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SUPREME COURT OF NEW JERSEY
DOCKET NO. 083298

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

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER

FILED
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DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Twelve New Jersey citizens swore an oath to perform their duties as jurors in a double-homicide trial. The duty is a heavy one, one that jurors take seriously, and one that should be treated with the utmost respect. After a four-week-long trial, the jurors acquitted Mark Melvin of all murder and related charges.

The judge in Mr. Melvin's case disagreed with the jurors. He disagreed with their judgment. He disagreed with the way they carried out their oath. The judge in Mr. Melvin's case believed that Mr. Melvin had to be punished for the murders that he was acquitted of. So when sentencing Mr. Melvin for the only crime he was convicted of—possession of a weapon without a license—the judge explicitly and repeatedly relied on his personal belief that Mr. Melvin committed a double homicide to justify a very lengthy sentence with a discretionary extended term.

In so doing, the judge violated the sanctity of the jury's role. He substituted his judgment for the jury's, he disrespected the special significance of an acquittal, and he broke the cardinal rule of the criminal-justice system by imposing criminal punishment for an offense without a conviction for that offense. The sentencing in this case violated the rights to a due process, fundamental fairness, a jury trial, and against double jeopardy.

Mr. Melvin has been awaiting a fair sentencing proceeding for over five years. He has been incarcerated for over seven years. He is parole eligible in September. This Court should exercise its original jurisdiction and sentence Mr. Melvin fairly for only the crime he committed. In the alternative, this Court must remand this matter for a resentencing before a different judge.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Essex County Indictment Number 2013-5-1257 charged Mark Melvin, with: murder, contrary to N.J.S.A. 2C:11-3(a)(1) and (2) (Counts One and Five); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Two); second-degree possession of a weapon with an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Three); attempted murder, contrary to N.J.S.A. 2C:5-1 and 2C:11-3 (Count Four); second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Count Six); third-degree possession of a controlled dangerous substance, contrary to N.J.S.A. 2C:35-10a(1) (Count Seven); third-degree possession of a controlled dangerous substance with intent to distribute, contrary to N.J.S.A. 2C:35-5a(1) and b(3) (Count Eight); and third-degree possession with intent to distribute a controlled dangerous substance within 1,000 feet of school property, contrary to N.J.S.A. 2C:35-7 (Count Nine).[2] (Da 1-11)[3]

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[1] Due to the interrelated nature of the procedural history and statement of facts in this case, the two sections have been combined for clarity to the reader.

[2] Count Four was dismissed by motion of the prosecutor. (Da 12)

[3] The following abbreviations will be used:
Dsa - appendix to defendant-petitioner's supplemental brief
1T - October 27, 2014 (sentence)
2T - June 7, 2018 (resentence)
3T - December 3, 2018 (SOA)
PSR - Presentence Report

Mr. Melvin was arrested on September 27, 2012 and has been incarcerated ever since. A jury trial began before the Honorable Martin G. Cronin, J.S.C., and a jury, on June 3, 2014. On June 24, 2014, the jury returned a verdict, convicting Mr. Melvin of only possession of a firearm without a permit. (Da 12) The jury was unable to reach a verdict on the remaining seven counts. (Da 12)

On October 27, 2014, Mr. Melvin appeared before Judge Cronin for sentencing. Judge Cronin found that Mr. Melvin was the shooter and that he did not take responsibility for the shooting. (1T 72-10 to 74-4) Judge Cronin determined that it was appropriate to sentence Mr. Melvin to an extended term as a persistent offender and sentenced Mr. Melvin to the maximum sentence, which consisted of a discretionary extended term and a parole disqualifier: twenty years with a ten-year period of parole ineligibility. (1T 95-19 to 96-6; Da 12-14)

A notice of appeal was filed on Mr. Melvin's behalf on March 9, 2015, as within time. (Da 14-15)

While the appeal was pending, the State retried Mr. Melvin. On August 8, 2016, Mr. Melvin was acquitted of all of the counts related to the shooting, including the homicide—counts one, three, five, and six. (Da 16-17, 21-22) The jury was unable to return a verdict on the counts related to the drugs—counts

seven, eight, and nine. (Da 16-17, 21-22) The State dismissed the remaining drug charges. (Da 16-17, 21-22)

On September 23, 2016, Judge Cronin submitted a letter to the Appellate Division defending his rulings on the plenary issues raised by Mr. Melvin in his appeal. (Da 18-20)

On March 1, 2017, the Appellate Division affirmed defendant's convictions but remanded the case for resentencing. The Appellate Division held that Judge Cronin "abused his discretion by finding defendant was the shooter by a preponderance of the evidence and considering that conduct in his sentencing decision." State v. Melvin, No. A-3003-14T1, 2017 N.J. Super. Unpub. LEXIS 480, at *14 (App. Div. Mar. 1, 2017) ("Melvin I"). The Supreme Court denied the State's petition for certification.

On June 7, 2018, Mr. Melvin was resentenced by Judge Cronin. At the resentencing, the defense argued that Judge Cronin was not allowed to use his belief that Mr. Melvin committed the homicides in his sentencing decision. (2T 7-10 to 27-7) Judge Cronin rejected this argument and held that he would consider acquitted conduct in determining the appropriate sentence. (2T 53-22 to 64-18) Judge Cronin outlined the evidence in the case which led him to believe that "the Defendant was the shooter of the two individuals" who died, as well as another victim who was injured. (2T 65-14 to 19) Judge Cronin stated

that he was using "that evidence to determine 1) the aggravating and mitigating factors for sentencing, 2) whether to . . . apply an extended term of imprisonment, and 3) where within the extended term should Mr. Melvin be sentenced." (2T 65-10 to 24)

Judge Cronin 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. (2T 68-17 to 20) Judge Cronin 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." (2T 69-17 to 19) Judge Cronin found aggravating factor (9) in part because of the "evidence supporting its conclusion that Mr. Melvin not only possessed the weapon, but also utilized it to shoot 3 other individuals." (2T 72-20 to 23)[4] In assessing the appropriate sentence as a whole, Judge Cronin stated that his conclusion that Mr. Melvin was the

[4] When first sentencing Mr. Melvin, Judge Cronin found that aggravating factor (2) applied. On appeal, the Appellate Division held that Judge Cronin "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." Melvin I, 2017 N.J. Super. Unpub. LEXIS at *14. Judge Cronin did not find aggravating factor (2) at the resentencing. (2T 67-7 to 13)

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." (2T 72-23 to 73-2)

In resentencing Mr. Melvin, Judge Cronin took account of Mr. Melvin's extensive rehabilitative efforts while in prison and the fact that Mr. Melvin has not been disciplined even once while incarcerated. (2T 33-2 to 44-3) Judge Cronin resentenced Mr. Melvin to an extended term of 16 years with a parole disqualifier of 8 years.[5] (2T 73-15 to 74-7; Da 38-41)

Mr. Melvin filed a notice of appeal on June 14, 2018. (Da 42-43) Mr. Melvin then filed a petition for direct certification to this Court. That petition was denied on September 12, 2018. (Da 45)

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[5] L. 2013, c. 117 added possession of a handgun without a permit to the list of Graves Act offenses which carry a mandatory parole disqualifier of 42 months or one half of the sentence, whichever is greater. That law was effective as of August 8, 2013 and applies to offenses that took place on or after that date. The offense at issue in this case was committed on September 27, 2012 (Da 1-11), and therefore the previous version of the Graves Act applies, which mandated a minimum term of "at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater." N.J.S.A. 2C:43-6c (2012). Judge Cronin did not explain why the longest permissible parole disqualifier in the range was appropriate, which Mr. Melvin raised on appeal. The Appellate Division rejected the argument that Judge Cronin should have explained his reasons for imposing the maximum period of parole ineligibility. State v. Melvin, No. A-4632-17T5, 2019 N.J. Super. Unpub. LEXIS 1555, at *9 (App. Div. July 8, 2019). This Court did not grant certification on that issue.

This case was heard on the Sentence Oral Argument calendar on December 3, 2018. On December 7, the Appellate Division issued an order placing the matter on the plenary calendar. (Da 46) Oral argument was held on March 4, 2019. On June 19, 2019, State v. Tillery, 238 N.J. 293 (2019) was decided. The State filed a letter regarding Tillery pursuant to Rule 2:6-11d on June 26, 2019, and Mr. Melvin responded the same day. The Appellate Division affirmed Mr. Melvin's sentence on July 8, 2019, holding that that the Court's opinion in Tillery "disposes of defendant's argument." State v. Melvin, No. A-4632-17T5, 2019 N.J. Super. Unpub. LEXIS 1555, at *7 (App. Div. July 8, 2019) ("Melvin II").

Mr. Melvin filed his petition for certification on July 23, 2019. This Court granted certification on January 31, 2020. (Da 47)

LEGAL ARGUMENT

POINT I

SENTENCING A DEFENDANT BASED ON CONDUCT HE WAS ACQUITTED OF ENGAGING IN IS UNLAWFUL.

Unlike the vast majority of defendants in our legal system, Mr. Melvin held tight to his right to have a jury determine his guilt or innocence. He sat in jail for a year and a half before his first trial. He then endured weeks of trial, only to have the jury fail to reach a verdict on most of the charges. Committed to his innocence and to having his case assessed by a jury of his peers, he waited over two years for his second trial. Finally, after another trial that spanned almost a month, he was vindicated by the jury, which acquitted him of all counts related to the homicides. Yet he is still effectively serving a sentence for the murders he was acquitted of committing because the court explicitly sentenced him based on its belief that Mr. Melvin is a murderer.

The sentencing in this case violated many of Mr. Melvin's constitutional rights. First, the sentencing violated the rights to due process and fundamental fairness, as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, paragraphs 1 and 10 of the New Jersey Constitution. Second, the sentencing violated the right to a trial by jury, as guaranteed by the Sixth Amendment to the Federal Constitution

and Article I, paragraph 9 of the New Jersey Constitution. Last, it violated the state-law protection against double jeopardy.

The core problem in this case is simple: it is wrong for a trial court to throw aside an acquittal and punish a defendant according to the judge's own personal verdict. It is wrong to do this for many reasons—juries are critically important, acquittals are immensely significant, and proof beyond a reasonable doubt is a constitutional prerequisite for punishment. Yet a defendant who was acquitted by a jury of his peers is serving time based on a judge's perception that the defendant is nonetheless guilty. The jury's voice—and therefore the voice of the community—has been drowned out by one man's beliefs. This outcome cannot stand.

A. Sentencing Based On Acquitted Conduct Violates the Federal and State Constitutional Rights To Due Process And Fundamental Fairness.

Sentencing based on acquitted conduct violates due process, as guaranteed by both the federal and state constitutions. Moreover, the sentencing also violated the doctrine of fundamental fairness, which "can be viewed as an integral part of the right to due process" or as a "penumbral right reasonably extrapolated from other specific constitutional guarantees." State v. Abbati, 99 N.J. 418, 430 (1985). Fundamental fairness requires that government action comport with "commonly accepted standards of decency." State v. Talbot, 71 N.J. 160, 186 (1976).

This Court has "applied standards of decency and fairness" to "protect the rights of defendants at various stages of the criminal justice process" and to restrain governmental action that "includes elements of oppression and harassment." State v. P.Z., 152 N.J. 86, 117-18 (1997).

One of the core components of due process is that guilt must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363-64 (1970). The presumption of innocence is "axiomatic and elementary," and its "enforcement lies at the foundation of the administration of criminal justice. Id. at 358 (internal quotation marks omitted). The presumption of innocence is not a merely technicality; it is a constitutional requirement of the highest order that mandates that individuals are treated as innocent until the moment their guilt is determined by a jury of their peers. And when a jury determines that the government has not met its burden, the defendant is cloaked in that presumption yet again. As far as the criminal-justice system is concerned, that person is innocent. As the Michigan Supreme Court recently explained when holding that it was unconstitutional to consider acquitted conduct at sentencing, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent." People v. Beck, 2019 Mich. LEXIS 1298, at

*19 (July 29, 2019). Thus, 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. Marley, 364 S.E.2d 133, 139 (N.C. 1988).

An acquittal is the most sacred part of a jury verdict. An "acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." Yeager v. United States, 557 U.S. 110, 122 (2009). No matter how much a judge may disagree with an acquittal, "its finality is unassailable." Id. at 123. Yet, Mr. Melvin was made to answer at sentencing for crimes he was acquitted of, an act that guts the "special significance" of the acquittal. United States v. Scott, 437 U.S. 82, 91 (1978). When a judge disagrees with the jury's verdict and punishes the defendant on that basis, the court disrespects the jury's function and judgment.

The justification for considering acquitted conduct focuses on the truism that an acquittal does not mean a person is factually innocent, that just because a jury found that the State did not meet its burden does not mean there is not credible evidence in the record a court can rely on at sentencing. The criminal-justice system, however, does not deal with factual innocence, only legal innocence, and there is

nothing more the accused can do to prove his innocence than secure an acquittal. When he does so, he must be treated as innocent once more. To do otherwise, as the sentencing judge did in this case, violates the presumption of innocence and therefore the right to due process, as well as the doctrine of fundamental fairness. See Beck, 2019 Mich. LEXIS 1298 at *20 ("[C]onduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process.").

Moreover, using acquitted conduct at sentencing erodes the public trust in our legal system because it strikes the public as fundamentally unfair. Judges across the country have noted this corrosive effect of sentencing based on acquitted conduct. See United States v Brown, 892 F.3d 385, 408 (D.C. 2018) (Millett, J., concurring) ("[A]llowing courts at sentencing 'to materially increase the length of imprisonment' based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government."); United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); United States v. Canania, 532

F.3d 764, 778 & n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); United States v. White, 551 F.3d 381, 387 (2008) (Merritt, J., dissenting) (arguing that the defendant's sentence, as increased on the basis of acquitted conduct, "represents an as-applied violation of White's Sixth Amendment rights" under Apprendi); United States v. Coleman, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.'").[6]

[6]Myriad commentators have noted the same. See, e.g., James J. Bilsborrow, Sentencing Acquitted Conduct to the Post-Booker Dustbin, 49 Wm. & Mary L. Rev. 289, 333 (2007) ("When laypersons see that the product of a jury's fact-finding may be affirmatively set aside by a single judge, the civic value of jury service suffers. In this way, . . . judicial consideration of acquitted conduct harmfully impacts the jury's intended democratic accountability function."); Barry L. Johnson, The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It, 49 Suffolk U. L. Rev. 1, 26 (2016) ("[C]ritics of acquitted conduct emphasize the way it frustrates the role of citizen participation in the criminal justice system, robbing that system of the democratic legitimacy conferred by the jury's role, and diminishing the civic value of juror participation in the criminal justice process."); Orhun Hakan Yalincak, Critical Analysis of Acquitted Conduct

Other courts around the country have held that using acquitted conduct against a defendant at sentencing violates due process and is fundamentally unfair. See Beck, 2019 Mich. LEXIS 1298; State v. Koch, 112 P.3d 69, 79 (Haw. 2005) (holding that the trial court abused its discretion and "exceeded the bounds of reasoning" by "consider[ing] alleged conduct of which [defendant] was acquitted in sentencing him"); Marley, 364 S.E.2d at 139; State v. Cote, 530 A.2d 775, 784 (N.H. 1987) (holding that a sentencing court cannot consider acquitted conduct in rendering its sentence, because the presumption of innocence is "not to be forgotten after the acquitting jury has left, and sentencing has begun"); Jefferson v. State, 353 S.E.2d 468, 474 (Ga. 1987) ("[A] prior crime may be proven in aggravation" at sentencing "despite the lack of a conviction, so long as there has not been a previous acquittal.") (emphasis added). This Court should join these states and provide a critical protection against this concerning government overreach.

Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?, 54 Santa Clara L. Rev. 675, 723 (2014) ("[Acquitted conduct sentencing] repudiates the jury's verdict [and] undermines the juror's role … and is the type of deviation from the public's understanding of a defendant's right to a jury trial that could undermine public confidence in the criminal justice system.") (citation omitted).

Mr. Melvin put his liberty on the line—in fact, he put the rest of his life on the line—in order to have his case decided by a jury. To sentence him on the basis that he committed the murders the jury acquitted him of violates due process and fundamental fairness. Moreover, the unfairness of using acquitted conduct at sentencing undermines public trust in the criminal-justice system. Mr. Melvin's sentence cannot stand.

B. Sentencing Based On Acquitted Conduct Violates A Defendant's Federal and State Constitutional Rights To A Trial By Jury.

Sentencing based on acquitted conduct also violates the state and federal constitutional guarantees to a trial by jury. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 9. The right to a trial by is a constitutional protection "of surpassing importance." New Jersey v. Apprendi, 530 U.S. 466, 476-77 (2000). In fact, the right to a jury trial in criminal cases was the only right guaranteed by every state constitution written between 1776 and 1787. Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1183 (1991).

The Constitution places the jury at the center of the criminal-justice system as the fundamental protector of individual liberty. Lay juries "guard against a spirit of oppression and tyranny on the part of rulers." United States v. Gaudin, 515 U.S. 506, 510-11 (1995). In describing a scenario so "absurd" that it would undermine the entire jury system, the

Supreme Court of the United States described a hypothetical scenario in which a judge "could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it." Blakely v. Washington, 542 U.S. 296, 306 (2004). Surely, the Court made clear, such an outcome would not be permitted. Yet, this absurd and illegal situation is exactly what occurred in this case.

A judge's disagreement with a jury's verdict makes it even more important to protect that verdict. "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." Duncan v. Louisiana, 391 U.S. 145, 157 (1968). See also Jones v. United States, 526 U.S. 227, 245 (1999) (at common law, it was accepted that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power"). Punishing a defendant for acquitted conduct not only violates the protection an acquittal affords, but it undermines the very point of the right to trial by jury: to protect the defendant from overreaching government conduct.

The line of cases that begins with Apprendi implements the right to a trial by jury in a specific way. In Apprendi, the United States Supreme Court held that findings of fact that increase the range of punishment to which a defendant is subject

to upon conviction for a given crime must be charged in the indictment, submitted to a jury (or admitted by the defendant), and proven beyond a reasonable doubt. Id. at 490. Any judicial factfinding (other than factfinding related to a defendant's criminal history) that increases a defendant's sentence violates the Sixth and Fourteenth Amendments. Ibid. Mr. Melvin's sentence was justified by judicial factfinding—to wit, the finding that Mr. Melvin committed two homicides—not by facts found by the jury beyond a reasonable doubt. Therefore, it violates Apprendi.

That Mr. Melvin's sentence was within the legal range does not remove it from Apprendi's purview; the Supreme Court of the United States has already made clear that the relevant maximum is not what is technically statutorily allowed for a specific type of felony, but what is allowed by the actual jury finding. In Blakely v. Washington, 542 U.S. 296, 299 (2004), the defendant was convicted of second-degree kidnapping, which carried a possible punishment of up to ten years, but for which the "standard range" for punishment was 49 to 53 months. Ibid. However, the court sentenced a defendant to a 90-month sentence because it found "substantial and compelling reasons justifying an exceptional sentence." Ibid. Defendant appealed. The Blakely court rejected the argument that Apprendi did not apply because defendant's 90-month sentence was below the 10-year statutory maximum. Blakely, 542 U.S. at 303. The Court held that 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." Id. at 303-04 (citation omitted, emphasis in original). Therefore, the imposition of the 90-month sentence violated Apprendi. Ibid.

Thus, Blakely makes clear that the question is not whether Mr. Melvin's sentence is below the statutory maximum allowed for second-degree crimes for persistent offenders; the question is whether Mr. Melvin's sentence can be justified without judicial factfinding about Mr. Melvin's culpability for crimes the jury acquitted him of. Because Mr. Melvin's sentence is substantively unreasonable without the consideration of acquitted conduct, it violates Apprendi. See Jones v. United States, 574 U.S. 948, 948 (2014) (Scalia, J., dissenting from denial of petition for certiorari) (the Sixth Amendment requires 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").[7]

Mr. Melvin possessed a weapon without a license. The ordinary range for that crime is three to five years. N.J.S.A. 2C:43-6. He received a sentence over three times the maximum generally available for that crime. While it is true that Mr. Melvin was eligible for an extended term as a persistent offender, that does not automatically mean he should have received that extended term, let alone a sentence at the top of the extended range. Even where the predicates for persistent-offender status have been proven, "relatively few convictions will warrant" persistent-offender extended terms. State v. Dunbar, 108 N.J. 80, 89 (1987).

There is nothing extraordinary about either the crime or Mr. Melvin's record that warranted this term. A sentencing court should consider the severity of the offense in relation to other offenses of its class. State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), ("The aggravating and mitigating factors . . . are intended to afford a flexible . . . range of sentences

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[7] Of course, this Court need not decide whether the federal right to a jury trial, as articulated in Apprendi, is violated in order to determine that any of the relevant provisions of the state constitution have been violated and to provide protections accordingly, regardless of what would happen if and when the Supreme Court of the United States ever addresses this issue. Michigan v. Long, 463 U.S. 1032 (1983).

based upon individual circumstances which distinguish the particular offense from other crimes of the same nature.") (emphasis added), aff'd, State v. Yarbough, 100 N.J. 627 (1985). Mr. Melvin was found in a car that contained a gun in a hidden compartment. The gun was not out in the open. There were not any children in the car. In short, there was nothing so egregious about this possessory offense to justify a sentence many times more than Mr. Melvin could otherwise be exposed to. To the contrary, the sentence is this case can only be justified because of the court's belief that Mr. Melvin committed two murders. If the sentence is appropriate for a double murderer, the same sentence is not appropriate for a person who possessed a weapon. It is substantively unreasonable.

Nor is there anything about Mr. Melvin's record that could justify this sentence. In enacting the persistent-offender statute, the Legislature sought to deter "those criminals from society who demonstrate an inability to refrain from repeated commission" of crimes. State v. Galiano, 349 N.J. Super. 157, 165 (App. Div. 2002). "[T]he reason for the infliction of severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists in violating the law after conviction of previous infractions." State v. Johnson, 109 N.J. Super. 69, 75 (App. Div. 1970). At the time of the resentencing,

Mr. Melvin was 39 years old. He had been convicted of indictable offenses on four previous occasions: third-degree possession of a controlled dangerous substance and conspiracy to possess a controlled dangerous substance with intent to distribute when he was 18 years old; third-degree possession of a controlled dangerous substance in a school zone when he was 19 years old; conspiracy to distribute heroin when he was 20 years old; and armed robbery when he was 21 years old.[8] (PSR 5-6) While his record is clearly not unblemished, it is does not consist of repetitive violent acts that would justify such a long sentence. Mr. Melvin, who grew up in Newark, committed a handful of drug offenses and one robbery. His record is not extraordinary in either direction. The sentence is extraordinary, however, and is substantively unreasonable.

Two other things bear mention when considering the reasonableness of Mr. Melvin's sentence. First, the judge originally sentenced him to the maximum possible sentence: 20 years with a 10-year parole disqualifier. The only reasons a lesser sentence is before this Court now is because Mr. Melvin was later resentenced and the court was required to take into account his extraordinary rehabilitative efforts under State v.

[8] There is no information available in the PSR about the details of this non-New Jersey offense, for which Mr. Melvin received five years in prison. (PSR 6)

Randolph, 210 N.J. 330 (2012) and because the Appellate Division held that the court's belief that Mr. Melvin was the shooter did not provide a basis for finding aggravating factor (2). Melvin I, 2017 N.J. Super. Unpub. LEXIS at *14. But the court was working backwards from the very maximum sentence, which he imposed because he believed Mr. Melvin committed the murders he was that he was facing trial for again. If he had not considered his belief that Mr. Melvin committed those murders, which the Appellate Division made clear he should not have in Melvin I, the decreased sentence Mr. Melvin received after the resentencing would have been lower, because it would be decreasing a sentence that would have been lower to begin with.

Second, it is merely the happenstance of this case that 20 years was the absolute maximum the sentencing judge could impose. There was no second conviction to impose consecutively. It is clear from the record of sentencing that if the court could have imposed more, it would have. If this Court does not prohibit using acquitted conduct at sentencing, there will be cases where the sentence crafted based on acquitted conduct is even more extreme than what occurred here.

In sum, what happened in this case prevented the jury from serving its essential role of "function[ing] as circuitbreaker in the State's machinery of justice." Blakely, 542 U.S. at 306-07. While a judge is entitled to decide how an offense will be

punished, it is the sole province of the jury to decide which offenses will be punished. This decision is rendered when the jury delivers a guilty verdict, based on facts proved beyond a reasonable doubt. Yet the sentencing court treated the jury exactly in the manner prohibited by Blakely, "relegat[ing] the jury to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." Id. at 307. That result cannot stand.

C. Sentencing Based On Acquitted Conduct Violates The State Constitutional Prohibition Against Double Jeopardy.

Third, sentencing Mr. Melvin based on the court's own belief that Mr. Melvin committed a crime he was acquitted of violated double jeopardy because it is tantamount to reprosecution after an acquittal. N.J. Const., art. I, ¶ 11. It is true that this Court has often interpreted the State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution. State v. Schubert, 212 N.J. 295, 304 (2012). It is also true that the United States Supreme Court held in Watts that Double Jeopardy does not preclude the use of acquitted conduct at sentencing. Mr. Melvin submits that this Court should, in this context, interpret the New Jersey Constitution to provide broader protections than currently provided by the United States Supreme Court.

New Jersey's courts give a broader construction to state constitutional provisions where federal case law fails to "pay[] due regard to precedent and the policies underlying specific constitutional guarantees." State v. Baker, 81 N.J. 99, 112 n.8 (1979) (internal quotation marks omitted). As a matter of state constitutional law, Watts has never been accepted by this Court or any court in New Jersey.

As a threshold matter, it is beyond debate that this Court can and does provide greater protections to defendants' individual rights than those provided by the federal constitution. See, e.g., State v. Gilmore, 103 N.J. 508, 523-24 (1986) (holding that the New Jersey Constitution provides greater protection against a prosecutor's discriminatory use of peremptory challenges than the United States Supreme Court had afforded). Despite the fact that Watts was decided 23 years ago, New Jersey courts have never followed it; it is cited in two published cases, neither of which have anything to do with the issue in this case. State v. Kelly, 406 N.J. Super. 332, 347 (App. Div. 2009) (addressing collateral estoppel issue); State v. Miller, 342 N.J. Super. 474, 492 (App. Div. 2001) (citing Ninth Circuit decision in Watts about the standards for executing an arrest warrant). In fact, given the opportunity, the Appellate Division implicitly rejected Watts 13 years after it was decided in State v. Tindell, 417 N.J. Super. 530 (App.

Div. 2011), where the Appellate Division vacated a sentence imposed after the jury acquitted a defendant of murder and the trial court, disagreeing with the verdict, imposed consecutive, maximum sentences on other counts in order to reflect the defendant's supposed culpability for murder. And despite the same sentencing court's reliance on Watts in imposing the sentence in State v. Tillery, 238 N.J. 293 (2019), this Court did not adopt Watts's rationale in Tillery.

As a matter of federal law, Watts is a paradigmatic example of an undertheorized case with catastrophic results. It is a short, per curiam opinion rendered without the benefit of argument. Even justices of the Supreme Court of the United States have noted that Watts is not a particularly well-thought-out decision. Booker, 543 U.S. at 240, n.4 (noting that the Court in Watts "did not even have the benefit of full briefing or oral argument. It is unsurprising that [the Court] failed to consider fully the issues presented to" it in Watts). There is no reason to follow it as precedent.

Once Watts is dispensed with, there is no jurisprudential reason not to recognize that punishing a defendant at sentencing for conduct he has been acquitted of violates the state-constitutional guarantee against double jeopardy. Our double-jeopardy clause "provide[s], in essence, three forms of protection to a defendant." State v. Schubert, 212 N.J. 295, 305

(2012). It prohibits (1) prosecuting a defendant for the same offense after an acquittal, (2) prosecuting a defendant for the same offense after a conviction, and (3) imposing on a defendant multiple punishments for the same offense. Ibid. The sentencing in this case violated the first prohibition. After Mr. Melvin was acquitted of the murders, the State is clearly precluded from prosecuting him again for those murders, obtaining a conviction for those murders, and then sentencing him on those murders. For the court to punish Mr. Melvin at sentencing for committing the murders he was acquitted of is functionally the same.

D. Mr. Melvin Was Unlawfully Sentenced For Crimes He Was Acquitted Of Committing. His Sentence Cannot Stand.

The use of acquitted conduct to sentence a defendant is wrong legally, logically, and viscerally. The Appellate Division came to the contrary conclusion by relying on Tillery. But Tillery had only to do with the use of hung conduct in sentencing—it did not have anything to do with the use of acquitted conduct.

Many of the concerns about using acquitted conduct do not apply to hung conduct. An acquittal has a special significance that a failure to render a verdict lacks. For the reasons discussed above, ignoring a jury's acquittal is a special kind of constitutional harm, over and above judicial fact-finding in

the absence of a jury verdict. As the Michigan Supreme Court explained, "[t]he difference between acquitted conduct and uncharged bad acts presented at sentencing is critical and constitutional. Acquitted conduct shows up at sentencing in the company of the due-process protection of the presumption of innocence; uncharged conduct does not." Beck, 2019 Mich. LEXIS 1298, at *14-15 (July 29, 2019). Moreover, the Double Jeopardy Clause of both the state and federal constitutions offers no protections to a defendant after a jury fails to reach a verdict, as the jury did in Tillery. Abbati, 99 N.J. at 427. Last, the Apprendi issue was never raised, briefed, or argued in Tillery. Thus, it has never been truly decided.

Mr. Melvin has already served almost eight years in prison because the sentencing judge twice trampled on the jury's verdict and punished Mr. Melvin as though he committed murders he was acquitted of committing. Mr. Melvin has served more time than would have been required on any ordinary-term sentence and more than many extended-term sentences. Every additional day he spends incarcerated due to the unlawful sentencing proceeding is an irreparable harm. Because the "interests of justice demand intervention and correction," this Court should exercise its original jurisdiction and sentence Mr. Melvin to time served. State v. Jarbath, 114 N.J. 394, 410 (1989) (exercising original jurisdiction when the "interests of justice demand intervention

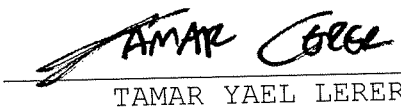
and correction") (internal quotation marks omitted). In the alternative, if this Court believes Mr. Melvin should go through a third sentencing proceeding, that proceeding should take place before a different judge.

CONCLUSION

Mr. Melvin's sentence must be vacated.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: 
TAMAR YAEL LERER
Assistant Deputy Public Defender

Dated: March 16, 2020

Superior Court of New Jersey
Essex County
(Law Division - Criminal)
22 ND Grand Jury 2012 Term

The State of New Jersey
vs.

J MARK MELVIN — Count (s) 1 thru 9

Indictment #: 2013 - 5 - 1257

INDICTMENT — 9 Count (s)

FIRST	degree	MURDER
SECOND	degree	UNLAWFUL POSS. OF WEAPON(S)
SECOND	degree	POSS. WEAPON(S) UNLAW. PURPOSE
FIRST	degree	ATTEMPTED MURDER
SECOND	degree	AGGRAVATED ASSAULT
THIRD	degree	POSS. OF CDS(S)
THIRD	degree	POSS. W/I TO DIST. CDS(S)
THIRD	degree	POSS. W/I TO DIST. CDS-SCHOOL

A True Bill — Foreperson ☑ Deputy Foreperson ☐

P #: 12006422
w2012-021581,020388,020390-0714

Returned: Friday, May 31, 2013

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did purposely or knowingly murder Fuquan Mosely by his own conduct with a handgun

contrary to the provisions of N.J.S.2C: 11-3a. (1),(2), a crime of the First Degree, and against the peace of this State, the government and dignity of the same.

SECOND COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, knowingly and unlawfully did possess a certain firearm, a handgun, without first having obtained a permit to carry the same

contrary to the provisions of N.J.S. 2C:39-5b., a crime of the Second Degree, and against the peace of this State, the government and dignity of the same.

THIRD COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, knowingly and unlawfully did possess a certain weapon, a handgun with a purpose to use it unlawfully against the person or property of another

contrary to the provisions of N.J.S.2C:39-4a, a crime of the Second Degree, and against the peace of this State, the government and dignity of the same.

THIRD COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, knowingly and unlawfully did possess a certain weapon, a handgun with a purpose to use it unlawfully against the person or property of another

contrary to the provisions of N.J.S.2C:39-4a, a crime of the Second Degree, and against the peace of this State, the government and dignity of the same.

FOURTH COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did purposely attempt to commit the murder of Jason Chavis which conduct constitutes a substantial step in the commission of said crime, and is strongly corroborative of criminal purpose

contrary to the provisions of and N.J.S.2C:5-1, N.J.S.2C: 11-3 a crime of the First Degree, and against the peace of this State, the government and dignity of the same.

FIFTH COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did purposely or knowingly murder Jason Chavis by his own conduct with a handgun

contrary to the provisions of N.J.S.2C: 11-3a. (1),(2), a crime of the First Degree, and against the peace of this State, the government and dignity of the same.

SIXTH COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life cause or attempt to cause serious bodily injury to Bertha Lynn

contrary to the provisions of N.J.S. 2C:12-1b(1), a crime of the Second Degree, and against the peace of this State, the government and dignity of the same.

SEVENTH COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did have in his possession a controlled dangerous substance, Heroin or its analogue

contrary to the provisions of N.J.S.2C: 35-10a(1), a crime of the Third Degree, and against the peace of this State, the government and dignity of the same.

EIGHTH COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did possess or have under his control with intent to distribute a controlled dangerous substance, Heroin or its analogue

contrary to the provisions of N.J.S. 2C:35-5a(1),b(3) a crime of the Third Degree and against the peace of this State, the government and dignity of the same.

NINTH COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

MARK MELVIN

on the 27TH day of September, 2012 in the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did violate subsection a. of N.J.S. 2C:35-5 by possessing with intent to distribute a controlled dangerous substance, Heroin or its analogue, while on school property used for school purposes which is owned by or leased to an elementary or secondary school or school board, or within 1,000 feet of school property or a school bus or while on a school bus

contrary to the provisions of N.J.S. 2C:35-7 a crime of the Third Degree and against the peace of this State, the government and dignity of the same.

CAROLYN A. MURRAY
SDAG IN CHARGE/
ACTING ESSEX COUNTY PROSECUTOR

BY: _____
PORTIA DOWNING
SPECIAL DEPUTY ATTORNEY GENERAL/
ACTING ASSISTANT PROSECUTOR

State of New Jersey

v.

Defendant: (Specify Complete Name) MELVIN, MARK

DATE OF BIRTH	03/31/1979	SBI NUMBER	311498C
DATE OF ARREST	09/27/2012	DATE INDICTMENT/ ACCUSATION FILED	05/31/2013
DATE OF ORIGINAL PLEA	06/25/2013	ORIGINAL PLEA	☒ Not Guilty ☐ Guilty

New Jersey Superior Court
Law Division – Criminal
Essex County

☒ JUDGMENT OF CONVICTION
☐ CHANGE OF JUDGMENT
☒ ORDER FOR COMMITMENT
☐ INDICTMENT / ACCUSATION DISMISSED
☐ JUDGMENT OF ACQUITTAL

2014 OCT 31 P 3:39

ADJUDICATION BY

☐ GUILTY PLEA DATE: ☐ NON-JURY TRIAL DATE:
☒ JURY TRIAL DATE: 06/24/2014 ☐ DISMISSED / ACQUITTED DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
13-05-01257-I	1	MURDER-PURPOSE/KNOWINGLY	1ST	2C: 11-3A(1)(2)
	2	UNLAW POSS WEAP-HANDGUN	2ND	2C: 39-5B
	3	UNLAW PURPOSE-FIREARMS	2ND	2C:39-4A
	4	CRIMINAL ATTEMPT, MURDER	1ST	2C:5-1; 2C:11-3
	5	MURDER-PURPOSE/KNOWINGLY	1ST	2C:11-3A(1)(2)
	6	AGG ASSLT SBI	2ND	2C:12-1B(1)
	7	POSS SCHD I II III IV	3RD	2C:35-10A(1)
	8	POSS/DIST/MFG/DISPENSE CDS	3RD	2C: 35-5A(1)
	9	DIST, DISP, POSS CDS/SCHOOL ZONE	3RD	2C:35-7

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE
2	UNLAW POSS WEAP-HANDGUN	2ND	2C: 39-5B

It is, therefore, on 10/27/2014 ORDERED and ADJUDGED that the defendant is sentenced as follows:

ON COUNT TWO (2) - COMMITTED TO THE CUSTODY OF THE COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS FOR A TERM OF TWENTY (20) YEARS WITH THE IMPOSITION OF AN EXTENDED TERM ON THE GROUNDS THAT DEFENDANT IS A PERSISTENT OFFENDER AS PER N.J.S.A. 2C:44-3A AND INCLUDING TEN (10) YEARS OF PAROLE INELIGIBILITY PER GRAVES, N.J.S.A. 2C: 43-6(C) AND PER 2C:43-6(B).

COUNT FOUR (4) – DISMISSED BY MOTION OF PROSECUTOR.

COUNTS ONE (1), THREE (3), FIVE (5), SIX (6), SEVEN (7), EIGHT (8) AND NINE (9) RESULTED IN A HUNG JURY.

☐ The defendant is hereby sentenced to community supervision for life.
☐ The defendant is hereby ordered to serve a _____ year term of parole supervision which term shall begin as soon as defendant completes the sentence of incarceration.
☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.
☐ The court finds that the defendant is amenable to sex offender treatment.
☐ The court finds that the defendant is willing to participate in sex offender treatment.
☐ The court finds that the defendant is willing to participate in sex offender treatment.
☒ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

☒ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☒ Defendant is to receive credit for time spent in custody (R. 3:21-8).	TOTAL NUMBER OF DAYS 760 DAYS	DATE: (From/To) 09/27/12
		DATE: (From/To) 10/26/14
☐ Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).	TOTAL NUMBER OF DAYS	DATE: (From/To)
		DATE: (From/To)

Total Custodial Term 20 YEARS Institution DOC Total Probation Term

JAIL P.D. ✓ PROS. ✓
PROS. A.O.C. D.C.
PAROLE P.S.I. OTHER

Administrative Office of the Courts
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CP0106a (rev. 08/20/07)
Page 1 of 2

State of New Jersey v. MELVIN, MARK S.B.I.# 223851C Ind / Acc # I-01-02-0707

Total Fine $_____

Total RESTITUTION $_____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☒ Assessment imposed on count(s) TWO (2) is $100.00 each

Total VCCB Assessment $100.00

Installment payments are due at the rate of $_____ per _____ beginning _____ (Date)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

_____ 1st Degree @ $3000 _____ 4th Degree @ $750

_____ 2nd Degree @ $2000 _____ Disorderly Persons or Petty Disorderly Persons @ $500

_____ 3rd Degree @ $1000

Total D.E.D.R. Penalty $_____

☐ Court further Orders that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. _____ Offenses @ $50.

Total Lab Fee $_____

3) Name of Drugs Involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED.

The suspension shall begin today, _____ and end _____.

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____ Sex _____ Date of Birth Errorl Reference source not found.

Eye Color _____

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____.

☐ Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c. 9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. (P.L. 1993, c.220) $75.00

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 276) Amount per month $_____.

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered. $30.00

If the crime occurred on or after May 4, 2001, and the defendant has been convicted of aggravated sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endanger the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a minor under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor, kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3) or (4), or an attempt to commit any of these crimes, a $800 Statewide Sexual Assault Nurse Examiner Program Penalty is ordered for each of these offenses.

Name (Court Clerk or Person preparing this form)	Telephone Number	Name (Attorney for Defendant at Sentencing)
THERESA HOUTHUYSEN, TRIAL COURT JUDGE'S SECRETARY	(973) 693-6444	BROOKE BARNETT, ESQ.

STATEMENT OF REASONS – Include all applicable aggravating and mitigating factors

AGGRAVATING FACTORS
(2) The gravity and the seriousness of the harm inflicted on the victim.
(3) The risk that the defendant will commit another offense;
(6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted.
(9) The need for deterring the defendant and others from violating the law.

MITIGATING FACTORS
NONE

THERE BEING NO MITIGATING FACTORS, I AM CLEARLY CONVINCED THAT THE AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH THE NONEXISTENT MITIGATING FACTORS AND THEREFORE A TEN (10) YEAR PAROLE INELEGIBILITY TERM APPLIES AS PER N.J.S.A. 2C: 43-6b.

Judge (Name)	Judge (Signature)	Date
MARTIN CRONIN, J.S.C.		10/31/14

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New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

Type or clearly print all information. Attach additional sheets if necessary.

TITLE IN FULL (AS CAPTIONED BELOW)
STATE OF NEW JERSEY
V.
MARK MELVIN

ATTORNEY / LAW FIRM / PRO SE LITIGANT

NAME			
HELEN C GODBY, Esq.			
STREET ADDRESS			
31 CLINTON ST. P.O. BOX 46003			
CITY	STATE	ZIP	PHONE NUMBER
NEWARK	**NJ**	**07101**	**973-877-1200**
EMAIL ADDRESS			
Edward.Germadnig@opd.state.nj.us			
intake.appellate@opd.state.nj.us			

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
MARTIN G. CRONIN, JSC	**ESSEX**	**13-05-1257-I**

Notice is hereby given that **MARK MELVIN** appeals to the Appellate Division from a ■ Judgment or ☐ Order entered on **10/31/2014** in the ☐ Civil ■ Criminal or ☐ Family Part of the Superior Court or from a ☐ State Agency decision entered on _____.

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

On October 31, 2014 defendant was sentence to 20 years with 10 years parole ineligibility for unlawful possession of a weapon.

This appeal is from a ■ conviction ☐ post judgment motion ☐ post-conviction relief.
If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ■ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ■ No

If in custody, name the place of confinement:
NORTHERN STATE PRISON

Defendant was represented below by:

☐ Public Defender ☐ self ■ private counsel **BROOKE BARNETT** (specify)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	**MARTIN G. CRONIN, JSC**	**03/09/2015**
Trial Court Division Manager	**ESSEX**	**03/09/2015**
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
STATE OF NEW JERSEY	**TERESA ANGELA BLAIR, Esq.** **ATTORNEY GENERAL CRIMINAL JUSTICE** **25 MARKET STREET** **PO BOX 085** **TRENTON NJ 08625-0085** **609-984-6500** **dcj-efile@njdcj.org**	**03/09/2015**

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Trial Court Transcript Office	**ESSEX**	**03/09/2015**
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

☐ No verbatim record.

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

03/09/2015
Date

s/ HELEN C GODBY, Esq.
Signature of Attorney or Pro Se Litigant

BAR ID # **018191981** EMAIL ADDRESS **intake.appellate@opd.state.nj.us**

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
MATTHEW ASTORE
Acting Deputy Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973.877.1200 · Fax 973.877.1239
TheDefenders@OPD.NJ.GOV

JOSEPH E. KRAKORA
Public Defender

August 18, 2016

Joseph H. Orlando, Clerk
Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625

Re: State v. Mark Melvin
Docket No. A-3003-14

Dear Mr. Orlando:

I am writing in order to update the court regarding the proceedings in the above-captioned appeal.

Mr. Melvin was tried on a nine count indictment on June 3, 2014 through June 2, 2014. On June 24, 2014, the jury returned a verdict, convicting Mr. Melvin of only unlawful possession of a firearm. The jury was unable to reach a verdict on the remaining seven counts which related to a double homicide and drug charges.

On July 13, 2016, this Court entered an order temporarily remanding the matter to the Law Division for trial on the remaining counts. Proceedings on the appeal were "stayed until the trial court entered a judgment of conviction at the conclusion of the remand proceeding." A copy of that order is appended to this letter.

Yesterday undersigned counsel was informed by Mr. Melvin's trial counsel that the jury returned a not guilty verdict on the counts related to the homicides—counts one, three, five, and six. The jury was unable to return a verdict on the counts related to the drugs—counts seven, eight, and nine.

Respectfully submitted,

TAMAR Y. LERER
Assistant Deputy Public Defender

Cc: Steven Pogany, Essex County Prosecutor's Office

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
ESSEX VICINAGE

Chambers of
Honorable Martin Cronin
Judge

Veteran's Court House
50 West Market Street, 8th Fl
Newark, New Jersey 07102

September 20, 2016

Appellate Division Clerk's Office
Hughes Justice Complex
25 W. Market Street
PO Box 006
Trenton, 08625-006
ATTN: Matthew Dunn, Esq.

Re: State v. Mark Melvin
Docket Number A-3003-14T1

Dear Mr. Dunn:

Please accept this letter as an amplification of the reasons supporting this court's ruling that the State's witness, Jahad Marshall, could not, on self-incrimination grounds, refuse to testify at defendant's first trial. Since this letter is being filed contemporaneously with the judgment of conviction, resolving all of defendant's charges, it is timely filed pursuant to Rule 2:5-1.

A) Procedural History

Defendant was charged under Essex County Indictment Number 13-05-1257, with nine (9) counts. This court granted the State's motion to dismiss count four (4). Defendant was then tried before a jury (hereinafter "first trial"). Jahad Marshall testified at this first trial which resulted in a conviction on count two (2), second degree unlawful possession of a weapon, contrary to N.J.S.A. 2C: 39-5b. This jury was hung on counts one (1), three (3), five (5), six (6), seven (7), eight (8) and nine (9). This court sentenced defendant to an extended term of twenty years, with ten years parole ineligibility. Defendant thereafter appealed from the judgment of conviction entered on October 31, 2014. Both the defendant and the State filed briefs concerning the first trial with the Appellate Division.[1]

[1] Citation codes are as follows:
Da - Refers to Defendant's appendix.
Db – Refers to Defendant's Brief.
Sa – Refers to State's Brief.

In response to the State's motion, the Appellate Division temporarily remanded this matter to this court for trial on the remaining counts. On these counts, defendant was tried before a second jury (hereinafter "second trial"). Jahad Marshall also testified before this second jury which found the defendant not guilty on counts one, three, five, and six. This second jury was unable to reach a verdict on counts seven, eight and nine. On September 16, 2016, this court granted the State's motion to dismiss counts seven, eight and nine. This court then entered the attached judgment of conviction resolving all counts.

B) Amplified Ruling

In his appeal, defendant challenges this court's ruling that Jahad Marshall could be compelled to testify at defendant's first trial. There are two independent and sufficient grounds to support this conclusion, only the first of which was referenced in the State's brief. This first ground focused upon the facts and circumstances of this case which establish that any danger of prosecution is "extremely remote, unrealistic, and highly speculative." See State v. Johnson, 223 N.J. Super 122, 133-34 (App. Div. 1988), analyzed in, Sb at 13-14. Second, as amplified through this letter, the State is bound by its representation to Mr. Marshall that it "doesn't intend to charge him for this offense" (3T4:21-22) or for any claims "arising out of this criminal conduct" (3T4:18 - 5:1). See State v. Riley, 242 N.J. Super. 113, 119 (App. Div. 1990). Cf. Santabello v. New York, 404 U.S. 257, 266 (1971)(defendant may obtain specific enforcement of plea agreement); People v. Brunner, 32 Cal.App.3d 908, 915 (1973)(state estopped from refusing to comply with grant of immunity).

Transcripts from the first trial fully memorialize these State representations. Outside of the jury's presence, the State advised this Court of their understanding that Jahod Marshall expressed an intention to invoke his privilege against self-incrimination. (3T 4: 12-15). The State then set forth its position that, under the then existing facts of this case, Mr. Marshall could not properly invoke such a privilege. (3T4: 15 -17). The State explained its position as follows:

MS. DOWNING: He is not charged in this investigation. He was charged with a hindering charge, which was ultimately sent to remand court and dismissed by the State. He's not a target; the State doesn't intend to charge for this offense.

THE COURT: Well, the hindering charge - - you may be seated Mr. Melvin. The hindering charge arose out of this incident; correct?

MS. BARNETT: That is correct.

THE COURT: And so the filing of that charge and the dismissal, jeopardy attached, then it's gone.

MS. DOWNING: That is correct.

THE COURT: So he has not - - if he has no, uh - - **he has no possible criminal exposure arising out of this criminal incident; correct?**

MS. DOWNING: **That is the State's position.**

(3T 4:18 – 5:9) (emphasis added). Referring to the State's apparent double jeopardy concession, the Court engaged in the following exchange with Mr. Melvin's counsel:

THE COURT: … once jeopardy attaches, the case has been dismissed.

MS. BARNETT: Yes, Judge.

THE COURT: So he has no realistic chance of criminal exposure arising out of these homicides. It's a matter of law. I mean, am I missing something?

MS. BARNETT: Not that I - - no, Judge.

(3T 6: 2- 8). Hence, this Court properly advised Mr. Marshall that he has "no valid privilege to assert." (3T 10:25-11:4).

Significantly, the propriety of this ruling is not affected by events occurring after Mr. Marshall testified in defendant's first trial. As a matter of law, the propriety of this ruling is evaluated at the time it is made, based upon the facts and circumstances existing at that time. See State v. Hoffman, 341 U.S. 479, 487-88 (1951); In re. Ippolitio, 75 N.J. 435, 440 (1978). As previously demonstrated, Mr. Marshall did not have a valid privilege to assert when he was called to testify at defendant's first trial. Thus, subsequent events are logically irrelevant in assessing the propriety of that ruling.

Respectfully submitted,

HON. MARTIN CRONIN, J.S.C.

cc: Stephen Pogany, Esq., Essex County Prosecutor's Office
Tamar Lerer, Esq., Office of the Public Defender
Portia Downing, Esq., Essex County Prosecutor's Office
Roy Greenman, Esq.

FILED, Clerk of the Appellate Division, September 23, 2016, A-003003-14

V.

Superior Court
Law Division – Criminal
Essex County
AMENDED JUDGMENT

Defendant: (Specify Complete Name) MELVIN, MARK

DATE OF BIRTH	03/31/1979	SBI NUMBER	311498C
DATE OF ARREST	09/27/2012	DATE INDICTMENT/ ACCUSATION FILED	05/31/2013
DATE OF ORIGINAL PLEA	06/25/2013	ORIGINAL PLEA	☒ Not Guilty ☐ Guilty

☒ JUDGMENT OF CONVICTION
☒ CHANGE OF JUDGMENT
☒ ORDER FOR COMMITMENT
☐ INDICTMENT / ACCUSATION DISMISSED
☐ JUDGMENT OF ACQUITTAL

ADJUDICATION BY

☐ GUILTY PLEA DATE:
☒ JURY TRIAL DATE: 06/24/2014
☐ NON-JURY TRIAL DATE:
☐ DISMISSED / ACQUITTED DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
13-05-01257-I	1	MURDER-PURPOSE/KNOWINGLY	1ST	2C: 11-3A(1)(2)
	2	UNLAW POSS WEAP-HANDGUN	2ND	2C: 39-5B
	3	UNLAW PURPOSE-FIREARMS	2ND	2C:39-4A
	4	CRIMINAL ATTEMPT, MURDER	1ST	2C:5-1; 2C:11-3
	5	MURDER-PURPOSE/KNOWINGLY	1ST	2C:11-3A(1)(2)
	6	AGG ASSLT SBI	2ND	2C:12-1B(1)
	7	POSS SCHD I II III IV	3RD	2C:35-10A(1)
	8	POSS/DIST/MFG/DISPENSE CDS	3RD	2C: 35-5A(1)
	9	DIST, DISP, POSS CDS/SCHOOL ZONE	3RD	2C:35-7

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE
2	UNLAW POSS WEAP-HANDGUN	2ND	2C: 39-5B

It is, therefore, on 9/20/16 ORDERED and ADJUDGED that the defendant is sentenced as follows:

ON COUNT TWO (2) - COMMITTED TO THE CUSTODY OF THE COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS FOR A TERM OF TWENTY (20) YEARS WITH THE IMPOSITION OF AN EXTENDED TERM ON THE GROUNDS THAT DEFENDANT IS A PERSISTENT OFFENDER AS PER N.J.S.A. 2C:44-3A AND INCLUDING TEN (10) YEARS OF PAROLE INELIGIBILITY PER GRAVES, N.J.S.A. 2C: 43-6(C) AND PER 2C:43-6(B). DEFENDANT WAS CONVICTED BY JURY VERDICT ON 6/24/14.

COUNT FOUR (4) – DISMISSED BY MOTION OF PROSECUTOR BEFORE 6/24/14.

ON COUNTS ONE (1), THREE (3), FIVE (5) AND SIX (6) DEFENDANT WAS FOUND NOT GUILTY BY JURY VERDICT ON 8/8/2016.

COUNTS SEVEN (7), EIGHT (8) AND NINE (9) WERE DISMISSED WITHOUT PREJUDICE BY MOTION OF PROSCUTOR ON 9/16/16.

☐ The defendant is hereby sentenced to community supervision for life.
☐ The defendant is hereby ordered to serve a _____ year term of parole supervision which term shall begin as soon as defendant completes the sentence of incarceration.
☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.
☐ The court finds that the defendant is amenable to sex offender treatment.
☐ The court finds that the defendant is willing to participate in sex offender treatment.
☒ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

☒ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☒ Defendant is to receive credit for time spent in custody (R. 3:21-8).	TOTAL NUMBER OF DAYS 1450 DAYS	DATE: (From/To) 09/27/12 DATE: (From/To) 09/15/16
☐ Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).	TOTAL NUMBER OF DAYS	DATE: (From/To) DATE: (From/To)

Total Custodial Term 20 YEARS Institution DOC Total Probation Term

CP0106a (rev. 08/20/02)
Page 1 of 2

Administrative Office of the Courts
State Bureau of Identification
COPIES TO: CHIEF PROBATION OFFICER STATE POLICE AOC CRIMINAL PRACTICE DIVISION DEPT OF CORRECTIONS OR COUNTY PENAL INSTITUTION

Total Fine $_____

Total RESTITUTION $_____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☒ Assessment imposed on

count(s) TWO (2)

is $100.00 each

Total VCCB Assessment $100.00

Installment payments are due at the rate of

$_____ per _____

beginning _____

(Date)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

_____ 1st Degree @ $3000 _____ 4th Degree @ $750

_____ 2nd Degree @ $2000 _____ Disorderly Persons or Petty Disorderly Persons @ $500

_____ 3rd Degree @ $1000

Total D.E.D.R. Penalty $_____

☐ Court further Orders that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. _____ Offenses @ $50.

Total Lab Fee $_____

3) Name of Drugs involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED.

The suspension shall begin today, _____ and end _____.

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____ Sex _____ Date of Birth **Error! Reference source not found.**

Eye Color _____

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____

☐ Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c. 9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. (P.L. 1993, c.220) **$75.00**

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month $_____.

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered. **$30.00**

If the crime occurred on or after May 4, 2001, and the defendant has been convicted of aggravated sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endanger the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a minor under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor, kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3) or (4), or an attempt to commit any of these crimes, a $800 Statewide Sexual Assault Nurse Examiner Program Penalty is ordered for each of these offenses.

Name (Court Clerk or Person preparing this form)	Telephone Number	Name (Attorney for Defendant at Sentencing)
THERESA HOUTHUYSEN, TRIAL COURT JUDGE'S SECRETARY	(973) 693-6444	ROY GREENMAN, ESQ.

STATEMENT OF REASONS – Include all applicable aggravating and mitigating factors

AGGRAVATING FACTORS
(2) The gravity and the seriousness of the harm inflicted on the victim.
(3) The risk that the defendant will commit another offense;
(6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted.
(9) The need for deterring the defendant and others from violating the law.

MITIGATING FACTORS
NONE

THERE BEING NO MITIGATING FACTORS, I AM CLEARLY CONVINCED THAT THE AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH THE NONEXISTENT MITIGATING FACTORS AND THEREFORE A TEN (10) YEAR PAROLE INELEGIBILITY TERM APPLIES AS PER N.J.S.A. 2C: 43-6B.

Judge (Name)	Judge (Signature)	Date
MARTIN CRONIN, J.S.C.		9/20/16

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3003-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK MELVIN,

Defendant-Appellant.

Submitted February 14, 2017 – Decided March 1, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-05-1257.

Joseph E. Krakora, Public Defender, attorney for appellant (Tamar Y. Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Stephen A. Pogany, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from his conviction for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). We affirm the conviction, but remand for resentencing.

We discern the following facts from evidence adduced at the jury trial. In September 2012, a male wearing a gray hooded sweatshirt and a mask entered a restaurant in Newark, shot and killed two men, and shot and injured a female employee of the restaurant. Officers found three bricks of heroin next to one of the male victims.

A detective (the detective) was working as a patrol officer in a marked patrol vehicle in the area on the day of the shooting. She testified that she heard a dispatch report of a car possibly involved in the shooting and saw a car fitting the description stopped at a corner. It was later determined that defendant owned the car and it had run out of gas. The detective testified she radioed that she saw the car, observed two occupants inside, and she and her partner approached the vehicle.

When the detective reached the vehicle, defendant said, "What's going on? I didn't do anything." He then exited the car and ran. Defendant was wearing a gray hooded sweatshirt when the detective first started pursuing him. The detective chased him, apprehended him, and arrested him.

Officers searched the areas where defendant had been running. They recovered two non-matching gloves and a gray hooded sweatshirt from the backyards where defendant ran. The State's DNA expert testified that the gray hooded sweatshirt contained DNA evidence from one of the male victims.

Officers eventually searched the car and found a handgun, heroin, a glove, and a black facemask. They found a black facemask in the rear passenger side of the car, which contained defendant's DNA. An officer explained that the handgun and heroin were found in the front passenger side, "inside the door where the controls for the vehicle, like the windows and the door locks. . . it was actually inside a compartment in there." Ballistic testing indicated the handgun from defendant's car was the same weapon used in the shooting at the restaurant.

In May 2013, an Essex County Grand Jury indicted defendant and charged him with two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1)-(2) (Counts One and Five); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (Count Two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count Three); first-degree attempted murder, N.J.S.A. 2C:11-3 and N.J.S.A. 2C:5-1 (Count Four); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (Count Six); third-degree unlawful possession of a controlled dangerous substance (CDS) (heroin),

N.J.S.A. 2C:35-10(a)(1) (Count Seven); third-degree possession of a CDS (heroin) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (Count Eight); and third-degree unlawful possession of a CDS (heroin) with the intent to distribute within 1000 feet of a school, N.J.S.A. 2C:35-7 (Count Nine).[1]

A passenger (the passenger) in defendant's vehicle testified at trial. The State originally charged the passenger with "hindering," but this charge was dismissed before defendant's trial. The passenger first attempted to invoke his Fifth Amendment right not to testify, but the judge found he "ha[d] no realistic chance of criminal exposure arising out of these homicides." 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 this shooting, "you cannot logically incriminate yourself" and, therefore, "you have no valid privilege to assert."

The passenger testified that he was playing basketball in a park the morning of the shooting and flagged defendant down to get in his car. He testified that defendant was wearing a gray hooded sweatshirt. The passenger said defendant drove to the area of the

[1] The State dismissed Count Four before trial began because this attempted murder charge related to the same victim referred to in Count Five.

shooting and got out, he heard gunshots, then defendant came back to the car and drove away. He said defendant had his sweatshirt hood up, had a black glove in the sweatshirt pocket, and had a gun on his hip. Defendant told the passenger that "he wasn't going to let [him] go to jail."

The jury found defendant guilty of second-degree unlawful possession of a handgun (Count Two). The jury was unable to reach a verdict on the remaining seven counts. The judge granted the State's motion to sentence defendant to an extended term pursuant to N.J.S.A. 2C:44-3(a), and sentenced defendant to twenty years imprisonment with ten years of parole ineligibility.

On appeal, defendant argues:

> POINT I
> BECAUSE THE TRIAL COURT INAPPROPRIATELY INTERFERED WITH THE DECISION OF THE STATE'S MAIN WITNESS TO NOT TESTIFY, THE DEFENDANT WAS DENIED DUE PROCESS AND HIS RIGHT TO A FAIR TRIAL. (Not Raised Below).
>
> POINT II
> THE STATE'S BURDEN TO PROVE THAT THE DEFENDANT POSSESSED THE HANDGUN WAS IMPERMISSIBLY LOWERED WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT IT COULD INFER THAT THE HANDGUN FOUND IN THE CAR WAS POSSESSED BY ALL OF THE CAR'S OCCUPANTS. (Not Raised Below).
>
> POINT III
> THE SENTENCING COURT VIOLATED THE DEFENDANT'S RIGHTS TO A JURY TRIAL AND DUE PROCESS BY FINDING THAT DEFENDANT COMMITTED THE MURDERS DESPITE THE JURY'S VERDICT. MOREOVER, THE

SENTENCE IS EXCESSIVE. THEREFORE, THE SENTENCE MUST BE VACATED.

A. The Sentencing Court Improperly Replaced Its Judgment For The Jury's In Sentencing The Defendant For Murders Which The Jury Did Not Convict Him Of Committing.

B. The Defendant's Sentence Is Excessive.

C. The Trial Court's Denial of Defendant's Right to Allocution Requires A Remand For Resentencing.[2]

We first address defendant's contention that the court interfered with the passenger's Fifth Amendment right not to testify. Because defendant did not object to this testimony at trial, this court will review for plain error. State v. Bunch, 180 N.J. 534, 541 (2004). Under this deferential standard, this court disregards any error or omission "unless it is of such a nature as to have been clearly capable of producing an unjust result[.]" R. 2:10-2; see also State v. Czachor, 82 N.J. 392, 402 (1980) (explaining "[t]he test for plain error is whether under the circumstances the error possessed a clear capacity for

[2] Defendant also filed a pro se supplemental brief arguing that the jury's verdict was against the weight of the evidence and that the trial court erred by not granting defendant's motion for a new trial after the passenger recanted his testimony post-trial. Defendant requests a judgment of acquittal on all counts of the indictment or a reversal of the conviction and a new trial. These arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

producing an unjust result, that is, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached" (citation omitted)).

The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The trial court must determine whether a witness is compellable by deciding whether there is "a realistic threat of incrimination." State v. Patton, 133 N.J. 389, 396 (1993). Defendant argues the State could have charged the passenger with the dismissed hindering charge and thus he should have been permitted to invoke his right not to testify.

The State argues this case is similar to State v. Johnson, 223 N.J. Super. 122, 129 (App. Div. 1988), certif. denied, 115 N.J. 75 (1989), where this court found that it was a mistaken exercise of discretion for the trial judge to advise a witness of his Fifth Amendment right not to testify. This witness gave a gun to a friend for protection and the gun was later used in an aggravated assault. Id. at 127-28. Because the risk that the witness would later be prosecuted for his conduct was "extremely remote, unrealistic and highly speculative," this court found the witness's Fifth Amendment right was not implicated. Id. at 133-34.

Although the witness in Johnson voluntarily testified, this case is similar in that the State made it clear that the passenger was not being considered for prosecution. The State sought testimony from the passenger consistent with his statement the day of the shooting, that defendant drove the car to the area of the shooting, got out, the passenger heard gunshots, and saw the gray hooded sweatshirt, a black glove, and a gun on defendant. The judge used his discretion to find that there was a remote or unrealistic threat that the passenger would incriminate himself and appropriately found he could be compelled to testify. There was no plain error in this determination.

We next consider whether the judge erred by instructing the jury it could infer that a handgun found in a vehicle was possessed by all of the vehicle's occupants. Defendant did not object to the charge at trial. "[A] defendant waives the right to contest an instruction on appeal if he does not object to the instruction." State v. Torres, 183 N.J. 554, 564 (2005). This court will review for plain error and determine whether the charge prejudicially affected the rights of the defendant and can "convince the court that of itself the error possessed the clear capacity to bring about an unjust result." State v. Chew, 150 N.J. 30, 82 (1997) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)), cert. denied, 528 U.S. 1052, 120 S. Ct. 593, 145 L. Ed. 2d 493 (1999).

N.J.S.A. 2C:39-2(a) states:

> When a firearm, weapon, destructive device, silencer, or explosive described in this chapter is found in a vehicle, it is presumed to be in the possession of the occupant if there is but one. If there is more than one occupant in the vehicle, it shall be presumed to be in the possession of all, except under the following circumstances:
>
> (1) When it is found upon the person of one of the occupants, it shall be presumed to be in the possession of that occupant alone;
>
> (2) When the vehicle is not a stolen one and the weapon or other instrument is found out of view in a glove compartment, trunk or other enclosed customary depository, it shall be presumed to be in the possession of the occupant or occupants who own or have authority to operate the vehicle; and
>
> (3) When the vehicle is a taxicab and a weapon or other instrument is found in the passenger's portion of the vehicle, it shall be presumed to be in the possession of all the passengers, if there are any, and if not, in the possession of the driver.

On the subject of the unlawful possession of the weapon charge, the judge instructed the jury:

> I have instructed you concerning circumstantial evidence that you may infer a fact from other facts in the case if you find it is more probable than not, if the inferred fact is true. Evidence has been presented that a handgun was found in a vehicle. If you find that the vehicle had more than one occupant, you may infer that the handgun was possessed by all of the occupants.

> If you find the handgun was on the person of one of the occupants, you may infer that it was possessed by that occupant alone.
>
> You are never required or compelled to draw any inference.

Defendant argues the judge erred in delivering the instruction because the gun was found in a "secret compartment" of a car. The trial court found that the exception under N.J.S.A. 2C:39-2(a)(2) did not apply and thus did not instruct the jury on this exception. Defendant argues the secret compartment was a "non-customary depository" and the jury should have been instructed that it could not infer that he possessed the weapon. However, even if the court found the secret compartment in the passenger-side door where the heroin and handgun were found was a "customary depository," he would still be the one presumed to be in possession of the weapon because he owned and had authority over the vehicle.

Any error in this instruction would not be clearly capable of producing an unjust result. The trial court instructed the members of the jury that they could infer the handgun was possessed by all occupants of the vehicle if they found the vehicle had more than one occupant. The judge added, "You are never required or compelled to draw any inference."

The jury heard evidence of where the gun was found and how many occupants were in the vehicle when the detective first saw the car. Defendant owned the car and was in the driver's seat when officers approached that day. The passenger testified he saw the gun on defendant's hip when he came back to the car. The gun was found in a secret compartment in a car that defendant owned. The jury had more than enough evidence to find defendant unlawfully possessed the handgun that day beyond a reasonable doubt. There was no plain error in this jury charge.

On the sentencing issue, defendant contends the court abused its discretion by considering the charges on which the jury was hung. Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We will not ordinarily disturb a sentence imposed which is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16, 220 (1989).

In sentencing, the trial court—"first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the

relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, supra, 117 N.J. at 215.

We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that [were] supported by competent credible evidence in the record." Ibid. Furthermore, when a court is sentencing an individual to an extended-term under the persistent offender statute, N.J.S.A. 2C:44-3, the decision to sentence the defendant within that extended-term range "remains in the sound judgment of the [sentencing] court" subject to review under "an abuse of discretion standard." State v. Pierce, 188 N.J. 155, 169 (2006).

Double jeopardy provides protection "against multiple punishments for the same offense," among other protections. State v. Yoskowitz, 116 N.J. 679, 689 (1989). Here, the judge relied on United States v. Watts, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), for the proposition that he could, by a preponderance of the evidence, find that defendant had used the handgun to commit the shooting and consider this in sentencing. Accordingly, the judge stated "I have such discretion, and will consider conduct on the [counts] for which the jury was unable to reach a unanimous verdict." Under certain circumstances, Watts permits a sentencing judge to consider acquitted charges in

sentencing. Id. at 149, 117 S. Ct. at 634, 136 L. Ed. 2d at 560. In this case, however, defendant was scheduled for retrial on the murders and other charges on which the jury was hung.

The judge also cited State v. Jarbath, 114 N.J. 394, 412 n.4 (1989), stating that a sentencing judge may consider otherwise inadmissible evidence including, "the arrest record, polygraph reports, investigative reports, juvenile adjudications, and unlawfully-seized evidence." He reasoned that this proposition combined with the Watts holding permitted him to find defendant committed the shooting and punish him accordingly.[3]

The judge found aggravating factor two, the gravity and seriousness of the harm inflicted upon the victim; factor three, the risk that defendant will commit another offense; factor six, the extent of defendant's criminal record; and factor nine, the need to deter defendant and others from violating the law. N.J.S.A. 2C:44-1(a)(2), (3), (6), and (9). He found no mitigating factors. The judge stated "there is reliable and credible evidence . . . identifying [defendant] as the shooter." He found "by a preponderance of the credible evidence at trial, that [defendant] did in fact use a firearm, which resulted in the death of [the two

[3] The judge cited an unpublished decision by this court as well, but that case also concerned acquitted charges, not a hung jury. State v. Van Hise, No. A-2115-07 (App. Div. July 9, 2010) (slip op. at 4-5).

male victims] and the injury to [the female victim.]" The judge sentenced defendant to the maximum extended term for unlawful possession of a weapon, twenty years imprisonment.

This court has considered the issue in State v. Tindell, 417 N.J. Super. 530, 569, 572 (App. Div. 2011), which remanded for resentencing when a judge "took exception to the verdict" and stated on the record that the jury "enabled this defendant to literally get away with murder". The defendant in that case was tried for first-degree murder but convicted of second-degree manslaughter and other lesser charges; the judge sentenced him to five consecutive maximum terms. Id. at 571-72, 568. Judges are not permitted "to act as a 'thirteenth juror,' substituting their judgment for that of the jury." Id. at 570-71 (quoting State v. Whitaker, 79 N.J. 503, 515-16 (1979)).

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 issues. 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. See State v. Lawless, 423 N.J. Super. 293, 304-05 (App. Div. 2011), aff'd, 214 N.J. 594 (2013) (holding that aggravating

factor two was improperly applied when the judge considered other victims and the defendant only pled guilty to one crime involving one person). 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.

After considering the record and the briefs, we conclude that defendant's remaining arguments are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(2). We add the following brief remarks. The judge had the discretion to impose an extended term under the statute. At sentencing, the judge did not deny defendant his right to allocution. The judge simply advised defendant he may not want to speak as freely in order to protect his claim of innocence for the retrial on the other charges.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

Change of Judgment of Conviction & Order for Commitment
RESENTENCE
Superior Court of New Jersey, ESSEX County

State of New Jersey v.

Last Name	First Name	Middle Name
MELVIN	MARK	

Also Known As: MELVIN MARK

Date of Birth	SBI Number	Date(s) of Offense
03/31/1979	311498C	09/27/2012

Date of Arrest	PROMIS Number	Date Ind / Acc / Complt Filed	Original Plea	Date of Original Plea
	12 006422-001	05/31/2013	☑ Not Guilty ☐ Guilty	06/25/2013

Adjudication By: ☐ Guilty Plea ☑ Jury Trial Verdict ☐ Non-Jury Trial Verdict ☐ Dismissed / Acquitted Date: 09/16/2016

Original Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
13-05-01257-I	1	MURDER-PURPOSE/KNOWINGLY	2C:11-3A(1)(2)	1
13-05-01257-I	2	UNLAWFUL POSSESSION OF WEAPONS - HANDGUN	2C:39-5B	2
13-05-01257-I	3	POSS OF WEAPON FOR UNLAWFUL PURPOSES-FIREARMS	2C:39-4A	2
13-05-01257-I	4	CRIMINAL ATTEMPT	2C:5-1	1
		MURDER	2C:11-3	
13-05-01257-I	5	MURDER-PURPOSE/KNOWINGLY	2C:11-3A(1)(2)	1
13-05-01257-I	6	AGG ASSAULT-ATTEMPT/CAUSE SBI PURP/KNOW/RECKLESS	2C:12-1B(1)	2

(Cont...)

Final Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
13-05-01257-I	2	UNLAWFUL POSSESSION OF WEAPONS - HANDGUN	2C:39-5B	2

Sentencing Statement

It is, therefore, on 06/07/2018 ORDERED and ADJUDGED that the defendant is sentenced as follows:

As per the Appellate Division decision A-3003-14T1 issued on 3/1/17, the defendant is resentenced as follows:

Count Two (2) - Committed to the Commissioner of the Department of Corrections for sixteen (16) years with the imposition of an extended term on the grounds that defendant is a persistent offender as per N.J.S.A. 44-3A, including eight (8) years parole ineligibility N.J.S.A. 2C:43-6(B).

Count Four (4) - Dismissed by motion of prosecutor 6/24/14.

Defendant was convicted by jury verdict on 6/24/14.

Counts Seven (7), Eight (8), and Nine (9) were dismissed without prejudice by motion of the prosecutor on 9/16/16.

Counts One (1), Three (3), Five (5) and Six (6) defendant was found not guilty by jury verdict on 8/8/16.

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

Total Custodial Term	Institution Name	Total Probation Term
016 Years 00 Months 000 Days	CARE COMMISS/CORR	00 Years 00 Months

New Jersey Judiciary, Revised Form Effective August 1, 2017, CN: 10070
Copies to: County Probation Division Defendant Defense Counsel Prosecutor State Parole Board Department of Corrections or County Penal Institution Juvenile Justice Commission

State of New Jersey v. MELVIN, MARK

S.B.I. # 311498C Ind / Acc / Complt # 13-05-01257-I

DEDR (*N.J.S.A.* 2C:35-15 and 2C:35-5.11)

A mandatory Drug Enforcement and Demand Reduction (DEDR) penalty is imposed for each count. (Write in number of counts for each degree.)

☐ DEDR penalty reduction granted (*N.J.S.A.* 2C:35-15a(2))

	Standard	Doubled
1st Degree	____ @ $	____ @ $
2nd Degree	____ @ $	____ @ $
3rd Degree	____ @ $	____ @ $
4th Degree	____ @ $	____ @ $
DP or Petty DP	____ @ $	____ @ $

Total DEDR Penalty $ ____

☐ The court further ORDERS that collection of the DEDR penalty be suspended upon defendant's entry into a residential drug program for the term of the program. (*N.J.S.A.* 2C:35-15e)

Forensic Laboratory Fee (*N.J.S.A.* 2C:35-20)	Total Lab Fee
____ Offenses @ $ ____	$ ____

VCCO Assessment (*N.J.S.A.* 2C:43-3.1)

Counts	Number	Amount
2	1 @	$ 100.00
	@	$
	@	$
	@	$

Total VCCO Assessment $ 100.00

Vehicle Theft / Unlawful Taking Penalty (*N.J.S.A.* 2C:20-2.1)

Offense	Mandatory Penalty
	$

Offense Based Penalties

Penalty	Amount
	$

Other Fees and Penalties

Law Enforcement Officers Training and Equipment Fund Penalty (*N.J.S.A.* 2C:43-3.3) ☑ $ 30.00	Safe Neighborhood Services Fund Assessment (*N.J.S.A.* 2C:43-3.2) ☑ 1 Offenses @ $ 75.00 Total: $ 75.00
Probation Supervision Fee (*N.J.S.A.* 2C:45-1d) ☐ $	Statewide Sexual Assault Nurse Examiner Program Penalty (*N.J.S.A.* 2C:43-3.6) ☐ ____ Offenses @ $ Total $
Transaction Fee (*N.J.S.A.* 2C:46-1.1) ☐	
Domestic Violence Offender Surcharge (*N.J.S.A.* 2C:25-29.4) ☐ $	Certain Sexual Offenders Surcharge (*N.J.S.A.* 2C:43-3.7) ☐ $
Fine $	Sex Crime Victim Treatment Fund Penalty (*N.J.S.A.* 2C:14-10) ☐ $
Restitution $ Joint & Several ☐	Total Financial Obligation $ 205.00

Details

Additional Conditions

☑ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided (*N.J.S.A.* 53:1-20.20 and *N.J.S.A.* 53:1-20.29).

☐ The defendant is hereby sentenced to community supervision for life (CSL) if offense occurred before 1/14/04 (*N.J.S.A.* 2C:43-6.4).

☐ The defendant is hereby sentenced to parole supervision for life (PSL) if offense occurred on or after 1/14/04 (*N.J.S.A.* 2C:43-6.4).

☐ The defendant is hereby ordered to serve a ____ year term of parole supervision, pursuant to the No Early Release Act (NERA), which term shall begin as soon as the defendant completes the sentence of incarceration (*N.J.S.A.* 2C:43-7.2).

☐ The court imposes a Drug Offender Restraining Order (DORO) (*N.J.S.A.* 2C:35-5.7h). DORO expires ____

☐ The court continues/imposes a Sex Offender Restraining Order (SORO) if the offense occurred on or after 8/7/07 (Nicole's Law *N.J.S.A.* 2C:14-12 or *N.J.S.A.* 2C:44-8).

☐ The court imposes a Stalking Restraining Order (*N.J.S.A.* 2C:12-10.1).

☐ The defendant is prohibited from purchasing, owning, possessing, or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun (*N.J.S.A.* 2C:25-27c(1)).

Findings Per *N.J.S.A.* 2C:47-3

☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

☐ The court finds that the defendant is amenable to sex offender treatment.

☐ The court finds that the defendant is willing to participate in sex offender treatment.

License Suspension

☐ CDS / Paraphernalia (*N.J.S.A.* 2C:35-16) ☐ Waived

☐ Auto Theft / Unlawful Taking (*N.J.S.A.* 2C:20-2.1)

☐ Eluding (*N.J.S.A.* 2C:29-2)

☐ Other

Number of Months	☐ Non-resident driving privileges revoked
Start Date	End Date
Details	
Driver's License Number	Jurisdiction

If the court is unable to collect the license, complete the following:
Defendant's Address

City	State	Zip

Date of Birth	Sex ☐ M ☐ F	Eye Color

State of New Jersey v. MELVIN, MARK S.B.I. # 311498C Ind / Acc / Complt # 13-05-01257-I

Time Credits

Time Spent in Custody
R. 3:21-8
Date: From - To
09/27/2012 - 09/20/2016
Total Number of Days 1455

Gap Time Spent in Custody
N.J.S.A. 2C:44-5b(2)
Date: From - To
Total Number of Days

Rosado Time
Date: From - To
Total Number of Days

Prior Service Credit
Date: From - To
09/21/2016 - 06/06/2018
Total Number of Days 624

Statement of Reasons - Include all applicable aggravating and mitigating factors

AGGRAVATING FACTORS

3. The risk that the defendant will commit another offense.

6. The extent of the defendant's prior criminal record and the seriousness of the offenses of which he/she has been convicted.

9. The need for deterring the defendant and others from violating the law.

While defendant's post sentence rehabilitation efforts are insufficient to arise to a non-statutory mitigating factor, they were considered to moderately reduce the weight attributed to aggravating factor three (3).

Nevertheless, I am clearly convinced that the aggravating factors substantially outweigh the mitigating factors to impose an eight (8) year parole ineligibility term as per N.J.S.A. 2C:43-6B.

Attorney for Defendant at Sentencing	Public Defender
ANDREW C ROJAS	☑ Yes ☐ No
Prosecutor at Sentencing	**Deputy Attorney General**
PORTIA N DOWNING	☐ Yes ☑ No
Judge at Sentencing	
MARTIN G. CRONIN	
Judge (Signature)	**Date**
/s MARTIN G. CRONIN	06/13/2018

New Jersey Judiciary, Revised Form Effective August 1, 2017, CN: 10070
Copies to: County Probation Division Defendant Defense Counsel Prosecutor State Parole Board Department of Corrections or County Penal Institution Juvenile Justice Commission

State of New Jersey v.
MELVIN, MARK S.B.I. #311498C Ind / Acc / Complt # 13-05-01257-I

Continuation

ORIGINAL CHARGES (Cont.)

Ind / Acc / Complt	Count	Description	Statute	Degree
13-05-01257-I	7	POSS CDS/ANALOG - SCHD I II III IV	2C:35-10A(1)	3
13-05-01257-I	8	MANUF/DISTR CDS OR INTENT TO MANUF/DISTR CDS	2C:35-5A(1)	3
13-05-01257-I	9	CDS/ANALOG - DISTRIBUTE ON/NEAR SCHOOL PROPERTY/BUS	2C:35-7	3

New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

TITLE IN FULL (AS CAPTIONED BELOW)	ATTORNEY / LAW FIRM / PRO SE LITIGANT
STATE OF NEW JERSEY **V.** **MARK MELVIN**	NAME **CLAIRE DRUGACH, Esq.** STREET ADDRESS **31 CLINTON STREET P.O. BOX 46003** CITY **NEWARK** / STATE **NJ** / ZIP **07101** / PHONE NUMBER **973-877-1200** EMAIL ADDRESS **INTAKE.APPELLATE@OPD.NJ.GOV** **STEPHEN.MARTINEZ@OPD.NJ.GOV**

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
MARTIN G. CRONIN, JSC	**ESSEX**	**13-05-01257-I**

Notice is hereby given that **MARK MELVIN** appeals to the Appellate Division from a ■ Judgment or ☐ Order entered on **06/13/2018** in the ☐ Civil ■ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a ☐ State Agency decision entered on _____

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

ON JUNE 3, 2018 DEFENDANT WAS SENTENCED TO 16 YEARS WITH AN 8 YEAR PAROLE DISQUALIFIER FOR UNLAWFUL POSSESSION OF WEAPONS

This appeal is from a ■ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention
If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other_____ (specify)

Is defendant incarcerated? ■ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ■ No

If in custody, name the place of confinement:
NORTHERN STATE PRISON

Defendant was represented below by:

■ Public Defender ☐ self ☐ private counsel _____ (specify)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	**MARTIN G. CRONIN, JSC**	**06/14/2018**
Trial Court Division Manager	**ESSEX**	**06/14/2018**
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
STATE OF NEW JERSEY	**DANIEL IAN BORNSTEIN, Esq.** **ATTORNEY GENERAL CRIMINAL JUSTICE** **25 MARKET STREET** **PO BOX 085** **TRENTON NJ 08625-0085** **609-984-6500** **DCJ-EFILE@NJDCJ.ORG,BORNSTEIND@NJDCJ.ORG**	**06/14/2018**

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Trial Court Transcript Office	**ESSEX**	**06/14/2018**
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

☐

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

06/14/2018
Date

s/ CLAIRE DRUGACH, Esq.
Signature of Attorney or Pro Se Litigant

(*) truncated due to space limit. Please find full information in the additional pages of the form.

			INTAKE.APPELLATE@OPD.NJ.GOV,STEPHEN.MAR
BAR ID #	016471975	EMAIL ADDRESS	TINEZ@OPD.NJ.GOV

(*) truncated due to space limit. Please find full information in the additional pages of the form.

SUPREME COURT OF NEW JERSEY
M-15 September Term 2018
081415

State of New Jersey,

Plaintiff-Respondent,

v.

FILED
SEP 12 2018
CLERK

ORDER

Mark Melvin,

Defendant-Movant.

It is ORDERED that the motion for direct certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 5th day of September, 2018.

CLERK OF THE SUPREME COURT

FILED, Clerk of the Appellate Division, September 21, 2018, A-004632-17, AMENDED
FILED, Clerk of the Appellate Division, August 01, 2016, A-003003-14

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3003-14T1
MOTION NO. M-9354-15
BEFORE PART: L
JUDGES: YANNOTTI
HAAS

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK MELVIN,

Defendant-Appellant,

EMERGENT MOTION FILED 7/13/16 BY: STATE OF NEW JERSEY
ANSWER FILED 7/13/16 BY: MARK MELVIN

SUBMITTED TO THE COURT: 7/13/16

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 13TH DAY OF JULY, 2016, HEREBY ORDERED AS FOLLOWS:

EMERGENT MOTION TO DISMISS APPEAL AS INTERLOCUTORY — DENIED/OTHER

EMERGENT MOTION FOR LIMITED REMAND — GRANTED/OTHER

SUPPLEMENTAL:

Defendant was charged under Essex County Indictment No. 13-05-1257, with nine counts. The trial court granted the State's motion to dismiss count four. Defendant was tried before a jury and convicted on count two, second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b.

The jury was hung on counts one, three, five, six, seven, eight and nine. The trial court sentenced defendant to an extended term of twenty years, with ten years of parole ineligibility.

Defendant thereafter appealed from the judgment of conviction entered on October 31, 2014. The appeal has been fully briefed.

Trial on the other counts of the indictment was scheduled to begin on July 12, 2016. In the trial court, the State suggested that the court may not have jurisdiction to proceed with the trial, in view of the pending appeal.

To clarify this jurisdictional issue, the State now moves to dismiss the appeal as interlocutory or for a limited remand, allowing the Law Division to proceed with the trial on the unresolved counts of the indictment. Defendant opposes dismissal of the appeal.

The State's motion to dismiss the appeal is denied. The matter is temporarily remanded to the Law Division for trial on counts one, three, five, six, seven, eight and nine of the indictment, and if required, sentencing. Proceedings on this appeal are stayed until the trial court enters a judgment of conviction at the conclusion of the remand proceedings. We retain jurisdiction of the pending appeal.

FOR THE COURT:

JOSEPH L. YANNOTTI, P.J.A.D.

STATE OF NEW JERSEY
V.
MARK MELVIN

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-004632-17
BEFORE: PART E
JUDGES: MESSANO
ROSE

ORAL ARGUMENT DATE: DECEMBER 03, 2018

DECIDED DATE: DECEMBER 03, 2018

O R D E R

THIS APPEAL HAVING BEEN ARGUED ON THE EXCESSIVE SENTENCE ORAL ARGUMENT (ESOA) CALENDAR BEFORE PART E ON DECEMBER 3, 2018; AND,

THE PANEL HAVING CONCLUDED THE ARGUMENTS PRESENTED REQUIRE FULL BRIEFING AND ARGUMENT ON THE PLENARY CALENDAR;

IT IS ON THIS 7TH DAY OF DECEMBER, 2018, ORDERED,

1. The appeal is listed for oral argument on Part E's March 4, 2019 calendar.

2. Defendant shall have until December 28, 2018, to file a supplemental brief.

3. The State shall have until January 25, 2019, to file an opposing brief.

4. No reply brief shall be filed without leave of court.

5. The dates are peremptory and no extensions shall be granted.

FOR THE COURT:

CARMEN MESSANO, P.J.A.D.

ESSEX
13-05-01257-I

SUPREME COURT OF NEW JERSEY
C-458 September Term 2019
083298

State of New Jersey,
Plaintiff-Respondent,

v.

Mark Melvin,
Defendant-Petitioner.

FILED
JAN 31 2020
CLERK

ORDER

A petition for certification of the judgment in A-004632-17 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted, limited to the issue of whether the sentencing judge could consider defendant's conduct even though the jury acquitted defendant of the underlying crimes; and it is further

ORDERED that the appellant may serve and file a supplemental brief on or before March 16, 2020, and respondent may serve and file a supplemental brief thirty (30) days after the filing of appellant's supplemental submission, or, if appellant declines to file such a submission, on or before April 15, 2020.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 28th day of January, 2020.

CLERK OF THE SUPREME COURT