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April 8, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-44-19 *State v. Mark Melvin* (083298),
Appellate Division Docket No. A-4632-17T5

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

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Preliminary Statement

This case requires the Court to confront a rarely used sentencing practice that unconstitutionally depreciates the role of juries as fact finders. Generally, sentencing judges should consider all evidence of a defendant's conduct and character to develop a picture of the "whole person" in order to arrive at a just sentencing outcome. This case, however, compels the Court to ask what outer limits to that consideration exist. Are there circumstances where the tail of sentencing wags the dog of acquittal in a way that offends the State Constitution?

Amicus contends that where juries have been asked to consider particular conduct and have acquitted the defendant of that conduct, judges cannot disregard that jury determination and sentence the defendant (on other charges) as if he had, in fact, been convicted.

Amicus focuses on the negative impact that sentencing on acquitted conduct has on both a defendant's decision to proceed to trial and his or her subsequent strategy at trial. Although the State suggests that "whole person" sentencing is the norm throughout New Jersey, in fact, sentencing defendants based on acquitted conduct is actually quite rare. Indeed, it appears that the lion's share of this sentencing practice is limited to a single courtroom in a single county (Point I). Where defendants fear that they might be punished based on acquitted conduct, they are more likely to plead guilty than go to trial—even when they have

meritorious defenses—further driving down the already low rates of defendants exercising their right to a jury trial (Point II). Those defendants who do choose to go to trial in front of judges who are empowered to sentence based on acquitted conduct face the additional burden of having to persuade both the judge and the jury on two different standards of proof, thus compromising trial strategy (Point III).

These effects have a destabilizing effect on a defendant's right to a fair trial, are anathema to notions of due process, and chill a defendant's ability to present an adequate defense. Accordingly, this Court should create a bright line rule disallowing any consideration of acquitted conduct during the sentencing process.

Statement of Facts and Procedural History

Amicus accepts the statement of facts and procedural history contained within Defendant's Appellate Division brief. *Amicus* American Civil Liberties Union of New Jersey ("ACLU-NJ") also adopts the compelling arguments of Defendant about why this result is commanded by 1) the *Apprendi*-line of cases; 2) the doctrine of fundamental fairness; 3) principles of due process; and 4) the prohibition on double jeopardy.

Argument

Amicus suggests that this Court create a bright line rule allowing sentencing judges to consider the "whole person" at sentencing with one critical limitation: courts should not consider facts where the jury has acquitted a defendant of same or similar conduct.[1] That is, the Court should not adopt the practice seemingly approved in federal courts since the United States Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (finding that a jury's verdict of acquittal does not prevent a sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence).

Such rejection would not be novel. As the Michigan Supreme Court explained: "Five justices [of the United States Supreme Court] gave [*Watts*] side-eye treatment . . . and explicitly limited it to the double-jeopardy context." *People v. Beck*, 2019 Mich. LEXIS 1298, *17, 2019 WL 3422585 (Mich. 2019) (citing *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005)). Several other state courts have similarly prohibited consideration of acquitted conduct. *See State v. Marley*, 321 N.C. 415, 425 (N.C. 1988) (holding that due process and fundamental fairness

[1] Although not present in this case, the Court may also have to grapple with sentencing manipulation from prosecutors opting *not to charge* difficult-to-prove counts, only to ask a judge to use that conduct to aggravate a sentence. However, that is a problem for a different day.

preclude consideration of acquitted conduct); *State v. Cote*, 129 N.H. 358, 375 (N.H. 1987) (holding that the presumption of innocence is denied when a sentencing court uses charges that have resulted in acquittals to punish the defendant); *Beck*, 2019 Mich. LEXIS 1298, *2 ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."). Commentators too have expressed similar approbation, vociferously disparaging the *Watts* decision. *See, e.g.*, Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ L Rev 1, 25 (2016) (describing critiques of *Watts*); Orhun Hakan Yalincak, *Critical Analysis Of Acquitted Conduct Sentencing In The U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" And "Pernicious"?*, 54 Santa Clara L. Rev. 675, 679-680 (2014) (same); Eang Ngov, *Judicial Nullification Of Juries: Use Of Acquitted Conduct At Sentencing*, 76 Tenn. L. Rev. 235, 261 (2009) (describing use of acquitted conduct as "nonsensical").

For its part, New Jersey does not take lightly the role of the jury and has " . . . upheld the importance of jury trials in constitutions that date back to the origins of our nation." *Williams v. American Auto Logistics*, 226 N.J. 117, 123 (2016) (citing *N.J. Const. art*. XXII (1776) ("[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); *N.J. Const. art.* I, § 7 (1844) ("The right of trial by jury shall remain

inviolate . . . ."); *N.J. Const. art*. I, ¶ 9 (1947) (same). To preserve that important role, the Court should prohibit the use of acquitted conduct in sentencing.

I. New Jersey judges rarely punish defendants for acquitted conduct.

It is axiomatic that uniformity in sentencing is a paramount goal of our Code of Criminal Justice. *State v. Roth*, 95 N.J. 334, 345 (1984). The Court has explained that "there can be no justice without a predictable degree of uniformity in sentencing." *State v. Hodge*, 95 N.J. 369, 379 (1984). Indeed, sentencing processes that "foster less arbitrary and more equal sentences" represent a "central theme" of New Jersey sentencing jurisprudence. *Roth*, 95 N.J. at 345. When some judges choose to aggravate defendants' sentences based on acquitted conduct and others do not, uniformity and predictability suffer.

The central question at issue in this case—whether a defendant can be sentenced based on conduct for which he has been acquitted—has rarely been considered by appellate courts in this state.[2] *State v. Tindell*, 417 N.J. Super. 530, 538 (App. Div. 2011) (considering trial court's imposition of five consecutive, maximum sentences where the judge determined that the jury erred in acquitting defendant on top charge); *see also State v. Paden-Battle*, App. Div. Docket No. A-

[2] The related question, whether a defendant can be sentenced based on conduct that a jury considered and upon which it could not reach a verdict, has also rarely been considered in New Jersey. *State v. Tillery*, 238 N.J. 293, 327 (2019) (holding that it was not error for a sentencing court to consider "evidence presented as to offenses on which the jury deadlocked").

001320-17 (pending appeal raising question of whether a defendant can be sentenced based on acquitted conduct); *State v. Allen*, 2016 N.J. Super. Unpub. LEXIS 689, *5 (App. Div. 2016) (ordering resentencing where judge sentenced a defendant acquitted of robbery but convicted of theft as if he had been convicted of robbery).[3]

In total, appellate courts have only considered five cases where judges have relied on facts upon which juries have either been hung or have voted to acquit. The same trial judge imposed sentence in three of them (*Melvin*, *Paden-Battle*, and *Tillery*). Indeed, those three cases appear to be the *only* ones where the trial court sought to justify the sentence by relying upon *Watts*. In the other two cases, the trial judges sought to sentence defendants whom the judges believed had "gotten away" with crimes; the courts did not seek to apply legal justifications for the sentences that reviewing courts appropriately found unlawful. In other words, it appears that statewide there is only one judge who sentences defendants on the belief that New Jersey law allows consideration of acquitted conduct. Accordingly, a rule prohibiting consideration of acquitted conduct would hardly impact sentencing practices throughout the state.

[3] Pursuant to *R.* 1:36-3, *amicus* attaches the unpublished opinion here as AA01-02. We are aware of no contrary precedent.

Even if that practice could be squared with the right to a jury trial, due process, fundamental fairness, prohibitions on double jeopardy, and good policy, the rarity of its use raises independent concerns. This Court and others have long recognized that "[r]andom and unpredictable sentencing is anathema to notions of due process." *State v. Moran*, 202 N.J. 311, 326 (2010). Indeed, "[t]here is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Furman v. Ga.*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). Such arbitrary or capricious sentencing schemes violate the United States Constitution's prohibition on cruel and unusual punishment. *Id*. at 309 (Stewart, J., concurring) ("death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual").

Public confidence in the fairness of the criminal justice process suffers when defendants in one courtroom face different rules from those in every other courtroom in New Jersey; such confidence is fully assaulted when different rules are used by those who are should be seen as unbiased arbiters of justice.

II. Punishing defendants for acquitted conduct increases pressure on defendants to plead guilty.

As a result of, among other factors, harsh sentencing practices after trial, jury trials are increasingly rare; but if courts can punish defendants for conduct on which a jury votes to acquit, they will virtually disappear.

Of course, not every case should result in a trial. Plea bargaining is a necessary component of our criminal justice system. *State v. McQuaid*, 147 N.J. 464, 485-486 (1997). That is so because a "plea-bargain provides 'mutuality of advantage' to both the defendant and the State." *Id.* (internal citations omitted). Defendants "benefit[] by reducing [their] penal consequences and avoiding the public humiliation" associated with trials; "the State benefits by assuring that a guilty defendant is punished and by protecting valuable judicial and prosecutorial resources." *Id.*

A database maintained by the National Center on State Courts demonstrates that in New Jersey less than two percent of criminal cases end in a trial. Court Statistics Project, *Felony Jury Trials and Rates, New Jersey*, 2018 (noting that in 2018 of 44,251 dispositions, there were only 650 criminal jury trials and 106 criminal bench trials).[4]

Indeed, the expansion of the practice of plea bargaining has transformed the criminal justice system from a "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (finding also that in 2012, pleas made up

"[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court."); George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

Even those who praise the "mutuality of advantage" that flows from plea bargaining must remain concerned about systems of resolving cases that encourage innocent people to plead guilty. Where prosecutors charge defendants with crimes that carry extremely serious sentences, the incentive to plead guilty – despite factual innocence – increases. *See*, *e.g.*, *Lafler*, 566 U.S. at 185 (Scalia, J., dissenting) ("prosecutorial overcharging []effectively compels an innocent defendant to avoid massive risk by pleading guilty"); Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 83-85 (2011); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014; Nat'l Ass'n of Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 6 (2018) (documenting so-called "trial taxes" imposed on defendants who exercise their right to a jury trial).

This temptation for innocent people to plead guilty reaches its apex where courts consider acquitted conduct at sentencing, creating a virtual "heads I win, tails you lose" scenario for a beleaguered defendant. By way of example: imagine a first-offender accused of having intercourse with a person who is under 16 years old. The victim alleges that the defendant was armed with a knife. As a result, the defendant is charged with first-degree aggravated sexual assault for the use of the knife and second-degree sexual assault based on the victim's age. Defendant is offered a plea bargain of eight years imprisonment. Defendant acknowledges having had intercourse with the victim, claiming that he reasonably believed that the victim was older, but denies having been armed or otherwise having used force or coercion.

In a system where acquitted conduct could not be used to elevate a sentence, the defendant would have to weigh the likelihood of conviction on only the second-degree charge (with a likely sentence closer to five years as a first offender who has a justification that fails to amount to a complete defense) against the probability of a conviction on the first-degree charge (with a probable sentence above ten years). On the other hand, if the court could consider acquitted conduct, the defendant would have to consider a third possibility: that the jury would acquit him of the higher charge, but the court would nonetheless determine, by a

preponderance of the evidence, that defendant was armed and sentence him to ten years.

Under this scenario, if the defendant submits to the State's aggressive offer and pleads guilty, he suffers. If he goes to trial and the jury convicts on the first-degree charges, he loses again. If he goes to trial and persuades a jury that he was not armed, he still comes out behind, so long as the State secures the conviction on a more easily proved offense—albeit, an admitted one—and persuades the sentencing judge of the defendant's guilt on the weapon-based charge by a preponderance of the evidence. Prosecutors are thus incentivized to charge defendants with certain unprovable counts where acquittal of other counts will serve merely as a "speed bump at sentencing." *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*). Defendants, for their part, knowing that a partial acquittal will provide little sentencing relief, face additional increased pressure to plead guilty to weak allegations.

Sentencing defendants based on acquitted conduct coerces defendants to avoid trial or else subject themselves to lose-lose scenarios. Although our criminal justice system accepts, and even appreciates, plea bargaining, it loathes coercive practices that induce innocent people to plead guilty to crimes they did not commit. *Cf.* Diana Dabruzzo, Arnold Ventures, *New Jersey Set Out to Reform Its Cash Bail*

System. Now, the Results Are In. (Nov 14, 2019) (praising reform to pretrial system that reduced phenomenon of innocent defendants pleading guilty in exchange for time-served offers).[5] Without a bright line rule to avoid such outcomes, such inducement will encourage the very abuses recent reforms sought to curb.

III. Punishing defendants for acquitted conduct distorts trial strategy, forcing defendants simultaneously to influence two different decision makers.

Trial strategies that appeal to juries may not appeal to judges. Scalia & Garner, *Making Your Case: The Art of Persuading Judges*, 31 (2008) (explaining that a "jury argument" will "almost never" play well to a judge). So too in the other direction. Amsterdam & Hertz, *Trial Manual 6 for the Defense of Criminal Cases* 835 (6th Ed. 2016) (explaining that technical defenses, which might appeal to judges, cause jurors to lose focus and are therefore ineffective). In instances where courts allow the use of acquitted conduct in their sentencing decisions, attorneys must thus appeal to two decision makers whose interests are often contradictory and competing.

By way of example, the decision of whether or not a defendant should testify becomes particularly fraught where acquitted conduct can be considered. There is no doubt that "[t]he decision whether to testify, although ultimately defendant's, is

[5] Available at https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/.

an important strategic[] choice, made by defendant in consultation with counsel." *State v. Savage*, 120 N.J. 594, 631 (1990). But neither counsel nor the defendant can know what to do, where they must please two very different audiences. Many jurors want to hear from defendants because they "expect an innocent person to testify." Amsterdam & Hertz at 834. But judges, who are less likely to draw improper adverse inferences from a defendant's election not to testify, may be more "skeptical of the testimony of the defendant . . . ." *Id.* at 832. Where a defendant must simultaneously convince both the jury and the judge of his innocence, a difficult decision becomes even harder.

Similarly, defendants must think twice about employing a trial defense that relies simply on holding the State to its burden. To do so risks signaling to a judge that the defendant likely committed the alleged crime and escaped culpability only because of the high standard of proof. Perverse results flow where a defendant's "largely successful effort to escape guilt beyond a reasonable doubt [does] not preclude, and, in its success, actually might . . . contribute[] to, his punishment for those acquitted offenses under a lesser standard of proof . . . ." *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., concurring).

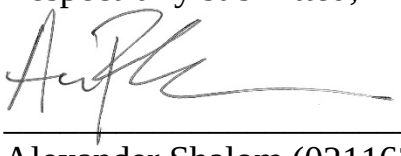
Put simply, trying a criminal case is difficult enough; forcing defense attorneys to satisfy two fact-finders, with two different viewpoints, and subject to two different standards of proof makes task almost insurmountable.

Conclusion

A sentence based upon conduct for which a jury had voted to acquit strains public respect for the jury system, indeed for the integrity of the entire criminal justice system. *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.). Lay people "would undoubtedly be revolted by the idea" that a defendant could be penalized for conduct for which they were never found to be guilty. *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio), *rev'd on other grounds by United States v. Kaminski*, 501 F. 3d 644 (6th Cir. 2007). Sentencing based on acquitted conduct harms uniformity, pressures defendants to plead guilty, and compromises trial strategy. It is a practice unworthy of use in our courts.

As a result, this Court should reverse the judgement of the Appellate Division and either resentence Defendant without consideration of the murder for which he was acquitted or remand the case for resentencing under the same terms.

Respectfully submitted,



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Amicus’s Appendix

State v. Allen

Superior Court of New Jersey, Appellate Division

March 15, 2016, Argued; March 30, 2016, Decided

DOCKET NO. A-5289-13T2

Reporter
2016 N.J. Super. Unpub. LEXIS 689 *

STATE OF NEW JERSEY, Plaintiff-Respondent, v. ROBERT L. ALLEN, a/k/a ALLEN ALLEN, JASON GREEN, ROBERT GREEN, Defendant-Appellant.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-01-0002.

Core Terms

mitigating factors, robbery, sentencing, theft, teller

Counsel: Peter Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Blum, of counsel and on the brief).

Jason Magid, Assistant Prosecutor, argued the cause for respondent (Mary Eva Colalillo, Camden County Prosecutor, attorney; Mr. Magid, of counsel and on the brief).

Judges: Before Judges Fisher and Rothstadt.

Opinion

PER CURIAM

At the conclusion of a jury trial, defendant was acquitted of second-degree robbery, *N.J.S.A. 2C:15-1*, but convicted of third-degree theft, *N.J.S.A. 2C:20-3(a)*. Notwithstanding the jury's finding that the State failed to demonstrate defendant's intent to threaten or put the victim in fear of immediate bodily injury — a requisite for the robbery offense charged here but unnecessary on the theft charge[1] — the judge sentenced defendant based on her finding that defendant did threaten or purposely put the victim in fear of immediate bodily injury. Consequently, we remand for resentencing.

During a three-day trial,[2] the jury heard testimony that defendant passed a bank teller a note that read: "Give me the money." The teller responded, "Are you serious?" Defendant stuck out his arm and said, "Come on," and the teller asked what he wanted, to which defendant said, "Twenties." Acting pursuant to bank policy that tellers simply comply with such a demand, the teller provided $2100 from her drawer.

In her closing statement, defense counsel acknowledged a theft occurred but zealously urged the absence of a threat or a purpose to put the victim in fear of injury. As in her opening statement, defense counsel argued in her summation that "to find Robert Allen guilty of robbery, you must find not only that he committed a theft, and that's not an issue here, the defense concedes that he did commit a theft from [the bank,] but you must find that in the course of committing that theft,

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[1] By definition, a person is guilty of robbery "if, in the course of committing a theft, he . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury." *N.J.S.A. 2C:15-1(a)(2)* **[*2]** .

[2] All evidence was elicited on the first day, closing statements and the jury charge were given on the second, and the jury rendered its verdict on the third.

he either threatened [the bank teller] with bodily harm or put her in fear of immediate bodily injury." After defining the issue in this way, defense **[*3]** counsel argued the words and conduct attributed to defendant failed to satisfy the elements of a robbery. The jury signified its agreement with counsel's argument by acquitting defendant of robbery.

At sentencing, however, the judge declined defendant's invitation to apply mitigating factors one and two because she viewed the evidence differently. With respect to mitigating factor one,[3] the judge said she "considered the crime for which [defendant was] convicted" — which she described as "walk[ing] into a bank and . . . pass[ing] a teller . . . a note saying give me the money" — "caus[es] or certainly does threaten serious harm." Similarly, in rejecting application of mitigating factor two,[4] the judge said the following:

> I find that number two is not applicable. Again, I emphasize it is your purpose, it's not what the other parties believed. I find by a preponderance of the evidence, I find that when you pass a note to someone, your conduct certainly does contemplate harm or a threat of serious harm.

By rejecting these mitigating factors, and by concluding "the aggravating factors[5] clearly, convincingly and substantially outweigh[ed] the mitigating factors," the judge imposed an extended prison term of ten years with a five-year **[*4]** parole disqualifier on the third-degree theft conviction.

In appealing, defendant argues the judge disregarded the jury's verdict in violation of the *Fifth*, *Sixth* and *Fourteenth Amendments*, as well as the same or similar rights guaranteed by our state constitution.[6] We agree.

In imposing the maximum permissible prison term and maximum parole disqualifier, it is clear that the judge assumed defendant was guilty of an offense for which he was acquitted.[7] The limitations on judicial factfinding in sentencing preclude reliance on any fact, other than a prior conviction, that was not submitted to a jury and proved beyond a reasonable doubt. *See, e.g.*, *Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000)*; *State v. Pomianek, 221 N.J. 66, 82-83, 110 A.3d 841 (2015)*.[8] The judge's determination likewise disregarded the special place the law provides **[*5]** for an acquittal. *See, e.g.*, *United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 433, 66 L. Ed. 2d 328, 340-41 (1980)*; *State v. J.M., Jr., 438 N.J. Super. 215, 239, 102 A.3d 1233 (App. Div. 2014)*, *certif. granted, 221 N.J. 216, 110 A.3d 929 (2015)*. The sentencing judge was obligated — but failed — to recognize and honor the "collective judgment of twelve of defendant's fellow citizens," *State v. Tindell, 417 N.J. Super. 530, 572, 10 A.3d 1203 (App. Div. 2011)*, when acquitting defendant of second-degree robbery; the judge, instead, proceeded on an assumption that defendant should have been convicted of robbery much as the *Tindell* judge crafted a sentence based on his personal view that the jury let the defendant "get away with murder." *Id. at 569*.

Because the judge nullified the robbery acquittal, defendant must be resentenced by a different judge in conformity with the letter and spirit of this opinion.

Vacated and remanded. We do not retain jurisdiction.

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[3] *N.J.S.A. 2C:44-1(b)(1)* (permitting consideration that "defendant's conduct neither caused nor threatened serious harm").

[4] *N.J.S.A. 2C:44-1(b)(2)* (permitting consideration of whether defendant "contemplate[d] that his conduct would cause or threaten serious harm").

[5] Because of defendant's significant criminal record, the judge applied the aggravating factors defined in *N.J.S.A. 2C:44-1(a)(3)*, *(6)*, and *(9)*.

[6] This appeal was originally heard on an excessive sentencing oral argument calendar, but was removed after argument so that briefs on these issues could be submitted and considered.

[7] Because the judge imposed the maximum sentence possible, we reject the State's argument that any error was harmless — a contention of insufficient merit to warrant further discussion. *R. 2:11-3(e)(2)*.

[8] The judge's failure to apply mitigating factors one and two requires our rejection of her determination that the aggravating factors substantially outweighed what she concluded were the nonexistent mitigating factors — the basis for her imposition of a period of parole ineligibility. This determination must be reconsidered upon resentencing, when the two mitigating factors are added to the calculus and assigned proper weight. We emphasize what should be obvious from the above — that when a proper inclusion of all aggravating and mitigating **[*6]** factors is reconsidered in determining whether to impose a parole ineligibility period — the sentencing judge's view of evidence obviously rejected by the jury will play no role. *See Alleyne v. United States, U.S. , , 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314, 321 (2013)*; *State v. Grate, 220 N.J. 317, 334-35, 106 A.3d 466 (2015)*.