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May 4, 2005

BY OVERNIGHT DELIVERY

Stephen W. Townsend, Clerk
SUPREME COURT OF NEW JERSEY
Hughes Justice Complex
25 West Market Street
Trenton, NJ 08625-0970

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

Dear Mr. Townsend:

On behalf of Amicus Curiae the Association of Criminal Defense Lawyers of New Jersey, enclosed herewith for filing in the above-listed matter are an original and nine copies of our letter pursuant to R. 2:6-11(d). Kindly return one copy marked "received" to me in the preaddressed, postage-paid envelope provided for that purpose.

I thank you in advance for your consideration.

Very truly yours,

ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

By:_____
Steven G. Sanders, Esq.

Encl.

cc: All Counsel of Record
(by fax & U.S. Mail)

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May 4, 2005

BY OVERNIGHT DELIVERY

Honorable Justices of the
Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0970

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

Your Honors:

We are counsel to Amicus Curiae the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ"). Pursuant to R. 2:6-11(d), we respectfully submit this letter in response to the State's April 22, 2005 letter.

The State's letter brings to this Court's attention the Tennessee Supreme Court's decision in State v. Gomez, ___ S.W.2d ___ (Tenn. 2005). There, a bare majority of the court interpreted the U.S. Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005), to mean that a Sixth Amendment violation occurs only when judicial fact-finding automatically mandates a sentence higher than the one the defendant would have received in the absence of any judicial fact-finding. Since a Tennessee judge is not required to impose a sentence above the statutory presumptive term upon finding an aggravating fact, the Gomez majority reasons, Tennessee's sentencing scheme passes constitutional muster.

The Gomez majority's holding essentially mirrors the position the State advanced in the supplemental briefs it filed with this Court in this case. We have already demonstrated why the State's view of the Sixth Amendment fundamentally misunderstands Booker. See Joint Supplemental Brief Amicus Curiae (filed Feb. 22, 2005) at 13-17. Instead of repeating those arguments here, we point out that the Tennessee Attorney General has filed a Petition for Rehearing

(attached herewith), contending that the Gomez majority misunderstood Booker and arguing that Tennessee's sentencing scheme clearly runs afoul of the Sixth Amendment principles articulated in Booker and Blakely v. Washington, 124 S. Ct. 2531 (2004).[1] According to Tennessee's chief law enforcement officer:

> The critical inquiry under the Sixth Amendment is *not* whether the finding of an enhancement factor mandates an increased sentence above the presumptive minimum, but whether, under the applicable statutes, the judge [obtains the power to] increase the sentence above the presumptive minimum only by finding additional facts. "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 124 S.Ct. at 2538, n.8. It is as plain as a pikestaff that a Tennessee judge has no authority to impose a sentence above the presumptive minimum - the sentence authorized by the jury verdict alone - unless an enhancement factor is found. *See* Tenn, Code Ann. § 40-35-210 (c), (d). Except for the fact of a prior conviction or a fact stipulated by the defendant, *Apprendi* holds that any such fact must be found by a jury beyond a reasonable doubt. 530 U.S at 490.

Tenn. A.G.'s Pet for Reh'g at 2 (emphasis in original).

The Tennessee Attorney General's willingness to place intellectual honesty before political expediency is commendable, if not refreshing. We respectfully submit that his understanding of Booker is more faithful to the Sixth Amendment principle articulated in Blakely than the State's.

Respectfully submitted,

ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

By: _____
Steven G. Sanders, Esq.

Encl.

cc: All Counsel of Record
(by fax & U.S. Mail)

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[1]The Tennessee Association of Criminal Defense Lawyers also has petitioned for rehearing as amicus curiae. That petition is available at: http://sentencing.typepad.com/sentencing_law_and_policy/files/petitiontorehearofamicuscuriae_4.25.05.pdf.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
	)	
v.	)	**DAVIDSON COUNTY**
	)	**NO. M2002-01209-SC-R11-CD**
	)	
EDWIN GOMEZ and	)	
JONATHAN S. LONDONO,	)	
	)	
Appellants.	)	

PETITION FOR REHEARING

The State of Tennessee requests a rehearing in this case with respect to Part III.C. of the majority opinion of the Court. Slip op at 19-27. In concluding that the defendants' sentences were not imposed in violation of the Sixth Amendment, the Court determined that

> [t]he Reform Act authorizes a discretionary, non-mandatory sentencing procedure and requires judges to consider the principles of sentencing and to engage in qualitative analysis of enhancement and mitigating factors. The Reform Act does not include a formula, a grid, or any other mechanical process. It instead sets out broad sentencing principles, enhancement and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature. Under the Reform Act, the finding of an enhancement factor does not mandate an increased sentence. The Reform Act does not provide a system which requires or even allows judicial power to "infringe upon the province of the jury." Blakely *[v. Washington]*, 124 S.Ct. at 2540.

Slip op at 27. In reaching this determination however, the Court has overlooked or misapprehended a material proposition of jaw. Sec Rule 39(a), T.R.A.P.

The Court places much emphasis on the fact that, under the Reform Act, "the finding of an enhancement factor does not mandate an increased sentence" Slip op. at 27. That is true enough, in that a court is always free to sentence a defendant at or below the presumptive minimum sentence, even when an enhancement factor is applicable. But that was equally true of the Washington guidelines under review in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the New Jersey statute at issue in *Apprendi v. New Jersey*, 530 U.S. 466(2000), the statute involved in *Jones v. United States*, 526 U.S. 227 (1999), and Arizona's capital sentencing statute under scrutiny in *Ring v. Arizona*, 536 U.S. 584 (2002), all of which were found to violate the Sixth Amendment.

The critical inquiry under the Sixth Amendment is *not* whether the finding of an enhancement factor mandates an increased sentence above the presumptive minimum, but whether, under the applicable statutes, the judge can increase the sentence above the presumptive minimum only by finding additional facts. "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 124 S.Ct. at 2538, n.8. It is as plain as a pikestaff that a Tennessee judge has no authority to impose a sentence above the presumptive minimum – the sentence authorized by the jury verdict alone – unless an enhancement factor is found. *See* Tenn, Code Ann. § 40-35-210 (c), (d). Except for the fact of a prior conviction or a fact stipulated by the defendant, *Apprendi* holds that any such fact must be found by a jury beyond a reasonable doubt. 530 U.S at 490.

The decision in *United States v. Booker*, 125 S.Ct. 738 (2005), does not alter the conclusion that Tennessees scheme violates the *Apprendi* rule. While *Booker* acknowledges that sentencing guidelines that are "merely advisory provisions" and not "mandatory and binding on

all judges" do not implicate the Sixth Amendment, *Booker*, 125 S.Ct. at 750, it is clear from the context in *Booker* that the Court regarded the federal sentencing guidelines to be mandatory and binding because the only means of imposing an upward departure from the base range sentence was through the application of the guidelines, which in turn required findings of fact beyond the facts necessarily found by the jury verdict. In other words, an upward departure could only be reached by following the guidelines. It was in that sense that the Court viewed the guidelines as mandatory and binding; it was not because they required a particular sentence. See *Booker*, 125 S.Ct. at 750-51.

The same is true of Tennessee's statutory scheme, which authorizes a sentence above the presumptive minimum *only* when enhancement factors are found. Tenn. Code Ann. § 40-35-210(c), (d). On the other hand, an example of an advisory non-mandatory scheme is the proposal recommended by the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing. Under that proposal, the statutory presumptive minimum sentence is eliminated, the enhancement factors are merely advisory, and the trial judge is free to impose any sentence within the range.

As this Court correctly determined, the defendants failed to preserve properly their constitutional claims of error and failed to carry their burden of demonstrating plain error. For the reasons stated in the States principal brief, *see* pp. 24-25, the defendants failed to satisfy the requirements of the plain-error test because they failed to demonstrate that consideration of the error is "necessary to do substantial justice."

CONCLUSION

Rehearing should be granted and the judgment affirmed for the reasons stated herein and in the State's principal and supplemental briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to:

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this _____ day of April, 2005.

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Associate Solicitor General

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