SUPREME COURT OF NEW JERSEY
DOCKET NO. A-42-14 (075170)

	:	
	:	Criminal Action
	:	
STATE OF NEW JERSEY,	:	**On Certification from the**
Plaintiff-	:	**Superior Court,**
Appellant	:	**Appellate Division**
v.	:	**Docket No. A-1577-12T2**
:		
JAMES DENELSBECK	:	
Defendant-	:	Sat below: Judges Alvarez
Respondent	:	and Carroll, J.J.A.D.
	:	

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this appeal, *amicus curiae* American Civil Liberties Union of New Jersey ("ACLU-NJ") accepts the facts and procedural history as found by the Appellate Division, *State v. Denelsbeck,* No. A-5730-12T3 (App. Div. Oct. 2, 2014) (unpublished opinion), with the following additions:

Defendant sought certification, which this Court granted on February 17, 2015.

The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

Further, for factual clarity, it is worth restating the current mandatory penalties associated with convictions for third or subsequent DWI offenses. A person so convicted faces: (1) 180 days in jail with no ability to obtain early release based on work credits, commutation credits or parole (*N.J.S.A.* 39:4-50(a)(3)); (2) a fine of $1,000 (*id.*); (3) a driver's license suspension of 10 years (*id.*); (4) a $100 fee payable to the Alcohol Education, Rehabilitation and Enforcement Fund (*N.J.S.A.* 39:4-50(b)); (5) screening, evaluation, referral, and program requirements of the Intoxicated Driving Resource Program (IDRC) (*id.*); (6) a $100 surcharge (*N.J.S.A.* 39:4-50(i)); (7) insurance surcharges of between $3,000 and $4,500 (N.J.S.A. 17:29A-35b(2)(b)); and (8) installation of an Interlock device for between one and three years (*N.J.S.A.* 39:4-50.17).

SUMMARY OF ARGUMENT

Defendants subjected to sentences for serious offenses are entitled to jury trials under the Sixth Amendment to the United States Constitution and Article I, Paragraphs 9 and 10 of the New Jersey Constitution. The United States Supreme Court has held that the right to a jury trial attaches, *at a minimum*, when a person is subject to six months or more in jail. (Point I).

Defendants in New Jersey charged with third or subsequent DWIs are entitled to jury trials for several reasons. Most simply, defendants face 182 days of confinement for such convictions. Defendants are subject to 180 days of incarceration initially plus additional time in the IDRC, which the Legislature has determined is equivalent to an additional two days of incarceration. At certain times of year, including in the present matter, 182 days equals or exceeds six months. As a result, under long-standing United States Supreme Court precedent, Defendant is entitled to a jury trial (Point II).

But, even if the Court determines that 182 days falls just short of the incarceration threshold for a jury trial requirement, the mandatory nature of the incarceration (the judge *must* impose that sentence and the Defendant is not entitled to work credits, commutation credits, or parole) bespeaks a legislative determination that third DWIs are serious. Indeed, the sentence imposed on Mr. Denelsbeck results

in more *actual* incarceration that sentences of far longer than six months (on crimes for which credits are awarded). As such, the mandatory nature of the incarceration triggers a jury trial right (Point III, A).

Finally, the significant non-incarcerative penalties both on their own and in combination with the mandatory periods of incarceration reflect the fact that the penalty for third DWIs is serious. The financial penalties exceed the federal threshold below which a fine can be termed "petty" (Point III, B, 1). Even if the Court excludes insurance surcharges, which result directly from state action, the financial penalties approach the federal threshold (Point III, B, 2). Finally, the ten year driver's license suspension, coupled with the incarceration and financial penalties, evinces a legislative determination of seriousness requiring attachment of the right to a jury trial (Point III, B, 3).

ARGUMENT

In *State v. Hamm*, 121 *N.J.* 109, 116 (1990), this Court addressed whether the penalties attending a third DWI under the *then existing* statute mandated a jury trial. The Court held that they did not, but that it was an extremely close call. *Id.* at 130 (Whether New Jersey's scheme mandates a jury trial "is not an easy question"). The statute has now changed and significant new penalties have been added. The additional penalties that now

exist push the scheme over the line where the right to a jury trial is now required.

I. THE RIGHT TO A JURY TRIAL ATTACHES WHENEVER A DEFENDANT IS SUBJECTED TO SERIOUS PENALTIES

For centuries, the right to a trial by jury has played an important role in protecting the rights of those accused of crimes. This nation has a "long tradition [of] attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams v. Fla.*, 399 *U.S.* 78, 87 (1970). Indeed, the United States Supreme Court has consistently affirmed the premise that "the right of the accused to a trial by a constitutional jury [must] be jealously preserved." *Patton v. United States*, 281 *U.S.* 276, 312 (1930). *See also State v. Stanton*, 176 *N.J.* 75, 120 (2003) (Albin, J., dissenting) ("We have no greater state interest than sustaining the right to trial by jury, ensuring the heritage that places great trust in the common wisdom of everyday men and women to make judgments on the most vital issues concerning their fellow citizens").

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury[.]" *U.S. Const. Amend. VI.* However, "[i]t has long been settled that 'there is a category of petty crimes or offenses which is not subject to the Sixth

Amendment jury trial provision.'" *Blanton v. N. Las Vegas*, 489 *U.S.* 538, 541 (1989) (*citing Duncan v. Louisiana*, 391 *U.S.* 145, 159 (1968)); *but see Baldwin v. New York*, 399 *U.S.* 66, 75 (1970) (Black, J., concurring) (suggesting that the Sixth Amendment makes no distinction between "petty" and "serious" crimes).

There is no doubt that, where the maximum penalty exceeds six months of imprisonment, the crime is serious and the defendant is entitled to a jury trial. *Duncan*, 391 *U.S.* at 161; *Baldwin*, 399 *U.S.* at 69. In *Blanton v. N. Las Vegas*, the United States Supreme Court held that while the maximum jail/prison sentence is the primary consideration, if other statutory penalties are so severe as to clearly reflect a legislative determination of seriousness, the jury trial right must likewise attach. 489 *U.S.* at 543; *see also Hamm*, 121 *N.J.* at 112 (noting that the "question is posed primarily as one of federal-constitutional right" because New Jersey does not treat DWI convictions as criminal). Thus, while a sentence in excess of six months is sufficient to guarantee a jury trial, it is not a necessary element to ensure the right. Put differently, while *Duncan* held that in some cases "the length of the authorized prison term or the seriousness of other punishment is enough to require a jury trial," 391 *U.S.* at 161, it does not affect the corollary principle that even offenses bearing shorter potential terms of imprisonment may also be serious crimes, thereby

requiring the attendant procedural guarantees extended to persons accused of committing them. *Blanton*, 489 *U.S.* at 543.

In 1990, in *Hamm*, this Court examined the then-existent penalties for a third DWI offense under the test set forth in *Blanton*. 121 *N.J.* at 116. At that time, the penalties for a third (or subsequent) DWI were: up to 180 days in jail without the possibility of commutation credits, work credits or parole, a fine of $1,000, and a driver's license suspension of 10 years. The period of incarceration could be cut in half (to 90 days) by periods of community service of the same length. *Id.* The Court held that those penalties were not significant enough to require a jury trial. *Id.* at 129-30. The Court in *Hamm* conceded that such a determination was "not an easy" one (*id.* at 130) and acknowledged that the treatment of DWI offenders could change over time, requiring different constitutional analysis. *Id.* The treatment has, in fact, changed, as the Legislature has significantly increased the penalty imposed. Further, determinations of whether a crime is "serious" or "petty" are not intended to be static: crimes and punishments once thought to be mild may come to be regarded as harsh, calling for a jury trial, even when one was not previously mandated. *District of Columbia v. Clawans*, 300 *U.S.* 617, 627 (1937).

II. DEFENDANT IS ENTITLED TO A JURY TRIAL BECAUSE THE PERIODS OF INCARCERATION AUTHORIZED FOR THIRD OR SUBSEQUENT DWI CONVICTIONS BY *N.J.S.A.* 39:4-50(a)(3) EXCEED SIX MONTHS

As noted above, in the quarter century since *Hamm*, the Legislature has made a series of changes to the statute, which collectively elevate the penalties beyond that which can be fairly deemed as "petty." Today, the penalties are as follows: 180 days in jail (*N.J.S.A.* 39:4-50(a)(3)); a fine of $1,000 (*id.*); a driver's license suspension of 10 years (*id.*); a $100 fee payable to the Alcohol Education, Rehabilitation and Enforcement Fund (*N.J.S.A.* 39:4-50(b)); screening, evaluation, referral, and program requirements of the Intoxicated Driving Resource Program (*id.*); a $100 surcharge (*N.J.S.A.* 39:4-50(i); insurance surcharges of between $3,000 and $4,500 (*N.J.S.A.* 17:29A-35b(2)(b)); and installation of an Interlock device for between one and three years[1] (*N.J.S.A.* 39:4-50.17).

In addition to the 180 days plainly authorized, (and, as discussed in Point III, A, *infra*, mandated) the requirement that a defendant attend the Intoxicated Driving Resource Center creates an additional period of incarceration that must be measured in determining a defendant's right to a trial by jury.

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[1] The period during which the interlock device is required could be even longer than three years. A defendant is required to have the interlock device installed "during and following the expiration of the period of license suspension." *N.J.S.A.* 39:4-50.17. Thus, a defendant who maintains a vehicle registration during a period of license suspension might be required to utilize the interlock device for up to thirteen years.

N.J.S.A. 39:4-50(b) provides that a person convicted of DWI "must satisfy the screening, evaluation, referral, program and fee requirements of the Division of Alcoholism and Drug Abuse's Intoxicated Driving Program Unit, and of the Intoxicated Driver Resource Centers and a program of alcohol and drug education and highway safety, as prescribed by the chief administrator." Courts interpret this as a requirement that defendants be sentenced to serve a particular amount of time at the IDRC. Mr. Denelsbeck, for example, was sentenced to attend the IDRC for twelve hours over two days. 12T 147:15-148:18.[2] The question becomes whether the IDRC portion of the sentence counts as incarceration.

There is no doubt that time spent in either jail or a state hospital is a period of incarceration for Sixth Amendment purposes. *See R.* 3:21-8 (counting for the purpose of jail credit any pretrial time served in either a jail or a state hospital). Judicial decrees that a person be in a particular place (other than a jail or hospital) at a particular time can also create custodial sentences. *See State v. Reyes*, 207 *N.J. Super.* 126, 141-43 (App. Div.), *certif. den.* 103 *N.J.* 499 (1986) ("In order to secure sentence credit for the time spent at a residential drug program, a probationer must show that the program was so

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[2] 12T refers to the transcript from October 25, 2012;
PCert refers to Defendant's Petition for Certification

confining as to be substantially equivalent to custody in jail or in a state hospital"); *but see State v. Mastaper*, 290 *N.J. Super.* 56, 62-63 (App. Div. 1996) (no jail credits for electronic monitoring with a curfew as a condition of pretrial release); *State v. Mirakaj*, 268 *N.J. Super.* 48, 52-53 (App. Div. 1993) (no jail credits where defendant was ordered to live in a convent as a condition of bail).

Critical to the determination of whether a placement should be treated as incarceration for the purposes of jail credits is whether failure to remain at the location constitutes a separate offense or whether it is merely an institutional infraction subjecting the violator to a loss of privileges. *See, e.g., Reyes*, 207 *N.J. Super.* at 144 ("violation of restrictions produce greater restrictions, but are not themselves criminal conduct, do not subject the participant to arrest, and departure is not the offense of escape"); *Mastaper*, 290 *N.J. Super.* at 62-63 (comparing pretrial release on electronic monitoring to post-trial release, where in the latter circumstance, removal of the monitoring device constitutes escape).

There is no doubt about what the consequences are for failure to attend or remain at the Intoxicated Driving Resource Center. The Legislature has explicitly provided that "failure to satisfy such requirements shall result in a mandatory two-day term of imprisonment in a county jail and a driver license

revocation or suspension and continuation of revocation or suspension until such requirements are satisfied. . . ." *N.J.S.A.* 39:4-50(b). Failure to attend the IDRC, in other words, plainly subjects a defendant to arrest and two additional days in jail. *See also Dow v. Circuit Court*, 995 *F.*2d 922, 923 (9th Cir. 1993) (holding that attendance at IDRC-like class constituted "custody" such that court had jurisdiction in *habeas corpus* case). Because the New Jersey Legislature has placed such serious consequences on failure to attend the IDRC, it plainly cannot be termed "*de minimus*" as the Court in *Blanton* suggested was the case with Nevada's requirement of attendance at an alcohol education course. *Blanton*, 489 *U.S.* at 544, n.9.

As a result, the maximum period of incarceration faced by a defendant, such as Mr. Denelsbeck, charged with a third DWI offense, is 182 days: 180 days under *N.J.S.A.* 39:4-50(a)(3) and an additional two days under *N.J.S.A.* 39:4-50(b). As such, it meets the threshold beyond which the United States Supreme Court has already determined a jury trial is mandated.

The easy threshold for the Sixth Amendment right to a jury trial is measured in months rather than days. Converting months into days yields different lengths of time (mainly depending on whether it covers the month of February), ranging from 181 to

184 days,[3] depending on the method of calculation. *See, e.g., Turner v. Bayly*, 673 A.2d 596, 596-597 (D.C. 1996) (explaining that six months will amount to between 181 and 184 days). Half of one year is 182.5 days, so 183 days is plainly greater than six months, using that method of calculation. If measured from March, May, July or August, six months actually contain 184 days (so, in order to be more than six months, a sentence would need to be 185 days); if measured from April or July, six months actually contain 183 days; measured from October or December it is 182; but, when measuring days in six-month periods beginning in January, February, September or November, the time periods actually only contain 181 days.

This Court should use the method of calculation that provides the greatest protection of defendants' rights. While not precisely the doctrine of lenity, which requires ambiguous statutes to be construed in defendants' favor, when the legislative intent cannot be otherwise divined, *State v. Regis*, 208 *N.J.* 439, 452 (2011), similar rationales support such an interpretation of the number of days in a six-month period. *See State in Interest of K.O.*, 217 *N.J.* 83, 96-97 (2014) (explaining principles supporting doctrine of lenity). The important interests protected by jury trials (*see, e.g., Williams v. Fla.*,

[3] All of the calculations of days assume that it is not a leap year.

399 *U.S.* at 87) cannot be disregarded because a court chooses to measure days in a particular fashion. Courts should not "woodenly" measure time in determining whether a defendant is entitled to a jury trial. *Codispoti v. Pa.*, 418 *U.S.* 506, 535-536 (1974) (Rehnquist, J., dissenting).

California's interpretation of the time within which a litigant must file a notice of tort claim is instructive. Lawsuits were required to be filed within six months of the governmental body's rejection of the claim. *Gonzales v. County of L.A.*, 199 *Cal. App.* 3d 601, 603 (Cal. App. 2d Dist. 1988). Following a January 20, 1983 rejection of a claim, litigants filed a complaint on July 21, 1983. *Id.* The court held that while six calendar months had passed, because only 182 days had elapsed, the lawsuit was timely filed. *Id.* at 605-06. As the court explained:

> Our conclusion that a governmental tort claims action is timely if filed within six calendar months or 182 days after the claims rejection notice is mailed . . . comports with the strong public policy in favor of giving a litigant his day in court. Furthermore, it avoids the drawbacks of adopting one computation method exclusively. Although ordinarily, a calculation by merely adding six calendar months has the advantage of simplicity, it can cause confusion and theoretically could be manipulated by the government entity to allow the plaintiff the least amount of time in which to file an action. On the other hand, to set an absolute limit of 182 days, regardless of whether six calendar months have elapsed,

> would cut off the rights of other plaintiffs who otherwise would have 183 or 184 days and might also snare the unwary.
>
> [*Id.*]

Put differently, when important interests are at stake, the Court should interpret statutes (or, here, constitutional provisions) in the way that is most protective of those interests.[4] Were the Court to determine that a defendant was entitled to a jury trial only when his offense (or his sentencing) occurs in months where the six-month span is limited to 181 days (January, February, September or November), the result would be plainly absurd. On the one hand, there is no rational basis to extend an important constitutional right only to those who happened to offend during certain months; on the other, it would create a perverse incentive for prosecutors to stack trials in certain months and avoid them in others. Such a result plainly offends basic concepts of equal protection. *See, e.g., Plyler v. Doe*, 457 *U.S.* 202, 230 (1982) (striking down

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[4] Of course, this does not suggest that there are no countervailing interests to be considered. Indeed, there are expenses that attach to the provision of jury trials. But, while "the government's interest . . . in conserving scarce fiscal and administrative resources . . . is a factor that must be weighed . . . [,]" *Mathews v. Eldridge*, 424 *U.S.* 319, 348 (1976), "[f]inancial cost alone is not [given] controlling weight in determining whether due process requires a particular procedural safeguard. . . ." *Id. see also Hamm*, 121 *N.J.* at 128 (third DWIs not classified as petty "out of a wish to avoid the administrative burden of jury trials").

statute that violates Equal Protection guarantee under rational basis review).

III. EVEN IF THE STATUTE IS CONSTRUED AS ALLOWING LESS THAN SIX MONTHS OF INCARCERATION, THIRD DWIS ARE SERIOUS RATHER THAN PETTY AND DEFENDANT IS THEREFORE ENTITLED TO A JURY TRIAL

While *Blanton* acknowledged a *per se* rule that a sentence of six months incarceration is sufficiently serious to trigger the right to a trial by jury, it is not the only test. *Blanton*, 489 *U.S.* at 542; *see also Baldwin*, 399 *U.S.* at 69, n. 6 ("a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'") *Blanton* instructs that courts examine the entire range of penalties to gauge whether it is serious for purposes of the right to a trial by jury. 489 *U.S.* at 543.

A. The Legislative Determination That Convictions For Third DWIs Require A Defendant To Actually Serve 180 Days Of Incarceration Is An Indication That The Conviction Is Not Petty

As noted, the penalties associated with convictions for third DWIs have changed significantly since the Court evaluated them in *Hamm*. In 1990, a defendant could be sentenced to 180 days in jail, but there were at least two opportunities to reduce the amount of time the defendant *actually* served. A judge could order a defendant to perform up to 90 days community service, thereby reducing the amount of time a defendant must serve incarcerated to only 90 days. *Hamm*, 121 *N.J.* at 116. Also,

defendants convicted of third DWIs were entitled to the same credits as other offenders sentenced to jail, which could result in reduced jail time. *Id.* Even based on those penalties, the Court indicated that whether a jury trial right attached was "not an easy question" (*id.* at 130).

Today, a sentence for the third DWI offense is much harsher: the sentence *must* include a full 180 days of incarceration (90 days of which must be served in the county jail and 90 days of which may be served at an approved, in-patient treatment facility). *N.J.S.A.* 39:4-50(a)(3). So, where a defendant could previously avoid at least 90 days in custody with community service, he must now serve the full 180 days incarcerated. It is worth noting that the defendant in *Hamm* "serve[d] no county-jail time; his sentence [wa]s split between community service and rehabilitation. . . ." 121 *N.J.* at 130.

It is not only the statute that has changed in the last twenty-five years, it is also the United States Supreme Court's treatment of mandatory minimum sentences in relation to the Sixth Amendment. In *Blanton*, decided in 1989, the Court determined that the existence of a mandatory minimum sentence was not constitutionally determinative. 489 *U.S.* at 544. At that time, the Court appeared only concerned with the maximum sentence. *Id.* The Court determined that neither the fact that "a particular defendant may be required to serve some amount of

jail time less than six months" nor the fact that "a defendant may receive the maximum prison term because of the prohibitions on plea bargaining and probation" impacted the constitutional analysis. *Id.*

But, in a sea change, in *Allayne v. United States*, the United States Supreme Court held that "[m]andatory minimum sentences increase the penalty for a crime." 133 *S.Ct.* 2151, 2155 (2013). Explaining that statutory maxima set the "ceiling" for crimes and mandatory minima set the "floor," the Court concluded that "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* at 2160. And, the Court concluded, "it is impossible to dispute that . . . increasing the legally prescribed floor aggravate[s] the punishment." *Id.* The Court's decision in *Alleyne* is consistent with long-standing New Jersey sentencing jurisprudence, which has always recognized that "the basic sentencing issue is always the real time defendant must serve, and we have always recognized that real time is the realistic and practical measure of the punishment imposed." *State v. Mosley*, 335 *N.J. Super.* 144, 157 (App. Div. 2000).

The real time served by offenders sentenced on a third DWI conviction is significantly different than offenders sentence to 180 days without mandatory minimums. As explained below, a person in New Jersey sentenced to 180 days in jail without a

mandatory minimum sentence would *actually* serve between 46 and 138 days. In contrast, a third DWI offender would *actually* serve 180 days (plus two days associated with the IDRC). Indeed, this sentence results in more "real time" than many sentences of well more than six months.

There are certain credits that are routinely awarded that reduce the time spent in jail or prison. New Jersey statutes provide that commutation credits are awarded at a rate of seven days per month in the first year. *N.J.S.A.* 30:4-140. These reductions apply to sentences imposed in the county jail. New Jersey State Parole Board, *The Parole Book: A Handbook on Parole Procedures for Adult and Young Adult Inmates*, Fifth Edition, 7 (Hereinafter "*Parole Handbook*") (available at: http://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf). "Significantly, commutation or 'good time' credit is not earned based on the institutional conduct of the defendant. Rather, this credit is automatically applied [to] the computation of parole eligibility [and release] dates." The New Jersey Commission to Review Criminal Sentencing, *Statutory Changes Under the NJ Code of Criminal Justice: 1979 to the Present*, September 2007, 19 (hereinafter "*Statutory Changes*") (available at: http://sentencing.nj.gov/downloads/pdf/Statutory Changes to Sentencing.pdf).

A defendant sentenced to 180 days in jail who does not have a mandatory minimum sentence is entitled to commutation credits and may also be eligible for parole. Prior to being eligible for parole, the defendant must serve one-third of the sentence (60 days) less applicable commutation credits (14 days). *Parole Handbook* at 6-7. But, even if the defendant is not granted parole, his receipt of commutation credits will reduce the sentence by 42 days, to 138 days. *Id. see also Statutory Changes* at 19. Other credits, such as work credits and minimum custody credits, may serve to reduce a sentence further, even when a defendant is not paroled. *Parole Handbook* at 6; *see also In re DiLeo*, 216 *N.J.* 449, 459 (2014) (describing how disorderly persons defendants actually served 124 days on 180-day sentences). A person sentenced to a mandatory minimum sentence of 180 days actually serves *more* time than a person sentenced to 230 days without a mandatory minimum (who would receive more than 53 days of commutation time).

As noted, the United States Supreme Court only recently adopted the view that mandatory minimum sentences were relevant to the inquiry about the seriousness of the sentence. *Compare Blanton*, 489 *U.S.* at 544 *and Harris v. United States*, 536 *U.S.* 545, 554 (2002) *with Allayne* 133 *S.Ct.* at 2160. But this Court has long-known that mandatory minimums reflect a legislative determination of seriousness. As the Court explained in *Hamm*:

> when the New Jersey Legislature wants to treat an offense as "serious," there will be no mistaking it. When the Legislature became concerned with the prevalence of guns in our society, it directed that many routine offenses would carry a mandatory three-year term of imprisonment if committed with a firearm. *N.J.S.A.* 2C:43-6c. And recently, in its Comprehensive Drug Reform Act, the Legislature provided mandatory prison sentences for the selling of drugs within one thousand feet of a school. *N.J.S.A.* 2C:35-7.
>
> [*Hamm*, 121 *N.J.* at 117-118.]

Twenty-five years ago, this Court determined that jury trials were not necessary because third DWIs were petty rather than serious. *Id.* at 111. It noted that "[t]he Legislature has yet to require a sentence in excess of six months, *or even to require a mandatory six months of incarceration*. It continues to address the problem with a measured response tempered by strong doses of rehabilitation and reparation." *Id.* (emphasis added). As illustrated above, times - and the amount of punishment - have changed.

B. The Legislative Stacking of Additional, Non-Incarcerative Penalties Is An Indication That A Conviction For A Third DWI Is Not Petty

As the United States Supreme Court has explained: "the most significant index to the seriousness of an offense is the degree of penalty that attaches, [but] it should be recalled that this is not alone determinative." *Williams*, 399 U.S. at 121, n. 7 (Harlan, J., concurring in part, dissenting in part) (internal

citations omitted). Indeed, in *Blanton*, the Court made explicit that penalties other than incarceration can be considered in determining the seriousness of a punishment. 489 *U.S.* at 543. The non-incarcerative penalties associated with a conviction for a third DWI include: a driver's license suspension, fines, fees, surcharges, and the requirement that a defendant install an Interlock device. Viewed in concert, these additional penalties coupled with the periods of required confinement evince a legislative determination that third DWIs are serious offenses.

The financial costs associated with a third DWI conviction are illustrated below:

Description	**Cost**	**Statutory Authority**
Fine	$1,000	*N.J.S.A.* 39:4-50(a)(3)
Alcohol Education, Rehabilitation and Enforcement Fund Fee	$100	*N.J.S.A.* 39:4-50(b)
Surcharge	$100	*N.J.S.A.* 39:4-50(i)
Insurance Surcharge	$3,000-$4,500	*N.J.S.A.* 17:29A-35b(2)(b))
Interlock Device	~$1,050- ~$2,850[5]	*N.J.S.A.* 39:4-50.17

[5] According to Mothers Against Drunk Driving, "[o]n average, interlocks [cost] about $70-150 to install and about $60-80 per month for monitoring and calibration." Mothers Against Drunk Driving, *Ignition Interlock Frequently Asked Questions*, available at: http://www.madd.org/drunk-driving/ignition-interlocks/interlockfaq.html. These cost estimates are consistent with defense counsel's representation that the "current market rate for IID rental is $75." PCert 11, n.3. At $75 per month and an additional $150 for installation/deinstallation, the cost for three years of

Safe Neighborhoods Services	$75	*N.J.S.A.* 2C:43-3.2
Victims of Crime Compensation Board	$50	*N.J.S.A.* 2C:43-3.1(c)
Additional fees associated with fine	$6	*N.J.S.A.* 39:5-41(d)-(h)[6]
TOTAL	**$5,331-$8,681**	

1. Financial Penalties, Including the Insurance Surcharge, Exceed $5,000 And Therefore Cannot Be Deemed "Petty"

The direct financial costs associated with a third DWI conviction range between $5,331 and $8,681. Mr. Denelsbeck's costs will be approximately $6,281. *See* 12T 148:22-23 (two-year interlock requirement imposed). Under federal law, fines of more than $5,000 only attach to felonies and serious misdemeanors. *Compare* 18 U.S.C. § 3571(b)(3)-(5) with 18 U.S.C. § 3571(b)(6)-(7). In other words, federal defendants only face fines of more than $5,000 when they also face more than six months in jail and, therefore, are entitled to jury trials. 18 U.S.C. § 3559(a). In 1990, this Court noted that the $1,000 fine faced by the defendant in *Hamm* was comparable to the fine faced by the defendant in *Blanton*, was well-below the $5,000 federal

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interlock installation is approximately $2,850; the cost for one year is approximately $1,050.

[6] This actually represents five additional fees of either $1 (*N.J.S.A.* 39:5-41(d), (e), (f), and (h)) or $2 (*N.J.S.A.* 39:5-41(g)). They are consolidated here for convenience, as they were by the trial court. 12T 147:16.

threshold for "petty" fines, and was therefore not constitutionally "serious." *Hamm*, 121 *N.J.* at 117.

In *Hamm*, the Court focused only on the $1,000 fine, rather than the insurance surcharges associated with DWI convictions. 121 *N.J.* at 125. The Court concluded that because the "surcharges are reasonable in themselves[,]" (*id.*) and "increased insurance premiums . . . [could] easily result" from non-criminal conduct like accidents, (*id.*) there was no evidence that the Legislature enacted the surcharge in an effort to "pack" penalties for DWI offenses. *Id.* As such, this Court held that the surcharge "is not 'punitive' for purposes of *ex post facto* analysis." (*id. citing Clark v. New Jersey Div. of Motor Vehicles*, 211 *N.J. Super.* 708, 711 (App.Div.1986)). The surcharges were therefore not part of the calculation of the seriousness of third DWIs for the purpose of determining whether a jury trial was required.

This analysis does not take into account the "real life" impact of the penalties. Whether the Legislature labels consequences as criminal or civil is of little import to a defendant who faces the consequences. This Court has rejected the "traditional dichotomy . . . [of] penal [versus] collateral" consequences. *State v. Nunez-Valdez*, 200 *N.J.* 129, 138 (2009). The bottom line is that, even when *Hamm* was decided, defendants faced far more than $1,000 in *government mandated* financial

penalties. This is not a case where private insurance companies opt to raise rates based on actuarial calculations - these surcharges are government mandated as a penalty for a third DWI. *But see State v. Nakata*, 76 *Haw.* 360, 367 (Haw. 1994) (determining that "insurance companies would likely raise insurance rates regardless of whether" Hawai'i law compelled such a result).

It makes little difference whether those penalties are termed "fines," "fees," "surcharges," or anything else. After all, if the "classification by label" of an offense should not "govern whether [a] jury decides the issue[,]" *Stanton*, 176 *N.J.* at 115 (Albin, J., dissenting), the classification by label of a penalty should not govern whether it triggers a jury trial right. The more sound analysis - and the analysis required by *Blanton* - focuses on "only penalties resulting from state action, *e.g.*, those mandated by statute or regulation[.]" *Blanton*, 489 *U.S.* at 543, n.8. Because the mandatory insurance surcharge was enacted by the Legislature, it is an appropriate part of the calculus.

2. The Financial Penalties, Even Excluding the Insurance Surcharge, Reflect A Legislative Determination of Seriousness

Even if the distinctions drawn in *Hamm* still made sense, third DWIs now also contain a series of financial penalties that - even excluding the insurance surcharges - approach the federal

threshold for serious offenses. Third DWI offenders face a $1,000 fine (*N.J.S.A.* 39:4-50(a)(3)); a $100 fee payable to the Alcohol Education, Rehabilitation and Enforcement Fund (*N.J.S.A.* 39:4-50(b)); a $100 surcharge (*N.J.S.A.* 39:4-50(i)); a $75 Safe Neighborhoods Services fee (*N.J.S.A.* 2C:43-3.2); a $50 Victims of Crime Compensation Board fee (*N.J.S.A.* 2C:43-3.1(c)); $6 in other mandatory fees (*N.J.S.A.* 39:5-41(d)-(h)); and up to $2,850 in costs associated with the Interlock device (*N.J.S.A.* 39:4-50.17). Thus, even excluding the massive insurance surcharges, today, third DWI defendants face $4,181 in financial penalties.

It is worth noting that the fine a defendant faces under *N.J.S.A.* 39:4-50(a)(3), unlike most fines under the Code of Criminal Justice, is mandatory in nature. While *N.J.S.A.* 2C:43-3 allows for significant fines (for example, fines of up to $10,000 are authorized for fourth-degree crimes), the imposition of a fine does not automatically attach upon conviction for such a crime. *Id.* ("A person who has been convicted of an offense *may* be sentenced to pay a fine . . ." (emphasis added)). *See also N.J.S.A.* 2C:44-2 (listing criteria for imposing fines and restitution, including a requirement of an opportunity to pay hearing). In contrast, a conviction for a third DWI *mandates* a fine of $1,000. *N.J.S.A.* 39:4-50 ("a person [so-convicted] *shall* be subject to a fine of $ 1,000.00") (emphasis added). Thus, a third DWI offender can receive fines in excess of those received

by convicted robbers, carjackers, or murderers. As explained in Point III, A, *supra*, a mandatory penalty is fundamentally more serious than a discretionary one. Indeed, this is exactly what the Court in *Hamm* suggested: "when the New Jersey Legislature wants to treat an offense as 'serious,' there will be no mistaking it . . ." and mandatory penalties will attach. 121 *N.J.* at 117.

3. The Decade-Long Driver's License Suspension Associated With A Third DWI Conviction Reflects A Legislative Determination of Seriousness

The non-incarcerative penalties for a third DWI are not simply financial. Third DWI offenders also face mandatory driver's license suspensions for a decade. *N.J.S.A.* 39:4-50(a)(3). In other words, a defendant faces a license suspension of more than 20 times the length of the period of incarceration. In examining a similar scheme, the Nebraska Supreme Court observed that "[t]he imposition of a 15-year suspension of driving privileges is such a significant additional penalty that it clearly shows serious legislative concern about this offense." *State v. Wiltshire*, 241 *Neb.* 817, 821 (1992) (examining period of license suspension in relation to maximum period of incarceration and noting that at 30 times greater, it is clearly significant, but a one-year suspension for a second DWI is not so far out of line with the incarceration period to be deemed serious).

Taken together, the *mandatory* periods of incarceration either exceeding (*supra*, Point II) or just less than the clear threshold for a jury trial (*supra*, Point III, A); the significant financial penalties, either exceeding (*supra*, Point III, B, 1) or just under (*supra*, Point III, B, 2) the federal threshold for serious fines; and the lengthy driver's license suspension (*supra*, Point III, B, 3) evince a legislative determination of seriousness requiring attachment of the right to a jury trial. While some of the above penalties were considered by the Court in *Hamm*, they must be considered in combination with all the increases over the last quarter century. A defendant now faces three additional months of actual jail time as well as additional financial penalties at a level reserved for serious offenses. Considering the magnitude of all these consequences, the Sixth Amendment and Article I, Paragraphs 9 and 10, require that defendants receive the right to a jury trial.

CONCLUSION

For all the above reasons, the Court should determine that third DWI offenders are entitled to a jury trial, and reverse Defendant's conviction obtained after a bench trial.

Respectfully submitted,

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