

SUPREME COURT OF NEW JERSEY
Docket No. 083298

STATE OF NEW JERSEY,

Plaintiff,

v.

MARK MELVIN,

Defendant.

Criminal Action

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

DOCKET NO. A-4632-17

Sat Below:

Hon. Messano, Fasciale and Rose

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY..... 3

ARGUMENT..... 7

 POINT I 7

 THIS COURT’S POST-APPRENDI DECISIONS ALLOW TRIAL COURTS TO ENHANCE A DEFENDANT’S SENTENCE WITHIN THE SENTENCING RANGE AUTHORIZED BY THE JURY VERDICT BASED ON A FINDING OF ONE OR MORE STATUTORY AGGRAVATING FACTORS AND A CONCLUSION THAT THEY OUTWEIGH ALL MITIGATING FACTORS. BUT A TRIAL COURT’S RELIANCE ON AN AGGRAVATING FACTOR INCONSISTENT WITH THE JURY VERDICT VIOLATES THE ESSENCE OF APPRENDI, AND ITS USE TO ENHANCE A DEFENDANT’S SENTENCE EVEN WITHIN THE RANGE AUTHORIZED BY THE VERDICT VIOLATES THE NEW JERSEY CONSTITUTION. 7

 POINT II 14

 U.S. v. WATTS, THE PRECEDENT RELIED ON BY VIRTUALLY ALL THE COURTS OF APPEAL TO SUPPORT ENHANCED SENTENCES BY SENTENCING JUDGES BASED ON ALLEGATIONS OF WHICH A DEFENDANT WAS ACQUITTED, CANNOT SUPPORT THE RULE ALLOWING SENTENCING ENHANCEMENT BASED ON ACQUITTED CHARGES. 14

 A. SEVEN CURRENT AND FORMER SUPREME COURT JUSTICES HAVE EXPRESSED SERIOUS CONCERNS ABOUT THE HOLDING IN WATTS, AS HAVE NUMEROUS FEDERAL AND STATE COURT JUDGES. ... 14

 B. THE VAST MAJORITY OF FEDERAL COURT OF APPEALS’ DECISIONS THAT AFFIRM SENTENCES WITHIN THE AUTHORIZED RANGE ENHANCED BY FINDINGS OF FACT BASED ON ACQUITTED CHARGES RELY SOLELY OR PRIMARILY ON U.S. v. WATTS; WATTS WAS A PRE-APPRENDI DOUBLE JEOPARDY CASE THAT NEVER ADDRESSED THE FIFTH OR SIXTH AMENDMENT PROTECTIONS THAT WERE THE BASIS FOR APPRENDI’S HOLDING. ... 23

 C. NEITHER WATTS NOR STATE v. TILLERY SUPPORT THE APPELLATE DIVISION OPINION. 29

 POINT III 30

 ARTICLE I, PARAGRAPHS 9 AND 10 OF THE NEW JERSEY CONSTITUTION CONSTITUTE INDEPENDENT STATE GROUNDS FOR REJECTING THE HOLDING OF U.S. v. WATTS AS INCOMPATIBLE WITH THE NEW JERSEY CONSTITUTION. 30

TABLE OF AUTHORITIES

Page (s)

Constitution

New Jersey Constitution,
Article I, Paragraphs 9 and 10..... i, 31, 37

Cases

Almendarez-Torres v. U.S.,
523 U.S. 224 (1998) 27

Apprendi v. New Jersey,
530 U.S. 466 (2000) *passim*

Blakely v. Washington,
542 U.S. 296 (2004) *passim*

Coffin v. United States,
156 U.S. 432 (1895) 23, 34

Cunningham v. California,
549 U.S. 270 (2007) 17

Gall v. United States,
552 U.S. 38 (2007) 17

Johnson v. Mississippi,
486 U.S. 578 (1988) 34

Jones v. U.S.,
574 U.S. 948 (2014) 17

Jones v. U.S.,
526 U.S. 227, 230-31 (1999) 35

McMillian v. Pennsylvania,
477 U.S. 79 (1986) 27

Nelson v. Colorado,
137 S.Ct. 1249 (2017) 33, 34

People v. Beck,
2019 WL 3422585 (Mich. 2019) 22

<u>State v. Cote,</u> 530 A.2d 775 (N.H. 1987)	23
<u>State v. Crisantos (Arriagas),</u> 102 N.J. 265 (1986)	11
<u>State v. Eckers,</u> 185 N.J. 523, 538 (2006).....	33
<u>State v. Franklin,</u> 184 N.J. 516 (2005)	10, 11, 12
<u>State v. Gilmore,</u> 103 N.J. 508 (1986)	31, 32, 33
<u>State v. Gilmore,</u> 199 N.J. Super. 389 (App. Div. 1985)	32
<u>State v. Ingenito,</u> 87 N.J. 204 (1981)	11
<u>State v. K.S.,</u> 220 N.J. 190 (2015)	12, 13, 29
<u>State v. Kiriakakis,</u> 235 N.J. 420 (2018)	8, 9
<u>State v. Marley,</u> 364 S.E.2d 133 (N.C. 1988)	22
<u>State v. Melvin,</u> 2017 WL 796453 (App. Div. March 1, 2017)	5
<u>State v. Melvin,</u> 2019 WL 2910738 (App. Div. July 8, 2019)	6
<u>State v. Natale,</u> 184 N.J. 458 (2009)	7, 8
<u>State v. Novembrino,</u> 105 N.J. 95, 145 (1987).....	33

<u>State v. Pierce,</u>	
136 N.J. 184, 209 (1994)	33
<u>State v. Thomas,</u>	
188 N.J. 137 (2006)	8
<u>State v. Tillery,</u>	
238 N.J. 293 (2019)	6, 29, 30
<u>State v. Tindell,</u>	
417 N.J. Super. 530 (App. Div. 2011)	13, 14
<u>State v. Zuber,</u>	
227 N.J. 422, 438 (2017)	33
<u>Swain v. Alabama,</u>	
380 U.S. 202 (1965)	31
<u>U.S. v. Ashworth,</u>	
139 Fed. App'x 525 (4th Cir. 2005)	24
<u>U.S. v. Bell,</u>	
808 F.3d 926 (D.C. Cir. 2015)	19, 21
<u>U.S. v. Booker,</u>	
543 U.S. 220 (2005)	passim
<u>U.S. v. Brady,</u>	
928 F.2d 844 (9th Cir. 1991)	15, 24
<u>U.S. v. Dorcely,</u>	
454 F.3d 366 (D.C. Cir. 2006)	24
<u>U.S. v. Duncan,</u>	
400 F.3d 1297 (11th Cir. 2005)	24
<u>U.S. v. Farias,</u>	
469 F.3d 393 (5th Cir. 2006)	23
<u>U.S. v. Faust,</u>	
456 F.3d 1342 (11th Cir. 2006)	22, 24
<u>U.S. v. Gobbi,</u>	
471 F.3d 302 (1st Cir. 2006)	23

<u>U.S. v. Gotti,</u> 767 Fed. App'x 173 (2nd Cir. 2019)	23
<u>U.S. v. Hammond,</u> 381 F.3d 316 (4th Cir. 2004)	35
<u>U.S. v. Hayward,</u> 177 Fed. App'x 214 (3d Cir. 2006)	24
<u>U.S. v. Jones,</u> 744 F.3d 1362 (D.C. Cir. 2014)	16, 18, 19, 23
<u>U.S. v. Lasley,</u> 832 F.3d 910 (8th Cir. 2016)	21
<u>U.S. v. Magallanez,</u> 408 F.3d 672 (10th Cir. 2005)	24
<u>U.S. v. Mercado,</u> 474 F.3d 654 (9th Cir. 2007)	21, 23
<u>U.S. v. Price,</u> 418 F.3d 771 (7th Cir. 2005)	24
<u>U.S. v. Putra,</u> 78 F.3d 1386 (9th Cir. 1996)	15
<u>U.S. v. Rodriguez,</u> 73 F.3d 161 (7th Cir. 1996)	35
<u>U.S. v. Sabellion-Umana,</u> 772 F.3d 1328 (10th Cir. 2014)	18
<u>U.S. v. Settles,</u> 530 F.3d 920 (D.C. Cir. 2008)	23
<u>U.S. v. Vaughan,</u> 430 F.3d 518 (2d Cir. 2005)	24
<u>U.S. v. Watts,</u> 67 F.3d 790 (9th Cir. 1995)	passim
<u>U.S. v. Watts,</u> 519 U.S. 148 (1997)	passim

<u>U.S. v. White,</u> 551 F.3d 381 (6th Cir. 2008)	21, 23
<u>United States v. Pimental,</u> 367 F.Supp.2d 143 (D.Mass.2005)	20, 22
<u>Witte v. U.S.,</u> 515 U.S. 389 (1995).....	27, 28

Statutes

N.J.S.A. 2C:43-6(f)	8
N.J.S.A. 2C:43-6(b)	9
N.J.S.A. 2C:43-6(c)	10
N.J.S.A. 2C:43-6(d)	11

Other Authorities

Sentencing Reform Act of 1984, 18 U.S.C. 3553(b) (2000 Ed. And Supp. 14).....	27
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PRELIMINARY STATEMENT

This appeal raises a profound issue implicating the New Jersey Constitution and this Court's extensive jurisprudence implementing the United States Supreme Court's opinion in Apprendi v. New Jersey, 530 U.S. 466 (2000).

The issue is whether a sentencing judge in New Jersey can enhance a convicted defendant's sentence by finding, by a preponderance of the evidence, that the defendant committed a criminal offense of which he was acquitted by a jury in the underlying trial. That practice, despite extensive and impassioned disagreement and skepticism by numerous federal judges, including several Supreme Court Justices, continues to be the practice in federal criminal cases, supported by authority in all of the federal Courts of Appeal. It has not been a commonly accepted practice in New Jersey criminal cases. This appeal gives this Court the opportunity to reject the significant attempt to undermine the role of juries and the significance and force of their verdicts by extending the principle of Apprendi to hold that a defendant's right to trial by jury and to due process of law under New Jersey's Constitution would be violated if the federal practice was implemented in our courts.

Even the federal courts recognize the anomaly of allowing a sentencing judge to rely on a factual finding that a defendant, as in this case, actually did commit a crime of which he was acquitted

by a jury in order to enhance the defendant's sentence. The analytical justification is simplistic. The standard for conviction by a jury is proof beyond a reasonable doubt. The standard for fact-finding by a sentencing judge is by a preponderance of the evidence. Hence, the contention is that no inconsistency exists if a sentencing judge finds a fact that the jury could not determine to exist beyond a reasonable doubt.

Respectfully, whatever logic or analytical justification may support the federal practice cannot override the fundamental damage that practice does to the sanctity and stature of jury verdicts. Imagine the dismay of a defendant whose sentence is enhanced by the sentencing judge's findings that defendant committed an offense of which he was acquitted by a jury. Imagine the challenge to defense counsel preparing a defense in a jury trial that has to persuade first the jury and then, after trial, the sentencing judge, based on two different standards of proof.

New Jersey's guarantee of a trial by jury, and due process of law, should not tolerate the subversion of jury verdicts that directly results from the federal practice. This Court should remand this case for resentencing and hold that our State Constitution does not allow a jury verdict of acquittal to be overridden by a sentencing judge's fact-finding that contradicts the jury's verdict.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

In May 2013 an indictment was returned against Defendant Mark Melvin charging him with two Counts of first-degree murder (Counts One and Five); second-degree unlawful possession of a weapon (Count Two); second-degree possession of a weapon with an unlawful purpose (Count Three); attempted murder (Count Four); second-degree aggravated assault (Count Six); third-degree possession of a controlled dangerous substance (Count Seven); third-degree possession with intent to distribute a controlled dangerous substance (Count Eight); third-degree possession of a controlled dangerous substance with intent to distribute within 1,000 feet of school property (Count Nine).

At Defendant's first trial in June 2014, the jury convicted Melvin only of possession of a firearm without a permit. The jury could not reach a verdict on the remaining Counts.

At sentencing, the trial judge found as a fact that defendant was the perpetrator of the murder charges on which the jury was unable to reach a verdict. (1T94-4 to 11). Based on that finding, and defendant's status as a habitual offender, the judge found four aggravating factors: (2) the gravity and seriousness of the

¹ 1T refers to the October 27, 2014 Sentencing Transcript
2T refers to the June 7, 2018 Remand Sentencing Transcript

harm inflicted on the victim; (3) the risk defendant would commit another crime; (6) the extent of defendant's prior record; and (9) the need to deter. (1T71-23 to 74-8). The judge found it appropriate to sentence defendant to an extended term as a persistent offender, and imposed the maximum sentence permitted by the jury verdict: twenty years with ten years of parole ineligibility. (1T95-10 to 96-6).

Defendant appealed. Defendant was retried on the remaining counts of the indictment while the appeal was pending. At the retrial, the jury acquitted Defendant of all counts related to the shooting and homicide - counts one, three, five and six. The jury could not reach a verdict on the drug related counts - seven, eight and nine. The State dismissed the remaining drug charges.

The Appellate Division affirmed Defendant's conviction but remanded the case for resentencing, concluding that by considering the facts related to the murder charges on which the first jury was unable to reach a verdict, the judge violated Defendant's constitutional protection against double jeopardy:

Here, the judge also substituted his judgment for that of the jury. He considered the charges on which the jury was hung even though a new trial would occur. Defendant could later be punished again if convicted of these crimes, implicating double jeopardy. The judge improperly found aggravating factor two, the gravity and seriousness of harm inflicted on the victim, because there is no victim named in the unlawful possession of a weapon offense. The judge abused his discretion by

finding defendant was the shooter by a preponderance of the evidence and considering that conduct in his sentence decision.

[State v. Melvin, 2017 WL 796453, *6 (App. Div. March 1, 2017).]

On resentencing, the sentencing judge, relying primarily on U.S. v. Watts, 519 U.S. 148 (1997), determined that he was authorized, despite the jury's acquittal of Defendant on the murder charge, to consider evidence that Defendant, in fact, was responsible for the murders.

Unlike the first trial, Mr. Melvin no longer faces the possibility of jeopardy on the acquitted conducts as it's been, he's been found not guilty of some charges and other charges have been dismissed. This Court views the consideration of that evidence I just referred to, of Mr. Melvin as the shooter, as totally consistent with the broad discretion which is accorded to a trial, a sentencing judge when imposing an appropriate sentence in evaluating the whole man and the entire circumstances of the case. That is this Court's duty. And the Court will exer-, in the exercise of that duty has determined to consider that evidence.

[2T66-3 to 15.]

The Court found aggravating factors 3, 6 and 9. It found aggravating factor (3) in part because Mr. Melvin, "has accepted no responsibility even for the possession of a weapon, let alone any other conduct that preceded his arrest with the weapon in the car" - in other words, for the shooting he was acquitted of. (2T68-17 to 20). The Court found aggravating factor (6) in part

because "the facts adduced at the trial which this Court finds reliable, [show] not only did he possess said weapon, but he used it to shoot upon three other human beings." (2T69-17 to 19). The Court found aggravating factor (9) in part because of the "evidence supporting its conclusion that Mr. Melvin not only possessed the weapon, but also used it to shoot 3 other individuals." (2T72-20 to 23). In assessing the appropriate sentence as a whole, the Judge stated that his conclusion that Mr. Melvin was the shooter "affects the seriousness . . . of the offense in that the unlawful possession of a weapon does not expressly take into account the use of it, the use of the weapon, which is designed to be deadly." (2T72-23 to 73-2).

The Court also took into account that Defendant had no record of disciplinary infractions during his imprisonment after the initial trial. Based on those findings, the judge resentenced Defendant to a term of sixteen years with eight years parole ineligibility. (2T73-3 to 22).

The Appellate Division affirmed, relying primarily on U.S. v. Watts, supra, 519 U.S. 148, and State v. Tillery, 238 N.J. 293 (2019). See State v. Melvin, 2019 WL 2910738 (App. Div. July 8, 2019).

This Court granted Defendant's Petition for Certification. 240 N.J. 549.

ARGUMENT

POINT I

THIS COURT'S POST-APPRENDI DECISIONS ALLOW TRIAL COURTS TO ENHANCE A DEFENDANT'S SENTENCE WITHIN THE SENTENCING RANGE AUTHORIZED BY THE JURY VERDICT BASED ON A FINDING OF ONE OR MORE STATUTORY AGGRAVATING FACTORS AND A CONCLUSION THAT THEY OUTWEIGH ALL MITIGATING FACTORS. BUT A TRIAL COURT'S RELIANCE ON AN AGGRAVATING FACTOR INCONSISTENT WITH THE JURY VERDICT VIOLATES THE ESSENCE OF APPRENDI, AND ITS USE TO ENHANCE A DEFENDANT'S SENTENCE EVEN WITHIN THE RANGE AUTHORIZED BY THE VERDICT VIOLATES THE NEW JERSEY CONSTITUTION.

This Court's post-Apprendi jurisprudence has never addressed the issue raised in this appeal. In Apprendi, the United States Supreme Court held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Apprendi v. New Jersey, 530 U.S. 466, 483 (2000) (emphasis added). Underpinning the holding in Apprendi was the Court's recognition of the primacy of the jury verdict in determining the Defendant's maximum sentencing exposure.

Recognizing Apprendi's impact on New Jersey's criminal sentencing procedures, and relying in addition on Blakely v. Washington, 542 U.S. 296 (2004), this Court in State v. Natale, 184 N.J. 458 (2009), held that "a sentence above the presumptive statutory term based solely on a judicial finding of aggravating factors violates a defendant's Sixth Amendment jury trial

guarantee," a conclusion that "compelled [the Court] to eliminate presumptive terms from the sentencing process." Id. at 466

In State v. Thomas, 188 N.J. 137 (2006), this Court adopted the Supreme Court's modification of Apprendi and held, relying on Blakely v. Washington, supra, that "no Sixth Amendment violation results from the sentencing court's finding of the fact of defendant's prior convictions, which required imposition of a mandatory enhanced sentencing under N.J.S.A. 2C:43-6(f)." Id. at 152.

And in State v. Kiriakakis, 235 N.J. 420 (2018), this Court recognized that the United States Supreme Court in Apprendi, Blakely and U.S. v. Booker, 543 U.S. 220, 251 (2005), held that "judges retained their authority to rely on traditional sentencing factors concerning the offense and the offender in exercising their discretion in imposing a sentence within the prescribed sentencing range." Id. at 435.

This Court endorsed the traditional use by judges of the statutory aggravating and mitigating factors in imposing sentence within the range authorized by the jury verdict:

We reject any suggestion that the judicial finding of aggravating factors within the prescribed sentencing range authorized by a jury's verdict or a defendant's admission at his plea hearing violates the Sixth Amendment when the judge imposes a discretionary sentence. To be sure, a sentencing court must quantitatively and qualitatively compare the applicable aggravating and mitigating

factors, and then weigh and balance those factors to reach a fair sentence. We cannot fathom, however, that a sentence set at the highest end of a sentencing range can rationally occur without the finding of at least one aggravating factor. Requiring the finding of aggravating factors to justify a sentence within the prescribed range does not transform those factors into the substantial equivalent of elements of an offense to be decided by a jury. To hold otherwise would bring crashing down the Code's entire scheme of sentencing based on the distinct nature of the offense and the unique characteristics of the offender, and would be inconsistent with the remedy the Booker Court fashioned for the Federal Sentencing Guidelines.

[Id. at 436-37.]

In addition, the Court upheld the power of a sentencing judge, pursuant to N.J.S.A. 2C:43-6(b), which authorizes imposition of a period of parole disqualification based on a weighing of aggravating and mitigating factors, to impose a parole disqualifier based on the judge's finding of aggravating factors and the balancing of aggravating and mitigating factors:

We reject defendant's argument that such considerations as the risk that defendant will reoffend and the need for deterrence become elements of the offense when the court weighs whether to impose a mandatory-minimum sentence. In the sentencing context, the aggravating factors, including the likelihood of defendant's involvement in organized criminal activity, along with the mitigating factors, are legitimate considerations in setting a fair sentence within the ordinary range and the mandatory-minimum range.

[Id. at 445-46.]

Among this Court's post-Apprendi decisions are cases that cast doubt on the soundness of the Appellate Division's ruling in the case at bar. In State v. Franklin, 184 N.J. 516 (2005), Defendant was convicted of second-degree passion provocation manslaughter and was acquitted of various gun-related offenses. The sentencing judge, who presided at the trial, and relying on undisputed evidence at trial, determined that Defendant committed the crime with a handgun. That finding resulted in Defendant becoming a second-time offender under the Graves Act, N.J.S.A. 2C:43-6(c), and the judge sentenced him to an extended term of twenty-years, a sentence authorized by the Graves Act but not by the jury verdict, pursuant to which defendant's maximum sentence was ten years. The Appellate Division affirmed.

This Court reversed, holding that the sentence violated Apprendi which held that

[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

[530 U.S. at 490.]

Concededly, the distinction between this case and Franklin is that Defendant Melvin's sentence was within the statutory range authorized by the jury verdict, given that Melvin was a persistent offender subject to an extended term. But in Franklin this Court

clearly expressed its serious concern about the sentencing judge's reliance on a fact that was inconsistent with the jury verdict:

On appellate review, we cannot find that the State satisfied an element of an offense that was never presented to the jury.

Because the jury was not asked whether defendant used or possessed a gun in killing Warmack, the jury did not answer that simple question one way or the other. We will not speculate why the jury acquitted defendant of two counts of possession of a firearm with an unlawful purpose and three counts of knowingly, under circumstances manifesting extreme indifference to human life, pointing that firearm in the direction of his wife and two children. It is important to remember that 'a jury, once properly charged, has the power to disregard even overwhelming proof of culpability and either acquit entirely or convict of a lesser-included offense.' State v. Crisantos (Arriagas), 102 N.J. 265, 273, 508 A.2d 167 (1986), see also State v. Ingenito, 87 N.J. 204, 212, 432 A.2d 912 (1981) ('Indeed, a jury has the prerogative of returning a verdict of innocence in the face of overwhelming evidence of guilt.').

[184 N.J. 516, 535-36.]

To comply with Apprendi's mandate, the Court in Franklin construed the Graves Act to conform with Apprendi's holding:

We will conform the Graves act to the Consitution in the way we believe the Legislature would have intended under the present circumstances, rather than let the second-offender provision perish completely. N.J.S.A. 2C:43-6(d) no longer will empower judges to decide whether a defendant possessed or used a gun in second-offender cases. In the future, if the State intends to seek an extended term under the Graves Act, it must obtain an indictment charging possession or

use of the gun in the commission of one of the designated crimes and then submit the charge to the jury. That remedy not only complies with the dictates of Apprendi, supra, but also best achieves the Legislature's purpose in enacting the Graves act.

[Id. at 539.]

In State v. K.S., 220 N.J. 190 (2015), this Court reversed the Appellate Division's affirmance of the Somerset County Prosecutor's decision to reject Defendant's application for admission to the County's Pretrial Intervention Program (PTI) on the basis of adult criminal charges that had been dismissed and juvenile charges of possession of a weapon, assault, fighting and harassment that had been diverted and dismissed. In rejecting the prosecutor's grounds for denying Defendant's PTI application, this Court observed:

Because all of defendant's prior charges were dismissed, he had no record of criminal or penal 'violations.' We have not been provided with any writings, transcripts, or other evidence considered by the PTI director and the prosecutor containing admissions made by defendant in any of the matters, adult or juvenile, for which the charges were dismissed. Unless an inference of guilt or other conclusions could be drawn from at least one dismissed charge, based on facts, defendant's criminal record includes no indication that he had a history of violence or presented a danger toward others. Use of prior dismissed charges alone as evidence of a history of and propensity for violence or a pattern of anti-social behavior, where defendant's culpability or other facts germane to admission into Pretrial Intervention have

not been established in some way, constitutes an impermissible inference of guilt.

[Id. at 202.]

Moreover, the Appellate Division has refused to uphold sentences imposed by sentencing judges who explicitly refused to accept the underlying jury verdict. In State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011), a jury acquitted defendant of murder, attempted murder and conspiracy to commit murder, but convicted him of second-degree reckless manslaughter, third-degree receiving stolen property, third-degree possession of cocaine, third-degree unlawful possession of a handgun and third-degree terroristic threats.

Prior to sentencing, the sentencing judge expressed his strong disagreement with the jury's verdict:

Simply stated, the jury's verdict enabled this defendant to literally get away with murder. This jury has given defendant Tindell a license to kill in the future. Before I get into the facts of the matter and my decision on this sentencing, I want to first commend all the attorneys involved in the case for the professional manner in which they presented their respective positions. It was an exceptionally well tried case on all sides.

Mr. Tindell, you owe a great deal to your attorney, because he saved you a murder conviction. There's no doubt in my mind that his lawyering skills, together with a jury which lacked common sense and courage, saved you a murder verdict.

[Id. at 569.]

The judge then sentenced defendant to five consecutive maximum terms with maximum periods of parole ineligibility resulting in an aggregate sentence of thirty years with eighteen years parole ineligibility.

The Appellate Division reversed and remanded for resentencing, based on the trial judge's unwillingness to accept the jury verdict:

Given this record, we conclude that the trial judge's personal views as to the propriety of the jury's verdict irreparably tainted the sentence he imposed on defendant. We are thus left with no other choice but to vacate the sentence and remand for defendant to be re-sentenced consistent with this opinion and before a different judge to be selected by the Presiding Judge of the Criminal Division of the vicinage.

[Id. at 572.]

POINT II

U.S. v. WATTS, THE PRECEDENT RELIED ON BY VIRTUALLY ALL THE COURTS OF APPEAL TO SUPPORT ENHANCED SENTENCES BY SENTENCING JUDGES BASED ON ALLEGATIONS OF WHICH A DEFENDANT WAS ACQUITTED, CANNOT SUPPORT THE RULE ALLOWING SENTENCING ENHANCEMENT BASED ON ACQUITTED CHARGES.

A. SEVEN CURRENT AND FORMER SUPREME COURT JUSTICES HAVE EXPRESSED SERIOUS CONCERNS ABOUT THE HOLDING IN WATTS, AS HAVE NUMEROUS FEDERAL AND STATE COURT JUDGES.

U.S. v. Watts, 519 U.S. 148 (1997), a case decided on the Supreme Court's summary calendar without oral argument or full briefing, provides extremely fragile support for the federal practice permitting sentencing judges to enhance criminal

sentences within the range authorized by the jury verdict based on the judge's reliance on evidence supporting criminal charges of which the defendant was acquitted.

In Watts, and its companion case, U.S. v. Putra, two panels of the Ninth Circuit held that sentencing judges could not consider conduct of the defendants' underlying charges of which they had been acquitted. U.S. v. Watts, 67 F.3d 790 (9th Cir. 1995); U.S. v. Putra, 78 F.3d 1386 (9th Cir. 1996).

Police discovered two loaded firearms and ammunition in Watts' bedroom closet and cocaine base in a kitchen cabinet. A jury convicted Watts of possessing cocaine base with intent to distribute but acquitted him of using a firearm in connection with the drug offense. The District Court found by a preponderance of the evidence that Watts had possessed the gun in connection with the drug offense, and accordingly increased Watts' sentence. The Ninth Circuit reversed on double jeopardy grounds, holding that consideration by the sentencing court of facts underlying a charge on which a jury returned a not guilty verdict causes a defendant "to suffer punishment for a criminal charge for which he or she was acquitted." Watts, 67 F.3d at 797 (quoting U.S. v. Brady, 928 F.2d 844, 851 (9th Cir. 1991)).

The United States Supreme Court reversed. Rejecting the Ninth Circuit's double jeopardy analysis, the Court's per curiam opinion observed that "sentencing enhancements do not punish a defendant

for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.” Watts, supra, 519 U.S. at 154.

Justice Stevens dissented, asserting that the Court’s rulings violated the defendant’s Sixth Amendment rights to trial by jury:

In my opinion the statute should be construed in the light of the traditional requirement that criminal charges must be sustained by proof beyond a reasonable doubt. That requirement has always applied to charges involving multiple offenses as well as a single offense. Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guideline that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.

[Id. at 169.]

Justice Kennedy also dissented, objecting to the fact that the court had decided so significant an issue without the benefit of full briefing and oral argument. Id. at 171.

Justices Stevens and Kennedy were not the only Justices to question the holding in Watts. In U.S. v. Jones, 744 F.3d 1362 (D.C. Cir. 2014), a jury convicted defendants of distributing small amounts of cocaine and acquitted them of conspiring to distribute drugs. The sentencing judge found that they were involved in the

charged conspiracy and significantly enhanced their sentences. The Court of Appeals for the District of Columbia affirmed the sentence. The Supreme Court denied certiorari. Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the denial of certiorari. Jones v. U.S., 574 U.S. 948 (2014). Justice Scalia's dissent pointedly questioned the Court of Appeals' holding and strongly disagreed with the court's refusal to consider the issue:

Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, Apprendi v. New Jersey, 530 U.S. 466, 483, n. 10, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and "must be found by a jury, not a judge," Cunningham v. California, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). We have held that a substantively unreasonable penalty is illegal and must be set aside. Gall v. United States, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable - thereby exposing the defendant to the longer sentence - is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.

For years, however, we have refrained from saying so. In Rita v. United States, we dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case. We thus left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness. 551 U.S. at 353, 127 S.Ct. 2456; see also id. at 366, 127 S.Ct. 2456

(Stevens, J., joined in part by GINSBURG, J., concurring) ("Such a hypothetical case should be decided if and when it arises"). Nonetheless, the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range.

This has gone on long enough. The present petition presents the nonhypothetical case the Court claimed to have been waiting for. And it is a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense. Petitioners were convicted of distributing drugs, but acquitted of conspiring to distribute drugs. The sentencing judge found that petitioners had engaged in the conspiracy of which the jury acquitted them. The Guidelines, petitioners claim, recommend sentences of between 27 and 71 months for their distribution convictions. But in light of the conspiracy finding, the court calculated much higher Guidelines ranges, and sentenced Jones, Thurston, and Ball to 180,194, and 225 months' imprisonment.

On petitioners' appeal, the D.C. Circuit held that *even if* their sentences would have been substantively unreasonable but for judge-found facts, their Sixth Amendment rights were not violated. 744 F.3d 1362, 1369 (2014). We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment - or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.

[Ibid.]

In U.S. v. Sabellion-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014), then-Judge Gorsuch, relying on Justice Scalia's dissent

from the denial of certiorari in Jones, supra, observed that “[i]t is far from certain whether the Constitution allows” a judge to increase the defendant’s sentence “based on facts the judge finds without the aid of a jury or the defendant’s consent” - which clearly would encompass a finding that a defendant had committed an offense of which he had been acquitted by a jury.

Similarly, in U.S. v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015), then-Judge Kavanaugh observed that “[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences seems a dubious infringement of the rights to due process and a jury trial.”

A number of other federal judges also have expressed disagreement with the holding in Watts. In U.S. v. Bell, supra, 808 F.3d 926, Circuit Judge Millet, concurring in the denial of a rehearing en banc, expressed her vehement disagreement with the Watts rule. Bell was convicted on three counts of distributing a small quantity of crack cocaine, and acquitted of conspiring to distribute cocaine. His guidelines sentencing range for the offense of conviction was 51 to 63 months. But the sentencing judge found that Bell did engage in the conspiracy of which he was acquitted, and sentenced him to 192 months in prison, over 300% higher than the top of the guidelines range for the crimes of which he was convicted.

Sharply criticizing the decision to uphold the sentence,
Judge Millet observed:

The foundational role of the jury is to stand as a neutral arbiter between the defendant and a government bent on depriving him of his liberty. But when the central justification the government offers for such an extraordinary increase in the length of imprisonment is the very conduct for which the jury acquitted the defendant, that liberty-protecting bulwark becomes little more than a speed bump at sentencing.

* * * *

To be sure, the Supreme Court has generally permitted judicial fact-finding by a preponderance of the evidence at sentencing that goes beyond what the jury's verdict encompasses, including facts about character, criminal history, cooperation, and even some unadjudicated conduct. . . .But allowing judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury in the same criminal case is too deep of an incursion into the jury's constitutional role. '[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.' (quoting United States v. Pimental, 367 F.Supp.2d 143, 152 (D.Mass. 2005)).

* * * *

In other words, proof beyond a reasonable doubt is what we demand from the government as an indispensable precondition to depriving an individual of liberty for the alleged conduct. Constructing a regime in which the judge deprives the defendant of liberty on the basis of the very same factual allegations that the jury specifically found did not meet our

constitutional standard for a deprivation of liberty puts the guilt and sentencing halves of a criminal case at war with each other.

[Id. at 929-30]

See also U.S. v. Lasley, 832 F.3d 910, 920-21 (8th Cir. 2016) (asserting that "the use of acquitted conduct to enhance a defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment.") (Bright, J., dissenting); U.S. v. White, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting), joined by five other Judges, quoting U.S. v. Booker as stating that "in Watts there was no contention that the sentence enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue . . . simply was not presented.").

Judge Merritt added:

The majority's simple and single-minded reliance on Watts as authority for enhancements based on acquitted conduct is obviously a mistake. It is a mistake that other federal circuit courts have also made, but it is a mistake nonetheless. Therefore, we should treat this as an open question and consider whether the use of acquitted conduct to increase criminal sentences is permitted.

[Id. at 392.]

See also U.S. v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment. Both Booker and the clear import of the

Sixth Amendment prohibit such a result.”) (Fletcher, J., dissenting); U.S. v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006) (“I join the majority in affirming Faust’s conviction, but concur in its sentencing decision only because I am bound by Circuit precedent. . . . I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”) (Barkett, J., dissenting); U.S. v. Pimental, 367 F.Supp.2d 143, 150 (6th Cir. 2005) (“United States v. Booker substantially undermines the continued vitality of United States v. Watts both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, Blakely v. Washington, . . . and also conclude that the fruits of the jury’s efforts can be ignored with impunity by the judge in sentencing.”) (Gertner, J., dissenting).

Several State courts also have refused to follow Watts. See, e.g., People v. Beck, 2019 WL 3422585 (Mich. 2019) (“We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.”); State v. Marley, 364 S.E.2d 133, 139 (N.C. 1988) (“To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the

presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.”); State v. Cote, 530 A.2d 775, 785 (N.H. 1987) (“We think it disingenuous at best to uphold the presumption of innocence until proven guilty, a principle that is ‘axiomatic and elementary, and [whose] enforcement lies at the foundation of the administration of our criminal law,’ while at the same time punishing a defendant based upon charges in which that presumption has not been overcome.”).

B. THE VAST MAJORITY OF FEDERAL COURT OF APPEALS’ DECISIONS THAT AFFIRM SENTENCES WITHIN THE AUTHORIZED RANGE ENHANCED BY FINDINGS OF FACT BASED ON ACQUITTED CHARGES RELY SOLELY OR PRIMARILY ON U.S. v. WATTS; WATTS WAS A PRE-APPRENDI DOUBLE JEOPARDY CASE THAT NEVER ADDRESSED THE FIFTH OR SIXTH AMENDMENT PROTECTIONS THAT WERE THE BASIS FOR APPRENDI’S HOLDING.

As noted, U.S. v. Watts is the foundation for the vast majority of Court of Appeals’ decisions that affirm enhanced sentences within the authorized range that rely on fact findings based on acquitted conduct. See, e.g., U.S. v. Gotti, 767 Fed. App’x 173, 174-75 (2nd Cir. 2019), cert. den. 2020 WL 871696; U.S. v. Jones, 744 F.3d 1362, 1369 (D.C. Cir. 2014); U.S. v. White, 551 F.3d 381, 383-384 (6th Cir. 2008); U.S. v. Settles, 530 F.3d 920, 923 (D.C. Cir. 2008); U.S. v. Mercado, 474 F.3d 654, 656-57 (9th Cir. 2007); U.S. v. Gobbi, 471 F.3d 302, 314 (1st Cir. 2006); U.S. v. Farias, 469 F.3d 393, 399 (5th Cir. 2006); U.S. v. Faust, 456 F.3d 1342, 1347-48 (11th Cir. 2006); U.S. v. Dorcely, 454 F.3d

366, 372 (D.C. Cir. 2006); U.S. v. Hayward, 177 Fed. App'x 214, 215 (3d Cir. 2006); U.S. v. Vaughan, 430 F. 3d 518, 526 (2d Cir. 2005); U.S. v. Price, 418 F.3d 771, 787-88 (7th Cir. 2005); U.S. v. Ashworth, 139 Fed. App'x 525, 527 (4th Cir. 2005); U.S. v. Magallanez, 408 F.3d 672, 684 (10th Cir. 2005); U.S. v. Duncan, 400 F.3d 1297, 1304 (11th Cir. 2005).

The uniformity with which the Courts of Appeal have relied on Watts to allow sentencing judges to base enhanced sentences on acquitted conduct compels a close examination of whether Watts can support that reliance. The Supreme Court's opinion in Watts clearly recognized that the Ninth Circuit's holding was based on double jeopardy concerns:

In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted.

The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our double jeopardy jurisprudence. The Court of Appeals asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant "suffer[s] punishment for a criminal charge for which he or she was acquitted." Watts, 67 F.3d, at 797 (quoting Brady, 928 F.2d, at 851). As we explained in Witte, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.

[515 U.S. at 402-403.]

But Watts was a pre-Apprendi decision. That Apprendi fundamentally altered the nation's sentencing jurisprudence is an understatement. It held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. For Apprendi purposes, the statutory maximum is the maximum sentence a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.

Post-Apprendi decisions by the Supreme Court clearly have diminished Watt's precedential value. In Blakely v. Washington, 542 U.S. 296 (2004), Petitioner pleaded guilty to kidnapping his estranged wife. The facts admitted in his plea supported a maximum sentence of 53 months, but the sentencing judge imposed a 90-month sentence based on his finding that Petitioner had acted with deliberate cruelty, a statutory ground for departing from the prescribed sentencing range.

The State contended that there was no Apprendi violation because the relevant "statutory maximum" was not 53 months, but rather the ten year maximum for Class B felonies. Justice Scalia's opinion for the Court rejected that argument, holding that for Apprendi purposes the "statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected on

the jury verdict or admitted by the defendant. Justice Scalia observed:

In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' and the judge exceeds his proper authority. (quoting I.J. Bishop, Criminal Procedure, §87, p. 55 (2d ed. 1972)).

Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

[542 U.S. at 303-06.]

Justice O'Connor, dissenting, argued that deference to the Washington statute authorizing a maximum of ten years in prison was the preferable result. Significantly, she criticized the Court's decision in Blakely as being inconsistent with U.S. v.

Watts as well as other prior decisions, including Almendarez-Torres v. U.S., 523 U.S. 224 (1998); Witte v. U.S., 515 U.S. 389 (1995); and McMillian v. Pennsylvania, 477 U.S. 79 (1986), among others. Id. at 321-22 (O'Connor, J. dissenting).

In U.S. v. Booker, 543 U.S. 220 (2005), the issue concerned the constitutionality under Apprendi and Blakely of the mandatory sentencing provisions of the Federal Sentencing Guidelines adopted pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. 3553(b) (2000 Ed. And Supp. 14).

Booker's case illustrated the mandatory nature of the Guidelines. A jury convicted Booker of possession of at least 50 grams of crack, based on evidence that he had 92.5 grams of crack in his duffel bag. Given those facts, the Guidelines specified an offense level of 32 which, based on Booker's criminal history, authorized a sentence of 210 to 262 months. The sentencing judge would have been reversed if he had not imposed a sentence within the level 32 Guidelines range.

The sentencing judge, however, found facts beyond those found by the jury. He determined that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard the evidence concerning that additional crack. Based on that finding, the judge sentenced Booker to a term of 360 months, a term also mandated by the Guidelines which was almost ten years longer than the Guidelines range supported by the jury

verdict. The Supreme Court set aside the sentence, invalidating the mandatory feature of the Guidelines and 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 244.]

In his Opinion, Justice Stevens emphasized that the Court's decision in Watts did not preclude it from reaching its decision in Booker.

In Watts, relying on Witte v. U.S., 515 U.S. 389 (1995), we held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines. In neither Witte nor Watts was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue we confront today simply was not presented.

[Id. at 240.]

Justice Stevens also noted that the Court's opinion in Watts was premised on the assumption by Congress - which was incorrect - that the mandatory sentencing provision of the Guidelines would continue in effect. Id. at 251-52.

Clearly, the Court's opinions in Apprendi, Blakely and Booker, although not overruling Watts, significantly weaken its precedential force.

C. NEITHER WATTS NOR STATE v. TILLERY SUPPORT THE APPELLATE DIVISION OPINION.

In affirming Defendant Melvin's sentence, the Appellate Division relied substantially on U.S. v. Watts and State v. Tillery, 238 N.J. 293, 326 (2019), quoting Tillery solely for the proposition that a sentencing court may consider evidence relating to offenses on which a jury deadlocked in determining the appropriate sentence:

When a judge presides over a jury trial regarding multiple offenses, he or she has the opportunity to evaluate the credibility of witnesses and to assess the evidence presented as to each of those offenses. If a jury is unable to return a verdict as to some offenses and convicts the defendant of others, and the State requests that the court consider evidence presented as to offenses on which the jury deadlocked, such information may constitute competent, credible evidence on which the court may rely in assessing the aggravating and mitigating factors. No Sixth Amendment or other constitutional principle, or statutory provision, generally bars a court from considering such evidence. And consideration of competent evidence presented in support of charges - even if the jury does not go on to convict defendant on those charges - does not raise concerns about drawing inferences from the mere fact that charges had been brought, a practice we found improper in State v. K.S., 220 N.J. 190, 104 A.3d 258 (2015).

[Id. at 326 (citation omitted).]

Significantly, the Tillery court never addressed the precise issue presented in the instant case, the constitutionality of a sentencing judge relying on evidence of charges on which a

defendant was acquitted. Moreover, the Court in Tillery criticized the sentencing court's reliance on evidence supporting charges on which the jury deadlocked but had not been dismissed by the State at the time of sentencing:

The trial court should have denied the State's request to consider evidence relevant to those charges, and should not have opined about the defendant's guilt with respect to those charges, while the charges remained pending. We caution courts not to consider evidence pertaining to charges as to which a jury deadlocked in sentencing unless and until the defendant no longer faces the prospect of prosecution for those charges.

[Id. at 326-27].

In addition, the opinion in Tillery made clear that the sentencing court's reliance on U.S. v. Watts was misplaced, because the United States Supreme Court did not confront the deadlocked jury issue raised by Tillery. Id. at 327.

POINT III

**ARTICLE I, PARAGRAPHS 9 AND 10 OF THE NEW JERSEY
CONSTITUTION CONSTITUTE INDEPENDENT STATE GROUNDS FOR
REJECTING THE HOLDING OF U.S. v. WATTS AS INCOMPATIBLE
WITH THE NEW JERSEY CONSTITUTION.**

The New Jersey Constitution, Article I, paragraph 9, provides in part as follows:

9. The right to trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury.

Article I, paragraph 10 provides:

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining a witness in his favor; and to have the assistance of counsel in his defense.

In State v. Gilmore, 103 N.J. 508 (1986), this Court declined to follow the United States Supreme Court's holding in Swain v. Alabama, 380 U.S. 202 (1965), where the Court's opinion, in a case challenging the constitutionality of a prosecutor's use of peremptory challenges to exclude all black jurors, concluded:

[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws.

[Id. at 226.]

In Gilmore, the Court affirmed the Appellate Division's opinion that interpreted the New Jersey Constitution

as prescribing the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, a cognizable group, a practice designed to defeat the purpose of the representative cross-section rule.

[Id. at 519 (quoting State v. Gilmore, 199 N.J. Super. 389, 405-06 (App. Div. 1985)).]

In relying on the New Jersey Constitution's right-to-jury-trial protections as the source of its holding, this Court's opinion by Justice Garibaldi emphasized that the New Jersey

Constitution is a source of fundamental rights not dependent on the United States Constitution:

Accordingly, we base our decision on the New Jersey Constitution, which protects fundamental rights independently of the United States Constitution. . . . We previously have construed our state constitution as providing greater protection to our citizens' individual rights than accorded them under the federal constitution. We do so here as well. In this regard, the Appellate Division tersely and aptly summarized the history of our state constitutional right to trial by an impartial jury drawn from a representative cross-section of the community. We refer to federal constitutional law only as establishing the floor of minimum constitutional protection. Furthermore, when we cite federal or other state court opinions in construing the provisions of our Constitution, we rely upon them merely for the purpose of guidance, not as compelling the result we reach on independent state grounds.

[Id. at 522-23 (citations omitted).]

See also, State v. Zuber, 227 N.J. 422, 438 (2017) (addressing an excessive sentencing argument and recognizing that “[a]s in other contexts, the State Constitution can offer greater protection in this area than the Federal Constitution.”); State v. Eckel, 185 N.J. 523, 538 (2006) (Noting that “United States Supreme Court interpretations of the Federal Constitution establish not the ceiling but only “the floor of minimum constitutional protection.”); State v. Pierce, 136 N.J. 184, 209 (1994) (“The federalist system contemplates that state courts may grant greater protection to fundamental rights than is accorded under the federal

constitution. When a state supreme court grants such protection, it does no more than fulfill its obligation to uphold its own constitution."); State v. Novembrino, 105 N.J. 95, 145 (1987) ("This Court has frequently resorted to our own State Constitution in order to afford our citizens broader protection of certain personal rights than that afforded by . . . the federal Constitution.").

As in Gilmore, based on the New Jersey Constitution's guarantee of the right to trial by jury, this Court should reject the Appellate Division's holding that defendant Melvin's sentencing judge could enhance his sentence by relying on charges of which he was acquitted. That reliance ignores the analytical underpinning of the United States Supreme Court's holdings in Apprendi, Blakely and Booker, which prohibit a sentencing judge from relying on any fact necessary to support a sentence exceeding the maximum authorized by the jury verdict or a guilty plea unless that fact was admitted by a jury or proved beyond a reasonable doubt. Booker, supra, 543 U.S. at 244.

It also ignores the United States Supreme Court's recent decision in Nelson v. Colorado, 137 S.Ct. 1249 (2017), holding that upon reversal of a criminal conviction the defendant's "presumption of innocence" is restored. As a result, a Colorado law allowing the State to retain court costs, fees and restitution assessed against defendants upon their convictions unless

defendants proved their innocence by clear and convincing evidence in a separate civil proceeding was held by the Court to violate the Fourteenth Amendment's guarantee of due process. As Justice Ginsburg's opinion explained:

Colorado urges, however, that the funds belong to the State because Nelson's and Madden's convictions were in place when the funds were taken . . . But once those convictions were reversed, the presumption of their innocence was restored. See, e.g., Johnson v. Mississippi, 486 U. S. 578, 585 (1988) (After a 'conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.') 'Axiomatic and elementary,' the presumption of innocence 'lies at the foundation of our criminal law.' Coffin v. United States, 156 U.S. 432, 453 (1895). Colorado may not retain funds taken from Nelson and Madden solely because of their now invalidated convictions, . . . for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions.

[Id. at 1255-56.]

The United States Supreme Court's (7-1) holding in Nelson clearly casts a shadow of doubt over the continuing validity of Watts. If Colorado "may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions", Nelson, supra, 137 S. Ct. at 1256, then surely New Jersey cannot presume a person acquitted of serious criminal charges to be "guilty enough" for his sentence to be enhanced on the basis of those charges.

The Court's rationale supporting U.S. v. Watts, as well as the basis for the numerous Court of Appeal holdings that follow Watts, is that the reliance by sentencing judges on evidence supporting acquitted conduct does not increase a defendant's sentence above the maximum sentence supported by the jury verdict, and that the findings by those judges are based on a preponderance of the evidence. That rationale is premised not on a Sixth Amendment or Due Process analysis, but on the basis that enhancing a sentence based on acquitted conduct does not violate a defendant's guarantee against Double Jeopardy.

That rationale is small comfort to defendants whose actual sentences are increased dramatically based on charges rejected by the jury. As Justice Stevens' majority opinion in U.S. v. Booker, supra, observes:

The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.

[543 U.S. at 236.]

As examples, Justice Stevens cited the defendants' enhanced sentences in Booker (respondent Booker's sentence increased from 262 months to life; respondent Fanfar's sentence increased from 78 to 235 months; Jones v. U.S., 526 U.S. 227, 230-31 (1999) (judge's

finding increased maximum sentence from 15 to 25 years); U.S. v. Hammond, 381 F.3d 316, 361-62 (4th Cir. 2004) (en banc) (Motz, J., dissenting) (actual sentence increased from 57 months to 155 years); in U.S. v. Rodriguez, 73 F.3d 161, 162-63 (7th Cir. 1996) (Posner, C.J., dissenting) (dissenting from denial of rehearing en banc, noting that judge's finding increased sentence from 54 months to life, and adding that

there is a serious question whether it is permissible to sentence a person to life in prison, without possibility of parole, at the end of a brief and casual sentencing hearing in which there is no jury, in which the rules of evidence are not enforced, in which the standard of proof is no higher than in an ordinary civil case, and in which the judge's decision will make the difference between a light punishment and a punishment that is the maximum that our system allows short of death).

[Booker, 543 U.S. at 236]).

The frequent and substantial sentencing enhancements occurring in the federal courts under the imprimatur of Watts threaten to undermine the constitutional role of the jury as the institution that stands between the rights of individuals and the power of the government. The Apprendi decision clearly was an emphatic and significant reaffirmance of the jury's institutional role. The Watts rule, allowing judges to contradict and at the same time diminish the sanctity of jury verdicts, would be inconsistent with the New Jersey judiciary's history of relying on

its own Constitution as the ultimate guarantor of individual rights.

Amicus New Jersey Association of Criminal Defense Lawyers urges this Court to reverse the Appellate Division decision and hold that sentencing enhancements based on evidence of charges of which a defendant was acquitted by a jury violates Article I, paragraphs 9 and 10 of the New Jersey Constitution.

Respectfully Submitted,

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