N.J.S.A. 2C:44-1a substantially outweigh any mitigators. See State v. Baylass, 114 N.J. 169, 179 (1989) (sentencing court may impose mandatory minimum term only if is clearly convinced that the aggravating circumstances substantially outweigh the mitigating); State v. Kruse, 105 N.J. 354, 359 (1987) (sentencing court must impose sentence that does not include a parole-ineligibility period unless it finds the presence of identifiable aggravating factors and is clearly convinced that they outweigh any mitigating factors); State v. Williams, 310 N.J. Super. 92, 98 (App. Div. 1998) (even a mandatory extended term cannot include a discretionary parole disqualifier unless the sentencing court finds that the aggravators substantially outweigh the mitigators). A reviewing court will reverse the sentence if there is insufficient evidence in the record to support the findings offered to justify the imposition of the parole disqualifier. Kruse, 105 N.J. at 360.

As previously addressed, the Legislature assigned to judges, rather than juries, the role of determining the presence of aggravating factors, without which a parole disqualifier cannot

stand. Hence, N.J.S.A. 2C:43-6b, like 2C:44-1f, is unconstitutional.

State v. Stanton, 176 N.J. 75 (2003), reached a contrary result, but it was decided before Blakely and rested on the mistaken assumption that the Apprendi principle applies only to sentences that exceed the maximum designated for the crime by the Legislature. In a 4-3 decision, Stanton held that a finding of intoxication, which served as the factual predicate for a mandatory-minimum term under N.J.S.A. 2C:11-5b, need not be made by the jury beyond a reasonable doubt, because the finding "does not increase the penalty for vehicular homicide beyond the statutory maximum prescribed for that offense." Stanton, 176 N.J. at 97.

The Stanton majority relied in large part on the United States Supreme Court's post-Apprendi decision in Harris v. United States, 536 U.S. 545 (2002). Harris, decided after Apprendi, but before Ring and Blakely, involved a conviction for the federal crime of carrying a firearm during a drug-trafficking offense. Harris's crime carried a penalty of between five years and life imprisonment. U.S.C.A. ¶924(c)(1)(A)(i).

The statute also set forth an "incremental sentencing range" triggered by a judicial finding regarding the defendant's use of the weapon. The minimum sentence available to the judge varied upward, to seven years if the defendant was found to have brandished the weapon, U.S.C.A. ¶924(c)(1)(A)(ii), and to 10 years if he discharged the weapon. U.S.C.A. ¶924(c)(1)(A)(iii).

The maximum available sentence remained life in prison. Harris, 536 U.S. at 574. After the trial, the judge found that Harris had "brandished" the weapon, which foreclosed him from imposing a sentence of less than seven years.

A four-Justice plurality ruled that the judge-found fact that increased the sentencing range, from between five years and life to between seven years and life, did not violate the Sixth Amendment, because both sentences were authorized by the conviction itself. Id. at 567-568. The Court explained that the Sixth Amendment does not prohibit a statutory structure in which judicial fact-finding raises the available minimum sentence, so long as the sentence is still "within the range authorized by the jury's verdict." Id. at 567. It thus declined to overrule its earlier holding in McMillan v. Pennsylvania, 477 U.S. 79 (1986).

McMillan involved a Sixth Amendment challenge to a Pennsylvania sentencing statute that mandated a designated minimum sentence whenever the judge, at a post-conviction hearing, found that the defendant had committed an enumerated crime with a firearm. Id. at 80-82. The Supreme Court rejected the constitutional challenge, finding that the statute merely operated to require the sentencing court to impose a specific penalty "within the range already available to it." McMillan, 477 U.S. at 87-88.

Thus, although not recognized at the time, Harris was not, as the Stanton majority characterized it, a "retreat[] from the position [the Supreme Court] seemingly had taken in Apprendi...."

Stanton, 176 N.J. at 95. Rather, Harris was both consistent with Apprendi, and foreshadowed the decision in Blakely. Because the Stanton majority relied on Apprendi's references to "punishment beyond that provided by statute," Apprendi, 530 U.S. at 484, it mistakenly believed that Apprendi was limited to facts that would extend a sentence beyond the maximum set by the Legislature for the crime. Stanton, 176 N.J. at 95.

However, the Harris Court explained that the difference between the statute it invalidated in Apprendi, and the one it upheld in McMillan, was not that the Apprendi statute raised the maximum, and the one in McMillan raised the minimum. Rather, the critical distinction is that "[t]he factual finding in Apprendi extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in McMillan restrained the judge's power, limiting his or her choices within the authorized range." Harris, 536 U.S. at 567 (emphasis added). Like McMillan, the Harris statute merely constrained the judge's power by precluding a sentence at the bottom of the available sentencing range; that is, it did not empower the judge to increase the penalty beyond that to which the defendant was exposed by the conviction. itself. Harris, id. Although the statute in McMillan called for a parole-ineligibility period that resembles a New Jersey Code parole disqualifier, it was nevertheless authorized by the jury's verdict, because Pennsylvania's sentencing law does not prohibit it absent the finding of enumerated aggravating facts. See

Commonwealth v. McMillan, 494 A.2d 354, 362 (Pa. 1985), aff'd McMillan v. Pennsylvania, 477 U.S. 79 (1986) ("The [Pennsylvania] legislature has chosen to vest the courts with the discretion to prescribe within statutory limits the maximum and minimum sentence to be served. The defendant has no substantive right to a particular sentence within the range authorized by statute."). Compare State v. O'Connor, 105 N.J. 399, 407 (1987) ("the Code confers on the court the limited power to depart from these presumptive terms where it finds a 'preponderance of aggravating ... or ... mitigating factors'"); Kruse, 105 N.J. at 358 (if aggravating and mitigating factors are in equipoise, court must impose presumptive term).

A New Jersey statute that barred a court from imposing a sentence below the presumptive term upon a judicial finding of a designated predicate fact, for example, would not run afoul of Blakely, because the conviction itself would expose the defendant to the presumptive sentence, irrespective of whether the fact is found. State v. Petrucci, 365 N.J. Super. 454 (App. Div. 2004), a pre-Blakely decision, describes a similar hypothetical statute that illustrates Harris's applicability to New Jersey's sentencing law. Petrucci raised a Sixth-Amendment challenge to N.J.S.A. 2C:43-6g, which mandates that a person who commits an enumerated offense with an assault firearm serve 100% of the maximum term for the crime, but does not identify the trier of fact or the standard of proof. Id. at 457-458. The Court found that because the statute required a sentence beyond what the

sentencing court "could have imposed in the absence of such a finding," id. at 459, the jury must find the predicate fact beyond a reasonable doubt. Id. at 460. Judge Skillman, writing for the court, observed that:

> This case would be like Harris if the assault firearms statute provided that a defendant convicted of a specified second degree offense who possessed an assault firearm must be sentenced to a base term of at least seven years, without mandating any parole ineligibility period. In that event, the assault firearms statute would not require the trial court to impose a heavier sentence than it could have imposed even if the defendant was not found to have possessed an assault firearm.

Id. at 461. Petrucci's endorsement in dictum of discretionary parole disqualifiers based on judge-found facts reflected, like Stanton, the court's pre-Blakely understanding that a parole-ineligibility period is authorized by the jury's verdict. Id. at 459.

In addition to discretionary parole disqualifiers, Blakely applies to some parole-ineligibility periods that are mandatory on the finding of a predicate fact. See, e.g., N.J.S.A. 2C:11-5b(1) (recklessly causing death while operating vehicle under influence of alcohol or drugs); N.J.S.A. 2C:43-6c (Graves Act);[9] N.J.S.A. 2C:43-6i (causing bodily injury while eluding). However, in many statutes with mandatory parole-disqualifier provisions, the predicate fact is an element of the offense, and thus the jury's verdict authorizes the sentence. See, e.g., N.J.S.A.

[9] State v. Watson, 346 N.J. Super. 521 (App. Div. 2002), held that there is no Sixth-Amendment right to a jury determination of the predicate fact, but like Stanton, it was decided before Blakely.

2C:12-2b(2) (reckless endangerment by enticing persons to take tranquilizing drink); N.J.S.A. 2C:13-1c(2) (kidnapping victim under 16 years old);[10] N.J.S.A. 2C:35-5b(1) (distribution of more than five ounces of heroin or cocaine); N.J.S.A. 2C:35-5b(6) (distribution of more than 100 mg. of lysergic acid diethylamide or more than 10 grams of phencyclidine); N.J.S.A. 2C:35-7 (distribution of drugs within a school zone); N.J.S.A. 2C:39-7b (possession of a firearm by a convicted felon); N.J.S.A. 2C:39-10e (distribution of a firearm to a minor).

In addition, Blakely does not invalidate statutes that mandate parole disqualifiers triggered by judicial fact-finding where the predicate fact is limited to a finding that the defendant was previously convicted of a predicate offense. Almendarez-Torres v. United States, 523 U.S. 224 (1998). See, e.g., N.J.S.A. 2C:14-6 (second or subsequent sexual offense); N.J.S.A. 2C:43-6f (prior enumerated drug conviction); N.J.S.A. 2C:43-7.1 (life imprisonment without parole for repeat offenders of enumerated violent crimes). Thus, the Stanton majority's assertion that Apprendi's application to parole-ineligibility terms "would invalidate...the Repeat Sex Offender Act (N.J.S.A. 2C:14-6) [and] the Three Strikes Law (N.J.S.A. 2C:43-7.1a and 7.2)" is erroneous.

In sum, Blakely's reach extends to all discretionary parole disqualifiers and, with the Almendarez-Torres exception, to any parole disqualifier mandated by the finding of a predicate fact.

[10]See State v. Smith, 279 N.J. Super 131 (App. Div. 1995).

Because our Legislature directed the wrong decisionmaker to find the predicate fact under the wrong burden, N.J.S.A. 2C:43-6b is unconstitutional.

C. N.J.S.A. 2C:44-5 Is Unconstitutional Because It Permits A Court To Impose Consecutive Sentences Based On Judge-Made Findings.

The court ordered the sentences on the convictions for uttering terroristic threats and criminal restraint to run consecutive to the sentence on the assault, but it failed to identify any facts found by the jury that would warrant consecutive terms. (8T 35-1 to 5) Consequently, the imposition of consecutive sentences violates the holding in Blakely.

N.J.S.A. 2C:44-5 provides that, unless expressly stated, the court has the discretion to decide whether to impose concurrent or consecutive terms. The statute does not, however, prescribe standards to guide the court's discretion. In the absence of statutory standards, the New Jersey Supreme Court established judicial standards to regulate the imposition of consecutive and concurrent sentences. The judicial guidelines, announced in State v. Yarbough, 100 N.J. 627 (1985), have assumed the force of law. See State v. Carey, 168 N.J. 413, 422 (2001) ("investing unbridled discretion in sentencing judges would inevitably lead to a lack of sentencing uniformity, so in Yarbough ... we set forth six guidelines"); State v. Ghertler, 144 N.J. 343, 390-91 (1989) ("The wellspring for standards guiding a sentencing court's decision on whether to impose concurrent or consecutive sentences for multiple offenses ... is this Court's opinion in

State v. Yarbough"); State v. Ellis, 346 N.J. Super. 583, 590 (App. Div.), aff'd 174 N.J. 535 (2002) (with respect to concurrent and consecutive sentencing, "[a] trial judge's discretion remains guided by the seminal precepts set forth in State v. Yarbough"). Where the sentencing court has not followed the Yarbough guidelines, the Supreme Court, and this court, have ordered a remand for resentencing. See State v. Pennington, 154 N.J. 344, 361-62 (1998) (although consecutive terms were not illegal, they must be justified consistent with the Yarbough guidelines; State v. Miller, 108 N.J. 112, 122 (1987) ("Because we do not have a separate statement of reasons for the trial court's decision to impose consecutive sentences, we are compelled to remand this case for resentencing."); State v. Marinez, 370 N.J. Super. 49, 59-60 (App. Div. 2004) (remanded for failure to consider Yarbough guidelines).

Under Blakely, the jury must make the findings in support of a consecutive term beyond a reasonable doubt, either in its verdict or at a sentencing hearing. See People v. Shaw, 18 Cal.Rptr.3d 766, 768 (Cal.App. 3 Dist. 2004), opinion modified by _ Cal.Rptr.3d _, 2004 WL 2252080 (Cal.App. 3 Dist. 2004) ("the decision to impose consecutive terms may under some circumstances require findings of fact not found by the jury"). Here, the court failed to cite any jury finding to support its imposition of consecutive terms. Consequently, the consecutive aspect of the sentence must be vacated.

II. THIS COURT CANNOT REWRITE N.J.S.A. 2C:44-1f(1) TO REQUIRE JURY TRIALS ON AGGRAVATING FACTORS THAT OUR LEGISLATURE CLEARLY INTENDED JUDGES TO FIND. ONLY THE LEGISLATURE CAN REMEDY THE CONSTITUTIONAL FLAW PATENT IN THE STATUTE.

The reality that N.J.S.A. 2C:44-1f(1), 2C:43-6b and 2C:44-5 violate the Sixth and Fourteenth Amendments requires this Court to declare the statutes unconstitutional in any case where a Law-Division Judge would rely on judicial fact-finding to impose a sentence above the presumptive term, a parole disqualifier or consecutive sentences. Declaring the statutes unconstitutional essentially dictates the proper remedy: it requires that the illegal sentences imposed thereunder be vacated without resorting to any of the remedies described in the State's brief, including harmless-error analysis.

In State v. Gould, 23 P.3d. 801, 814 (Kan. 2001), the Kansas Supreme Court facially invalidated Kansas' statutory scheme for imposing upward-departure sentences. Notably, the court did not write a jury-trial provision into the statute so that it could be applied constitutionally in future cases (and so the State could argue harmless-error or obtain jury findings anew in past cases). Rather, the Kansas Supreme Court facially invalidated the statute and made its holding fully retroactive to those cases that were not final as of the date Apprendi was decided. In so doing, the court properly recognized that it could not apply harmless-error analysis to affirm an illegally enhanced sentence:

> The state, in essence, urges this court to apply principles of harmless error. This we cannot do. The Kansas scheme for imposing upward departure sentences ... is unconstitutional

> on its face .... Gould's sentence was enhanced pursuant to an unconstitutional sentencing scheme and cannot stand.

Gould, 23 P.3d. at 814. The Kansas Supreme Court has properly recognized that "[w]here an act of the legislature or a portion thereof is clearly unconstitutional, it is the duty of the courts to so declare and to hold the unconstitutional provision or provisions null and void." State v. Cody, 35 P.3d 800 (Kan. 2001). Indeed, the Kansas Supreme Court has strictly adhered to its holding in Gould, going so far as to vacate sentence enhancements even where the defendant had admitted the aggravating fact, id.; stipulated to the fact, State v. Santos-Garza, 72 P.3d 560 (Kan. 2003); and where the trial court tried to "cure" the constitutional infirmity by submitting the aggravating fact to the jury for findings beyond a reasonable doubt. State v. Kessler, 73 P.3d 761, 771-72 (Kan. 2003).

Notably, Kessler rejected the very argument the State raises here: that a constitutional flaw in the statute affects solely the procedure for increasing the sentence (Sb at 58), but not the validity of the sentence itself:

> The State argues that Gould did not render the statute vesting the trial court with the authority to impose upward durational departures unconstitutional, but rather only the scheme employed by the courts in doing so. The State points out that the procedure employed by the trial court was in accordance with the requirements articulated in Apprendi and consistent with the Kansas Legislature's response to Gould. In accordance with this court's decision in Gould, Cody, and Kneil, we deny the State's invitation to work around a flawed sentencing scheme. A district court's authority to impose sentence is controlled by statute. Thus, where the statutory procedure for imposing upward durational departure sentences has been found unconstitutional, the district court has no authority to impose such a sentence. This case

> is remanded to the district court for resentencing on count one in accordance with this opinion.

Id. at ___ (emphasis added).[11]

Fully cognizant of the implications of a judgment declaring 2C:44-1f(1), 2C:43-6b and 2C:44-5 unconstitutional, the State implores this Court to write a jury-trial procedure into those statutes without any analysis as to whether it is within the judicial power to do so. To be sure, the State correctly recognizes that "[t]his Court cannot rewrite Chapters 43 and 44[.]" (Sb at 58). The State next argues, however, that this Court "is obligated to select a construction that saves as much of the statute as possible." Id. (emphasis added) (citation omitted). But rather than ask this Court to "construe" 2C:44-1f(1) in order to "save" it, the State invokes State v. Johnson, 166 N.J. 523 (2001), for the proposition that this Court is obligated to rewrite the unconstitutional statute. This judicial legislation is obligatory, the argument continues, because "the State must be given an opportunity to prove these aggravating factors beyond a reasonable doubt." (Sb at 58)

So understood, the State's entire severability analysis is motivated not by traditional concepts of judicial review,

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[11] Kessler thus conflicts with this Court's attempt in State v. Watson, 346 N.J. Super. 421 (App. Div. 2002). In Watson, this Court attempted to insulate from appellate review sentences enhanced pursuant to a potentially unconstitutional Graves Act. Although this Court found no basis for writing a jury-trial procedure into the statute, it nevertheless encouraged trial courts to obtain jury findings on the Graves Act's predicate fact, even though the statute itself explicitly required judges to find that fact under the preponderance standard.

statutory construction or respect for legislative intent, but by political expediency. For only by insisting that jury-trial procedures be written into the statute can the State even ask this Court to apply harmless-error analysis or, alternatively, to remand for a special jury trial limited to the omitted aggravators. See infra Point III (explaining why these remedies are improper). The State's insistence that this Court can and should enact a scheme of jury sentencing is fatally flawed.

First, this Court cannot "construe" a statute in a way that conflicts with binding New Jersey Supreme Court precedent. Moscatello v. UMDNJ, 342 N.J. Super. 351, 363-64 (App. Div. 2001) ("As an intermediate appellate court, we are bound by the holdings of our Supreme Court where it has spoken clearly on a subject."). O'Donnell clearly and unambiguously held that judges find 2C:44-1a's aggravators under the preponderance standard. The State does not suggest that Blakely somehow overrules or abrogates O'Donnell, nor could it. The O'Donnell Court construed a New Jersey statute and never addressed the question whether its construction violated a provision of the federal Constitution. Compare State v. Fortin, 178 N.J. 540 (2004) (Ring overrules State v. Martini, 131 N.J. 176 (1993), insofar as Martini explicitly held that statutory death-penalty aggravators are not "elements" under the Sixth Amendment) with State v. Natale, 178 N.J. 51 (2003) (per curiam) (implicitly rejecting State's argument that Harris overrules Johnson's statutory construction of NERA).

Second, the State's doctrinaire reliance on Johnson is ironic to say the least. The State insisted in this very case that Johnson was wrongly decided and should be overruled. Notably, the State did not simply complain that our Court had construed NERA to provide defendants with more procedural protections than the federal Constitution required. Rather, the State overtly accused our Court of thwarting the Legislature's unambiguous intentions by writing a jury-trial guarantee into NERA under the auspices of the constitutional doubt canon of construction. Having thoroughly denigrated Johnson's interpretive methodology, the State is hard-pressed to invoke Johnson as compelling a judicial rewriting of 2C:44-1f(1).

Third, and contrary to the State's mistaken belief, Johnson did not establish a paradigm for curing any and all Apprendi-related defects that may inhere in New Jersey's sentencing statutes. In Johnson, our Court found the statute in question ambiguous, and the applicable constitutional principles unclear, and so it construed the statute to avoid reaching the constitutional question altogether. Johnson has no precedential value whatsoever where, as here, the statute is not ambiguous and the governing constitutional principle is settled. See Harris v. United States, 536 U.S. 545, 554-56 (2003); State v. Stanton, 176 N.J. 75, 96 (2003).

Fourth, the State's reliance on Johnson to support a judicial rewriting of a facially unconstitutional statute is difficult to square with Apprendi. Justice Stevens concluded his

majority opinion facially invalidating New Jersey's hate-crime statute by stating that "the judgment of the Supreme Court of New Jersey is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." Apprendi, 530 U.S. at 497. Had our Supreme Court believed it possessed the authority that the State claims the Johnson Court exercised, on remand it would have (a) excised the unconstitutional portion of the statute, (b) written a jury-trial procedure into it, (c) applied harmless-error analysis, or (d) remanded for a jury trial on the "racial bias" aggravating fact. Our Court did none of these things. Rather, it simply vacated that portion of the defendant's sentence that had been illegally enhanced under the facially unconstitutional statute, and our Legislature later repealed the invalidated provision.[12]

Fifth, the State's argument fails to appreciate that the last time this Court invoked Johnson's interpretive methodology to rewrite a clear statute, our Supreme Court reversed the resulting judgment. In the process, this Court implicitly

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[12] State v. Anderson, 127 N.J. 191 (1992), is not to the contrary. In that case, a New Jersey statute indisputably defined the unitary offense of perjury but purported to remove the single element of materiality from the jury and assign it to the judge. Our Court invalidated that portion of the statute and remanded for a jury trial on all elements of the offense. The Anderson Court's conclusion that the perjury statute could be applied constitutionally has no relevance here. Had the Legislature created an offense called "perjury," and then attempted to locate within our sentencing statutes a penalty-enhancing fact labeled "materiality" (which when found by a judge resulted in a substantial increase in the defendant's sentencing exposure), then Anderson would have presented the same question that Apprendi resolved.

criticized this Court's resort to the "judicial surgery" doctrine to "save" an arguably unconstitutional statute. See State v. Stanton, 176 N.J. 75 (2001). Cf. Watson, 346 N.J. Super. at 421 (explaining that Johnson does not permit or require this Court to rewrite an unambiguous Graves Act to require jury findings beyond a reasonably doubt).

Finally, and perhaps most importantly, the Johnson Court invoked the constitutional doubt doctrine to construe NERA to require jury findings confident that its decision would not cause the sort of disruption that is certain to occur if this Court announces that 2C:44-1a's aggravating facts are now elements of every indictable offense listed in the Code. After all, NERA required a finding on only one of two additional facts (serious bodily injury or use of a deadly weapon), facts the Johnson Court recognized overlapped with elements of extant Code offenses. Thus, trial courts were able to instruct juries on those facts with little difficulty. Here, judicially rewriting 2C:44-1 to require jury findings would work a change in our sentencing scheme so radical that it would cross the line between judging and legislating.

Merely by way of example, interpolating a jury-trial right into our sentencing statutes raises several issues that the State's brief fails adequately to address:

- First, by converting 2C:44-1f(1)'s aggravators into elements, the State would be obligated to submit those aggravators to grand juries and allege them in an indictment.

- Second, and anomalously, courts could conceivably utilize one system (the one the Legislature originally devised) in those cases where the defendant pleads guilty and agrees to a sentencing exposure that does not exceed the presumptive term, but employ another system (the one the State asks this Court to create) in those cases where the defendant either elects to proceed to trial or negotiates a plea bargain that leaves him or her exposed to a sentence above the presumptive term. We doubt our Legislature would have sanctioned such a dual sentencing regime with its potential for widely varying sentences for similarly situated defendants.

- Third, it is unclear whether the jury would find the aggravators, while the sentencing judge would find the mitigators and perform the weighing required by 2C:44-1f(1).

- Fourth, although our Code abolished common-law crimes, a judicial edict to the effect that 2C:44-1a's aggravators are suddenly elements would effectively create hundreds of new "aggravated" versions of the offenses already defined in our Code.

- Fifth, our trial courts would require guidance as to devising jury instructions on the myriad factors set forth in 2C:44-1a.

- Sixth, writing a jury-trial requirement into 2C:44-1f(1) would have the disfavored result of rendering several other statutory provisions, such as 2C:44-7, inoperative.

Courts have correctly cautioned against judicial attempts to repair unconstitutional statutes. In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court held that the death penalty provision in the Federal Kidnapping Act unconstitutionally burdened a defendant's right to have a trial and to seek a jury. Id. at 581-582. The government proposed that the statute could be rescued from constitutional infirmity by reading it to authorize "by implication" the "convening [of a] special jury ... for the sole purpose of deciding whether [the defendant] should be put to death" in a case in which the defendant had pleaded guilty or waived jury trial. Id. at 576-577. Noting that there

was not "the slightest indication that Congress contemplated any such scheme," the Court rejected the government's proposal. Id. at 578. The Court explained that "it would hardly be the province of the courts to fashion [such] a remedy" and that "[a]ny attempt to do so would be fraught with the gravest difficulties." Id. at 579.

Among the difficult questions that courts would have to resolve would be: "If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy?" Id. The Court explained that "[i]t is one thing to fill a minor gap in a statute," but "quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

Similarly, this Court recently affirmed a Law Division Judge's refusal to invoke the "judicial surgery" doctrine where doing so would have usurped the legislative function. Feriozzi Concrete Co., Inc. v. Casino Reinvestment Dev. Auth., 342 N.J. Super. 237, 252-52 (App. Div. 2001) (stating that although a court has a duty to preserve as much of a statute as possible, "the offending provisions in the statutes and regulations are so widespread that judicial surgery would be inappropriate. What the Authority is asking the court to do is rewrite the statutory and

regulatory definitional scheme to comport with the specific findings of the Study Commission. That is a legislative, not a judicial, function."). Accord St. James v. Department of Env. Protection & Energy, 275 N.J. Super. 342, 350 (App. Div. 1994) ("The present statute and regulation are not susceptible of salvage by some minor scalpel work. We will not graft a whole regulatory section into the statute to permit its application in a constitutionally acceptable manner. It is not the function of the court to legislate."); see NYT Cable TV V. Homestead at Mansfield, Inc., 111 N.J. 21 (1988) (Stein, J., dissenting) ("I view the court's interpretation as contradictory to the plain meaning of § 49, and therefore beyond the permissible scope of construction for the purpose of saving an otherwise invalid statute.").

Without citing the foregoing case-law, and relying exclusively on Johnson instead, the State's severability analysis reduces itself to the following three sentences:

> The Legislature surely would choose to leave the whole sentencing ranges intact rather than compress them to their halfway points. The argument alleging a Sixth Amendment/Apprendi problem claims a deficiency in the sentencing procedure, not in the ranges themselves. The appropriate remedy is for a remand for a jury determination, not a windfall presumptive sentence.

(Sb at 58) (emphasis added). The State's confidence that "our Legislature surely would choose" a judicially legislated scheme of jury sentencing over a judgment partially invalidating is nothing more than ipse dixit.

At bottom, the highlighted phrase in the quotation above succinctly explains the State's position: a judgment rendering the statutes at issue in this appeal unconstitutional would afford some defendants a "windfall." But it is not Defendant's fault that the Legislature enacted, and that the Executive enforced, an unconstitutional statute. And so it is no more a "windfall" for the Judiciary to order the proper remedy here than when a court dismisses an indictment on double jeopardy grounds or suppresses illegally seized evidence. Quite to the contrary, upholding the Constitution and respecting the separation of powers reinforces our three-branch system of government.

We respectfully submit that the safest and most intellectually honest approach is to invalidate 2C:44-1f(1), 2C:43-6b and 2C:44-5 insofar as they permit judicial fact-finding to result in a sentence not otherwise authorized by the jury's verdict. Such a holding will prompt a response that is by no means uncommon: the Legislature will enact a statute that both complies with the Sixth Amendment and accommodates competing policy interests.[13] It may well be that our Legislature will opt to modify the current scheme by requiring jury sentencing. Or, perhaps, the Legislature will enact an entirely different sentencing regime based upon the work of the Commission to Review Criminal Sentencing. At all events, courts are poorly suited to make those sorts of policy choices.

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[13]Notably, the Kansas Legislature reacted to Gould by enacting a new upward-departure scheme that complied with Apprendi. Kan. Stat. Ann. § 21-4716(b) & 471.

III. EVEN WERE THIS COURT INCLINED TO WRITE A JURY TRIAL REQUIREMENT INTO THE STATUTES AT ISSUE, DEFENDANT IS ENTITLED TO THE EXACT SAME REMEDY.

"Saving" the statutes at issue by interpolating a jury-trial requirement into them obviously would allow them to be applied consistently with Blakely and Apprendi on a prospective basis. It would also permit this Court to ask whether they were unconstitutionally applied in this case; whether that error was prejudicial; and, if so, whether it can be remedied in the manner the State suggests.

A. As A Matter Of Law, The Failure To Submit 2C:44-1a's Aggravators To The Jury Can Never Be Considered Harmless Error.

The court decides whether to impose the presumptive term and whether to impose a discretionary period of parole ineligibility after evaluating the relevant aggravating and mitigating elements set forth at 2C:44-1(a) and (b). See 2C:43-6b; 2C:44-1f(1); 2C:44-3e; 2C:44-7; Yarbough, 100 N.J. at 635-36. The court may not consider sentencing elements that duplicate elements of the crime. 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"). Thus, as a matter of law, the elements the jury has found in determining guilt may not be identical to the elements the court must find in determining sentence. Accordingly, the state is mistaken, both as a matter of law (and,

as discussed below, fact) when it claims that "we know for certain the jury necessarily found these [aggravating] facts" in reaching its verdict. (Sb at 53)

This contrasts with the harmless-error analysis the New Jersey Supreme Court employed in Johnson, 166 N.J. 523. In Johnson, the predicate NERA fact was identical to an element of the offense, and the Court determined that although the jury was not instructed on the NERA fact, it actually found the fact beyond a reasonable doubt when it convicted the defendant of armed robbery. Id. at 546. Because the aggravating elements may never be identical to elements of the offense, it cannot be said that the jury actually found the aggravating elements. Thus, Blakely claims are not susceptible to Johnson-type harmless-error analysis. In short, the failure to present the aggravating elements to the jury can never be deemed harmless error.

The state's claim that the jury in this case found the aggravating factors is also wrong. In support of aggravating element (1), that the offense was committed in an especially heinous, cruel, or depraved manner, the court found that the offense was "brutal," "prolonged," "sever[e], and "relentless," and that Natale demonstrated a purpose to injure. (8T 28-22 to 30-7) Despite the state's claim that "we know for certain the jury necessarily found th[e] facts" supporting that aggravating factor (Sb at 53), the jury's verdict only indicates that it acquitted Natale of the charged offense of attempted murder and convicted of the lesser offense of second-degree assault. To

convict of second-degree assault the jury only needed to find that the defendant attempted to cause serious bodily injury or caused such injury purposely, knowingly, or recklessly. N.J.S.A. 2C:12-1b(1). Thus, contrary to the state's assertion, the verdict of second-degree assault does not "necessarily" reflect that the jury found that the offense was brutal, prolonged, severe, or relentless.

And the sentencing court's finding that Natale demonstrated a purpose to injure either conflicts with the jury's finding or double counts an essential element of the offense. See State v. Kromphold, 162 N.J. 345, 353 (2000) (prohibiting counting as aggravating factors facts that serve as elements of the crime). As this court pointed out in an earlier appeal in this case, "the verdict on [second-degree assault] does not reflect whether the jury found that [Natale] caused serious bodily harm or only attempted to do so." State v. Natale, 348 N.J. Super. 625, 627 (App. Div. 2002), aff'd 178 N.J. 51 (2003). If the jury found that Natale caused harm knowingly or recklessly, then the court's finding that he had a purpose to injure would contradict the jury's verdict. If the jury found that Natale attempted to cause harm, then the court's finding that he had a purpose to injure double counts the element of attempt, which is defined, at N.J.S.A. 2C:5-1a, as purposeful conduct. See State v. McAllister, 211 N.J. Super. 355, 362 (App. Div. 1986) (attempt must be purposive). If the jury found that he purposely caused injury, the court's finding double counts the jury's verdict that he

acted purposefully. For all of these reasons, the facts the court cited in support of the first aggravating factor are not, as the state contends, "implicit" in the jury's verdict. (Sb 53) Neither did the jury find, nor did Natale admit, aggravating elements (3) and (9), that he is likely to commit another offense and that he needs to be deterred. The state baldly asserts that the court properly found factors (3) and (9) based on a psychiatric assessment, contained in the presentence report, that concluded that Natale is likely to commit another offense. (8T 31-21 to 24) Without any legal support other than reference to the defendant's right to review the presentence report before sentencing, the state claims that if Natale did not contest the psychiatric report, he admitted it. (Sb at 54) That assertion is particularly unwarranted here where Natale was not advised that a failure to challenge the report would constitute a waiver of his Sixth- and Fourteenth-Amendment rights to have a jury determine sentence-enhancing facts beyond a reasonable doubt. See Miranda v. Arizona, 384 U.S. 436, 468 (1966) (defendant must be advised of a right before he can knowingly exercise or waive it); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (internal quotation marks omitted).

Addressing a similar Blakely challenge, the Oregon appellate court held, in State v. Warren, _ P.3d _, 2004 WL 2293688 (Or.App. 2004), that it is for the jury, not the court, to determine beyond a reasonable doubt whether the defendant is

likely to commit another offense. Under the Oregon sentencing scheme, the court may impose an extended term if it finds, based upon a psychiatric report, that the defendant has "a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another." Or. Rev. Stat. § 161.725(1)(a). The appellate court ruled that under the Sixth and Fourteenth Amendments, the defendant has the right to a jury finding that he suffered from the requisite personality disorder.

The court also found aggravating factor (2), that the victim was gravely injured. (8T 31-8 to 20) As this Court ruled in the earlier appeal, it cannot be determined from the jury's verdict, which acquitted Natale of attempted murder and convicted of second-degree assault, whether the jury found that he attempted to cause serious harm or actually caused such harm. Natale, 348 N.J. Super. at 627. Consequently, it cannot be said that the verdict reflects a finding that the victim was gravely injured.

In short, none of the sentence-enhancing factors the court cited were reflected in the verdict or admitted by the defendant.

B. This Court Cannot Order A Retrial Limited To The Four Statutory Aggravators Without Working A New Constitutional Violation.

The jury convicted Natale of second-degree assault, but the judge sentenced him for an offense consisting of second-degree assault plus four sentence-enhancement elements. That error is not, as the state maintains, a "mere defect in imposing a sentence." (Sb at 60) The sentence-enhancement elements are the equivalent of elements of the offense. As such, they should have

been alleged in the indictment and proven beyond a reasonable doubt to the jury. Because Natale received a sentence above the presumptive term, a discretionary parole disqualifier, and a consecutive term based upon elements that the state omitted from the indictment, he cannot be resentenced, as the state suggests, at a proceeding at which a jury is permitted to find the unindicted elements. The Due Process and Double Jeopardy Clauses and the constitutional right to indictment prohibit the retroactive application of jury sentencing to defendants who have already been sentenced. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 8, and 11. For an already sentenced defendant, the only constitutional remedy is to impose the maximum term authorized by the jury verdict or the facts admitted by the defendant.

1. Retrial Would Violate the Right to Indictment

Article I, ¶ 8 of the New Jersey Constitution guarantees that "[n]o person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury[.]" Apprendi establishes that facts that trigger additional punishment are the functional equivalents of elements of an offense and must be alleged in the indictment. Apprendi, 530 U.S. at 489 n.15, quoting United States v. Reese, 92 U.S. 214, 232-33 (1875) ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted").

Justice Thomas, in his concurrence in Apprendi, 530 U.S. at 501, set out the rationale for the right to indictment on

sentence-enhancing facts, explaining that such aggravating facts constitute elements of the crime:

> [A] "crime" includes every fact that is by law a basis for imposing or increasing punishment.... Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact ... the core crime and the aggravating fact together constitute an aggravated crime.... The aggravating fact is an element of the aggravated crime.

The Court reiterated that principle in Harris v. United States, 536 U.S. 545, 567 (2002), emphasizing that "those facts setting the outer limits of a sentence ... are elements of the crime for the purposes of the constitutional analysis."

Construing Apprendi, the Supreme Court ruled, in Ring v. Arizona, 536 U.S. 584, 609 (2002), that capital murder encompasses the lesser-included offense of murder plus one or more aggravating circumstances, that the aggravating factors are the functional equivalents of elements of the offense of capital murder, and that therefore the jury, rather than the judge, must find those factors beyond a reasonable doubt. See Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003). In Fortin, 178 N.J. at 643-46, the New Jersey Supreme Court observed that, since Ring, federal prosecutors have been presenting capital aggravating factors to grand juries. Fortin, at 633, concluded that defendants have a state-constitutional right to have capital aggravating factors presented to a grand jury.

Just as Ring applied Apprendi to capital prosecutions, Blakely applied Apprendi to noncapital prosecutions. As discussed above, for Blakely purposes, the maximum statutory sentence under

the New Jersey Code is the presumptive term. After Blakely, a fact that enhances the sentence beyond the presumptive term must be treated as the functional equivalent of an element of the offense, and must be presented to a grand jury.

Here, the sentencing court relied on aggravating elements N.J.S.A. 2C:44-1a(1), (2), (3), and (9) to impose a sentence above the presumptive term and a discretionary period of parole ineligibility. (8T 34-4 to 20) The state did not allege any of those elements in the indictment. That omission cannot be remedied by empaneling a sentencing jury. See Russell v. United States, 369 U.S. 749, 770 (1962) (charges in indictment may not be broadened except by resubmission to the grand jury); State v. Grothmann, 13 N.J. 90, 94 (1953) (only grand jury may amend indictment in substance). To permit a sentencing jury to find the aggravating elements would amount to constructive amendment in violation of the right to indictment, and would constitute reversible error. See Stirone v. United States, 361 U.S. 212, 217 (1960) (conviction obtained on unindicted theory reversed; deprivation of the basic right to be tried only on charges made in the indictment is far too serious to be dismissed as harmless error); Grothmann, 13 N.J. at 95 (reversing conviction obtained on amended indictment; indictment informs accused "of the crime charged to him to enable him to prepare his defense and to be protected against double jeopardy").

In Jones v. United States, 526 U.S. 227 (1999), the Supreme Court determined that the defendant was convicted of a lesser-

included offense but sentenced for a greater. On remand, the greater sentence was vacated. United States v. Jones, 172 F.3d 1115, 1115-16 (9th Cir. 1999). See United States v. Thomas, 274 F.3d 655, 663, 673 (2d Cir. 2001) (en banc) (finding Apprendi error, appropriate remedy was to impose no more than the statutory maximum term authorized by the jury verdict); United States v. Doe, 297 F.3d 76, 93 (2d Cir. 2002) (sentence in excess of statutory maximum reduced where sentence-enhancing element was not charged in indictment or proved beyond a reasonable doubt); United States v. Meshack, 225 F.3d 556 (5th Cir. 2000), cert. den. 531 U.S. 1100 (2001), pet. for rehearing gr. in part 244 F.3d 367 (5th Cir.), cert. den. 534 U.S. 861 (2001) (finding Apprendi error, court ordered sentence reduced).

2. Retrial Would Violate Double Jeopardy Principles

The Fifth Amendment prohibits multiple prosecutions and multiple punishments for the same offense. See United States v. Dixon, 509 U.S. 688, 695-96 (1993); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Article I, ¶ 11 of the New Jersey Constitution provides the same protection. See State v. Allah, 170 N.J. 269, 279 (2002) (state and federal Double-Jeopardy Clauses are "substantially coextensive in principle and scope"); see also N.J.S.A. 2C:1-9c (barring reprosecution after conviction for same offense if "[t]he former prosecution resulted in a ... judgment of conviction which has not been reversed or vacated"). Because sentence-enhancing facts are the functional equivalents of elements of an aggravated offense, trying an already sentenced

defendant on enhancement elements would amount to trial on an aggravated offense following conviction of the lesser-included offense. And because there is "no principled reason to distinguish ... between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause," Sattazahn, 537 U.S. at 111-12, a subsequent trial on the sentence-enhancement elements would constitute a clear violation of the state and federal constitutional protections against double jeopardy and due process.

For double-jeopardy purposes, two offenses are the same offense if they contain the same elements. See Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Dillihay, 127 N.J. 42, 48 (1992). At trial, the state proved the offenses of second- and third-degree assault, possession of various weapons, terroristic threats, and criminal restraint. The lesser assault and weapons offenses were merged with the second-degree assault, and Natale was sentenced for second-degree assault, uttering terroristic threats, and criminal restraint. (8T 28-4 to 5; 34-17 to 35-5)

The offenses proved at trial are lesser-included offenses of the greater crimes the state proposes to prove at a sentencing trial; the elements of the offenses already proved are a subset of the elements of the enhanced offenses. "[T]he Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense

where he has already been tried and acquitted or convicted on the lesser-included offense." Ohio v. Johnson, 467 U.S. 493, 501 (1984); see Illinois v. Vitale, 447 U.S. 410, 421 (1980) ("conviction on a lesser-included offense bars subsequent trial on the greater offense"); Brown v. Ohio, 432 U.S. 161, 169 (1977); ("Fifth Amendment forbids successive prosecution ... for a greater and lesser-included offense" "[w]hatever the sequence may be"); State v. Calvacca, 199 N.J. Super. 434, 439 (App. Div. 1985) (same). Having been tried and convicted of the lesser-included offenses of second-degree assault, uttering threats, and criminal restraint, Natale may not be retried for the greater offenses of aggravated second-degree assault, aggravated threatening, and aggravated criminal restraint.

A subsequent prosecution would not be saved by the fact that jeopardy has not terminated with respect to Natale's sentence. The point of Apprendi is that the aggravating elements are not mere sentencing facts, but rather, like any elements, they must be alleged in an indictment and proved to a jury beyond a reasonable doubt. And where the facts in question must be determined in a proceeding with "the hallmarks of a trial on guilt or innocence," double-jeopardy protections apply. Bullington v. Missouri, 451 U.S. 430 (1981). Compare Monge v. California, 524 U.S. 721, 728 (1998) (double-jeopardy protection does not apply to sentencing proceeding at which state must prove nature of prior conviction, as it is not an element but only a sentencing factor).

To the extent the court concludes that a single jury must determine guilt and sentence-enhancing elements, resentencing is precluded because the jury in this case has been discharged. See United States v. Alvarez, 519 F.2d 1036, 1049, 1051 (3d Cir. 1975) (refusing to order new trial "on some but not all of the issues upon which the government had the burden of proof beyond a reasonable doubt" because "[t]he safeguard of a single jury passing upon the entire government case is a significant one"); see also State v. Fungone 134 N.J. Super. 531, 534-35 (App. Div. 1975) (improper to reassemble jury after discharge); State v. Brandenburg, 38 N.J. Super. 561, 567 (App. Div. 1956) (same).

Resentencing would also be precluded for a defendant who pleaded guilty because he did not stipulate to a sentencing jury when he entered the guilty plea. See R. 3:9-2 (court shall not accept guilty plea unless defendant understands its conditions); State v. Crawley, 149 N.J. 310, 318 (1997) ("plea must be entered into voluntarily and intelligently"); compare Blakely, 124 S.Ct. at 2541 ("If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.").

2. Conclusion

Natale was tried for a lesser-included offense and sentenced, under an unconstitutional statute, for a greater offense. As discussed in Point I, supra, the maximum sentence for the lesser-included offense is the presumptive term, with no period of parole ineligibility and no consecutive term.

Accordingly, the proper remedy is to reduce the sentence to no more than the presumptive term and to vacate the discretionary parole bar and the consecutive term.

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.

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