SUPREME COURT OF NEW JERSEY
DOCKET NO. 57,010

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Petition for Certification from a Judgment of the
v.	:	Superior Court, Appellate Division, Affirming the Final
ABDUL ABDULLAH,	:	Judgment of Conviction and the Sentence
Defendant-Petitioner.	:	
		Sat Below:
	:	
		Hon. James J. Petrella,
	:	P.J.A.D.
		Hon. Jack L. Lintner, J.A.D.
	:	Hon. Joseph L. Yannotti, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-PETITIONER

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PROCEDURAL HISTORY

In 2002, defendant-petitioner Abdul Abdullah was convicted, following a jury trial, of murder and related burglary and weapons charges. The court merged the weapons convictions with the murder and imposed a life sentence, with a mandatory 30-year parole term (N.J.S.A. 2C:11-3b(1)). The court imposed a consecutive ten years, plus a discretionary five-year parole term (N.J.S.A. 2C:43-6b), on the burglary. (12T 12-7 to 13-7)[1] In October 2004, the Appellate Division affirmed the convictions and rejected Abdullah's challenge to his sentences under Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004). State v. Abdullah, 372 N.J. Super. 252 (App. Div.), certif. granted 182 N.J. 208 (2004). On December 9, this Court granted Abdullah's petition for certification, limited to the Blakely claim. On January 20, 2005, the Court ordered the parties to file supplemental briefs by February 9.

STATEMENT OF FACTS

For a detailed statement of the facts, Abdullah respectfully refers the Court to his Appellate-Division brief. For purposes of the Blakely claim, Abdullah states that the jury found him guilty of breaking into a former girlfriend's house and killing her. The court sentenced him for burglary and murder, finding aggravating factor (1) with respect to the murder and factors

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[1] Consistent with the transcript designations in the Appellate-Division brief:
"12T" - sentencing hearing - September 13, 2002

(3), (6), and (9) applicable to both convictions, and imposed maximum and consecutive sentences. (12T 12-21 to 14-18)

LEGAL ARGUMENT

POINT I

NEW JERSEY'S ORDINARY SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT ALLOWS AGGRAVATING FACTORS TO BE FOUND BY JUDGES BY A PREPONDERANCE OF THE EVIDENCE.

A. N.J.S.A. 2C:44-1f(1) Is Unconstitutional Because It Mandates A Presumptive Term But Permits Judges To Increase The Sentence By Finding Aggravating Factors By A Preponderance Of The Evidence.

In Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000), the United States Supreme Court held that, in accordance with the constitutional rights to proof beyond a reasonable doubt and trial by jury, the defendant must admit or "the jury [must] determin[e] ... [any] fact that ... exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict." (emphasis omitted) Subsequently, in Blakely v. Washington, 124 S.Ct. at 2537, the Court held that, for Apprendi purposes, the relevant maximum "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." (emphasis in original)

On October 2004, the Appellate Division ruled, in Abdullah, 372 N.J. Super. at 280, that the relevant statutory maximum under the New Jersey sentencing system is the top of the ordinary range, set forth at N.J.S.A. 2C:43-6a. Despite the fact that N.J.S.A. 2C:44-1f(1) bars a court from imposing more than the

presumptive term unless it finds aggravating factors outweigh mitigating factors, and despite the fact that aggravating factors may not duplicate elements of the offense, see 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"), Abdullah held that the jury verdict authorizes the court to impose a sentence above the presumptive term and up to the maximum term within the ordinary range. Therefore, according to Abdullah, as long as the court imposes a sentence within the ordinary range, there is no need for the defendant to admit or the jury to find aggravating facts. 372 N.J. Super. at 280.

State v. Natale, 373 N.J. Super. 226 (App. Div. 2004), certif. granted __ N.J. __ (2005), disagreed with Abdullah. Natale, at 235, concluded that the relevant statutory maximum is the presumptive term, and held that "2C:44-1f(1) is unconstitutional to the extent that it permits the trial judge to increase the presumptive sentence in the absence of jury fact-finding, based on proof beyond a reasonable doubt, of the aggravating factors[.]"

Following Natale, United States v. Booker, 125 S.Ct. 738 (2005), applied Apprendi and Blakely to the federal-sentencing system and confirmed that the facts increasing the quantum of punishment must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Id. at 755-56 ("our holding in

Blakely applies to the Sentencing Guidelines;" "We affirm our holding in Apprendi").

Abdullah believes that Natale was correct in identifying the presumptive term as the statutory maximum for Apprendi purposes, and he relies on the Natale opinion and the defense and amici curiae briefs filed in Natale in the Appellate Division and in this Court,[2] and relies on the supplemental brief he filed in the appellate court on the subject.

B. In The Absence Of A Statutory Presumptive Term For Murder, The 30-Year Statutory Minimum Is The Effective Presumptive Term Because Judges Could Not Increase The Sentence Above 30 Years Based Solely On The Jury Verdict.

In support of this claim, which the appellate court rejected, Abdullah, 372 N.J. Super. at 279, 282-83, Abdullah relies on the supplemental brief he filed with the Appellate Division.

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[2] In addition to granting certification in Natale, the Court also ordered it argued together with Abdullah (and with a third case that also raises an Apprendi issue, State v. Franklin, No. 56,569). Abdullah and Natale raise several identical issues, e.g., the application of Blakely to presumptive terms, as raised in Point I.A.; the application of Blakely to parole disqualifiers, as raised in Point I.C.; and the application of Blakely to consecutive terms, as raised in Point I.D.; and the appropriate remedy. Accordingly, Abdullah asked the Court, in accordance with N.J.R.E. 201, to take judicial notice of the amicus brief filed in Natale in the Appellate Division, and he hereby asks the Court to take notice of the supplemental briefs filed in Natale in this Court.

C. N.J.S.A. 2C:43-6b Is Unconstitutional Because It Permits Judges To Impose, Based on Judicial Fact-finding, A Parole Disqualifier Not Authorized By The Verdict Alone.

In support of this claim, which the appellate court rejected, id. at 283, Abdullah relies on the supplemental brief he filed with the Appellate Division.

D. N.J.S.A. 2C:44-5 Is Unconstitutional Because It Permits Judges To Impose, Based On Judicial Fact-finding, Consecutive Sentences Not Authorized By The Verdict Alone.

In support of this claim, which the appellate court rejected, id., Abdullah relies on the supplemental brief he filed with the Appellate Division.

POINT II

THE APPELLATE DIVISION'S FINDING OF A "RECIDIVISM EXCEPTION" VIOLATES ALMENDAREZ-TORRES, WHICH PERMITS A JURY TO FIND ONLY THE FACT OF A PRIOR CONVICTION.

While Apprendi held that either the defendant must admit or the jury must find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," it acknowledged that it had previously recognized, in Almendarez-Torres v. United States, 523 U.S. 224 (1998), "the fact of a prior conviction" as "at best an exceptional departure from the historic practice," Apprendi, 530 U.S. at 487, and as a "narrow exception to the general rule[.]" Id. at 490. Apprendi, at 488, carefully noted that "[b]ecause Almendarez-Torres had admitted the three earlier convictions — [and they] had been entered pursuant to proceedings with substantial procedural safeguards of their own — no question with regard to the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court." (emphasis in original) Indeed, Almendarez-Torres argued only that the prior convictions should have been alleged in the indictment. 523 U.S. at 226-27. (Apprendi did not pose a right-to-indictment claim because the defendant challenged a state conviction and "the Fourteenth Amendment ... has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' that was implicated ... in Almendarez- Torres[.]" 530 U.S. at 477 n.3.) Thus, Almendarez-Torres's prior convictions had been entered in accordance with appropriate

procedural safeguards, and when they were subsequently used as sentence enhancements, he admitted to them.

Further, the aggravating fact in Almendarez-Torres did not call for any additional finding beyond the fact that the defendant had the requisite prior conviction. The statute provided for two years of imprisonment for a foreign national who illegally reentered the country after being deported and mandated longer terms of imprisonment if the defendant had prior convictions for "three or more misdemeanors involving drugs, crimes against the person, or both, or a felony ... [or] an aggravated felony[.]" 8 U.S.C. § 1326(b). The mere fact that the defendant had the statutorily enumerated prior conviction(s) dictated an enhanced term.

In this case, the trial court found factors (3), (6), and (9) in aggravation of both of Abdullah's convictions. All of those factors require factual determinations that are qualitatively different from the bare finding that the defendant has incurred a prior conviction. The factors read as follows:

> (3) The risk that the defendant will commit another offense; ...
>
> (6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted; ...
>
> (9) The need for deterring the defendant and others from violating the law[.]

Abdullah said that "even if we agreed" that the presumptive term is the statutory maximum, 372 N.J. Super. at 281, the requirement that the jury find beyond a reasonable doubt any fact

that increases the punishment does not apply to aggravating factors (3), (6), and (9). According to Abdullah, "Logically [factors (3), (6), and (9)] fall within the recidivism exception outlined in both Blakely and Apprendi as they stem from a common origin, namely the defendant's criminal record." Id.

Far from outlining a recidivism exception, Blakely and Apprendi established a "bright-line rule" that requires the jury to find beyond a reasonable doubt every fact that increases punishment above that authorized by its verdict. Blakely, 124 S.Ct. at 2540. Apprendi contrasted the finding of a prior conviction, which was obtained after the defendant was afforded "the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt," id. at 496, with the finding of other aggravating facts, which were not previously established in accordance with procedural safeguards and raise "a contested issue of fact" warranting a jury finding beyond a reasonable doubt. Id.

Aggravating factors (3), (6), and (9) each call for findings in addition to the fact that the defendant has incurred a prior conviction; they each raise potential contested issues of fact. The mere fact that a defendant has one or more prior convictions does not dictate a finding, under factor (3), that there is a risk he will commit another offense; under factor (6), that the prior convictions are extensive and serious; or, under factor

(9), that the defendant and others need to be deterred.[3] For example, when deciding, under factor (3), whether the defendant will reoffend, the court must make factual findings such as whether the defendant has taken specific steps toward rehabilitation, see State v. Towey, 244 N.J. Super. 582, 593-94 (App. Div. 1990), whether he has been gainfully employed for a significant period of time, and whether he is a respected member of the community. See State v. Varona, 242 N.J. Super. 474, 491 (App. Div. 1990); see also Patrick v. State, 819 N.E.2d 840 (Ind. App. 2004) (likelihood defendant will reoffend is not based on facts found by jury or admitted by defendant); State v. Oaks, __ P.3d __, 2004 WL 2955944 at *5 (Ariz. App. Div. 2004) (sentence vacated where court found, among other aggravating factors, that defendant was poor candidate for rehabilitation and was likely recidivist). Aggravating factor (9), the need to deter, requires factual findings such as whether the defendant is capable of understanding the wrongfulness of his conduct, see State v. Jarbath, 114 N.J. 394, 405 (1989), whether he is remorseful, see State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991); see also State v. Van Buren, 98 P.3d 1235 (Wash. App. 2004) (lack-of-remorse aggravating factor must be submitted to jury), and whether he continues to deny his alcoholism. See State v. Travers, 229 N.J. Super. 144, 154 (App. Div. 1988). Factor (6) requires the factfinder to decide not only whether the defendant

[3] Indeed, courts have found factors (3) and (9) even where the defendant had no prior convictions. See, e.g., Natale, 373 N.J. Super. at 230, 236 n.5.

has one or more prior convictions, but also whether they are serious and extensive. That decision calls for more than a quantitative determination; it requires a qualitative evaluation.

Several out-of-state decisions involving sentence-enhancing factors very similar to factors (3), (6), and (9) hold that while the judge may find the existence of a prior conviction, the jury must find all other aggravating factors, including those, like (3), (6), and (9), that are related to the fact of prior conviction.

In State v. Warren, 98 P.3d 1129 (Or. App. 2004), the Oregon appellate court held that the statutory aggravating finding that the defendant has a propensity to commit serious, dangerous crimes, which closely resembles the finding, under factor (6), that the defendant has an extensive and serious prior record, had to be made by a jury beyond a reasonable doubt. Warren rejected the notion that Apprendi recognized a broad recidivism exception that would encompass a serious and dangerous finding, and emphasized that the prior-conviction exception is grounded on the fact that "a defendant's prior conviction[] ... already has been subjected to a previous determination by a jury." 98 P.3d at 1136, citing Apprendi, 530 U.S. at 496. Warren concluded that "the basis for the [prior-conviction] exception from the general rule is procedural, not substantive." Id.

In State v. Perez, 102 P.3d 705, 708 (Or. App. 2004), the trial court found three aggravating factors relating to the defendant's prior convictions: persistent involvement in similar

criminal conduct, commission of the offense while on probation or parole, and prior probationary supervision failed to deter. Despite the fact that all three factors are related to the fact of prior conviction, Perez held that each of them had to be found by a jury beyond a reasonable doubt. The court explained:

> Where the state obtained the prior conviction while observing the defendant's constitutional procedural rights, there is no need to test the conviction again in the later trial. ... The same is not true of facts other than the bare fact of a prior conviction — even those related thereto. Here, for example, the allegation that defendant was on probation or parole when he committed the offenses of conviction has not been proved to a jury beyond a reasonable doubt.... Moreover, the issue whether a previous term of parole or probation "failed to deter" defendant from committing further offenses is even more removed from any previous factual determination by a jury. ...[D]efendant argued that the state's failure to provide him with substance-abuse treatment while on supervision caused him to violate his supervision. Extending the exception in Apprendi to the resolution of such factual disputes would not be consistent with the rule in Apprendi because it would allow a sentence that exceeds the "prescribed statutory maximum" based on facts whose validity has not been tested by the applicable procedural safeguards.

Id. at 710.

And with respect to the "persistent-involvement" factor, which closely resembles the required finding, under aggravating factor (6), that the defendant's prior record is "extensive or serious," Perez explained that that factor had to be found by a jury because it "is intended to capture ... a separate malevolent quality in the offender represented by the repetitive nature or

pattern of the offender's criminal behavior over and above simply counting the number of offenses in an offender's criminal history." Id. (citation omitted).

Perez concluded that Apprendi had narrowly limited the fact of a prior conviction to the circumstances in Almendarez-Torres, and that even if the judge could properly find that the defendant had a prior conviction, the jury had to find beyond a reasonable doubt sentence-enhancing facts related to the fact of a prior conviction. See also State v. Gomez, 102 P.3d 992, 997 (Ariz. App. 2004) (rejecting as unconstitutional aggravating factor that defendant had prior indictment for violent crime because indictment may be obtained on less than proof beyond a reasonable doubt).

Like Oregon's persistent-offender and propensity to commit serious, dangerous crimes factors, Minnesota has aggravating factors that are closely akin to 2C:44-1a(6). Like Oregon, the Minnesota courts have held that, under Apprendi and Blakely, the jury must find those factors. In State v. Fairbanks, 688 N.W.2d 333, 336 (Minn. App. 2004), the Minnesota appellate court "conclude[d] that the statutory provision that the defendant's criminal behavior have a 'high frequency rate' or 'long involvement' in criminal activity requires additional factual findings." And in State v. Mitchell, 687 N.W.2d 393 (Minn. App.), review granted No. A03-110 (Dec. 22, 2004), and State v. Brown, 689 N.W.2d 796 (Minn. App. 2004), the Minnesota court held that the jury had to determine whether the defendant's prior

convictions exhibited "a pattern of criminal conduct." Like the Oregon court, Mitchell noted that Apprendi allowed the sentencing judge to find the fact of a prior conviction because procedural safeguards had already attached to the prior conviction. Id. at 400. The pattern-of-criminal-conduct factor required a factual finding in additional to the bare fact of a prior conviction: "this determination goes beyond a mere determination as to the fact, or number, of the offender's prior convictions[.]" Mitchell, 687 N.W.2d at 399-400. Consequently, the factual determination that the prior crimes were committed as part of a pattern of criminal conduct must be made by a jury beyond a reasonable doubt. Id.; Brown, 689 N.W.2d at 801.

In yet another case involving aggravating factors similar to factor (3), (6), and (9), and particularly factor (6), the California appellate court required a jury finding. The sentencing court in People v. Gaitan, 2004 WL 212089 at *11 (Cal. App. 1 Dist.), review granted (December 15, 2004), found the statutory aggravating factors that the defendant "had previously engaged in violent conduct indicating that he was a serious danger to society," had numerous prior adult and juvenile offenses, and had performed unsatisfactorily on probation. Although these factors related to the defendant's "recidivist status," the court concluded that they required subjective determinations and involved "extrinsic facts" beyond the bare fact of a prior conviction. Consequently, they did not fall within the prior-conviction exception and had to be found by a

jury beyond a reasonable doubt. Id.; see Kaua v. Frank, __ F.Supp.2d __, 2004 WL 2980265 at *9, *11 (D. Hawai'i 2004) (holding, on federal review of state sentence, that although defendant admitted that he had numerous prior convictions, "whether [his] commitment was necessary for the protection of the public" must be found by the jury).

In short, aggravating factors (3), (6), and (9) require factual determinations that are qualitatively different from the bare finding that the defendant has incurred a prior conviction. See State v. Vasquez, __ N.J. Super. __, 2005 WL 120387 at *9 (App. Div. 2005) (factors (3), (6), and (9) require findings that "arguably go beyond defendant's criminal record"). Accordingly, if aggravating factors (3), (6), and (9) are used to increase punishment above the statutory maximum they must be admitted by the defendant or found by a jury beyond a reasonable doubt.

Further, there is a serious question whether even the bare fact of a prior conviction, or at least, a contested prior conviction, may be found by a judge rather than a jury. The challenge to the fact of a prior conviction is not a challenge to the defendant's guilt of the prior crime. As Apprendi noted, guilt was undoubtedly determined in accordance with appropriate constitutional procedures. The challenge is to the existence of a qualifying conviction. The state must prove beyond a reasonable doubt that the defendant is actually the person named on the conviction and, when appropriate, that the prior conviction is for the qualifying offense. N.J.S.A. 2C:44-4b

defines a prior conviction as "[a]n adjudication by a court of competent jurisdiction that the defendant committed a crime ... provided that the time to appeal has expired and that the defendant was not pardoned on the ground of innocence." 2C:44-4d provides that "[a] prior conviction may be proved by any evidence, including fingerprint records made in connection with arrest, conviction, or imprisonment, that reasonably satisfies the court that the defendant was convicted." And 2C:44-4c provides that "[a] conviction in another jurisdiction shall constitute a prior conviction of a crime if a sentence of imprisonment in excess of 6 months was authorized under the law of the other jurisdiction."[4] Where the fact of the prior conviction is contested, the burden of proof and the factfinder make a difference.

Just a few weeks before the Supreme Court decided Blakely, it was asked to decide, in Dretke v. Haley, 541 U.S. 386 (2004), whether a sentencing judge could determine not only the existence of prior convictions, but also whether they were entered in the statutorily required sequence. Haley observed that Apprendi had "reserv[ed] judgment as to the validity of Almendarez-Torres," id. at 1853, and then avoided the issue, remanding instead on an alternative ground of relief. See Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 994

[4] In addition, the Code contains several sentence-enhancement provisions that are triggered only by certain prior convictions, sometimes only if the specified prior conviction was committed in a particular sequence. See, e.g., N.J.S.A. 2C:43-6c; 2C:43-6f; 2C:43-7.1; 2C:14-6.

(2004) ("neither Almendarez-Torres nor Apprendi answered whether the Constitution requires a jury trial and proof beyond a reasonable doubt on the existence of a prior conviction").

One month after the Court decided Haley, and just a few days before it issued its opinion in Blakely, the Court granted certiorari in United States v. Shepard, 348 F.3d 308 (1st Cir.), cert. granted 124 S.Ct. 2871 (2004), which questions the scope of the sentencing court's inquiry into the fact of a prior conviction. The statute at issue in Shepard, 18 U.S.C. § 924(e), provides for an increased sentence if the defendant has three prior convictions for "violent felonies." It was not clear from the face of Shepard's prior state judgments whether they were for violent felonies, and, unlike Almendarez-Torres, Shepard did not admit that his prior convictions satisfied the statutory criteria for an enhanced term. Over the defendant's objection, the circuit court permitted examination of police reports and complaint applications in order to resolve the contested fact. 348 F.3d at 314-15. The Supreme Court has granted the defendant's petition for certiorari.[5]

As Haley and Shepard indicate, rather than recognizing a general recidivism exception to the constitutional rule that the jury must find every fact that increases the penalty, the United States Supreme Court has not clearly excepted even the fact of a

[5]The Supreme Court may avoid reaching the Almendarez-Torres issue in Shepard and may decide only the extent to which a judge may look beyond the face of a prior judgment of conviction to determine whether the conviction meets any statutory requirements.

prior conviction, or at least a contested prior conviction, from the rule. And aggravating factors (3), (6), and (9) all require findings beyond the bare fact of a prior conviction.

POINT III

EVEN WERE THE COURT TO FIND A RECIDIVISM EXCEPTION, IT WOULD HAVE TO VACATE THE SENTENCE BECAUSE THE RECORD DOES NOT SUPPORT A FINDING THAT THE TRIAL COURT WOULD HAVE IMPOSED THE SAME SENTENCE ABSENT THE IMPROPERLY FOUND AGGRAVATING FACTOR.

The sentencing court found factor (1) in aggravation of the murder and factors (3), (6), and (9) in aggravation of both the murder and the burglary. (12T 12-21 to 14-18) In contrast to factors (3), (6), and (9), which are offender-based, factor (1) is grounded exclusively on the circumstances of the current offense. Under factor (1), the court considers "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]"

The Abdullah panel acknowledged that, unlike (3), (6), and (9), factor (1) does not fit within the purported recidivism exception. That distinction, however, did not alter the court's decision to affirm the sentence. According to the court, "Even if we were to conclude that the offense-based aggravating factor found here does not survive Blakely, its application is harmless beyond a reasonable doubt, because the remaining offender-based aggravating factors, together with the absence of any mitigating factors, are sufficient to justify the sentence imposed." 372 N.J. Super. at 283.

The question on review is not whether the appellate court would have imposed the same sentence without the invalid aggravating factor, but whether the record indicates that the

sentencing court would have imposed the same sentence. See Williams v United States, 503 U.S. 193, 203 (1992) (the issue is whether "the district court would have imposed the same sentence absent the erroneous factor"); United States v. Labastida-Segura, __ F.3d __, 2005 WL 273315 at *2 (10th Cir. 2005)("Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion."); State v. Evers, 175 N.J. 355, 386 (2003) ("It is well settled that when reviewing a trial court's sentencing decision, (a)n appellate court may not substitute its judgment for that of the trial court."); State v. Megargel, 143 N.J. 484, 493-94 (1996) ("A reviewing court may not substitute its own judgment for that of the sentencing court."); Jarbath, 114 N.J. at 401 ("appellate courts are adjured not to exercise their own sentencing discretion or to substitute their own judgment" but to review sentencing courts' decisions); State v. Roth, 95 N.J. 334, 365 (1984) ("We must avoid the substitution of appellate court judgment for trial court judgment."). This record does not support a finding that the trial court would have imposed the same sentence absent the invalid aggravating factor.

This Court has explained that a trial court reaches a sentence by "balanc[ing] the relevant [aggravating and mitigating] factors," State v. O'Donnell, 117 N.J. 210, 215 (1989), and that "[c]onsideration of an inappropriate aggravating factor violates the guidelines and thus is grounds for vacating a sentence." State v. Pineda, 119 N.J. 621, 628 (1990); State v.

Kromphold, 162 N.J. 345, 355 (2000) (same). The Court has specifically instructed that "ordinarily a remand should be required for resentencing ... when the trial court ... considers an improper aggravating factor." State v. Carey, 168 N.J. 413, 424 (2001); see O'Donnell, 117 N.J. at 215 ("The role of the appellate court is ... to affirm a sentence ... as long as the trial court properly identifies and balances aggravating and mitigating factors."). Critically, the Court has held that "the Code requires an inexorable focus upon the offense when formulating a sentence," Roth, 95 N.J. at 367, and that the weightiest aggravating factors are those that focus on "the severity of the crime" "as opposed to other factors personal to the defendant." State v. Hodge, 95 N.J. 369, 377 (1984). Here, the sentencing judge placed much weight on the severity-of-the-crime factor and, as the appellate court has acknowledged, it is precisely that factor that is invalid.

But the error here is not simply a traditional "invalid-factor" claim; the error here has constitutional significance. In finding and weighing the improper factor, the court violated the defendant's constitutional rights to trial by jury and to proof beyond a reasonable doubt of every fact necessary to impose punishment. Where the sentencing error implicates constitutional protections, the court must be particularly vigilant to ensure that the sentencing procedure is fair. See State v. Nelson, 173 N.J. 417, 451-52 (2002) (sentence reversed even though it could have been based on two proper aggravating factors because jury

may also have relied on third, invalid factor); State v. Rose, 112 N.J. 454, 526-27 (1988) (sentence reversed where instructions may have allowed jury to "assign inordinate weight to the facts that support multiple factors ... thereby impermissibly prejudicing defendant's right to a fair trial").

And while the U.S. Supreme Court has stated that a defendant seeking resentencing based on an invalid aggravating factor "does not have [to] prov[e] that the invalid factor was determinative in the sentencing decision," Williams, 503 U.S. at 203, here there can be little doubt that the invalid factor was determinative in the judge's decision to impose maximum and consecutive terms. The court characterized this as "the most brutal murder that I have seen in over 23 years on the bench." (12T 13-9 to 23)

In contrast to the offense-based factor, the other three factors the judge relied on, the likelihood Abdullah will commit another offense, his prior record, and the need to deter, are all "offender-based aggravating factors[.]" Abdullah, 372 N.J. Super. at 283. And Abdullah's prior record was not so serious and extensive as to warrant maximum and consecutive terms.[6] Given that this Court has directed sentencing courts "to focus on the gravity of the offense rather than the offender's blame-worthiness or capacity for rehabilitation," Evers, 175 N.J. at

[6] Abdullah was 33 years old at the time of the offense. His indictable convictions consisted of a first-degree non-violent drug charge and a fourth-degree charge for resisting arrest. (PSR 10-11)

451, it is inconceivable that after characterizing the offense as the most brutal it had ever seen, the court did not ascribe overwhelming weight to factor (1). Where the judge has placed such great value on the facts of the offense, removing that factor from the sentencing equation gravely undermines any suggestion that the judge would have imposed the same sentence without it. See Jarbath, 114 N.J. at 406 ("error in the sentencing court's determination concerning the existence of any aggravating factors nullifies the weight accorded to such factors and materially alters the calculus in the ensuing balancing of aggravating and mitigating factors"); State v. Mara, 253 N.J. Super. 204, 215-16 (App. Div. 1992) ("When a judge has considered an improper aggravating factor in the weighing and balancing process, the weight accorded such a factor materially alters the basis for the sentence [and] skew[s] the sentencing formula for weighing the aggravating and mitigating factors [and] derivatively impugn[s] the process to such an extent that a reconsideration of the sentence is required."); see also United States v. Urbanek, 930 F.2d 1512, 1516 (10th Cir. 1991) (although it is "highly unlikely" that this sentence would be any different if imposed under correct guidelines, because the trial court did not make it clear that the sentence would have been the same without the error, court is compelled to remand). In short, the Court must vacate the maximum and consecutive sentences because it cannot say with any confidence that the trial judge would have imposed the same sentences absent factor (1).

If the Court finds Apprendi/Blakely error in the New Jersey sentencing scheme and adds a jury-sentencing requirement, recognizing a "recidivism exception" could easily swallow that constitutional holding. Trial courts would be able to rely on the recidivism factors to justify virtually every sentence, thus short-circuiting jury sentencing and effectively shrinking the list of 13 statutory aggravating factors to the recidivism factors, and violating the mandate that sentences are to be offense-oriented rather than offender-oriented. Roth, 95 N.J. at 355; Hodge, 95 N.J. at 379.

CONCLUSION

The Court must vacate the maximum and consecutive sentences, including the discretionary parole disqualifier imposed on the burglary sentence, because they were imposed in violation of Abdullah's state and federal constitutional rights to trial by jury and to proof beyond a reasonable doubt of every fact necessary to impose punishment.

Respectfully submitted,

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BY:_____
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Assistant Deputy Public Defender

DATED: February 9, 2005