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Supreme Court of New Jersey

DOCKET NO. 083298

		Criminal Action
STATE OF NEW JERSEY,	:	
		On Certification Granted to the
Plaintiff-Respondent,	:	Superior Court of New Jersey,
		Appellate Division.
v.	:	
MARK MELVIN,	:	Sat Below:
		Hon. Carmen Messano, P.J.A.D.
Defendant-Petitioner.	:	Hon. Douglas M. Fasciale, J.A.D.
		Hon. Lisa Rose, J.A.D.

BRIEF ON BEHALF OF THE ATTORNEY GENERAL
AMICUS CURIAE

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[1] Copies of unpublished opinions are appended to this brief in accordance with Rule 1:36-3.

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"Aa" refers to the appendix to the ACLU's amicus brief.
"Ab" refers to the ACLU's amicus brief.
"AGa" refers to the appendix to this amicus brief.
"AGb" refers to this amicus brief.
"Dsa" refers to the appendix to defendant's supplemental brief.
"PSR" refers to defendant's Adult Presentence Report.
"1T" refers to original sentencing proceedings on October 27, 2014.
"2T" refers to resentencing proceedings on June 7, 2018.
"3T" refers to Excessive Sentencing Oral Argument (ESOA) proceedings on December 3, 2018.

PRELIMINARY STATEMENT

In weighing the sentencing factors to determine an individualized sentence within the applicable statutory range, a judge should consider the full circumstances of the crime for which the defendant was convicted, based on facts that are supported by competent, credible evidence in the record. Just as trial evidence underlying deadlocked charges may constitute competent, credible evidence on which a sentencing judge may rely, so too may trial evidence underlying acquitted charges, subject to the following conditions.

In evaluating the full context of a defendant's convicted crime, a sentencing judge may consider conduct underlying acquitted charges arising from the same case so long as (1) the judge finds the conduct by a preponderance of competent, credible evidence in the record, (2) defendant is not sentenced as though convicted of the acquitted charges, (3) the evidence is relevant and trustworthy, and (4) the sentence does not exceed the statutory maximum or increase the mandatory minimum for the convicted crime.

This practice is consistent with this state's long-standing sentencing jurisprudence that a judge exercises far-ranging discretion as to the evidence he or she may consider in weighing the sentencing factors to determine an appropriate sentence within the statutory range for a defendant's convicted offense. And under the Attorney General's proposed rule, no constitutional issue arises from the consideration of this

evidence at sentencing. Indeed, every federal circuit allows the practice, and so do a majority of states.

A rule preventing the judge from considering this conduct when taking into account the full context of a defendant's crimes would lead to an absurdity in this state's sentencing system. If defendant had pleaded guilty here and the other charges had been dismissed under a plea bargain, evidence underlying the dismissed charges could have been used in weighing the sentencing factors for defendant's convicted crime.

Likewise, if the jury had deadlocked at retrial and, before sentencing, the State had either dismissed the deadlocked charges or indicated it would not be retrying defendant for those counts, the trial evidence underlying the deadlocked charges could have been considered in weighing the sentencing factors.

The same should be true for trial evidence underlying an acquitted charge, which only reveals that the State did not meet its very high burden as to one element of the charge. It does not mean that a judge cannot use reliable and trustworthy trial evidence, based on competent, credible evidence in the record, in weighing the sentencing factors for defendant's convicted crime, as the judge did here.

The judge did not sentence defendant as if convicted of murder – a term that carries a minimum term of thirty years in prison. Nor did the judge find that defendant was a "murderer." Instead, the judge considered credible trial evidence in the

record to account for the full context of defendant's convicted crime when weighing the sentencing factors to impose an individualized sentence within the statutory range for that crime. Not only did the judge properly consider this evidence, but the aggravating factors were separately supported in the record.

For these reasons, the Appellate Division properly affirmed defendant's sentence. This Court should do so as well.

QUESTION PRESENTED

Can a judge, in imposing an individualized sentence within the applicable sentencing range for a defendant's convicted crimes, consider the full context of those crimes by relying on evidence of conduct underlying acquitted charges that is otherwise reliable and trustworthy and based on competent, credible evidence in the record?

STATEMENT OF PROCEDURAL HISTORY

On May 31, 2013, an Essex County Grand Jury returned Indictment No. 13-05-1257-I, charging defendant with the following crimes: Count One, first-degree murder of Fuquan Mosely with a handgun, in violation of N.J.S.A. 2C:11-3(a)(1) and (a)(2); Count Two, second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5(b); Count Three, second-degree possession of a handgun for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a); Count Four, first-degree attempted murder of Jason Chavis, in violation of N.J.S.A. 2C:5-1 and 2C:11-3; Count Five, first-degree murder of Jason Chavis with a handgun, in violation of N.J.S.A. 2C:11-3(a)(1) and (a)(2); Count Six, second-degree aggravated assault of Bertha Lynn, in violation of N.J.S.A. 2C:12-1(b)(1); Count Seven, third-degree possession of heroin, in violation of N.J.S.A. 2C:35-10(a)(1); Count Eight, third-degree possession with intent to distribute heroin, in violation of N.J.S.A. 2C:35-5(a)(1) and (b)(3); and Count Nine, third-degree possession with intent to distribute heroin within 1,000 feet of school property, in violation of N.J.S.A. 2C:35-7. (Dsa1 to 11). Before trial, the court dismissed Count Four (the attempted murder of Jason Chavis) on the State's motion. (Dsa12; Dsa18; 2T5-1 to 2).

Defendant's trial began before the Honorable Martin G. Cronin, J.S.C., on June 3, 2014, and ended on June 24, 2014. (Dsa12). The jury found defendant guilty of Count Two, second-degree unlawful possession of a handgun; but the jury was unable

to reach a unanimous verdict on Counts One, Three, Five, Six, Seven, Eight, and Nine. (Dsa12; 2T4-11 to 23).

On October 27, 2014, Judge Cronin sentenced defendant on Count Two as follows. After finding that defendant was eligible for an extended term as a persistent offender under N.J.S.A. 2C:44-3(a), the judge sentenced him to an extended term of twenty years in prison with ten years of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c), and under N.J.S.A. 2C:43-6(b). (Dsa12 to 13; 1T61-4 to 65-3; 1T92-19 to 96-6). In balancing the sentencing factors to impose a term within the statutory range of defendant's convicted crime, the judge considered evidence of the deadlocked charges although defendant would be retried on those counts. (1T65-4 to 71-22; 1T94-4 to 11; 1T96-15 to 98-2).

On March 9, 2015, defendant filed a Notice of Appeal before the Appellate Division, challenging Judge Cronin's reliance on the evidence underlying the deadlocked charges in sentencing defendant and raising two trial issues that are not pertinent to the matter before this Court. (Dsa14 to 15; Dsa27 to 28; Dsa33). A retrial on the deadlocked charges was scheduled to begin on July 12, 2016, while defendant's appeal was pending in the Appellate Division under Docket No. A-3003-14. (Dsa47).

On July 13, 2016, the State filed an emergent motion to dismiss the appeal as interlocutory, or alternatively for a limited remand so the Law Division could proceed with the retrial. (Dsa46 to 47). On the same date, the Appellate

Division denied the motion to dismiss but granted the State's motion for a temporary remand so the Law Division could proceed with the retrial on the deadlocked charges and sentencing, if required. (Dsa47). The Appellate Division also stayed the appellate proceedings until the trial judge entered a Judgment of Conviction (JOC) at the conclusion of the remand proceedings; it otherwise retained jurisdiction of the pending appeal. (Dsa47).

The retrial began before Judge Cronin on the same date, ending on August 8, 2016. (Dsa21). The jury found that the State did not prove beyond a reasonable doubt Counts One and Five (the charges for purposeful and knowing murder), Count Six (the charge for aggravated assault), and Count Three (the charge for possession of a handgun for an unlawful purpose), acquitting defendant of those charges. (Dsa19; 2T4-24 to 5-5). The jury also did not reach a unanimous verdict on Counts Seven, Eight, and Nine, the drug-related charges. (Dsa19). On September 16, 2016, the judge dismissed Counts Seven, Eight, and Nine on the State's motion. (Dsa19; 2T5-5 to 6).

On September 20, 2016, Judge Cronin entered an amended JOC to record this second jury's verdict without disturbing defendant's original extended-term sentence on Count Two, thereby ending the stay of the appellate proceedings. (Dsa21 to 22). The judge also sent a letter to the Appellate Division, dated September 20, 2016, summarizing the retrial's outcome and amplifying his ruling on a trial issue not pertinent to the

sentencing matter before this Court. (Dsa18 to 20).

On March 1, 2017, the Appellate Division affirmed defendant's conviction for second-degree unlawful possession of a weapon but remanded for resentencing. State v. Melvin, No. A-3003-14 (App. Div. Mar. 1, 2017) (slip op. at 2, 11) [hereinafter "Melvin I"] (Dsa24; Dsa33). In deciding whether "the court abused its discretion by considering the charges on which the jury was hung" in sentencing defendant, the panel acknowledged that "[u]nder certain circumstances, [United States v. Watts, 519 U.S. 148, 149 (1997) (per curiam),] permits a sentencing judge to consider acquitted charges in sentencing." Melvin I, slip op. at 12-13 (Dsa34 to 35). The panel, however, distinguished defendant's sentencing proceedings because "defendant was scheduled for retrial on the murders and other charges on which the jury hung." Id. at 13 (Dsa35).

The panel found that the judge's consideration of the evidence underlying the deadlocked charges raised double-jeopardy issues because, at the time of sentencing, there was a possibility that defendant could be punished again if later convicted of the deadlocked charges at retrial. Id. at 14 (Dsa36). The panel also found that, by doing this when a retrial would occur, the judge had substituted his judgment for that of the jury, which it reasoned was prohibited by State v. Tindell, 417 N.J. Super. 530, 570-71 (App. Div. 2011).[2] Melvin

[2] The Attorney General submits that the panel misapplied Tindell. The original sentencing proceedings show that the

I, slip op at 14 (Dsa36).

Because the judge should not have considered the evidence underlying the deadlocked charges when defendant was facing a retrial for those deadlocked charges, the panel held that the judge "abused his discretion by finding defendant was the shooter by a preponderance of the evidence and considering that conduct in his sentencing decision" on October 27, 2014. Id. at 15 (Dsa37). The panel also held that the judge improperly found aggravating factor two because "there [was] no victim named in the unlawful possession of a weapon offense." Id. at 14 (Dsa36). This Court denied defendant's and the State's Cross-Petitions for Certification. State v. Melvin, 230 N.J. 600 (2017).

On June 7, 2018, Judge Cronin resentenced defendant according to the panel's opinion. Before imposing sentence, the judge heard arguments from the parties concerning whether he could consider evidence underlying the acquitted charges, noting that all pending charges had been resolved either by the first trial, on retrial, or by the State's motion. (2T4-11 to 5-14;

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judge was not treating the facts underlying the deadlocked charges as "convictions of anything, because they were not convictions." (1T70-20 to 22). Rather, the judge considered the conduct underlying the pending deadlocked charges to place the entire case in context. (1T70-22 to 24). Although this was a mistake because defendant was still facing prosecution for those charges, there is no indication in the record that the judge "considered the jury's verdict to be unjust, or otherwise demonstrated a lack of respect for its determination." See State v. Tillery, 238 N.J. 293, 326 n.7 (2019). Tindell was therefore inapposite. See ibid.

2T6-11 to 7-5). In carefully considering the panel's opinion in Melvin I, the judge found that the panel's main concern was double jeopardy because, at the time of the initial sentencing, defendant was still facing prosecution on the deadlocked charges and it was theoretically possible for him to face double punishment if later convicted on retrial. (2T50-6 to 54-7).

But the judge found that this double-jeopardy concern no longer existed at the time of the resentencing. (2T66-3 to 6). Finding Watts persuasive, the judge ruled that he could consider evidence underlying acquitted charges to contextualize defendant's conduct in imposing an individualized sentence for defendant's convicted crime and considering the fullest information possible concerning defendant's life, circumstances, and characteristics. (2T61-24 to 64-18). The judge noted that any facts on which he relied would be established by the record. (2T62-24 to 63-1).

In addition, the judge followed the panel's direction to not consider aggravating factor two at resentencing. (2T53-16 to 21). Because aggravating factor two no longer applied, and in considering defendant's post-sentencing "rehabilitative efforts" in weighing aggravating factor nine, the judge imposed a lesser sentence than originally imposed – sixteen years in prison with eight years of parole ineligibility under the Graves Act and N.J.S.A. 2C:43-6(b), subject to the requisite fines and penalties. (2T73-3 to 74-5).

On June 13, 2018, defendant filed a Notice of Appeal with

the Appellate Division, solely challenging his sentence. (Dsa42 to 44); see also State v. Melvin, No. A-4632-17 (App. Div. July 8, 2019) (slip op. at 4-5) [hereinafter "Melvin II"]. The appeal was placed on the Excessive Sentencing Oral Argument (ESOA) calendar. See Melvin II, slip op. at 4; (Dsa48).

Shortly thereafter, defendant moved for direct certification for this Court to review his case with State v. Tillery, 238 N.J. 293 (2019). On July 5, 2018, the State filed a letter in opposition, noting the pages in its supplemental brief in Tillery that "explained why a sentencing judge's reliance on conduct underlying hung-jury or acquitted charges in considering the circumstances of defendant's convicted crime does not violate double jeopardy, Apprendi v. New Jersey, 530 U.S. 466 (2000), or [Tindell]." This Court denied the motion for direct certification on September 12, 2018. (Dsa45).

On December 3, 2018, Melvin II was argued on the ESOA calendar before the Appellate Division. (Dsa48; 3T). On December 7, 2018, the appeal was relisted on the plenary calendar for full briefing and oral argument on March 4, 2019. (Dsa48).

On June 26, 2019, the State filed a Rule 2:6-11(d) letter relying on this Court's holdings in Tillery. On July 8, 2019, the Appellate Division affirmed defendant's sentence, "reject[ing] any comparison between [his] resentencing

proceeding and the sentencing proceeding in Tindell."[3] Melvin II, slip op. at 6. Relying on this Court's reasoning in Tillery, the Appellate Division rejected defendant's contention that Melvin I "compelled the [sentencing] judge to ignore trial evidence that was probative of defendant's conduct, even though the State proffered that evidence to prove offenses for which the jury acquitted defendant." Melvin II, slip op. at 7-8.

The Appellate Division clarified that its first opinion was "firmly rooted in double jeopardy concerns, which no longer existed at resentencing because the jury acquitted defendant of some charges and the State dismissed all other counts of the indictment." Ibid. (emphasis added). The Appellate Division remanded only so the JOC could be amended to reflect that defendant earned prior-service credit from the date of his original sentencing to the date of his resentencing, a point the State had conceded in its brief and the judge had found at resentencing. Melvin II, slip op. at 9-10; (2T5-25 to 6-10; 2T74-6 to 7). "Considering the entire sentencing proceeding, which reflect[ed] the judge's thoughtful and comprehensive reasoning, [the Appellate Division] found no basis to disturb the sentence imposed." Melvin II, slip op. at 9-10.

On July 24, 2019, defendant filed a Petition for Certification. On January 31, 2020, this Court granted the

[3] The Honorable Douglas M. Fasciale, J.A.D., sat on the panels for both Melvin I and Melvin II. Melvin I, slip op. at 1 (Dsa23); Melvin II, slip op. at 1.

petition limited to the issue of whether the sentencing judge could consider evidence underlying the acquitted charges in imposing sentence for defendant's convicted crime. (Dsa49).

STATEMENT OF FACTS[4]

On September 27, 2012, a man wearing a gray hooded sweatshirt and black facemask walked into a restaurant in Newark and shot Fuquan Mosely and Jason Chivas. (PSR3; Dsa24). When police responded to the shooting, they found Mosely unconscious on the floor, bleeding from his head. (PSR3). Chivas was lying face down on the floor, choking on his own blood and bodily fluids as a result of the gunshot wound. (PSR3). Three bricks of heroin were on the floor near him. (PSR3; Dsa24).

Bertha Lynn, the restaurant's cook and owner, had been struck by a stray bullet in the shoulder. (PSR3; Dsa24). Mosely, Chivas, and Lynn were all taken to a local hospital for their injuries; Mosely and Chivas later died from their gunshot wounds. (PSR3; Dsa24).

Witnesses reported to police that after the male wearing a gray hooded sweatshirt shot the victims, he fled in a green Magnum. (PSR3). A detective, working in the area as a patrol officer in a marked car, saw a Dodge Magnum stopped at a corner; the detective and her partner approached the vehicle. (Dsa24).

The car had two occupants – defendant, the driver, who was wearing a gray hooded sweatshirt, and a passenger, Jihad Marshall. (PSR3; Dsa24; Dsa33). When the detective reached the vehicle, defendant said, "What's going on? I didn't do

[4] The trial facts are derived from defendant's presentence report and the Appellate Division's factual summary from Melvin I because the trial transcripts were omitted from this appeal's record.

anything." (Dsa24). He then exited the car and ran. (Dsa24). After a chase, the detective caught defendant, who was no longer wearing his gray hooded sweatshirt, and arrested him. (Dsa24).

Police searched the area where defendant had been running, and recovered a gray hooded sweatshirt from a backyard through which defendant had run. At trial, the State's DNA expert testified that Moseley's DNA was on this sweatshirt. (Dsa25).

The officers also searched the Dodge Magnum, which defendant owned. (PSR3; Dsa24 to 25; Dsa33). In the front-passenger area, in a secret compartment within the door where the controls for the windows and door locks were located, they found 100 decks of heroin and a .45 caliber, Para semi-automatic handgun. (PSR3; Dsa25; Dsa33). In the rear-passenger area, they found a black facemask with defendant's DNA on it. (PSR3; Dsa25). Ballistics testing showed that the handgun seized from defendant's car was the same weapon used in the shooting at the restaurant. (Dsa25).

The passenger from defendant's car testified at trial consistent with his police statement.[5] (Dsa26; Dsa30). On the morning of the shooting, the passenger was playing basketball in

[5] At trial, the passenger initially tried to avoid testifying by invoking the Fifth Amendment. (Dsa26). The passenger had been charged with hindering but the State dismissed this charge before defendant's trial. (Dsa26). "The judge informed the passenger that because the hindering charge was dismissed and the prosecution indicated he would not be charged with anything else related to [the] shooting, '[he could not] logically incriminate [him]self' and, therefore '[had] no valid privilege to assert.'" (Dsa26).

a park. (Dsa26). He flagged down defendant to get in his car. Defendant was wearing a gray hooded sweatshirt. (Dsa26).

With the passenger in tow, defendant drove to the area of the shooting and got out. (Da26 to 27). While the passenger was waiting for him, he heard gunshots. (Dsa27). Defendant returned to the car with his gray sweatshirt's hood up and a gun on his hip. (Dsa27; Dsa33). He told the passenger that "he wasn't going to let [him] go to jail," and drove away in his car – a Dodge Magnum. (PSR3; Dsa27). The car later stopped at a street corner because it ran out of gas. (Dsa24).

Based on the foregoing evidence, the jury found defendant guilty of Count Two, second-degree unlawful possession of a handgun. In Melvin I, the Appellate Division held that "[t]he jury had more than enough evidence to find defendant unlawfully possessed the handgun that day beyond a reasonable doubt." (Dsa33). The jury, however, did not reach a unanimous verdict on the remaining charges.

At the retrial, the jury found that the State did not prove beyond a reasonable doubt Counts One and Five (the charges for purposeful and knowing murder), Count Six (the charge for aggravated assault), and Count Three (the charge for possession of a handgun for an unlawful purpose). The jury again did not reach a unanimous verdict on Counts Seven, Eight, and Nine, the drug-related charges. (Dsa19; 2T4-24 to 5-5).

A. The judge's fact-findings at resentencing.

At the resentencing, in weighing the sentencing factors to impose an individualized, proportionate sentence for defendant's convicted crime, the judge made fact-findings based on the Appellate Division's statement of facts in Melvin I and the trial evidence he found was reliable. (2T64-22 to 66-12). This evidence showed that the shooting at the restaurant was at close range. (2T64-25 to 65-1). And the shooter was wearing a gray hooded sweatshirt and mask. (2T65-1 to 2).

When defendant ran from his car, he was wearing a gray hooded sweatshirt. (2T65-4 to 5). While fleeing from police, he discarded this sweatshirt, which had blood splatter on it from one of the deceased victims, Mosley. (2T65-9 to 12). The blood splatter also was consistent with a close-range shooting. (2T65-12 to 14).

In addition to this evidence, defendant left behind a mask in his car that had his DNA on it and was consistent with the shooter's mask. (2T65-5 to 7). And the gun used in the shooting was found in the trap compartment of defendant's car. (2T65-7 to 8). The judge found that this reliable evidence in the record showed that defendant was the shooter of Mosley and Chavis, who "expired within the [restaurant]," and Lynn, who ran the restaurant. (2T65-14 to 19).

The judge found it was appropriate to make these findings for three main reasons. First, unlike the original sentencing proceedings where the judge considered evidence underlying

pending deadlocked charges for which defendant still faced prosecution, the potential double-jeopardy issue found in Melvin I was no longer a concern at resentencing. (2T54-12 to 57-17; 2T66-3 to 6).

Second, consideration of evidence underlying acquitted conduct did not violate Apprendi, because any sentence he imposed for defendant's convicted crime would be within the statutory range. (2T60-2 to 61-10). Because defendant conceded that he was statutorily eligible for an extended term as a persistent offender, the judge recognized that the issue before him was where defendant should be sentenced within the expanded statutory range of five to twenty years. (2T33-22 to 34-1; 2T44-3 to 21; 2T46-2 to 12; 2T70-8 to 72-4). In making this determination, the judge stated that he was not relying on evidence underlying the acquitted charges "to impose a sentence for some other charge [beyond his conviction for unlawful possession of a weapon] because no other charge [was] before [the] Court." (2T50-9 to 13; 2T65-24 to 66-2).

Third, the judge ruled that considering this evidence was "consistent with the broad discretion [that] is accorded to a . . . sentencing judge when imposing an appropriate sentence in evaluating the whole man and the entire circumstances of the case." (2T66-6 to 12). He also ruled that there was nothing fundamentally unfair about relying on reliable evidence in the record – evidence that had been tested through the crucible of cross-examination not only at the first trial but also at

retrial – in imposing sentence for defendant's convicted crime. (2T61-11 to 23).

Based on his factual findings and the following additional reasons, the judge found that aggravating factors three, six, and nine applied. (2T65-20 to 67-21). Aggravating factor three was based in part on defendant's non-acceptance of responsibility. (2T67-21 to 24). The judge noted that defendant had an "absolute right to plea[d] not guilty [and] put the State to the proof," and he respected defendant's right to proceed to trial. (2T68-15 to 21). But after the jury returned a verdict, the judge found that defendant had accepted no responsibility for illegally possessing a weapon, or any conduct that preceded his arrest, and maintained that Marshall, the passenger, was the shooter. (2T68-10 to 25). Although defendant had the opportunity at resentencing to express remorse without the potential penalty of future prosecution, he instead focused exclusively on his post-sentencing rehabilitative efforts. (2T40-8 to 44-2; 2T67-24 to 68-9). In addition to this, the judge found a separate basis for aggravating factor three – that defendant committed his convicted crime while on supervised release from his federal convictions. (2T69-2 to 6).

Aggravating factor six was based on the seriousness of defendant's convicted crime and his criminal record. (2T69-6 to 19). The judge found that unlawful possession of a weapon is a serious offense because "the inherent design of a weapon" is to be deadly. (2T69-14 to 16; 2T72-23 to 73-2). Not only did

defendant possess a weapon, but he used it to shoot at three other human beings. (2T69-16 to 19; 2T72-17 to 23). This thus affected the seriousness of defendant's convicted crime overall, which "does not expressly take into account . . . the use of the weapon." (2T72-17 to 73-2). In addition to this, aggravating factor six was supported by the seriousness of his prior record – his four separate felony convictions for drug-related offenses and armed robbery. (2T69-10 to 12; PSR4 to 6).

Finally, the judge applied aggravating factor nine, finding a need to deter defendant because his prior contact with the criminal-justice system had not deterred him. (2T69-20 to 23). In considering the need for general deterrence, the judge also noted that defendant not only possessed the weapon but used it to shoot other individuals. (2T72-17 to 23). In weighing this factor, the judge also took into account defendant's post-sentencing rehabilitative efforts – his lack of a disciplinary record while in custody and his participation in two Employment-Readiness and Re-Entry Preparation programs for a few months. (2T33-11 to 13; 2T38-6 to 14; 2T69-25 to 70-10).

In balancing the sentencing factors, the judge was clearly convinced that the aggravating factors substantially outweighed the non-existent mitigating factors. (2T73-23 to 25; Dsa40). In considering defendant's "whole person" and the full context of his conduct on the date of his crime, the judge found it appropriate to impose an extended-term sentence for public safety. (2T73-3 to 7). And because the aggravating factors

preponderated, the judge sentenced defendant toward the upper end of the statutory range. (2T73-3 to 25).

Because aggravating factor two no longer applied, and in view of defendant's post-sentencing rehabilitative efforts, the judge resentenced defendant to a lesser term of sixteen years in prison with eight years of parole ineligibility under the Graves Act and N.J.S.A. 2C:43-6(b). (2T73-7 to 74-3).

LEGAL ARGUMENT

POINT I

DEFENDANT'S EXTENDED-TERM SENTENCE WAS PROPERLY IMPOSED AND NOT MANIFESTLY EXCESSIVE.

In evaluating the full context of a defendant's convicted crime, a sentencing judge may consider conduct underlying acquitted charges, just as a judge may consider conduct underlying deadlocked or dismissed charges, arising from the same case, so long as (1) the judge finds the conduct by a preponderance of competent, credible evidence in the record, (2) defendant is not sentenced as though convicted of the acquitted charges, (3) the evidence is relevant and trustworthy, and (4) the sentence does not exceed the statutory maximum or increase the mandatory minimum for the convicted crime. Such was the case here.

A. Consideration of conduct underlying acquitted charges, based on competent, credible evidence in the record, is consistent with this State's sentencing jurisprudence.

The judge's consideration of conduct underlying the acquitted charges in imposing an individualized, proportionate sentence was proper under this Court's precedent. At sentencing, "the judge exercises 'a far-ranging discretion as to the sources and types of evidence used to assist him or her in determining the kind and extent of punishment to be imposed.'" State v. Tillery, 238 N.J. 293, 325 (2019) (quoting State v. Davis, 96 N.J. 611, 619-20 (1984) (citing Williams v. New York, 337 U.S. 241 (1949))). "'Where, within [the] range of

sentences, the court chooses to sentence a defendant remains in the [court's] sound judgment . . . – subject to reasonableness and the existence of credible evidence in the record to support the court's finding of aggravating and mitigating factors and [its] weighing and balancing of those factors found.'" Id. at 324, 326 (quoting State v. Pierce, 188 N.J. 155, 169 (2006)).

Sentencing "courts [may] consider all relevant information, including hearsay, unrestrained by the rules of evidence." State v. Natale, 184 N.J. 458, 486 (2005) (other citations omitted); see also Tillery, 238 N.J. at 325 (citing N.J.R.E. 101(a)(2)(C)). This includes defendant's PSR, arrest record, polygraph reports, and juvenile adjudications, police investigation reports, and even suppressed evidence. State v. Jarbath, 114 N.J. 394, 412 n.4 (1989) (citing Sentencing Manual for Judges at 69-73 (September 1988)). Although "relaxed standards for admissibility are not to be equated with automatic admissibility," "sentencing judges may consider material that otherwise would not be admissible at trial, as long as it is relevant and trustworthy" and based on competent, credible evidence in the record. State v. Smith, 262 N.J. Super. 487, 530-31 (App. Div.) (citing Jarbath, 114 N.J. at 412 n.4; Davis, 96 N.J. at 620-22; State v. Carey, 232 N.J. Super. 553, 555 (App. Div. 1989)), certif. denied, 134 N.J. 476 (1993); see also Tillery, 238 N.J. at 325 (quoting State v. Case, 220 N.J. 49, 64 (2014)).

Indeed, this Court has already held that a sentencing judge

may properly consider conduct underlying deadlocked and dismissed charges. In State v. Marzolf, this Court held that a sentencing judge may consider conduct underlying dismissed charges so long as defendant is not sentenced as if guilty and convicted of the dismissed charges. 79 N.J. 167, 184-85 (1967). This is because "neither the defendant nor his offense should be fictionalized for the purposes of sentenc[ing]." Id. at 180.

The sentencing judge should consider the "'whole person' of defendant, not censored versions of his personal history or selected facets of his character, . . . assess[ing] the totality of circumstances, 'including details of the offense . . . .'" Id. at 180, 184; see also State v. Kiriakakis, 235 N.J. 420, 437, 445 (2018). The judge is "not required to wear blinders to avoid consideration of the character of [a] defendant's possession merely because those circumstances encompassed to some degree some of the elements necessary to sustain a conviction under the dismissed charge." Marzolf, 79 N.J. at 185.

For these same reasons, this Court recently reaffirmed that a sentencing judge may consider the circumstances of a defendant's crimes beyond the factual basis for his guilty plea. See State v. Fuentes, 217 N.J. 57, 71 (2014) (citing State v. Sainz, 107 N.J. 283, 293 (1987)). This Court favorably quoted Marzolf, holding that "'[a]t sentencing, there should be presented the fullest information possible concerning the defendant's life and characteristics.'" Id. at 71-72 (quoting

Marzolf, 79 N.J. at 176 (other citation omitted)). "Thus, the sentencing court gathers information necessary to assess the defendant's history and characteristics, and to understand the nature and circumstances of his or her crime." Ibid.

Consistent with this prior precedent, this Court, in Tillery, held that where a jury is unable to return a verdict as to some offenses and convicts defendant of others, "evidence presented as to offenses on which the jury deadlocked . . . may constitute competent, credible evidence on which the [sentencing judge] may rely in assessing the aggravating and mitigating factors" of defendant's convicted crime so long as "defendant no longer faces the prospect of prosecution for [the deadlocked] charges." 238 N.J. at 326-27 (citing Case, 220 N.J. at 63-65). Under these circumstances, this Court held that "[n]o Sixth Amendment or other constitutional principle, or statutory provision, generally bars a court from considering such evidence." Ibid. "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 . . . ." Ibid. (emphasis added).

The underlying logic of Tillery is that evidence presented at trial may be competent, credible evidence on which the sentencing judge may rely in weighing the aggravating and mitigating factors for defendant's convicted crime. This makes sense because "[w]hen a judge presides over a jury trial

regarding multiple offenses, he or she has the opportunity to evaluate the credibility of [trial] witnesses and to assess the evidence presented as to each of those offenses." Ibid. The judge, at sentencing, may therefore consider this evidence in taking account of the full context of defendant's convicted crime.

The rationales underlying Marzolf and Fuentes – that a judge should consider defendant's "whole person" and the nature and circumstances of his crime for which he is being sentenced – and Tillery – that evidence presented at trial may be competent, credible evidence on which the judge may rely in weighing the sentencing factors – logically support a sentencing judge's consideration of conduct underlying acquitted charges. Just as a judge may consider trial evidence underlying deadlocked charges, so too may the judge consider trial evidence underlying acquitted charges, so long as the evidence is competent and credible, in weighing sentencing factors to account for the full context of defendant's convicted crime. In either outcome, the judge has an equal opportunity to evaluate the credibility of trial witnesses and to assess the evidence presented as to each of those offenses in weighing the sentencing factors.

This is consistent with sound federal precedent. In Watts, the United States Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S.

at 157. The Court partially based its holding on three reasons: (1) sentencing courts have broad discretion to consider various kinds of information; (2) sentencing enhancements do not punish a defendant for crimes of which he is not convicted but rather increase his sentence because of the manner in which he committed the convicted crime; and (3) different standards of proof govern trials and sentencings. Id. at 151-56.

Importantly, like deadlocked charges, "[a]n acquittal is not a finding of any fact" by the jury; "[w]ithout specific jury findings, no one can logically or realistically draw any factual finding inferences" from a general verdict of acquittal. See id. at 155. Nor does an "acquittal on criminal charges . . . prove that the defendant is innocent . . . ." Ibid.; see also State v. J.M., 225 N.J. 146, 161-62 (2016) (rejecting bright-line rule barring admission of acquitted-act evidence at trial under N.J.R.E. 404(b) in part because "issues of ultimate fact" are not decided in trial that results in acquittal). An acquittal "merely proves the existence of a reasonable doubt as to [defendant's] guilt." Watts, 519 U.S. at 155.

Thus, "an assertion that a jury 'rejects' some facts when it returns a general verdict of not guilty misunderstands the preclusive effect of an acquittal." United States v. Coughlin, 821 F. Supp. 2d 8, 23-24 (D.D.C. 2011); see also Watts, 519 U.S. at 155. The evidence needed to convict a defendant is like building a brick wall – "[e]ach argument and piece of evidence the [State] put[s] before the jury [is] a possible brick for the

wall" that is "supposed to stack up beyond a reasonable doubt." Coughlin, 821 F. Supp. 2d at 22-23.

"The problem is that juries build these walls in the black box of the jury room, and their deliberations are intentionally secret and largely inaccessible to outsiders." Ibid. "For that reason, [we cannot] know which bricks the jury chose to use for its wall and which it discarded as unworthy building material." Ibid. And "'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.'" Ibid. (quoting Schad v. Arizona, 501 U.S. 624, 631-32 (1991)).

Indeed, the jury has the prerogative of acquitting or not finding guilt even in the face of overwhelming evidence. See State v. Franklin, 184 N.J. 516, 536 (2005). "[N]o amount of rational exegesis may explain the actions of a jury." State v. Kelly, 201 N.J. 471, 487-88 (2010) (explaining that it is impossible to know whether jury's inconsistent verdict reflects leniency, compromise, or misapplication of law).

For these reasons, a general verdict of acquittal reveals nothing more than that the State was unable to persuade a particular jury that it met its very high burden of proving just one essential element of an offense beyond a reasonable doubt. It is not necessarily a rejection by the jury of every piece of evidence that could conceivably support the acquitted charge. Nor is it necessarily a rejection of any particular piece of evidence since juries have the prerogative of not finding guilt, or returning inconsistent verdicts, in the face of overwhelming

evidence. And it is certainly not a finding of "innocence" regarding the underlying conduct. The sentencing judge's consideration of trial evidence, which may have also underlay the acquitted charges, is thus not a rejection of the jury's verdict but an assessment of the full context of defendant's convicted crime in weighing the sentencing factors to impose an individualized, proportionate sentence.

Contrary to the assertion of the American Civil Liberties Union (ACLU), this issue has arisen in more than five appellate cases. (Ab5 to 6). The Attorney General has found at least twelve additional cases where the issue presented was raised in various counties.[6] Of these cases, the Appellate Division fully affirmed the defendants' sentences in all but three, which were

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[6] See, e.g., State v. Widener, Docket No. A-4140-17 (App. Div. Jan. 15, 2020) (slip op. at 8, 20-21) (AGa23; Aga35 to 36); State v. Daniels, Docket No. A-5223-14 (App. Div. Mar. 4, 2019) (slip op. at 3, 11-13) (Aga42; AGa50 to 52); State v. Pittman, Docket No. A-4600-16 (App. Div. Sep. 21, 2018) (slip op. at 5, 9) (AGa57; AGa61); State v. Mallard, Docket No. A-4703-13 (App. Div. May 15, 2017) (slip op. at 3, 11-14) (AGa66; AGa74 to 77); State v. Roy, Docket No. A-3246-13 (App. Div. May 23, 2016) (slip op. at 3-4, 15, 18) (AGa80 to 81; AGa92; AGa95); State v. Bonilla, Docket No. A-1079-11 (App. Div. Aug. 6, 2013) (slip op. at 3, 22-23) (AGa98; AGa117 to 118); State v. Silvi, Docket No. A-3905-10 (App. Div. May 17, 2013) (slip op. at 24-25) (AGa142 to 143); State v. Hayes, Docket No. A-4984-10 (App. Div. Apr. 15, 2013) (slip op. at 5, 8-9) (AGa151; AGa154 to 155; State v. Thomas, Docket No. A-5415-07 (App. Div. Aug. 2, 2010) (slip op. at 2, 20-21) (AGa157; AGa175 to 176); State v. Van Hise, Docket No. A-2115-07 (App. Div. July 9, 2010); State v. Lucas, Docket No. A-0564-06 (App. Div. Dec. 28, 2007) (slip op. at 7) (AGa183); State v. St. Preux, Docket No. A-3835-04 (App. Div. Oct. 11, 2006) (slip op. at 2-3) (AGa186 to 187). Contrary precedent – State v. Allen, No. A-5289-13 (App. Div. Mar. 30, 2016) – is appended to the ACLU's amicus brief. (Aa1 to 2).

remanded for other reasons. See Daniels, slip op. at 11-13 (AGa50 to 52); Roy, slip op. at 15-18 (AGa92 to 95); Thomas, slip op. at 20 (AGa175).

Judge Cronin in Essex County is not the only judge who has correctly ruled that a sentencing judge may consider trial evidence underlying acquitted charges in accounting for the full context of defendant's convicted crime. For example, in Van Hise, the Appellate Division upheld the judge's consideration of conduct underlying an acquitted charge in weighing the sentencing factors for convicted crimes. Slip op. at 4-5, 11-13 (AGa4 to 5; AGa11 to 13). In doing so, the court highlighted the judge's reasoning that considering this trial evidence, which he had seen with his own eyes and heard with his own ears, helped "create an entire context for the case." Van Hise, slip op. at 12 (AGa12). Indeed, "[h]ad [the acquitted] charge never been brought, the information directly observed by the sentencing judge would have been relevant and admissible on the issue of an appropriate sentence on the [convicted] charges . . . ." Van Hise, slip op. at 12-13 (AGa12 to 13).

Likewise, the Appellate Division has favorably cited Watts in at least one published opinion. See State v. Kelly, 406 N.J. Super. 332, 347 (App. Div. 2009) (quoting Watts, 519 U.S. at 155) ("[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.").

Every federal circuit favorably applies Watts. See, e.g., United States v. Cox, 851 F.3d 113, 121 (1st Cir. 2017); United States v. Delva, 858 F.3d 135, 160 (2d Cir. 2017); United States v. Holton, 873 F.3d 589, 591-92 (7th Cir. 2017); United States v. Williams, 827 F.3d 1134, 1165 (D.C. Cir. 2016); United States v. Cavallo, 790 F.3d 1202, 1233 (11th Cir. 2015); United States v. Wilson, 624 F.3d 640, 649 n.9 (4th Cir. 2010); United States v. Jackson, 596 F.3d 236, 243-44 (5th Cir. 2010); United States v. Tyndall, 521 F.3d 877, 883 (8th Cir. 2008); United States v. Todd, 515 F.3d 1128, 1137-38 (10th Cir. 2008); United States v. Brika, 487 F.3d 450, 459-60 (6th Cir. 2007) (holding that judge's consideration of "conduct on which a jury could not agree" did not violate Sixth Amendment in light of Watts); United States v. Santiago, 495 F.3d 820, 824 (7th Cir. 2007); United States v. Mercado, 474 F.3d 654, 657-58 (9th Cir. 2007); United States v. Farias, 469 F.3d 393, 399 (5th Cir. 2006); United States v. Duncan, 400 F.3d 1297, 1304-05 (11th Cir.), cert. denied, 546 U.S. 940 (2005); United States v. Baird, 109 F.3d 856, 864-65, 870 (3d Cir. 1997) (holding that sentencing judge may consider conduct underlying dismissed charges due to plea bargain in light of Watts).

Although Watts did not consider the Apprendi line of cases because it was decided before they were rendered, every federal circuit has reconciled Watts with Apprendi. See, e.g., United States v. Ylli Gjeli, 867 F.3d 418, 422-24 (3d Cir. 2017); United States v. Jones, 744 F.3d 1362, 1369 (D.C. Cir.) (noting

that every federal circuit has held it is constitutional to consider acquitted conduct at sentencing even after Booker), cert. denied, 574 U.S. 948 (2014); United States v. White, 551 F.3d 381, 384-86 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); Mercado, 474 F.3d at 656-58 (recognizing that Sixth Amendment issue was not presented in Watts, and joining "parade of authority" finding no Sixth Amendment violation when sentencing judges consider conduct underlying acquitted counts) (citing United States v. Ashworth, No. 05-4282, 2005 U.S. App. LEXIS 14622, at *5-6 (4th Cir. July 19, 2005), cert. denied, 546 U.S. 1045 (2005)); United States v. Gobbi, 471 F.3d 302, 313-14 (1st Cir. 2006) (Watts survives Booker); Farias, 469 F.3d at 399-400 (same); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006) (even after Booker acquitted conduct can be considered); United States v. Vaughn, 430 F.3d 518, 525-27 (2d Cir. 2005) (Watts survives Booker), cert. denied, 547 U.S. 1060 (2006); United States v. Price, 418 F.3d 771, 787-88 (7th Cir. 2005) (same); United States v. Magallanez, 408 F.3d 672, 684-85 (10th Cir.) (Sixth Amendment not violated), cert. denied, 546 U.S. 955 (2005); Duncan, 400 F.3d at 1304-05 (same).

Importantly, Justice Scalia's dissent from the denial of certiorari in Jones, 574 U.S. at 948 – that any fact that exposes a defendant to a longer sentence is an element that must be either admitted by the defendant or found by the jury, regardless of the statutory range – is not the controlling law. See Holton, 873 F.3d at 591-92 (holding that Justice Scalia's

dissent in Jones did not undermine Watts as controlling authority); United States v. Briggs, 820 F.3d 917, 921-22 (8th Cir. 2016) (noting that Supreme Court has not adopted Justice Scalia's rationale); Jones, 744 F.3d at 1369 (finding that Justice Scalia's argument is not the law, and that "[n]o Supreme Court majority has ever recognized the validity of such challenges").

Nor did the United States Supreme Court in Nelson v. Colorado, 137 S. Ct. 1249 (2017), overrule Watts – a case that Nelson never even mentioned. In Nelson, the Supreme Court held that when a defendant's conviction has been overturned, he "should not be saddled with any proof burden" to reclaim fines, court costs, or restitution associated with the overturned conviction. See Nelson, 137 S. Ct. at 1252, 1256; United States v. Rankin, 929 F.3d 399, 408 (6th Cir. 2019). The Court therefore struck down a Colorado law that required defendants whose convictions had been reversed or vacated to prove their factual innocence by clear and convincing evidence before they were refunded the fines or restitution associated with that overturned conviction, holding that the practice violated due process. Nelson, 137 S. Ct. at 1257-58.

But Watts "deals with the clearly distinguishable question of what evidence may be considered at sentencing on a valid conviction." See Rankin, 929 F.3d at 408; United States v. Tegeler, 309 F. Supp. 3d 728, 731-32 (D. Neb. 2019). The Association of Criminal Defense Lawyers (ACDL)'s reliance on

Nelson is thus misplaced.

Neither defendant nor the amici has cited unique state interests justifying departure from this State's longstanding adherence to federal precedent in this area. See State v. Hunt, 91 N.J. 338, 363-68 (1982) (Handler, J., concurring) (identifying seven factors to consider when determining whether state constitution affords more protection than federal constitution). Nor has defendant or the amici cited a relevant state constitutional provision that affords more protection than its federal counterpart. See ibid.

Therefore, in light of Tillery, Marzolf, Fuentes, and Watts, and in line with this Court's precedent as to what a sentencing judge may consider, this Court should hold that a judge may consider trial evidence underlying acquitted charges so long as (1) the judge finds the conduct by a preponderance of competent, credible evidence in the record, (2) defendant is not sentenced as though convicted of the acquitted charges, (3) the evidence is relevant and trustworthy, and (4) the sentence does not exceed the statutory maximum or increase the mandatory minimum for the convicted crime.

This approach is consistent with the strong role in sentencing the Legislature gave to judges through New Jersey's Criminal Code. Natale, 184 N.J. at 486 (quoting State v. Roth, 95 N.J. 334, 352, 357-60 (1984)) ("The Code provides for "a strong judicial role in sentencing."); see also Kiriakakis, 235 N.J. at 437. A sentencing judge's task is "to determine the

type and extent of punishment after the issue of guilt has been determined." Carey, 232 N.J. Super. 557 (quoting Williams, 337 U.S. at 246-47). And the Code "delegates to judges, not juries, the consideration of aggravating factors for the purpose of imposing fair and uniform sentences." Natale, 184 N.J. at 486 (citing N.J.S.A. 2C:44-1(a)); see also Kiriakakis, 235 N.J. at 437.

"[T]he Legislature would not have wanted [courts] to substitute jurors for judges as the factfinders determining the applicability of aggravating sentencing factors," because "[r]equiring jurors to make findings of fact in sentencing proceedings that in the past have been made by experienced and trained judges likely would not advance the principles of uniformity and fairness that animate the Code." Natale, 184 N.J. at 486-87. Rather, the judge must, of necessity, consider all relevant information in properly imposing a just sentence. Carey, 232 N.J. Super. at 556.

B. Under the Attorney General's proposed rule, no constitutional issue arises from considering credible trial evidence underlying acquitted charges.

The Attorney General's proposed rule avoids any potential constitutional issue. A judge's consideration of evidence underlying acquitted charges, in weighing the sentencing factors for defendant's convicted crime, does not present a double-jeopardy issue because a court is permitted to increase a defendant's punishment due to the manner in which he committed

his convicted crime. See Watts, 519 U.S. at 154-55; State v. Harm, 340 P.3d 1110, 1116-17 (Ariz. 2015). Such a result is not additional punishment for a previous crime of which defendant was not convicted. See ibid.

"The Double Jeopardy Clause of the Fifth Amendment provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'" State v. Miles, 229 N.J. 83, 92 (2017) (quoting U.S. Const. amend. V). Similarly, Article I, Paragraph 11 of the New Jersey Constitution provides that "'[n]o person shall, after acquittal, be tried for the same offense.'" Ibid. (quoting N.J. Const. art. I, ¶ 11).

Importantly, this Court "has consistently interpreted the State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution." Id. at 92, 96, 99 (realigning this state's double-jeopardy jurisprudence with its "well-established tradition of keeping [state] double-jeopardy law coextensive with federal law" and adopting federal same-elements test as sole analysis) (citing State v. Schubert, 212 N.J. 295, 304 (2012)). The Double Jeopardy Clause thus provides three protections for defendants, none of which are implicated here: (1) protection against "'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.'" Id. at 92 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

Because this state's double-jeopardy protection is

coextensive with the federal guarantee, Watts is dispositive on the general issue. In the context of an extended-term sentence, as implicated here, the enhanced sentence imposed on a persistent offender is not "'viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" Monge v. California, 524 U.S. 721, 728 (1998) (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)); see also State v. Oliver, 162 N.J. 580, 587 (2000) (citing Gryger favorably).

Nor does this approach conflict with either the Fifth or Sixth Amendment. Under Apprendi, 530 U.S. at 490, and Alleyne v. United States, 570 U.S. 99, 103 (2013), any fact that increases a crime's penalty beyond the statutory maximum or mandatory-minimum sentence, apart from the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Thus, "[a]bsent [a defendant's] consent to judicial factfinding, a judge may sentence the defendant only within the range authorized by the jury's verdict, unless the judge relies on the fact of a prior conviction to give an extended term." Franklin, 184 N.J. at 538 (emphasis added) (citing Apprendi, 530 U.S. at 490) (other citations omitted). But under the Attorney General's proposed rule, a defendant's conduct underlying his acquitted charges may only be considered to determine the appropriate sentence within the convicted crime's sentencing range, thus complying with the Fifth and

Sixth Amendments.

In discussing Blakely v. Washington, 542 U.S. 296 (2004), defendant ignores the Supreme Court's later holding in United States v. Booker, 543 U.S. 220 (2005), and this Court's precedent. To better understand the breadth of Blakely's holding that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," it is important to understand the state sentencing system at issue in Blakely. See 542 U.S. at 298-300, 303. Blakely pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm. Under Washington's sentencing system, second-degree kidnapping, a class B felony, carried a "standard range" of 49 to 53 months that was calculated similar to the Federal Sentencing Guidelines, which differ from New Jersey's sentencing system. See id. at 299.

In addition to this "standard range," Washington law provided that a sentence for a class B felony shall not be punished "by confinement . . . exceeding . . . a term of ten years" and allowed a judge to impose an "exceptional" sentence above the standard range if the judge found "substantial and compelling reasons justifying an exceptional sentence," enumerating a non-exhaustive list of qualifying factors. Ibid. In order for the judge to impose an "exceptional" sentence, he or she had to "take[] into account factors other than those which [we]re used in computing the standard range sentence for

the offense." Ibid.

The Supreme Court thus held that the Washington judge's imposition of an "exceptional" sentence thirty-seven months above the "standard" range was unconstitutional because, like Apprendi, Blakely's sentence was not imposed from the standard range for his crime but from an enhanced range only applicable because of the judge's additional fact-findings. See id. at 303-04.

The Supreme Court later refined Blakely in Booker. The two questions presented in Booker are answered by two separate majority opinions – one by Justice Stevens and the other by Justice Breyer. Justice Stevens's opinion for the Court answered whether a mandatory application of the Federal Sentencing Guidelines that required judges to impose an enhanced sentence based on judicial fact-findings violated the Sixth Amendment. See Booker, 543 U.S. at 226, 229, 244-45.

After the jury convicted Booker of possession with intent to distribute at least fifty grams of cocaine base and specifically found that Booker possessed 92.5 grams of cocaine, the sentencing judge concluded by a preponderance of the evidence that Booker "possessed an additional 566 grams of crack and that he was guilty of obstructing justice." Id. at 227. Based on these judicial fact-findings, the Federal Sentencing Guidelines mandated the judge to sentence within an enhanced range. Ibid. As a result, the sentence Booker received was eight years above the standard range authorized by the jury's

verdict. Ibid. Justice Stevens therefore held for the Court that the federal guidelines, as mandatory, and Booker's sentence violated the Sixth Amendment, comparing the case to Blakely. Id. at 235-36.

But Justice Stevens explained that if the federal guidelines were merely advisory, recommending rather than requiring the imposition of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. 543 U.S. at 233. Justice Stevens explained that "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." Ibid.

Justice Breyer's opinion for the Court answered how to remedy the constitutional infirmity found in Justice Stevens's opinion. 543 U.S. at 245-67. To conform the federal guidelines to the Sixth Amendment, the Supreme Court made the guidelines "advisory" by severing the provision that made the guidelines mandatory from the federal sentencing statute. Id. at 245-46; see also Kiriakakis, 235 N.J. at 434. Thus, as this Court recently affirmed, "the maximum permissible sentence under a criminal statute became the ceiling of the statutory range." Kiriakakis, 235 N.J. at 434 (citing Booker, 543 U.S. at 245).

Important here, as this Court has recognized, "in Apprendi, Blakely, and Booker, the Supreme Court emphatically noted 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." Kiriakakis, 235 N.J. at 435; see Booker, 543 U.S. at 251 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." (alteration omitted)); Blakely, 542 U.S. at 309; Apprendi, 530 U.S. at 481 (stating that it is not "impermissible for judge to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute").

Even in Blakely, the United States Supreme Court explained that in a system that says the judge may punish burglary within a range of ten to forty years, "every burglar knows he is risking 40 years in jail," and the Constitution places no bar on imposing a sentence at the top of that range based on judicial fact-findings. 542 U.S. at 309; see also Kiriakakis, 235 N.J. at 443.

This Court also has recognized that in fashioning the remedy in Booker, the United States Supreme Court "provided examples of discretionary judicial fact-findings permissible within the prescribed range that would 'maintain[] a strong connection between the sentence imposed and the offender's real conduct.'" Kiriakakis, 235 N.J. at 443-44 (citing Booker, 543

U.S. at 246, 252). The United States Supreme Court noted that its earlier opinions assumed this system – that a sentencing judge would look to "real conduct" underlying the crime of conviction – would continue, which is "why the Court, for example, held in [Watts] that a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)." Booker, 543 U.S. at 250-51.

The breadth of Blakely is further clarified by Alleyne, where the Supreme Court held that "[j]uries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." 570 U.S. at 113 n.2. But the Supreme Court emphasized that this did "not mean that any fact that influences judicial discretion must be found by a jury." Id. at 116; see also Kiriakakis, 235 N.J. at 439.

"[W]hile factfindings 'within limits fixed by law . . . may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing.'" Kiriakakis, 235 N.J. at 439 (quoting Alleyne, 570 U.S. at 113 n.2 (quoting Williams, 337 U.S. at 246)). "[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." Ibid. (quoting Alleyne, 570 U.S. at 116).

The maximum sentence for Apprendi purposes is thus the statutory maximum, which includes the top of the extended-term

range here. See Tillery, 238 N.J. at 324 ("[O]nce the court finds that [the] statutory eligibility requirements are met, . . . the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range.'") (quoting Pierce, 188 N.J. at 169). This is because a judge's discretionary finding that defendant is statutorily eligible for an extended term as a persistent offender – by finding the fact of prior convictions – does not violate Blakely or Apprendi. Pierce, 188 N.J. at 162-63. Because the judge considers objective facts about defendant's prior convictions in determining whether he qualifies as a "persistent offender," the judge's finding of facts permissibly "renders defendant statutorily subject to a sentence within the higher extended-term range pursuant to the prior-conviction exception recognized by Blakely." Ibid.

Considering evidence underlying acquitted conduct in weighing sentencing factors within the statutory range of defendant's crime thus comports with Apprendi. This Court consistently holds that "[r]equiring 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." Kiriakakis, 235 N.J. at 437 (citing Natale, 184 N.J. at 486-87); see also Tillery, 238 N.J. at 324 n.6. "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." Kiriakakis, 235 N.J. at 437.

C. Consideration of credible trial evidence at sentencing to take into account the full context of defendant's convicted crime is fundamentally fair.

The judge's consideration of trial evidence underlying acquitted charges to account for the full context of defendant's convicted crime, in weighing the sentencing factors for that convicted crime, is fundamentally fair. Under this system, the jury remains a check on judicial power because its verdict "limits the range of the sentence that may be imposed by a judge." Kiriakakis, 235 N.J. at 431-32 (citing Blakely, 542 U.S. at 303-04).

But "[w]ithin the sentencing range authorized by a jury's verdict, a judge has broad discretion to impose an appropriate sentence by considering traditional factors related to the offense and offender." Ibid. (citing Apprendi, 530 U.S. at 481). "Within that authorized range, the judge may engage in factfindings, supported by credible evidence, in setting a fair sentence." Id. at 432 (citing Natale, 184 N.J. at 487). Indeed, "[a] rational system of justice requires differentiating among offenders – based on their backgrounds and the nature and circumstances of their offenses – within the range authorized by the jury verdict" for defendant's convicted crime. Id. at 445 (citing N.J.S.A. 2C:1-2(b)(6) (stating that one of Code's

general purposes is "[t]o differentiate among offenders with a view to a just individualization in their treatment")).

The out-of-state cases cited by defendant and the ACDL reflect the minority view and, collectively, rest on four misconceptions. The first misconception is that, by rendering an acquittal, the jury rejected every piece of trial evidence that could have supported the acquitted charge. See, e.g., United States v. Brown, 892 F.3d 385, 408 (D.C. 2018) (Millett, J., concurring); United States v. Bell, 808 F.3d 926, 930 (D.C. 2015) (Millett, J., concurring); United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring), cert. denied, 555 U.S. 1116 (2009).

Not so. A verdict of acquittal means only that the jury found that the State did not meet its high burden of proof as to one element of the offense. Kelly, 406 N.J. Super. at 347 (quoting Watts, 519 U.S. at 155). This is illustrated by the Model Criminal Jury Charges, which instruct juries to return a verdict of "not guilty" if, after consideration of all the trial evidence, it finds the State has failed to prove any element of the offense beyond a reasonable doubt. See, e.g., Model Jury Charges (Criminal), "Murder (N.J.S.A. 2C:11-3(a)(1) and 3(a)(2))" (rev. June 14, 2004). An acquittal thus, by definition, is not a finding that the underlying conduct did not happen.

The second misconception of these cases is that considering trial evidence underlying acquitted charges, to account for the

full context of defendant's convicted crime, violates the presumption of innocence and thereby erodes public confidence in the criminal-justice system. See, e.g., White, 551 F.3d at 396-97 (Merritt, J., dissenting); United States v. Coleman, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005), aff'd in part and vacated in part by United States v. Kaminski, 501 F.3d 655 (2007); People v. Beck, 939 N.W.2d 213, 620-22, 625-29 (Mich. 2019); State v. Marley, 364 S.E.2d 133, 138-39 (N.C. 1988); State v. Cote, 530 A.2d 775, 784-86 (N.H. 1987).

It is true that a defendant is presumed innocent until proven guilty at trial; and defendant here was afforded that presumption. But once he was convicted of a crime, he was no longer presumed innocent as to that conviction. And consideration of all competent, credible evidence adduced at trial, to give context to that convicted crime, in weighing the sentencing factors within the range to impose an appropriate sentence for that convicted crime, even if the evidence overlapped with acquitted charges, is a proper exercise of the judge's discretion.

The third misconception is that considering evidence underlying acquitted charges deprives defendant of adequate notice because he does not know the precise effect the jury's verdict will have on his punishment. See, e.g., Canania, 532 F.3d at 777 (Bright, J., concurring); Beck, 939 N.W.2d at 622. But a "[d]efendant, like every citizen[,] . . . is presumed to know the law[.]" Kiriakakis, 235 N.J. at 445 (explaining that

Kiriakakis "knew that conspiring to distribute a large quantity of cocaine exposed him to a potential sentence of ten years with a five-year parole disqualifier" because, like every citizen, he was presumed to know the law). And this State's sentencing statutes give defendants adequate notice of the sentencing exposure for their convicted crimes. See, e.g., N.J.S.A. 2C:43-6(a); N.J.S.A. 2C:44-3.

The fourth misconception is that Watts did not survive Booker, and that considering trial evidence underlying acquitted conduct violates the Sixth Amendment. See Bell, 808 F.3d at 927-28 (Kavanaugh, J., concurring); Bell, 808 F.3d at 928-29 (Millett, J., concurring); White, 551 F.3d at 386-87 (Merritt, J., dissenting); Canania, 532 F.3d at 776-77 (Bright, J., concurring). But this ignores that every federal circuit has found that Watts survives Booker. And as explained at AGb36 to 43, a judge's consideration of this evidence does not violate the Fifth or Sixth Amendment.

Indeed, now-Justice Kavanaugh, in his concurrence in Bell, recognized that a constitutional rule that a jury should find beyond a reasonable doubt any fact used to increase a defendant's sentence would be "far different from the one we now have or have historically had." 808 F.3d at 927-28. As the Supreme Court said in Booker: "'We have never doubted the authority of a judge to exercise discretion in imposing a sentence within a statutory range . . . . 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 judge deems relevant.'" Ibid. (Kavanaugh, J., concurring) (quoting Booker, 543 U.S. at 233, and citing Williams, 337 U.S. at 246-52).

In addition to every federal circuit allowing the consideration of evidence underlying acquitted charges at sentencing, a majority of states have cited this practice favorably.[7] See, e.g., Brakes v. State, 796 P.2d 1368, 1370-73 (Alaska Ct. App. 1990); State v. Anderson, 868 P.2d 964, 967-68 (Ariz. Ct. App. 1993); People v. Towne, 186 P.3d 10, 21-25 (Cal. 2008) ("Permitting a judge to consider evidence of conduct underlying counts of which the defendant was acquitted does not in any way undermine the jury's role in establishing, by its verdict, the maximum authorized sentence."); People v. Pagan, 165 P.3d 724, 730-31 (Colo. App. 2006); State v. Spears, 567 A.2d 1245, 1249-50 (Conn. App. Ct. 1989); State v. Mancinone, 545 A.2d 1131, 1149-50 (Conn. App. Ct. 1988); Barnes v. State, No. 273, 1994, 1995 Del. LEXIS 459, at *2-4 (Del. Dec. 8, 1995) (relying on United States v. Jones, 54 F.3d 1285, 1294 (7th Cir. 1995)); Williams v. United States, 106 A.3d 1063, 1071-72 (D.C. 2015); State v. Flowers, 249 P.3d 367, 372-73 (Idaho 2011);

[7] Jefferson v. State, 353 S.E.2d 468, 474 (Ga. 1987), and State v. Koch, 112 P.3d 69, 78-79 (Haw. 2005), two cases on which defendant relies, do not explain why they rejected consideration of evidence of acquitted conduct at sentencing. Cote, 530 A.2d at 375-76, also relied on a California case and United States Supreme Court case that are no longer good law in light of Watts as well as People v. Towne, 186 P.3d 10, 21-24 (Cal. 2008), and In re Coley, 283 P.3d 1252, 1275-76 (Cal. 2012).

People v. Robinson, 676 N.E.2d 1368, 1372-73 (Ill. App. Ct. 1997); Laux v. State, 821 N.E.2d 816, 820-21 (Ind. 2005); State v. Longo, 608 N.W.2d 471, 474-75 (Iowa 2000); State v. Wilcox, 827 P.2d 84 (Kan. Ct. App. 1992) (per curiam); State v. Hampton, 195 So. 3d 548, 560-61 (La. Ct. App. 2016); State v. Witmer, 10 A.3d 728, 732-35 (Me. 2011) (noting that Cote was limited to its facts, and holding that "sentencing court is not required to disregard facts that result in a conviction simply because some of those facts may have also been relevant to other charges of which the defendant was acquitted"); Jackson v. State, 148 A.3d 95, 106-07 (Md. Ct. Spec. App. 2016); Cowart v. State, 178 So. 3d 651, 654, 668-72 (Miss. 2015); State v. Davis, 422 S.W.3d 458, 462-64 (Mo. Ct. App. 2014); State v. Walker, 167 P.3d 879, 882 (Mont. 2007); State v. Oldenburg, 628 N.W.2d 278, 285-86 (Neb. Ct. App. 2001); People v. Zowaski, 31 Misc. 3d 242, 245-51 (N.Y. City Ct. 2011) (holding that sentencing court may consider evidence related to charge of which defendant has been acquitted but noting split between intermediate appellate courts of New York); State v. Wells, 265 N.W.2d 239, 242-43 (N.D. 1978); State v. Wiles, 571 N.E.2d 97, 109 (Ohio 1991); Harmon v. State, 248 P.3d 918, 939-40 (Okla. Crim. App. 2011); Commonwealth v. Stokes, 38 A.3d 846, 858-65 (Pa. Super. Ct. 2011); State v. McCrary, 676 N.W.2d 116, 124-25 (S.D. 2004); State v. Winfield, 23 S.W.3d 279, 282-83 (Tenn. 2000); State v. Lipsky, 639 P.2d 174, 176 (Utah 1981); Moses v. Commonwealth, 498 S.E.2d 451, 455-56 (Va. Ct. App. 1998); State v. Hernandez, 581 P.2d 157,

158-59 (Wash. Ct. App. 1978); State v. Prineas, 766 N.W.2d 206, 216-17 (Wis. Ct. App. 2009).

In Beck, not only did the Michigan Supreme Court rule against the federal and state majority, based on the second and third misconceptions cited above, that case is also distinguishable on its facts. Beck was subject to a statutory maximum sentence of up to life in prison for his felon-in-possession conviction because of his status as a fourth-offense habitual offender. 939 N.W.2d at 610, 660-61 (Clement, J., dissenting). Unlike here, although the jury acquitted Beck of "open murder," the judge imposed a sentence in the extended-term range in part because he found by a preponderance of the evidence that Beck "committed the homicide." Id. at 610-11, 629 n.24.

Here, the judge found that defendant was the shooter of the gun he was convicted of illegally possessing, not that he committed homicide. As the dissent in Beck explained, this is an important distinction. See 939 N.W.2d at 661-64, 667 n.10 (Clement, J., dissenting). By considering this evidence in weighing the sentencing factors within the statutory range of defendant's convicted crime, the judge here was considering the manner in which defendant committed that crime to impose an individualized, proportionate sentence that reflected his real conduct. See id. at 661 (Clement, J., dissenting).

As such, defendant was not sentenced as if he had been convicted of the crime of murder, which carries a minimum term

of thirty years in prison without parole. See ibid.; N.J.S.A. 2C:11-3(b). "There is no doubt that a sentencing court may generally consider facts relevant to how the defendant committed the offense, and there is no basis in the law to distinguish this particular factual finding from all other information relevant to the manner in which defendant committed [his convicted crime]." Ibid.

Like the dissent in Beck, various states have found it proper to consider trial evidence underlying an acquittal of murder in taking account of the full context of a defendant's conviction for a lesser offense. See, e.g., State v. Pena, 22 A.3d 611, 614, 618-22 (Conn. 2011) (convicted of carrying pistol without permit and criminal possession of firearm but found not guilty of murder); People v. Deleon, 882 N.E.2d 999, 1009 (Ill. 2008) (ineffective-assistance-of-counsel case); Jackson, 148 A.3d at 106-07; People v. Lipford, 129 A.D.3d 1528, 1531 (N.Y. App. Div. 2015) (convicted of kidnapping but acquitted of murder); People v. Cox, 78 A.D.3d 1571, 1572 (N.Y. App. Div. 2010); People v. Phong Le, 74 P.3d 431, 434-35 (Colo. App. 2003); Robinson, 676 N.E.2d at 1372-73; State v. Bobbitt, 503 N.W.2d 11, 13-19 (Wis. Ct. App. 1993) (convicted of armed robbery and false imprisonment as repeat offender but found not guilty of attempted first-degree murder); State v. Beasley, 615 A.2d 1072, 1072-73 (Conn. Ct. App. 1992); Brakes, 796 P.2d at 1371 (citing Ridgley v. State, 739 P.2d 1299, 1302 (Alaska Ct. App. 1987)); Spears, 567 A.2d at 1249-50.

The ACLU's "parade of horribles" does not require a contrary result. The jury will remain a check on judicial power because its verdict will dictate the sentencing range to which the judge must adhere. If a defendant exercises his right to trial, his trial strategies need not change. At sentencing, he will be able to present mitigating evidence to the judge.

And if a defendant decides not to testify, as is his right, that decision will not be used against him. If he chooses not to testify, the jury will be instructed, upon his request or consent, that "[i]t is his constitutional right to remain silent." Model Jury Charges (Criminal), "Defendant's Election Not to Testify" (rev. May 4, 2009). The jurors also will be told "not [to] consider for any purpose or in any manner in arriving at [its] verdict the fact that defendant did not testify." See ibid. The jury is presumed to faithfully follow the court's instructions. See State v. Santamaria, 236 N.J. 390, 413 (2019). And the judge is beholden to the law.

Moreover, this practice should not affect a defendant's decision to exercise his right to trial or plead guilty. As noted above, if charges are dismissed under a plea bargain, the sentencing judge may consider evidence underlying the dismissed charge in imposing sentence for a defendant's convicted crime. See Fuentes, 217 N.J. 57, 71; Marzolf, 79 N.J. at 184-85. Nonetheless, the right to a jury trial "does not guarantee that a particular number of jury trials will take place." Blakely, 542 U.S. at 312.

This practice will not affect a prosecutor's charging discretion either. "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion" and must be supported by probable cause. See State v. Fuqua, 234 N.J. 583, 596 (2018). This discretion, however, is not unlimited, and "[a] defendant who proves that a prosecutor's 'exercise of discretion was arbitrary and capricious would be entitled to relief.'" Ibid. (quoting State v. Vasquez, 129 N.J. 189, 196 (1992)).

A rule preventing the sentencing judge from considering trial evidence underlying acquitted charges when taking into account the full context of defendant's crimes would lead to an absurdity in our state's sentencing system. If defendant here had pleaded guilty to second-degree unlawful possession and the other charges were dismissed under a plea agreement, evidence underlying the dismissed charges could be used in weighing the sentencing factors under Marzolf and Fuentes.

Likewise, if the jury here had deadlocked again at retrial and, before sentencing, the State either dismissed the deadlocked charges or indicated it would not be retrying defendant for those charges, the trial evidence underlying the deadlocked charges could be considered in weighing the sentencing factors under Tillery.

The same should be true for trial evidence underlying an acquitted charge, which only means that the State did not meet its high burden as to one element of the charge. It does not

mean that the judge cannot use reliable and trustworthy trial evidence, based on competent, credible evidence in the record, in weighing the sentencing factors for defendant's convicted crime.

Consider a defendant who was convicted of a crime, but acquitted of other charges because the State was blocked from using its strongest evidence under the exclusionary rule. Surely, a sentencing judge could consider trial evidence underlying the acquitted charges in light of the suppressed, but otherwise reliable, evidence, which was excluded only from the State's case-in-chief and remained admissible for all other purposes, including sentencing for convicted crimes. See Jarbath, 114 N.J. at 412 n.4 (allowing suppressed evidence at sentencing hearing).

One legal fiction (suppression of truthful evidence), begetting another legal fiction (acquittal despite compelling suppressed evidence) should not be compounded to all parts of the criminal-justice process to the detriment of truth and justice. "Truth and justice are inseparable." State v. Bisaccia, 58 N.J. 586, 589 (1971). And a "false judgment debases the judicial process[,] no less so because the false judgment is an acquittal." Ibid. Of course, this is not to say that verdicts are not entitled to respect; but only that a holding that rigidly requires sentencing courts to always ignore well-proved facts to indulge a legal fiction debases the sentencing process.

Finally, the Appellate Division properly distinguished Tindell where, unlike here, the judge's personal views as to the propriety of the jury's verdict tainted the sentence. 417 N.J. Super. at 572. In Tindell, the trial judge took exception to the verdict, criticizing the jury for rendering an unbefitting verdict in fear of retaliation from Tindell based on unfounded speculation and saying that "[t]he injustice [was] that [Tindell was] only convicted of a reckless manslaughter." Id. at 569-72.

But here, the judge accepted the jury's verdict and made factual findings to accurately balance the sentencing factors for defendant's convicted crime. The record proves that the judge did not set a term for any acquitted charge as though he found the jury's verdict unbefitting. "There is no indication in the trial or sentencing record that the trial court considered the jury's verdict to be unjust, or otherwise demonstrated a lack of respect for its determination." Tillery, 238 N.J. at 326 n.7. Tindell is therefore inapposite. See ibid.

In holding that the judge's aspersions of the jury's verdict were improper in Tindell, the Appellate Division did not implicitly reject Watts nor consider the issue now before this Court. 417 N.J. Super. at 567-72. Even if this Court adopts the Attorney General's proposed rule in this case, Tindell would still remain good law. Although a sentencing judge may not criticize the jury for rendering an unbefitting verdict or offer his personal views as to the propriety of the jury's verdict,

the judge properly may consider credible trial evidence underlying, and often overlapping with, acquitted charges in weighing the sentencing factors to take into account the full context of defendant's convicted crime. The judge properly relied on such trial evidence here in weighing the aggravating and mitigating factors to impose a proportionate, individualized sentence for defendant's convicted crime.

D. In addition to the judge properly considering credible trial evidence in weighing the sentencing factors, the aggravating factors were separately supported in the record.

After weighing the sentencing factors, the judge imposed a fair sentence that does not shock the conscience. His sentence should be affirmed because not only did the judge properly consider credible trial evidence underlying the acquitted charges in finding aggravating factors three, six, and nine, but these factors were separately supported in the record.

Appellate courts accord extreme deference to sentencing courts – only a sentence that constitutes an abuse of discretion may be reversed. Pierce, 188 N.J. at 166-67 (citing Roth, 95 N.J. at 364-66). An appellate court's critical focus thus should be on whether the sentencing court's determination was "clearly mistaken." Jarbath, 114 N.J. at 401. In making this determination, appellate courts should review (1) whether the judge followed the sentencing guidelines, (2) whether the sentencing factors were based on competent, credible evidence in the record, and (3) whether the judge's application of the

sentencing guidelines to the facts of the case, even though appropriately followed, nevertheless renders the sentence clearly unreasonable so as to "shock the judicial conscience." Roth, 95 N.J. 364-65. Even if an appellate court would have reached a different result, it should not substitute its own judgment for that of the sentencing court; the sentencing court's judgment should be sustained so long as reasonable people could have made the same judgment on the evidence presented. Id. at 365.

Although the Criminal Code provides a general framework to guide judicial discretion, it does not impose inflexible rules. See Fuentes, 217 N.J. at 72-73. One reasonable approach a judge may take is to use "the middle of the sentencing range as a logical starting point for balancing" the sentencing factors. Ibid. Where "'the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence.'" Ibid. (citation omitted). But where the aggravating factors preponderate, as in this case, defendant's sentence will tend toward the higher end of the range. Ibid.; see also Kiriakakis, 235 N.J. at 442-43.

Thus, the judge did not abuse his discretion in sentencing defendant to a term at the high end of the extended-term range because he was clearly convinced that aggravating factors three, six, and nine substantially outweighed the non-existent mitigating factors. And not only was defendant's parole-ineligibility term mandatory under the Graves Act, N.J.S.A.

2C:43-6(c), but the judge also used his discretionary authority to impose a parole-ineligibility term under N.J.S.A. 2C:43-6(b). (2T73-3 to 74-5; Dsa40).

The aggravating factors were properly based not only on credible trial evidence but also on other competent evidence in the record. Aggravating factor three is separately supported by defendant's lengthy history of criminal activity that included violent offenses. See State v. Gallagher, 286 N.J. Super. 1, 21 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996). Indeed, defendant had four indictable convictions for drug-related offenses and armed robbery. (PSR4 to 6). He had been arrested fifteen times before, including violent offenses for aggravated assault, threat to kill, and possession of a weapon for an unlawful purpose. (PSR4 to 6).

When he was released from prison for his federal crimes, he violated his federal supervised release multiple times. (PSR6). In addition to his federal supervised release being revoked in 2010, he again violated the terms of his release by committing the instant crime. (PSR6; 2T69-2 to 6). And defendant's PSR shows he was arrested three times for drug-related municipal offenses while on federal supervised release. (PSR6). Based on this history, the judge properly found defendant was at risk of reoffending.

The judge also properly based aggravating factor three on defendant's refusal to accept responsibility. This Court has long held that a defendant's lack of remorse and denial of

responsibility are relevant to whether he is likely to reoffend under aggravating factor three. See State v. Carey, 168 N.J. 413, 428 (2001); State v. O'Donnell, 117 N.J. 210, 216 (1989). And here, defendant accepted no responsibility for his illegal possession of a weapon, as a felon, let alone the conduct that preceded his arrest.

By noting this at sentencing, the judge did not induce defendant to confess his guilt. See State v. Poteet, 61 N.J. 493, 498 (1972) (disapproving of practice of calling on defendants at sentencing to disavow their innocence and confess guilt); State v. Marks, 201 N.J. Super. 514, 539-40 (App. Div. 1985) (relying on Poteet). The sentencing judge must take into account a defendant's prospects for redemption and rehabilitation. Poteet, 61 N.J. at 496. And as to this determination, "a defendant's attitude toward the truth is not irrelevant." Ibid. Like Poteet, defendant's "criminal record was bad, and his guilt was clear" from the trial evidence as to his unlawful-possession-of-a-weapon crime at the very least. Ibid. Rationally, his lack of remorse and failure to take responsibility for that crime thus proved a risk of reoffending.

Aggravating factor six was separately supported by the extent of defendant's criminal activity that included serious crimes spanning over fifteen years. (PSR4 to 7); see State v. Dalziel, 182 N.J. 494, 502 (2005) (holding that uninterrupted history of criminality justified aggravating factor six). Indeed, defendant has been committing offenses in largely

unbroken succession since he was seventeen years old. (PSR6 to 10). And as the judge properly found, second-degree unlawful possession of a deadly weapon is a serious crime, especially where, as here, the offender is a convicted felon. See State v. Towey, 114 N.J. 69, 82-83 (1989) ("Implicit in the policies underlying the Graves Act is a recognition that the use of firearms in the commission of a crime poses a grave threat to public safety . . . . [The] intent of the Graves Act [is] to deter the use and possession of firearms by criminals for the purpose of reducing the number of persons killed or injured by such weapons.") (citation and internal quotation marks omitted) (emphasis added).

Finally, aggravating factor nine also was properly found. Defendant was convicted of a second-degree crime, creating a greater need to protect the public and a greater need for deterrence. See Fuentes, 217 N.J. at 78-79 (recognizing that deterrence is one of the most important factors in sentencing, and that the need for deterrence is "strengthened in direct proportion to the gravity and harmfulness of the offense"); State v. Lawless, 214 N.J. 594, 609 (2013); Carey, 168 N.J. at 426. Indeed, "[g]enerally, for first- and second-degree crimes there will be an overwhelming presumption that deterrence will be of value." State v. Evers, 175 N.J. 355, 395 (2003) (emphasis added). And because defendant was eligible for an extended term as a persistent offender, as he conceded, the need for deterrence is enhanced. State v. Pennington, 154 N.J. 344,

354 (1998).

The judge also properly found a need to specifically deter defendant. In considering aggravating factor nine, the judge may make "'determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history.'" Fuentes, 217 N.J. at 78 (quoting State v. Thomas, 188 N.J. 137, 153 (2006)). As the judge properly found, defendant's prior contact with the criminal-justice system has not deterred him. Indeed, the severity of defendant's crimes has escalated despite his service of significant time in state and federal prison. (PSR4 to 7).

This Court may thus affirm defendant's sentence as it did in Tillery. Like defendant here, Tillery was convicted of second-degree unlawful possession of a weapon and was extended-term eligible as a persistent offender. 238 N.J. at 301, 309-10, 312. After the judge found aggravating factors three, six, and nine and no mitigating factors, Tillery was sentenced to the maximum extend-term sentence of twenty years in prison subject to a mandatory ten-year parole disqualifier under the Graves Act. Id. at 310-12.

Although this Court found that the judge improperly relied on evidence pertaining to pending deadlocked charges, it nonetheless affirmed Tillery's sentence because the aggravating factors were otherwise supported by the record. Id. at 326-27. When finding aggravating factors six and nine, this Court noted that the judge emphasized other factors, including Tillery's

prior record, the failure of prior probationary sentences to deter him, the serious nature of his unlawful-possession-of-a-weapon offense, and the State's strong policy to protect the public with strict gun-control laws – the same facts the judge considered here in finding defendant's applicable aggravating factors. Ibid.

Therefore, in light of Tillery, who received the maximum extended-term sentence for unlawful possession of a weapon where aggravating factors three, six, and nine preponderated over non-existent mitigating factors, defendant's sixteen-year sentence with eight years of parole ineligibility is not manifestly excessive. Because the judge followed the sentencing guidelines, based his findings of the sentencing factors on competent, credible evidence in the record, and imposed a reasonable sentence that does not shock the judicial conscience, defendant's sentence should be affirmed.

CONCLUSION

Based on the foregoing, the Attorney General urges this Court to affirm defendant's sentence.

Respectfully submitted,

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Dated: May 1, 2020