Supreme Court of New Jersey

DOCKET NO. 57,143

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Petitioner/ Cross-Respondent,	:	On Petition for Certification to the Superior Court of New Jersey,
v.	:	Appellate Division
MICHAEL J. NATALE,	:	Sat Below: Hon. Edwin H. Stern, P.J.A.D. Hon. Donald S. Coburn, J.A.D.
Defendant-Respondent/ Cross-Petitioner.	:	Hon. Barbara Byrd Wecker, J.A.D.

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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PRELIMINARY STATEMENT

The recent opinion of the United States Supreme Court in United States v. Booker, 543 U.S. ___, 125 S. Ct. 738 (2005), leaves no doubt that a trial judge, when imposing a sentence from within the available sentence range, may find and rely upon any facts, even if the court is required to make particular findings and even when the finding requires the court to impose a particular sentence. The judge may even find facts to impose a sentence above that range, so long as the judge's fact-finding does not "require" or "mandate" that the judge move upward to a particular range and impose sentence from within that enhanced range. Booker, 125 S. Ct. at 745-47, 748, 750-51, 752.

The Supreme Court in Booker dispelled any notion that its single passage seven months earlier in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ("statutory maximum" is maximum sentence judge may impose without making "any additional findings"), could somehow be interpreted to mean that it had rendered unconstitutional judicial fact-finding to fix a sentence within a standard range. In Booker, the Supreme Court clarified that in referring to "additional" fact-finding in Blakely, it was referring to fact-finding to raise the "ceiling" of the available sentence range, and even then, only when such fact-finding "requires" and "mandates" that the judge move upward to a particular range and impose sentence from within that enhanced range. Booker, 125 S. Ct. at 745-47, 748, 750-51, 752.

In New Jersey, a trial court, based on its consideration of aggravating and mitigating factors, may, in its discretion, select any sentence from within the standard range authorized by

the jury's verdict or guilty plea--whether above, below, or at the presumptive midpoint. Because a judge's consideration of sentencing factors will not result in a sentence in excess of the maximum of the ordinary range set by the jury verdict or guilty plea, the Sixth Amendment is not implicated.

Not only is a term above the presumptive within the range authorized by the jury's verdict or guilty plea, but the judge's finding of an aggravating factor does not require an increase in sentence, let alone an increase above the presumptive term. Our judges have never been required, based on their analysis of the sentencing factors, to increase the sentence, let alone to increase it above the presumptive term or to a higher range.

A finding of an aggravating factor under N.J.S.A. 2C:44-1a does not extend the power of the judge. Rather, the process of finding and weighing aggravating and mitigating factors guides the judge's decision-making power in choosing a sentence within the authorized range for the degree of the crime of which the defendant was convicted. Thus, a trial court's assessment of the aggravating and mitigating factors to arrive at an appropriate sentence within our standard ranges falls squarely within the constitutional boundaries established by the United States Supreme Court.

STATEMENT OF PROCEDURAL HISTORY

Camden County Indictment No. 1427-5-99 charged defendant Michael J. Natale with first degree attempted murder, contrary to N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3a (Count One); third degree aggravated assault by causing or attempting to cause bodily injury with a deadly weapon, namely speakers, a candle holder,

LEGAL ARGUMENT

POINT I

NEW JERSEY'S ORDINARY TERM SENTENCING SCHEME, WHICH INVOLVES THE TRADITIONAL FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS BY A JUDGE PRIOR TO IMPOSITION OF SENTENCE, IS CONSTITUTIONAL.

A. The United States Supreme Court Has Made It Absolutely Clear that a Sentencing Court May Find, In Its Discretion, Facts Pertaining to the Offense and Offender To Arrive At An Appropriate Term Within the Standard Sentence Range.

In 1949, the United States Supreme Court observed that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law." Williams v. New York, 337 U.S. 241, 246, 69 S. Ct. 1079, 1082, 93 L. Ed. 1337, 1341-42 (1949). The Supreme Court explained that the judge's task in sentencing is to determine, "within fixed statutory or constitutional limits . . . the type and extent of punishment after the issue of guilt has been determined." Id. at 247, 69 S. Ct. at 1083, 93 L. Ed. at 1342.

In 1972, the Supreme Court reiterated that a trial judge "has wide discretion in determining what sentence to impose," and "that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446, 92 S. Ct. 589, 591, 30 L. Ed. 2d 592, 596 (1972). The Court agreed

that the Government was "on solid ground in asserting that a sentence imposed by a . . . judge, if within statutory limits, is generally not subject to review." Id. at 447, 92 S. Ct. at 591, 30 L. Ed. 2d at 596.

In 2000, in Apprendi v. New Jersey, the United States Supreme Court, in examining New Jersey's sentencing system, identified the "statutory maximum" for Sixth Amendment jury determination purposes as the top of our ordinary term ranges. Apprendi v. New Jersey, 530 U.S. at 491-97, 120 S. Ct. at 2363-66, 147 L. Ed. 2d at 455-59. Approving of judicial factfinding to move a sentence up or down "within the range prescribed by statute," id. at 481, 120 S. Ct. at 2358, L. Ed. 2d at 449-50, the Court held that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" Id. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455 (quoting Jones v. United States, 526 U.S. 227, 252, 119 S. Ct. 1215, 1228, 143 L. Ed. 2d 311, 332 (1999) (Stevens, J., concurring)). The hate-crime statute at issue in Apprendi was found to violate the Sixth Amendment because it authorized an "extended" 20-year sentence, despite the usual 10-year maximum for this second degree crime, if the judge found the crime to have been committed with a biased purpose. Id. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455.

The Apprendi Court observed that the question of whether the defendant committed his crime with a racially biased purpose turned on the defendant's state of mind or mens rea, which was "perhaps as close as one might hope to come to a core criminal

offense 'element.'" Id. at 492-93, 120 S. Ct. at 2364, 147 L. Ed. 2d at 456-57. Yet, the statute permitted the judge to make the finding that the offense was a hate-crime, and if so, to impose a sentence appropriate for a first degree crime, even though the jury had convicted Apprendi of only a second degree crime. Id. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455. The Supreme Court determined that Apprendi's constitutional rights were violated by the statute because the judge imposed an "extended" sentence greater than the maximum term that could have been imposed under state law based upon the jury's verdict, which the Court defined as the top of the standard sentence range for a second degree crime, 10 years. Id. at 491-97, 120 S. Ct. at 2363-66, 147 L. Ed. 2d at 455-59.

Citing its earlier opinions in Williams v. New York and United States v. Tucker, the Supreme Court in Apprendi v. New Jersey, 530 U.S. at 481, 120 S. Ct. at 2358, 147 L. Ed. 2d at 449-50, made it abundantly clear that "nothing . . . suggests that it is impermissible for judges to exercise discretion--taking into consideration various factors relating both to offense and offender--in imposing a judgment within the range prescribed by statute." Such factors are "sentencing factors," a term which "appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense." Apprendi v. New Jersey, 530 U.S. at 494 n.19, 120 S. Ct. at 2365 n.19, 147 L. Ed. 2d at 457 n.19. The Sixth Amendment is implicated only when a statute authorizes the judge to assess the

facts that "increase the prescribed range." Id. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455.

Two years later, in Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), the Supreme Court reaffirmed McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), and upheld the constitutionality of statutes that authorize the trial judge to find the factor giving rise to a mandatory minimum sentence that does not increase the sentence beyond the top of the "authorized range" for the offense. Harris, 536 U.S. at 567, 122 S. Ct. at 2419, 153 L. Ed. 2d at 544. In reconciling Apprendi with McMillan, the Court recognized the continuing distinction between "elements" and "sentencing factors," explaining that the 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." Harris, 536 U.S. at 567, 122 S. Ct. at 2419, 153 L. Ed. 2d at 544. The factor in Apprendi "'swell[ed] the penalty above what the law has provided' . . . and thus, functioned more like a 'traditional elemen[t].'" Harris, 536 U.S. at 562, 122 S. Ct. at 2417, 153 L. Ed. 2d at 541 (quoting J. Bishop, Law of Criminal Procedure § 85, p. 54 (2d ed. 1872)). In contrast, a finding that gives rise to a mandatory minimum sentence merely "restrain[s] the judge's power, limiting his or her choices within the authorized range." Harris, 536 U.S. at 567, 122 S. Ct. at 2419, 153 L. Ed. 2d at 544 (emphasis added).

Citing Apprendi, the Harris Court reiterated the principle that "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the

indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." Harris v. United States, 536 U.S. at 558, 122 S. Ct. at 2415, 153 L. Ed. 2d at 538 (emphasis added). The Harris Court explained that once the jury has found all the facts, i.e., the elements of the crime, that determine the maximum sentence, "Apprendi says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum." Harris v. United States, 536 U.S. at 565, 122 S. Ct. at 2418, 153 L. Ed. 2d at 542-43.

Thereafter, the judge may properly consider factors to move the sentence up or down within the range authorized by the substantive offense of which the defendant was convicted. The Supreme Court in Harris could not have made this plainer:

> Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge . . . chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries--and without contradicting Apprendi.
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> . . . .
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> [I]t is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant "will never get more punishment than he bargained for when he did the crime," but they did not promise that he will receive "anything less"

finding of an aggravating circumstance. The Court held that the judge's factual finding of "deliberate cruelty" violated Apprendi because it took Blakely's sentence beyond the maximum of the standard range for the crime to which he pled guilty. After defining "statutory maximum" as the sentence that the judge could impose without any additional findings, the Supreme Court held that the "statutory maximum" there was the top of the standard sentence range (53 months). Blakely, 124 S. Ct. at 2537, 159 L. Ed. 2d at 413-14. The Blakely Court made it clear that when sentencing within the standard range, a judge may consider information other than the facts found by the jury or admitted by defendant.

To grasp the reach of the Court's opinion in Blakely, it is necessary to have an understanding of the Washington sentencing scheme under review in that case. Under Washington's sentencing statutes, the trial court determined the standard sentence range using a "Sentencing Grid." Wash. Rev. Code § 9.94A.310; (Ra1-5).[3] The grid established standard sentence ranges for felonies based on the "seriousness level" of the offense (vertical axis of the sentencing grid) and the defendant's "offender score" (horizontal axis of the grid). Ibid. The offense seriousness level was determined by a table which set forth the precise level for each specific crime, which may vary from a low of I for such

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[3] The Washington Sentencing Reform Act has since been recodified. The code references cited herein are those that were applicable at the time that Blakely was sentenced and most of which were employed by the United States Supreme Court in its decision in Blakely. The relevant Washington statutes are provided in the appendix to the State's Appellate Division reply brief (Ra1-21), and the appendix to this brief (Sa5-6).

> than that. Apprendi, supra, at 498, 120 S. Ct. 2348 (Scalia, J., concurring). If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury--even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.
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> [Harris v. United States, 536 U.S. at 565-66, 122 S. Ct. at 2418-19, 153 L. Ed. 2d at 543 (emphasis added).]

In Ring v. Arizona, decided on the same day as Harris, the Supreme Court reinforced the fundamental principle that only those factors which "'rais[e] the ceiling of the sentencing range available'" must be treated as elements. Ring v. Arizona, 536 U.S. 584, 601, 122 S. Ct. 2428, 2439, 153 L. Ed. 2d 556, 571-72 (2002) (quoting Jones v. United States, 526 U.S. at 251, 119 S. Ct. at 1228, 143 L. Ed. 2d at 331). In Ring, the Arizona statute authorizing imposition of the death penalty if the judge found one of ten specified aggravating factors was found to violate Apprendi and the Sixth Amendment because the judicially imposed death sentence exceeded the maximum punishment authorized by the jury's guilty verdict alone, that being life imprisonment. Id. at 592-93, 604, 122 S. Ct. at 2434-35, 2440, 153 L. Ed. 2d at 566, 573-74.

Two years later, the Supreme Court in Blakely applied Apprendi to invalidate a Washington sentencing provision because it allowed the sentencing court to impose an "exceptional" sentence, above the standard sentence range, based on a judicial

offenses as forgery to a high of XVI for aggravated murder. Wash. Rev. Code § 9.94A.320; (Ra6-10). The "offender score" was calculated by the sentencing court, in its discretion, by assigning a point value based on several statutorily-enumerated factors, which took into account the defendant's prior convictions and present conviction, including such things as whether the present offense was a violent crime. Wash. Rev. Code § 9.94A.360 (Ra11-13). The intersection of the seriousness level and offender score on the grid yielded a standard sentence range extending from the lowest to the highest term that may be imposed for the offense and a sentencing "midpoint" between the lowest and highest terms. Wash. Rev. Code § 9.94A.310 (Ra1-2).

In selecting a sentence within the standard range, a Washington judge "shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." Wash. Rev. Code § 9.94A.110(1). (Sa2-3). Furthermore, the judge may rely upon information "admitted by the plea agreement, or admitted, acknowledged, or proved in trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports." Wash. Rev. Code § 9.94A.370(2). (Ra21).

At the sentencing hearing, each party may argue factual matters in support of a sentence at the high or the low end of the standard range. Wash. Rev. Code § 9.94A.110(1); (Sa5-6);

State v. Williams, 11 P.3d 878, 880, 882 (Wash. Ct. App. 2000) ("prosecutor may reference a defendant's prior bad acts in support of an argument that the sentencing judge should impose the maximum standard range sentence").

Under a statute entirely separate from those pertaining to the standard sentence range, entitled "Departures from the guidelines," the sentencing court was authorized to impose a term "outside the standard sentence range" if the court found "substantial and compelling reasons" to justify "an exceptional sentence." Wash. Rev. Code § 9.94A.390 (Ra15-17); Wash. Rev. Code § 9.94A.120 (Ra20). The exceptional sentence statute provided a list of aggravating factors which the court could consider in imposing an exceptional sentence. Ibid. (Ra15-17).[4] Once the sentencing court found "substantial and compelling reasons justifying an exceptional sentence" (Ra20), it was permitted, in its discretion, to determine the precise length of the "exceptional" sentence. State v. Ritchie, 894 P.2d 1308, 1312-16 (Wash. 1995).

A third statute, which was separate from both the "standard range" and "exceptional" statutes, simply set forth the "maximum sentences" for each class of felony. Wash. Rev. Code § 9A.20.021(1)(b); (Ra19). For example, the "maximum sentence" for a class B felony was "a term of ten years." (Ra19).

Blakely had pled guilty to second degree kidnapping. Id. at 2534-35. The seriousness level of second degree kidnapping was

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[4] It was this statute, allowing the judge to exceed the standard range based on findings it had made independently of the jury, that the Blakely Court held violated the Sixth Amendment.

V, and Blakely's offender score was determined by the judge to be 2, and thus, under Washington's Sentencing Grid, the standard sentence range was 13 to 17 months. Id. at 2535 (citing Wash. Rev. Code §§ 9.94A.320, 9.94A.360, 9.94A.310). Blakely pled guilty to a firearm enhancement, which added a mandatory term of 36 months to his sentence. Ibid. Thus, the standard range became 49 to 53 months.[5] Ibid. Second degree kidnapping was classified as a class B felony, and state law provided that a person convicted of a class B felony could be sentenced to a term of up to 10 years (120 months), but only if an exceptional circumstance was found by the sentencing judge. Ibid. (citing Wash. Rev. Code §§ 9A.40.030(3), 9A.20.021(1)(b)).

At sentencing, the judge imposed an "exceptional" sentence of 90 months pursuant to the statute which authorized the court to "depart" from the standard range if it found "substantial and compelling reasons justifying an exceptional sentence." Ibid. (citing Wash. Rev. Code § 9.94A.120(2)). In imposing the "exceptional" sentence, the judge found that Blakely had acted with "deliberate cruelty" in a domestic violence case, a statutorily-enumerated aggravating factor for departure from the standard range. Ibid. (citing Wash. Rev. Code §9.94A.390(2)(h)(iii)).

The United States Supreme Court held that the judge's factual finding of "deliberate cruelty" violated Apprendi because

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[5] According to the sentencing grid, the "midpoint" for a 13- to 17-month standard range was 15 months. Wash. Rev. Code § 9.94A.310 (Ra2). Logically, once the standard range became 49 to 53 months due to the firearm enhancement, the "midpoint" became 51 months.

it took Blakely's sentence beyond the maximum of the standard range for the crime to which he pled guilty. Citing Apprendi, Harris, and Ring, the Blakely Court defined the "statutory maximum" as the maximum sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" without any additional findings. The Court explained that any fact "legally essential to the punishment" must be proven beyond a reasonable doubt to a jury or admitted by the defendant. Id. at 2543. Having so defined "statutory maximum," the Supreme Court then held that the "statutory maximum" there was the top of the standard sentence range (53 months), rather than the 10-year maximum for a Class B felony. Blakely, 124 S. Ct. at 2537, 159 L. Ed. 2d at 413-14. The Court explained that the trial judge had imposed an "exceptional" 90-month sentence that "was more than three years above the 53-month statutory maximum of the standard range" based on the judge's finding that Blakely had acted with "deliberate cruelty," a fact that was neither admitted by him nor found by a jury. Ibid. (emphases added).

The Supreme Court noted that under Washington law, the "'reason offered to justify an exceptional sentence could be considered only if it took into account factors other than those which are used in computing the standard range sentence for the offense,'" thus, acknowledging that the judge may properly consider factors to move the sentence up or down within the standard range. Blakely, 124 S. Ct. at 2537-38, 159 L. Ed. 2d at 414 (quoting State v. Gore, 21 P.3d 262, 277 (Wash. 2001)) (emphases added). It was only when the fact-finding resulted in

an upward departure from the standard range to the "exceptional" range that there was a right to a jury determination. Ibid.

The Blakely Court specified that it was addressing the constitutionality of a determinate sentencing scheme, and made it clear that its holding did not apply to indeterminate schemes. Blakely, 124 S. Ct. at 2540-41, 159 L. Ed. 2d at 416-17. As the Court explained, the Sixth Amendment "is not a limitation on judicial power, but a reservation of jury power," and therefore it "limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so." Blakely, 124 S. Ct. at 2540, 159 L. Ed. 2d at 417 (emphasis added). The Court explicitly upheld indeterminate sentencing schemes involving judicial fact-finding wherein a judge may "rule on those facts he deems important to the exercise of his sentencing discretion," reasoning that those facts "do not pertain to whether the defendant has a legal right to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury in concerned." Ibid. The Court illustrated its point with the following example:

> In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence--and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.
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> [Ibid.]

Thus, Justice Scalia, writing for the majority, expressly

affirmed a trial court's discretion to find facts in setting an exact term within a standard range and illustrated the point by approving judicial fact-finding that causes the sentencing judge to impose any term within the hypothetical 10 to 40 year range for burglary. And that result holds true even if that fact precludes the court from imposing a lesser sentence. Harris v. United States, supra. But if the legislature caps the range at 10 years, and adds a provision that use of a gun expands the range to 40 years, the jury must find that the defendant used the gun, because, for the mere act of committing a burglary, the defendant had a legal right to expect no more than a 10-year sentence.

Seven months later, the Supreme Court issued its decision in United States v. Booker, 543 U.S. ___, 125 S. Ct. 738 (2005), which is comprised of two separate majority opinions, with Justice Stevens writing the majority opinion finding the Federal Sentencing Guidelines unconstitutional, and Justice Breyer writing the majority opinion that cures the unconstitutionality by construing the Guidelines as discretionary rather than mandatory.

In Justice Stevens' opinion, the Court held that the Federal Sentencing Guidelines were unconstitutional under the Sixth Amendment. The Court explained that the Guidelines violated the Sixth Amendment because they allowed the trial court, based on its finding of facts by a preponderance of the evidence, to impose an "enhanced" sentence, above the maximum of the standard sentence range supported by the jury verdict alone. Booker, 125 S. Ct. at 749-51.

Based on defendant Booker's criminal history and the quantity of drugs found by the jury, the Guidelines authorized a base sentence in the 210-to-262 month range for his conviction of possession with intent to distribute cocaine. Id. at 745-47, 750-51. However, based on the judge's finding of additional facts, the Guidelines "mandated" that the judge select an "enhanced" sentence in the 360 months-to-life range. Id. at 745-46. For defendant Fanfan's conviction of conspiracy to distribute and to possess with intent to distribute cocaine, the Guidelines authorized a sentence in the 5-to-6 year range. Id. at 747. However, based on the judge's finding of additional facts, the Guidelines "required" that the judge select an "enhanced" sentence in the 15-to-16 year range. Id. at 747.

The Supreme Court explained that the Guidelines authorized the judge to find a particular fact to raise the sentencing "ceiling" and impose a term within an "enhanced" range, as did the statutes at issue in Blakely, Apprendi, Jones, and Ring. Id. at 748-50, 755-56 (citing Blakely, 124 S. Ct. at 2537-38, 159 L. Ed. 2d at 413-14 (judge found facts to impose an "exceptional" sentence above maximum of standard sentence range); Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455 (judge found fact to impose an "extended" sentence above maximum of standard sentence range); Jones, 526 U.S. at 267, 119 S. Ct. at 1235, 143 L. Ed. 2d at 341 (judge found fact to increase maximum sentence for carjacking from 15 to 25 years); and Ring, 536 U.S. at 592-93, 604, 122 S. Ct. at 2434-35, 2440, 153 L. Ed. 2d at 566 (judge found fact to increase maximum sentence from life imprisonment to death)).

752. Obviously, sentencing under N.J.S.A. 2C:44-1 is the traditional practice described in Booker and not the new circumstance addressed in Apprendi and Blakely.

The Court explained that it has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." Id. at 750 (citing Apprendi, 530 U.S. at 481, 120 S. Ct. at 2358, 147 L. Ed. 2d at 449-50; and Williams v. New York, 337 U.S. at 246, 69 S. Ct. at 1082, 93 L. Ed. at 1341-42). For that reason, if the Guidelines were "merely advisory"--recommending, but not requiring, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." Booker, 125 S. Ct. at 750. The Court continued: "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." Id. at 750.

The problem was that the Federal Guidelines were not merely advisory; they were mandatory. Id. at 750. Indeed, Title 18 U.S.C.A. § 3553(b) directs that a court "shall impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in limited cases. Id. at 750. The Court found that there was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in" Blakely. Id. at 749. The Court explained: "This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." Id. at 749-50.

The Court concluded by reaffirming its holding in Apprendi that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id. at 756.

Having affirmatively answered the first question presented regarding whether imposition of an enhanced sentence under the Federal Guidelines violated the Sixth Amendment, the Supreme Court turned to the second question presented: "whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction."[6] Id. at 747 n.1 (emphases added).

In its majority opinion authored by Justice Breyer, the Supreme Court determined that, because the statutory provisions making the Guidelines mandatory were incompatible with its holding, those provisions must be severed and excised to make the Guidelines "effectively advisory." Booker, 125 S. Ct. at 757. Accordingly, the Court severed 18 U.S.C.A. §3553(b)(1), which made "the relevant sentencing rules . . . mandatory and impose[d]

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[6] The opinion provides that the statute for Booker's offense prescribed a minimum sentence of 10 years and a maximum sentence of life. 21 U.S.C.A. §841(b)(1)(A)(iii). Booker, 125 S. Ct. at 746. It does not provide this information as to the offense of which Fanfan was convicted.

binding requirements on all sentencing judges," and 18 U.S.C.A. §3742(e), which set forth the standards of review on appeal. Id. at 764.

With those provisions severed, a sentencing court would be permitted to consider the Guideline ranges, but allowed to tailor the sentence in light of other statutory concerns. Id. at 756-57. The Court explained the "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." Id. at 767. Additionally, the Court held that 18 U.S.C.A. §3553(a), "which sets forth numerous factors that guide sentencing," "remains in effect." Id. at 765-66. Interestingly, §3553(a) provides that the district judge "shall" consider such factors as, "the nature and circumstances of the offense," "the history and characteristics of the defendant," and the need for deterrence, essentially mirroring New Jersey's aggravating factors contained in N.J.S.A. 2C:44-1a. Id. at 769-70.

The Supreme Court concluded that its remedy, which retained judicial sentencing, use of the Guidelines, and consideration of the factors set forth in §3553(a), was most consistent with Congress' basic sentencing intent to achieve uniformity and to afford sufficient flexibility to allow individualized sentences. Id. at 760, 767-68. Congress' basic goal, to avoid disparity in sentencing, depended for its success on a judge's ability to punish based on the "real conduct" underlying the subject crime. Id. at 759.

The Supreme Court explained: "Federal judges have long relied upon a presentence report, prepared by a probation

officer, for information (often unavailable until after the trial) relevant to the manner in which the convicted offender committed the crime," and "Congress expected this system to continue." Id. at 760. "To engraft . . . [a] constitutional [jury determination] requirement onto the sentencing statutes . . . would destroy the system." Id. at 760. "It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial," "weaken the tie between a sentence and an offender's real conduct," and "thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." Id. at 760.

The Court stated that if a jury trial requirement were "patched onto" the statute, it "would move the system backwards in respect to both tried and plea-bargained cases." Id. at 762. As to tried cases, a patched-on jury fact-finding requirement "would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest." Id. at 762. As to plea bargaining, it "would likely lead to sentences that gave greater weight, not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime." Id. at 763.

The Court rejected a remedy that would leave the Guidelines mandatory but reduce sentences, precluding increases based on relevant conduct, stating that it did not believe that such "one-

way levers" were compatible with Congress' intent. Id. at 768. The Court elaborated:

> Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences upward than to adjust them downward. As several United States Senators have written in an amicus brief, "the Congress that enacted the 1984 Act did not conceive of--much less establish--a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level down, but not up, within the applicable guidelines range. Such a one-way lever would be grossly at odds with Congress's intent."
>
> [Id. at 763.]

The Supreme Court concluded that jury sentencing "would create a system far more complex than Congress would have intended." Id. at 761. The Court highlighted several compelling examples of the problems jury sentencing could create. Id. at 761-62. The Court questioned whether an indictment would have to allege not only the elements of robbery but also whether the victim was unusually vulnerable, whether the indictment in a mail fraud case would have to allege the number of victims and any of their vulnerabilities, and whether a jury would be qualified to measure loss in a securities fraud case, "a matter so complex" as to require that judges make only a reasonable estimate. Id. at 761-62.

The Supreme Court remanded the cases of both defendants for resentencing, up to a maximum of life in Booker's case, in the judge's discretion, in accordance with its opinions. Id. at 769. Interestingly, in Fanfan's case, the district judge had held Blakely applicable to the Guidelines, and yet, the Supreme Court

remanded to give the Government an opportunity to seek resentencing in accordance with its opinions, clearly contemplating that a sentence in the enhanced Guidelines range would be available to the trial court in its discretion.

B. New Jersey's Ordinary Term Sentencing Procedure Falls Squarely Within the Constitutional Boundaries Established by the United States Supreme Court.

1. Ordinary Term Sentencing Under New Jersey's Criminal Code and the Trial Court's Role Therein.

The goals of sentencing reform embodied in the adoption of the New Jersey Code of Criminal Justice were rational sentencing, greater uniformity in sentencing, and the avoidance of disparity in sentencing. State v. Dunbar, 108 N.J. 80, 97 (1987); State v. Roth, 95 N.J. 334, 351 (1984). The Legislature also lists among the purposes of the sentencing provisions of the Code the intent to give fair warning of the nature of the sentences that may be imposed on conviction of an offense, to prevent and condemn the commission of offenses, to promote the correction and rehabilitation of offenders, to insure public safety through deterrence and confinement, and to differentiate among offenders with a view to a just individualization in their treatment. N.J.S.A. 2C:1-2b(5); State v. Brimage, 153 N.J. 1, 20 (1998).

"The guiding purpose of the [Code] is clear--punishment, rather than rehabilitation, for wrongful acts." State v. Evers, 175 N.J. 355, 387 (2003). "To achieve that purpose, as well as uniformity and rationality in sentencing, the Code 'channel[s] the discretion of trial courts' by focusing on the gravity of the offense rather than the offender's blameworthiness or capacity for rehabilitation." Ibid. (quoting State v. Jabbour, 118 N.J.

1, 6 (1990)).

The central theme of the Code's sentencing reforms was to replace "the unfettered sentencing discretion of prior law with a structured discretion designed to foster less arbitrary and more equal sentences." State v. Roth, 95 N.J. at 345. "By structuring discretion, our Legislature has reposed the deepest trust in the judiciary." State v. Hodge, 95 N.J. 369, 379-80 (1984). The Legislature "has for the most part rejected determinate or flat-time sentencing," and "has sought to achieve the optimum balance between the scheme of laws and the flexibility of discretion," resulting in "principled, evenhanded, effective and fair . . . sentencing." Ibid.

In imposing sentence, the court is permitted to consider all relevant information, and is not bound by the strict rules of evidence. State v. Davis, 96 N.J. 611, 620 (1984); State v. Humphreys, 89 N.J. 4, 14 (1982); State v. Green, 62 N.J. 547, 566 (1973). The judge considers "the whole person" and all the circumstances surrounding the commission of the crime. State v. Sainz, 107 N.J. 283, 293 (1987). The judge should be presented with "'the fullest information possible concerning the defendant's life and characteristics.'" State v. Marzolf, 79 N.J. 167, 176-77 (1979) (quoting Williams v. New York, 337 U.S. at 247, 69 S. Ct. at 1083, 93 L. Ed. at 1342).

To that end, prior to sentencing, the probation department prepares a presentence report. R. 3:21-2(a). The presentence report includes a description of circumstances surrounding the commission of the crime; comprehensive information about the defendant, including his or her juvenile and criminal history,

family situation, financial status, employment background, personal habits, and medical and psychological history; and an assessment of the gravity and seriousness of the harm inflicted on the victim. N.J.S.A. 2C:44-6b. The report may include a statement from the victim. N.J.S.A. 2C:44-6b.

The presentence report is placed before the sentencing court and may be considered without application of conventional evidential standards. State v. Davis, 96 N.J. at 620. However, defendants are entitled to inspect the presentence report and to be heard on any adverse contents. State v. Kunz, 55 N.J. 128, 144 (1969).

To guide judicial discretion, as well as to promote the objectives of uniformity, rationality, and imposition of sentence to fit the offense, the Code classifies offenses into degrees of crimes, N.J.S.A. 2C:1-4; 2C:43-1; establishes permissible ranges for each degree of crime, N.J.S.A. 2C:43-6a; sets maximum, N.J.S.A. 2C:43-6a, and minimum, N.J.S.A. 2C:43-6b, sentences; specifies aggravating and mitigating factors, N.J.S.A. 2C:44-1a and -1b; and sets presumptive terms within the prescribed ranges, N.J.S.A. 2C:44-1f(1). State v. Brimage, 153 N.J. at 22; State v. Pineda, 119 N.J. 621, 625 (1990); State v. Jarbath, 114 N.J. 394, 400 (1989); State v. Towey, 114 N.J. 69, 79 (1989); State v. Roth, 95 N.J. at 356, 359.

When the trial court has decided that incarceration is warranted, taking into account the presumptions for and against imprisonment, the court must then determine the length of the sentence. State v. Jabbour, 118 N.J. at 5. A judge "may" punish first degree crimes with a specific term between 10 and 20 years,

second degree crimes with a term between 5 and 10 years, third degree crimes with a term between 3 and 5 years, and fourth degree crimes with a term up to 18 months. N.J.S.A. 2C:43-6a. A judge may punish first degree aggravated manslaughter with a term between 10 and 30 years, N.J.S.A. 2C:11-4c, and first degree kidnapping with a term between 15 and 30 years, N.J.S.A. 2C:13-1c(1).

Judicial discretion in setting a precise term within these ranges is guided by consideration of statutorily-prescribed aggravating and mitigating factors, which relate to both the offense and offender. State v. Kromphold, 162 N.J. 345, 352-53 (2000). The trial court consults a list of aggravating factors, which the judge "shall" consider, and mitigating factors, which the judge "may" consider. N.J.S.A. 2C:44-1a and -1b.[7] The aggravating and mitigating factors are not interchangeable and each is not to be accorded equal value; "the proper weight to be given to each is a function of its gravity in relation to the severity of the offense." State v. Roth, 95 N.J. at 367-68. The judge's sentencing decision should follow from a qualitative, not quantitative, analysis of the aggravating and mitigating factors. State v. Kruse, 105 N.J. 354, 363 (1987). New Jersey's

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[7] The aggravating and mitigating factors are also relevant with respect to downgrading the severity of the crime for sentencing purposes, N.J.S.A. 2C:44-1f(2), or setting a period of parole ineligibility, N.J.S.A. 2C:43-6b. For first and second degree crimes, the court may sentence the defendant for an offense one degree lower than the crime for which he or she was convicted if it is "clearly convinced" that the mitigating factors "substantially outweigh" the aggravating factors" and the interests of justice so demand. N.J.S.A. 2C:44-1f(2). If the court is "clearly convinced that the aggravating factors substantially outweigh the mitigating factors," it may impose a minimum sentence of parole ineligibility. N.J.S.A. 2C:43-6b.

sentencing law "contemplates a thoughtful weighing of the aggravating and mitigating factors, not a mere counting of one against the other." State v. Denmon, 347 N.J. Super. 457, 467-68 (App. Div.), certif. denied, 174 N.J. 41 (2002).

After the trial court has found and weighed the applicable factors, if there is a preponderance of aggravating factors, then the court "may" impose a base sentence higher than the presumptive term but within the applicable range for an offense of that degree. N.J.S.A. 2C:43-6a; N.J.S.A. 2C:44-1f(1); State v. Balfour, 135 N.J. 30, 35, 37 (1994); State v. Hartye, 105 N.J. 411, 420-21 (1987); State v. Kruse, 105 N.J. at 358. If there is a preponderance of mitigating factors, the court "may" impose a base sentence lower than the presumptive term. Ibid. "[U]nless the preponderance of aggravating or mitigating factors . . . weighs in favor of a higher or lower term within the limits provided in N.J.S. 2C:43-6," the court "shall" impose the presumptive term for each offense, which is either at or near the midpoint of the range. N.J.S.A. 2C:44-1f(1) (20 years for first degree aggravated manslaughter and kidnapping; 15 years for all other first degree crimes; 7 years for a second degree crime; 4 years for a third degree crime; and 9 months for a fourth degree crime).

Presumptive terms play an important role in achieving the Code's "goals of rationality, uniformity, the elimination of disparity, and the imposition of a sentence to fit the offense." State v. Zadovan, 290 N.J. Super. 280, 290-91 (App. Div. 1996)

State v. Ladovan, 290 N.J. Super. 280, 290-91 (App. [2]

(citing State v. Towey, 114 N.J. at 7[illegible]. The presumptive term is "a benchmark which may be adjusted 'upward or downward depending

on [the court's] evaluation and balancing of the aggravating and mitigating factors listed in N.J.S.A. 2C:44-1(a) and (b).'" State v. Zadoyan, 290 N.J. Super. at 291 (quoting State v. Towey, 114 N.J. at 79). "Although the Code channels the trial court's discretion by establishing presumptive terms, the trial judge "can adjust those terms after balancing the aggravating and mitigating factors," and "may impose the statutory minimum or maximum sentence, depending on the preponderance of" those factors. State v. Jabbour, 118 N.J. at 5.

This Court has made abundantly clear that "sentencing remains a discretionary decision," even after the enactment of the Code. State v. Kruse, 105 N.J. at 359. In "adjust[ing] the sentence beyond the presumptive term," the "statutory criteria that the court 'shall' examine and weigh" simply "temper[s] that discretion to make sentencing more uniform." Id. at 360. This serves the "legislative goal . . . [of] channel[ing] judicial discretion so that similar defendants will receive similar sentences." Ibid.

Uniformity in sentencing is also furthered by the requirement that the trial court (1) "identify the aggravating and mitigating factors," (2) "describe the balance of those factors," (3) "explain how it determined defendant's sentence," State v. Kruse, 105 N.J. at 360, and (4) place this analysis on the record. Id. at 359. See also N.J.S.A. 2C:43-2e ("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"); R. 3:21-4(g) ("[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"). This requirement that a judge undertake this sentencing analysis and place it on the record not only promotes uniformity, but also provides an intelligible record for appellate review. State v. Kruse, 105 N.J. at 360. Factors used in sentencing must be based on "competent reasonably credible evidence." State v. Roth, 95 N.J. at 363.

2. Under New Jersey's Ordinary Term Sentencing Procedure, the Trial Court Finds and Weighs Aggravating and Mitigating Factors to Guide its Discretion in Selecting an Appropriate Sentence from Within the Standard Range Established by the Degree of the Crime of which the Defendant Was Convicted.

The rule announced in Apprendi and applied in Blakely and Booker is not violated by New Jersey's ordinary term sentencing procedure. In State v. Abdullah, 372 N.J. Super. 252, 278-80 (App. Div.), certif. granted, 182 N.J. 204 (2004), the Appellate Division articulated the distinction between Apprendi's and Blakely's departure statutes, which authorized the trial court to impose a term in excess of the maximum of the standard range, and our statutory description of the traditional method of determining a precise term within a standard range. Unlike those departure statutes, New Jersey's ordinary term statutes "provide for standard ranges, rather than an enhanced term beyond the maximum." Id. at 279. It is only the latter that may be imposed only after a jury finding that the offense involved an additional element. Ibid.

Assessing the aggravating and mitigating factors under

N.J.S.A. 2C:44-1 to impose a sentence within the specified ordinary ranges of N.J.S.A. 2C:43-6a continues to be constitutional because it involves nothing more than the traditional fact-finding done by a judge in the exercise of traditional sentencing discretion. The Supreme Court has repeatedly told us in Apprendi and its progeny--most recently in Blakely and Booker--that the requirement of jury fact-finding beyond a reasonable doubt is triggered only when the sentence to be imposed exceeds the "statutory maximum," which the Supreme Court has defined as the top of the standard sentence range. So long as the sentencing court is imposing a term within the standard range, it is free to consider facts other than those which formed the basis of the jury verdict or were admitted by defendant without running afoul of the Sixth Amendment. And as demonstrated by Harris v. United States, supra, and this Court's opinion in State v. Stanton, 176 N.J. 75, cert. denied, 540 U.S. 903, 124 S. Ct. 259, 157 L. Ed. 2d 187 (2003), that remains true even when a fact requires the court to fix a sentence at some upper point within the ordinary range.

With regard to New Jersey's sentencing system, the Supreme Court in Apprendi specifically identified the relevant "statutory maximum" for Sixth Amendment purposes as the upper bound of our ordinary ranges for the degree of the offense committed. Apprendi v. New Jersey, 530 U.S. at 474, 120 S. Ct. at 2354, 147 L. Ed. 2d at 445. It is inconceivable that the United States Supreme Court was unaware of our presumptive sentences contained in N.J.S.A. 2C:44-1f when it decided Apprendi, particularly where the Court's specific objective was to determine the "statutory

maximum" sentence for a second degree crime under our scheme. The Court obviously scrutinized our sentencing statutes in reaching its decision. In fact, Justice Breyer, in his dissenting opinion, cited N.J.S.A. 2C:44-1f, as well as N.J.S.A. 2C:43-6, 2C:43-7, 2C:44-1a, and 2C:44-3, and summarized our scheme as follows: "setting sentencing ranges for crimes, while providing for lesser or greater punishments depending upon judicial findings regarding certain 'aggravating' or 'mitigating' factors." Apprendi v. New Jersey, 530 U.S. at 564, 120 S. Ct. at 2402, 147 L. Ed. 2d 435 (Breyer, J., dissenting). Given that a determination of the "statutory maximum" for Sixth Amendment purposes was the Supreme Court's critical analytical undertaking in Apprendi, it is implausible that the Court mischaracterized the "statutory maximum" and then repeated this mischaracterization in all of its subsequent Sixth Amendment cases up to and including Booker.

As Justice Zazzali has recognized, there is no constitutional problem with our practice of allowing the trial court, rather than the jury, to determine the aggravating factors in setting "a sentence within [the] prescribed statutory range." State v. Stanton, 176 N.J. at 108-09 (Zazzali, J., dissenting). With respect to application of the aggravating and mitigating factors to impose a sentence within the range, "the weighing process envisioned by the Code's provisions necessarily reflects the seasoning and experience of the . . . sentencing judge." State v. Flores, 228 N.J. Super. 586, 595 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989).

Thus, in New Jersey, the jury verdict, standing alone, or

guilty plea, standing alone, authorizes any sentence within the ordinary standard range established for the degree of the crime, up to the maximum of that range. Accordingly, our aggravating factors contained in N.J.S.A. 2C:44-1a are "facts [the judge] deems important to the exercise of his sentencing discretion," but "do not pertain to whether the defendant has a legal right to a lesser sentence." Blakely v. Washington, 124 S. Ct. at 2540, 159 L. Ed. 2d at 417.

New Jersey's ordinary term ranges are consistent with the accepted historical development of sentencing statutes. As the Supreme Court observed in Harris, in the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures structuring judicial discretion designed to achieve greater uniformity in sentencing so that similar defendants would receive similar sentences. Harris v. United States, 536 U.S. at 558, 122 S. Ct. at 2415, 153 L. Ed. 2d at 538-39. These systems maintained the statutory ranges and the judge's fact-finding role. Ibid.

Our sentencing reform embodied in the adoption of Title 2C "mirrored these national developments." State v. Flores, 228 N.J. Super. at 593. Title 2C is an example the kind of reform addressed in McMillan v. Pennsylvania, 477 U.S. at 87-88, 106 S. Ct. at 2417, 91 L. Ed. 2d at 77-78, which "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." See Apprendi v. New Jersey, 530 U.S. at 486, 120 S. Ct. at 2361, 147 L. Ed. 2d 435; Harris v. United States, 536 U.S. at 559, 122 S. Ct. at 2415, 153

and a preponderance of them, that does not authorize the judge to impose a sentence beyond the maximum of the applicable range, nor even require the judge to impose a sentence above the presumptive term. Hence, the Sixth Amendment is not implicated.

3. The Blakely and Booker Opinions Reinforce the Constitutionality of Our Ordinary Term Sentencing Scheme.

The Supreme Court did no more in Blakely than recognize that Washington's "exceptional sentence" was indistinguishable from New Jersey's "extended term" whose procedure for imposition was invalidated in Apprendi. The Appellate Division opinion in this case asks us to read, in isolation, the following single passage from the Blakely opinion: the "'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, 159 L. Ed. 2d at 413. This passage in Blakely cannot be read in a vacuum or analyzed without regard to the balance of the opinion. We cannot ignore the hundreds of other sentences employed by the Blakely Court to explain the scope of its opinion and how it should be applied beyond the statutory scheme under review in that case. This passage from the Blakely opinion must also be considered in light of Apprendi, Harris, and Ring, the cases upon which it relies.

The Blakely Court identified the "statutory maximum" for Sixth Amendment purposes as the top of the standard sentence range. The overarching enhancement provision at issue in Blakely authorized a sentence in excess of the standard range, and therefore, was subject to the Apprendi rule requiring proof to a jury beyond a reasonable doubt. Significantly, the Blakely Court

reaffirmed the constitutionality of judicial fact-finding to move a sentence up or down within a standard range. Blakely v. Washington, 124 S. Ct. at 2537-38, 2540, 159 L. Ed. 2d at 413-15, 416-17 (approving of sentencing schemes which permit a judge to find facts "he deems important to the exercise of his sentencing discretion" to impose a term within a set range).

The Blakely Court explicitly preserved Washington's procedure for imposing a standard sentence, which requires trial judges to make as many, or even more, factual determinations as judges do under New Jersey's ordinary sentence procedure. In Washington, the judge must both (1) calculate the offender score employing several enumerated statutory factors, many of which take into consideration the present offense, such as whether it was a violent crime, which score combines with the seriousness level to determine the standard range, and then (2) set a precise term within that range, which may be above the midpoint. It was only when the judge "departed" from that standard range and imposed an upward "exceptional" term that Apprendi was implicated. See People v. Joy, ___ Cal. App. 4th ___, ___ 2005 WL 15170 (Cal. Ct. App. 2005), modifying People v. Joy, 124 Cal. App. 4th 1115 (Cal. Ct. App. 2004) (recognizing that the Blakely Court "demonstrated its familiarity with the Washington sentencing statutes by citing them extensively," and "presumably knew those statutes required a court in selecting a sentence within the standard range to consider information besides the facts found by the jury or admitted by the defendant"). (Sa20-21).

The top of our ordinary ranges is not equivalent to the 10-

Blakely's constitutional requirement is that "the prosecutor prove to a jury all facts legally essential to the punishment." Blakely, 124 S. Ct. at 2543, 159 L. Ed. 2d at 420 (emphases added). The only "legally essential" fact to punishing a defendant within New Jersey's statutorily-mandated ordinary ranges is the fact of conviction.

Seven months after it released its opinion in Blakely, the Supreme Court in Booker simply recognized that there was no constitutional difference between an "enhanced sentence" under the Federal Guidelines and an "exceptional sentence" under Washington's system, the procedures for imposition of both violated Apprendi. Booker, 125 S. Ct. at 749-50. The Supreme Court in Booker dispelled any notion that its single passage in Blakely seven months earlier ("statutory maximum" is maximum sentence judge may impose without making any additional findings") could somehow be interpreted to mean that it had implicitly rendered unconstitutional judicial fact-finding to impose a sentence above the presumptive term within New Jersey's ordinary standard ranges. In fact, in a very recent unpublished Appellate Division case, the court acknowledged the split of authority in the Appellate Division between Abdullah and Natale, and held that "in light of the more recent decision in United States v. Booker, . . . we agree with Abdullah." State v. Cox, No. A-6119-02 (App. Div. Feb. 08, 2005).[8] (Sa7-19).

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[8] Interestingly, Judge Stern, the author of the Appellate Division's published opinion in this case, appears to be rethinking, in light of the Booker decision, his position on whether Blakely applies to our ordinary term sentencing scheme. In affirming the defendant's sentences above the presumptive term (continued...)

In Booker, the Supreme Court clarified that in referring to "additional" fact-finding in Blakely, it was referring to fact-finding to raise the "ceiling" of the available sentence range, and even then, only when such fact-finding "requires" and "mandates" that the judge move upward to a particular range and impose sentence from within that enhanced range. Booker, 125 S. Ct. at 745-47, 748, 750-51, 752.

In New Jersey, a judge's finding and weighing of aggravating and mitigating factors in N.J.S.A. 2C:44-1 still keeps the sentence to be imposed within the limits of the ranges set forth in N.J.S.A. 2C:43-6a. Finding aggravating factors does not authorize the judge to impose sentence from an enhanced range.

Although a sentencing judge is required to consider the aggravating factors set forth in N.J.S.A. 2C:44-1, the judge's finding of a particular aggravating factor or factors does not "require" or "mandate" that the court increase the sentence above the presumptive term. N.J.S.A. 2C:43-6a provides that the trial court "may" impose a sentence up to the maximum and down to the minimum of the range for the degree of the crime. This Court has consistently held since the Code's enactment that, under our sentencing law, the trial judge "may" impose a sentence above the presumptive term if he or she finds a preponderance of aggravating factors. State v. Balfour, 135 N.J. at 36; State v.

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[8] (...continued)
as waived by his guilty plea, Judge Stern wrote: "This is not the occasion to reconsider the remedy imposed by State v. Natale . . ., and determine whether the presumptive term in N.J.S.A. 2C:44-1f(1) should be severed or read to be advisory. See Booker v. United States. . . ." State v. Anderson, ___ N.J. Super. ___, ___ n.3 (App. Div. 2005).

Jabbour, 118 N.J. at 5; State v. Towey, 114 N.J. at 79; State v. O'Connor, 105 N.J. 399, 407 (1987); State v. Kruse, 105 N.J. at 358; State v. Hartye, 105 N.J. at 420-21; State v. Roth, 95 N.J. at 359.

Judges can, and often do, impose the presumptive term or a sentence below the presumptive term, even when they have found that the aggravating factors preponderate. State v. Carey, 168 N.J. 413, 420 (2001) (although trial court found that three aggravating factors outweighed absence of any mitigating factors, it imposed only the presumptive terms); State v. Marinez, 370 N.J. Super. 49, 58 (App. Div.), certif. denied, 182 N.J. 142 (2004) (recognizing judges sentence defendants to presumptive term even where aggravating factors outweigh mitigating, taking into account NERA parole disqualifier aspect of sentence); State v. Modell, 260 N.J. Super. 227, 255 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993) (although trial court found several aggravating factors and no "real" mitigating factors, it imposed only the presumptive term).

California's ordinary term sentencing scheme is similar to New Jersey's. Under California's tripartite sentencing structure, the trial court is afforded discretion to select any of three possible sentences (upper, middle, or lower) for an offense, but directed that it "shall" impose the middle term unless there is a preponderance of aggravating or mitigating circumstances. Cal. Penal Code § 1170(b) (West 2004); Cal. Rules of Court, Rule 4.420 (2001).

Two very recent appellate opinions have not only upheld California's sentencing scheme under Blakely, but have found

further support for their rulings from Booker.[9] The courts found that the judge's choice of the upper term was a proper exercise of discretion which followed from an evaluation of the aggravating and mitigating factors to impose a term within the specific statutory range, and thus, did not violate the Apprendi/Blakely rule. People v. Mendez, No. F041818, 2005 WL 100779, at *20 n.10 (Cal. Ct. App. Jan. 18, 2005) (Sa43-59); People v. Wright, No. F041819, 2005 WL 100780, at *24 n.12 (Cal. Ct. App. Jan. 18, 2005). (Sa22-42). In both opinions, the courts added with respect to Booker:

> Our conclusion finds support in the recent amplification of Apprendi-Blakely found in United States v. Booker. . . . We distill from Booker the following refinement for our present purposes: If a fact necessarily results in a higher sentence, the fact must be admitted by defendant or found by the jury. Because California's sentencing law vests in the trial court discretion to choose the upper or middle term even where aggravating factors are found which preponderate, the present sentence is constitutionally permitted.
>
> [Ibid.]

Likewise, New Jersey's sentencing law vests in the trial court discretion to choose the presumptive term even if it has found a preponderance of aggravating factors. The finding of an

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[9] There is a split of authority in the California Court of Appeal on the question of Blakely's application to California's sentencing scheme, and the issue is currently pending before the California Supreme Court. People v. Towne, review granted, July 14, 2004, S125677; People v. Black, review granted, July 28, 2004, S126182). Many interim opinions of the California Court of Appeal addressing the applicability of Blakely to California's sentencing scheme have been superseded pending the California Supreme Court's resolution of the issue. See e.g. People v. Picado, 20 Cal. Rptr. 3d 647 (Cal. Ct. App. 2004), which had been cited in the Appellate Division opinion in Natale, 373 N.J. Super. at 238.

aggravating factor does not necessarily result in a sentence above the presumptive term. In fact, if California's determinate scheme is constitutional, then New Jersey's indeterminate scheme, which is conceptually identical to the 10- to 40-year range hypothetical endorsed in Blakely, is certainly constitutional. Furthermore, as the California Court of Appeal correctly recognized, Booker has clarified that it is only when a sentence in the higher range is required by the judge's fact-finding, that the Sixth Amendment is implicated.

In New Jersey, the judge's finding of a particular aggravating factor or factors does not mandate an increase in sentence, let alone an increase that takes the sentence to another range. Hence, the judge may properly consider aggravating factors to adjust sentence within the applicable ordinary range.

4. Under New Jersey Sentencing Law, a Trial Court's Selection of Sentence From Within Our Ordinary Ranges--Whether Above, Below, or at the Presumptive Midpoint--Is Discretionary.

Although 2C:44-1f uses the word "shall" in describing selection of the presumptive term, it is only after the judge has carefully considered the entire record and determined to impose sentence within the ordinary range that the aggravating and mitigating factors are found and weighed and, if in equipoise, that the judge may and "shall" impose the presumptive term.

The Appellate Division in the present case misunderstood the language of N.J.S.A. 2C:44-1f and wrongly assumed that imposition of the presumptive term is the beginning point of a sentencing judge's analysis. State v. Natale, 373 N.J. Super. at 235.

Imposition of the presumptive term is not the beginning of a judge's sentencing analysis; rather it is a conclusion to which the judge is drawn only after the judge has assessed the aggravating and mitigating factors and determined that they are in equipoise.

The starting point of a sentencing judge's analysis is the finding and weighing of the aggravating and mitigating factors. The judge then goes to the range for the degree of the crime contained in N.J.S.A. 2C:43-6 and selects a term "within the limits provided in" the applicable range. N.J.S.A. 2C:44-1f(1).

The Appellate Division in Natale not only misunderstood the language of N.J.S.A. 2C:44-1f, but also how Blakely should be applied to it. The Blakely Court started by first determining whether the sentence imposed was outside the ordinary sentencing range, and only if the answer to that question was yes, determining whether imposition of that sentence required the finding of a particular fact. The Natale court reversed that order of analysis, first asking whether there is fact-finding, and then using that answer to determine the ordinary sentencing range's maximum term. State v. Natale, 373 N.J. Super. at 235.

Our presumptive terms serve as a guidepost to assist the judge in arriving at an appropriate term within the limits of the applicable range. See State v. Chapman, 95 N.J. 582, 587 n.1 (1984) (judges are "guided in sentencing by presumptive sentences"). Thus, our presumptive terms are relevant only to the extent that the judge adjusts the sentence upward or downward from that point after the judge has found a preponderance of either aggravating or mitigating factors. State v. Zadoyan, 290

N.J. Super. at 291 (quoting State v. Towey, 114 N.J. at 79 (presumptive term is "a benchmark which may be adjusted 'upward or downward depending on [the court's] evaluation and balancing of the aggravating and mitigating factors listed in N.J.S.A. 2C:44-1(a) and (b)'"); State v. Jabbour, 118 N.J. at 5 (trial court has discretion to adjust presumptive term after balancing the aggravating and mitigating factors, and "may impose the statutory minimum or maximum sentence, depending on the preponderance of" those factors).

In other words, it is "presumed" that, having weighed the aggravating and mitigating factors, if they are in equipoise, the judge will arrive at the middle of the range in selecting an appropriate term. This is essentially a codification of common sense. For example, if the judge were to start at the bottom of the range, the mitigating factors would be useless. Likewise, if the judge started at the top of the range, the aggravating factors would be useless. In order to give those factors any meaning, logic dictates that judges should, and of course do, first find and weigh the appropriate factors, and only then, assume that the middle of the range is appropriate unless there is a preponderance of aggravating or mitigating factors.

N.J.S.A. 2C:44-1f(1) no more requires imposition of the presumptive term than it requires imposition of a term at the top or the bottom of the range. Notwithstanding the statute's use of the term "shall" to describe selection of the presumptive term, whether or not to actually impose it is clearly an exercise of judicial discretion. The proof of that is the standard of appellate review of a sentence within our ordinary ranges:

whether the trial court clearly abused its discretion. State v. Kromphold, 162 N.J. at 355; State v. Roth, 95 N.J. at 363.

"The words 'may' and 'shall' are viewed as 'interchangeable whenever necessary to execute the clear intent of the Legislature.'" State v. Ercolano, 335 N.J. Super. 236, 244 (App. Div. 2000) (quoting Harvey v. Board of Chosen Freeholders of Essex County, 30 N.J. 381, 391 (1959)), certif. denied, 167 N.J. 635 (2001). "'The question is essentially one of legislative intent, to be gathered from the nature and object of the statute considered as a whole. . . .'" Id. at 244-45 (quoting Leeds v. Harrison, 9 N.J. 202, 213 (1952)).

Viewing N.J.S.A. 2C:44-1f as a whole, particularly its reference to the ranges in 2C:43-6, it is clear that the Legislature intended to confer discretionary authority on a court to impose any sentence within the applicable range, be that sentence the presumptive term or one that is above or below that point. N.J.S.A. 2C:44-1f(1) provides that "unless the preponderance of aggravating or mitigating factors . . . weighs in favor of a higher or lower term within the limits provided in N.J.S. 2C:43-6," the court "shall" impose the presumptive term. N.J.S.A. 2C:43-6a, in turn, provides that a trial court "may" impose a term up to the maximum and down to the minimum of the range for the degree of the offense.

Citing those statutes, this Court has explicitly and

this court has explicitly [2]
unwaveringly held that the trial judge "may" impose a sentence above or below the presumptive term if it finds a preponderance of either aggravating or mitigating factors. State v. Balfour, 135 N.J. at 36; State v. Jabbour, 118 N.J. at 5; State v. Towey,

114 N.J. at 79; State v. O'Connor, 105 N.J. at 407; State v. Kruse, 105 N.J. at 358; State v. Hartye, 105 N.J. at 420-21; State v. Roth, 95 N.J. at 359. In Roth, this Court explained:

> For each degree of crime the Code establishes ordinary sentences within the maximum and minimum range found in 2C:43-6(a). The court undertakes an examination and weighing of the aggravating and mitigating factors listed in 2C:44-1(a) and (b). If, on balance, there is a preponderance of aggravating factors, the court may impose sentence up to the maximum for the degree of the offense as provided in 2C:43-6(a); if a preponderance of mitigating factors, it may sentence down to the statutory minimum. 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.
>
> [State v. Roth, 95 N.J. at 359.]

And again:

> In the statutes pertaining to both parole ineligibility and presumptive sentences, the Legislature has recognized the continuing role of judicial discretion. Thus, sentencing remains a discretionary decision. The court "may" adjust the sentence beyond the presumptive term. . . .
>
> [State v. Kruse, 105 N.J. at 360.]

Recognizing the discretionary aspect of arriving at an overall appropriate term, this Court, with respect to a presumptive term with a period of parole ineligibility, has stated: "Even though the imposition of a period of parole ineligibility normally requires the conclusion that the aggravating factors outweigh the mitigating factors, and the determination to impose a presumptive sentence normally implies that the aggravating and mitigating factors are in equipoise, we

concluded [in Kruse] that in rare cases such a sentence might be appropriate as long as the trial court states the reasons for its determinations." State v. Balfour, 135 N.J. at 37 (emphases added) (citing State v. Kruse, 105 N.J. at 361-62). This Court continued, "'the length of the sentence and the period of parole ineligibility are separate facets of the sentencing decision, and each independently reflects the exercise of judicial discretion.'" Ibid. (quoting State v. Kruse, 105 N.J. at 362).

Hence, although equality of aggravating and mitigating factors "normally implies" imposition of the presumptive term, that is not always the outcome of the ultimate sentencing decision. This Court and our sentencing laws have directed trial courts to consider the entire record, to find and weigh the aggravating and mitigating factors supported by reasonable credible evidence in the record, to consider the impact of parole ineligibility, and to exercise their discretion in fashioning an overall appropriate sentence. Then on appeal, the reviewing court evaluates whether the trial court clearly abused its discretion. State v. Kromphold, 162 N.J. at 355; State v. Roth, 95 N.J. at 363. Thus, notwithstanding the statute's use of the term "shall" to describe selection of the presumptive term, whether or not to actually impose it is most definitely an exercise of judicial discretion.

Our Legislature could not possibly have intended to give sentencing judges discretion to select any term at all within the ranges, from the top to the bottom, but yet to have given the

judges absolutely no discretion whatsoever when it came to [2]

imposing the presumptive, midpoint terms within those very

ranges, based on exactly the same qualitative evaluation process while striving toward the same end, arriving at an appropriate sentence.

Imposition of the presumptive term must be a discretionary choice because a court's decision to impose any sentence within the range, regardless of the weighing of aggravating and mitigating factors, cannot constitute an illegal sentence, which is correctable at any time and appealable by the State. State v. Murray, 162 N.J. 240, 247 (2000); State v. Flores, 228 N.J. Super. at 595. Nor may the State appeal a sentence of the presumptive term, imposed after the judge finds that the aggravating factors outweigh the mitigating factors.[10] Ibid. Only a sentence that exceeds the statutory maximum of the authorized range for the offense or one which was not imposed in accordance with the law constitutes an illegal sentence.[11] State v. Murray, 162 N.J. at 247; State v. Flores, 228 N.J. Super. at 595. However, imposition of a term within the limits of the ranges set forth N.J.S.A. 2C:43-6a, based on the judge's weighing of aggravating and mitigating factors, cannot constitute an

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[10] The State may appeal only in certain limited circumstances. See, for example: sentence one degree lower or a non-custodial or probationary term for a first or second degree offense, N.J.S.A. 2C:44-1f(2); sentence to "special probation" under the "Drug Court Program" over the objection of the prosecutor, N.J.S.A. 2C:35-14(c); State v. Hester, 357 N.J. Super. 428, 430 (App. Div.), certif. denied, 177 N.J. 219 (2003); or non-consecutive sentences, N.J.S.A. 2C:35-4.1e.

[11] A sentence is illegal if the judge failed to impose a parole ineligibility term that was mandated by statute. State v. Murray, 162 N.J. at 247. However, imposition of a discretionary period of parole ineligibility under N.J.S.A. 2C:43-6b, based on the judge's weighing of the weighing of aggravating and mitigating factors, cannot constitute an illegal sentence. State v. Flores, 228 N.J. Super. at 595-96, 596 n.2.

illegal sentence. State v. Murray, 162 N.J. at 247; State v. Flores, 228 N.J. Super. at 595-96, 596 n.2. The point is that for more than two decades it has been abundantly clear that a judge's sentencing determination within the range, including imposition of the presumptive term, is discretionary.

In any event, it is irrelevant for Apprendi/Sixth Amendment purposes whether our statute characterizes the presumptive term as discretionary or mandatory. This is because the "effect" of using aggravating factors to impose a term above the presumptive still keeps the sentence imposed within the ordinary range for the offense.

As this Court observed in State v. Kruse, 105 N.J. at 359-60, "sentencing remains a discretionary decision," and in "adjust[ing] the sentence beyond the presumptive term," the "statutory criteria that the court 'shall' examine and weigh" simply "temper[s] that discretion to make sentencing more uniform." Ibid. By setting forth presumptive sentences within particular ranges, the Legislature sought to provide uniformity. State v. Roth, 95 N.J. at 361.

New Jersey's sentencing procedure falls squarely within the constitutional boundaries established by the Supreme Court in Apprendi, Harris, Ring, Blakely, and Booker. The Appellate Division opinion miscasting the presumptive sentence as the outer limit of the ordinary sentencing range, and aggravating factors as the constitutional equivalent of extended term grounds, must be reversed.

C. Conclusion

In New Jersey, the fact of conviction of a crime of a

specified degree qualifies the defendant for a sentence at the top of the standard range for that degree crime. Every defendant who commits a first degree crime knows he is risking 20 years in prison; every defendant who commits a second degree crime knows he is risking 10 years in prison; every defendant who commits a third degree crime knows he is risking 5 years in prison; every defendant who commits a fourth degree crime knows he is risking 18 months in prison; every defendant who commits first degree aggravated manslaughter or first degree kidnapping knows he is risking 30 years in prison; and every defendant who commits murder knows he is risking life imprisonment.

Because a judge's consideration of aggravating and mitigating factors will not result in a term in excess of the maximum of the ordinary range, the Sixth Amendment is simply not implicated. Not only is a term above the presumptive within the range authorized by the jury's verdict or guilty plea, but the judge's finding of an aggravating factor does not necessarily result in an increase in sentence, let alone an increase above the presumptive term.

The State urges this Court to reverse the Appellate Division opinion below declaring our ordinary term sentencing system "unconstitutional." We are in the advantaged position of knowing exactly where, within our sentencing system, the United States Supreme Court views the "statutory maximum" or benchmark for jury determination purposes. The Supreme Court answered that question just five years ago in Apprendi, and told us that our "statutory maximum" is the top of our ordinary term ranges. Then, just weeks ago in its Booker opinion, the United States Supreme Court

strongly reaffirmed its opinion in Apprendi. There is simply nothing to revisit here, particularly now that Booker has quelled any possible temptation to overread or misread Blakely's formulation of the term "maximum sentence."