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May 11, 2020

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

**Re: A-52-19 *State v. Edgar Torres* (083676)**
**Appellate Division Docket No. A-004663-1**

Honorable Chief Justice and Associate Justices:

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

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## Preliminary Statement

Sentencing is critical stage in the criminal justice process. Our Code of Criminal Justice appropriately vests human beings, not automatons, with the responsibility to make sentencing decisions. That is, our system of justice asks judges to weigh qualitatively a series of considerations to determine the proper sentence. Although New Jersey should not reduce sentencing to a quantitative assessment of risk, desert, or any other rationale for punishment, the Court must remain vigilant to ensure that sentencing decision remain moored to the Legislature's goals *and* real information about risk. Put differently, although not every finding by a sentencing court requires empirical support, appellate courts must examine sentences where data contradicts courts' findings or findings become so commonplace as to become hollow. Even in its limited role, appellate review of sentencing prevents the process from drifting far afield from its intended purpose of identifying the appropriate punishment for particular offenses and offenders.

*Amicus* joins the position of Defendant that courts must consider the overall fairness of a sentence before imposing consecutive sentences. Because that point is so well established in our case law, *amicus* does not focus on it in this brief. Instead, *amicus* addresses the trial court's application of aggravating factor three

(the risk that the defendant will commit another offense) and aggravating factor nine (the need for deterring the defendant and others from violating the law).

Reviewing courts generally defer to trial courts' properly supported sentencing determinations; but they nonetheless retain a critical role in ensuring that sentences reflect the legislative goal of issuing sentences that fit the crime, while at the same time providing some level of uniformity. (Point I, A). The Code's system of guided discretion flows from the identification and weighing of aggravating and mitigating factors. When courts find certain aggravating factors in virtually all cases, those factors cease to help differentiate between defendants. (Point I, B, 1). That is exactly what has happened with aggravating factor nine: it is found in cases where defendants have significant criminal records and where they do not; it is found in situations where evidence supports a high likelihood of recidivism (and therefore, presumably, an increased need to deter such behavior) and situations where there exists a uniquely low likelihood that the defendant will reoffend. When a factual finding becomes ubiquitous it ceases to aid courts in differentiating between offenses and offenders.

To ensure that aggravating factors serve their purpose in helping to guide judicial discretion courts cannot ignore the empirical evidence that undermines their existence. There exists strong evidence that older people reoffend at a far lower rate than do their younger peers. The trial court's finding that Defendant

would be likely to reoffend, despite the fact that he would not be released before age 77, flies in the face of this evidence. Although courts need not support every finding of fact with empirical analysis, where there exist clear data to undermine a finding, courts cannot ignore it. (Point I, B, 2).

## Statement of Fact and Procedural History

*Amicus* accepts the statement of facts and procedural history found in Defendant-Appellant's Petition for Certification in the section labeled "Statement of the Case."

## Argument

### I. Courts reviewing sentencing decisions must stay vigilant to ensure that aggravating factors remain moored to their legislative purpose.

#### A. Although appellate courts have a limited role in the review of sentences, they do serve as a critical check on the sentencing decisions.

It is now well-established that although "[a]ppellate courts are 'expected to exercise a vigorous and close review for abuses of discretion by the trial courts[,]'" *State v. Lawless*, 214 N.J. 594, 606 (2013) (quoting *State v. Natale*, 184 N.J. 458, 489 (2005)), as long as a trial court follows the sentencing procedure set forth in the Code of Criminal Justice, appellate review is "limited." *State v. Cassady*, 198 N.J. 165, 180 (2009).

In *State v. Roth*, 95 N.J. 334, 363-66 (1984), the Court established a three-pronged[1] method to consider sentencing appeals: First, the Court always requires "findings of fact that are grounded in competent, reasonable credible evidence." *Id*. at 363. Second, the "fact-finder [must] apply correct legal principles in exercising its discretion." *Id*. Third, reviewing courts "will exercise that reserve of judicial power to modify sentences when the application of the facts to the law is such a clear error of judgment that it shocks the judicial conscience[.]" *Id.* at 364. The Court anticipated that it would "not be required to invoke this judicial power frequently." *Id.*

But the assumption that courts would only rarely interfere with sentences imposed after sentencing hearings that followed proper procedure presupposes that trial courts will not drift far afield from the "paramount" goals of the Code: that the "punishment fit the crime, not the criminal, and that there be a predictable degree of uniformity in sentencing." *State v. Yarbough*, 100 N.J. 627, 630 (1985). Reviewing courts have only rarely found sentences that "shock the judicial conscience." *See, e.g.*, *State v. Candelaria*, 311 N.J. Super. 437, 454 (App. Div.

[1] Later, in *State v. Roach*, 146 N.J. 208, 232-34 (1996), the Court added a fourth step to the appellate review of sentences, holding that otherwise proper sentences may be deemed excessive if there exists a significant disparity between a defendant's sentence and that of a co-defendant. That prong is not applicable here.

1998); *State v. Bogus*, 223 N.J. Super. 409, 434 (App. Div. 1988); *State v. Roach*, 222 N.J. Super. 122, 130 (App. Div. 1987).

Appellate courts nonetheless retain the power to reject sentences imposed. When troubled by the length of a sentence, court have frequently remanded cases for reconsideration of sentence after finding that aggravating factors had been improperly found, mitigating factors had been ignored, or where the sentencing court failed to make a proper record. *See, e.g., State v. Randolph*, 210 N.J. 330, 355 (2012) (remanding case for resentencing, allowing defendant to present evidence of rehabilitation, following Appellate Division remand requiring reconsideration and justification of original sentence); *State v. Lawless*, 423 N.J. Super. 293, 308 (App. Div. 2011) (finding two aggravating factors inapplicable and remanding for sentencing). Reviewing courts have also altered severe sentences without finding that they shock the conscience. *See, e.g., State v. Vasquez*, 374 N.J. Super. 252, 268-269 (App. Div. 2005) (vacating defendant's sentence and exercising original jurisdiction to impose a reduced sentence); *State v. Marinez*, 370 N.J. Super. 49, 58-59 (App. Div. 2004) (concluding that sentence was "unduly harsh and severe," and ordering that it be reduced).

In other words, while the Code anticipated only a limited judicial review of the propriety of sentences – as opposed to the process of sentencing – it did not create a system where trial courts receive unreviewable *carte blanche* to impose

sentences within applicable ranges. Judicial intervention is particularly appropriate where, as here, the sentencing court's determinations render legislatively created aggravating factors, designed to differentiate between crimes, meaningless.

### B. Aggravating factors must remain moored to the Legislature's purpose in establishing the Code of Criminal Justice.

Under our sentencing scheme, conviction of a crime exposes a defendant to a range of punishment. N.J.S.A. 2C:43-6. To identify the proper sentence within that range, the sentencing court must identify and weigh aggravating and mitigating factors. N.J.S.A. 2C:44-1. "Aggravating and mitigating factors are used to insure that sentencing is individualized without being arbitrary. The factors insure that the sentence imposed is tailored to the individual offender and to the particular crime he or she committed." *State v. Sainz*, 107 N.J. 283, 288 (1987). The identification and weighing of aggravating and mitigating factors "guide[s] judicial discretion and ensure[s] uniformity and consistency in the exercise of this discretion." *Id.* at 289.

#### 1. When an aggravating factor becomes ubiquitous, it ceases to differentiate among defendants or crimes.

Appellate courts have upheld application of aggravating factor nine – the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1a(9) – in cases where defendants have significant criminal records and where they have no record whatsoever. *Compare State v. Ghertler*, 114 N.J. 383, 393 (1989)

(endorsing finding of aggravating factor nine for defendant with a "lengthy record that goes back" a decade) *with State v. Fuentes*, 217 N.J. 57, 80 (2014) (declining "to find that aggravating factor nine is inappropriate in a case in which the defendant had no prior record"). They have endorsed the factor when there are special, case-specific justifications for it and they have allowed it based simply on the nature of the crime. *Compare State v. Rivers*, 252 N.J. Super. 142, 153-54 (App. Div. 1991) (upholding trial judge's finding that there was a specific need to deter a defendant who had admitted the crime at his presentence interview, then denied it at sentencing, because lack of remorse indicated that he needed to be deterred from future criminal conduct) *with State v. Doss*, 310 N.J. Super. 450, 461 (App. Div. 1998) (finding special need for deterrence where defendant was convicted of assaulting a corrections officer). Much like drug courier profiles described by Justice Marshall in dissent in *United States v. Sokolow*, aggravating factor nine appears to have a "chameleon-like way of adapting to any particular set of" facts. 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting).

The need to deter contained in N.J.S.A. 2C:44-1a(9) contemplates both specific deterrence of the particular defendant and general deterrence of others. Courts are empowered to "address both general and specific deterrence" in imposing sentence. *Fuentes*, 217 N.J. at 81. But, because "[i]n the absence of a finding of a need for specific deterrence, general deterrence has relatively

insignificant penal value" *id*. at 79, the primary focus must remain on specific, or individual, deterrence.

The Court has long-acknowledged that "a well[-]recognized purpose of punishment is individual deterrence." *In re Application of Trantino*, 89 N.J. 347, 373 (1982). But as a purpose of punishment, like incapacitation, rehabilitation, or retribution, *see id.* at 370-73 (discussing purposes of punishment), it applies to some extent in *every* case. If reviewing courts allow sentencing courts to find the need to deter without connecting it to particular facts and circumstances in a given case, it ceases to aggravate. That is, it no longer distinguishes between cases that are more or less blameworthy. The Legislature designed aggravating factors to allow for the differentiation that individualized sentencing requires. *Sainz*, 107 N.J. at 288. To allow a factor to be found in every case is to allow the sentencing scheme to be "set loose from its legislative moorings[.]" *State v. Morrison*, 227 N.J. 295, 314 (2016).

**2. Courts cannot find aggravating factors that directly contradict data.**

Where aggravating factor nine creates problems in its ubiquity, aggravating factor three – the risk that the defendant will commit another offense – generates concern in the irrationality of its application. If reviewing courts allow sentencing courts to find aggravating factors in the face of evidence that directly contracts the finding, the factor ceases to provide meaningful assistance to courts. The data are

overwhelming: by the time Mr. Torres completes his first sentence – when he will be 77 years old – he will pose a significantly lower risk of reoffending than almost any other category of defendant.[2]

Researchers have been clear that "[a]ge is a consistent predictor of crime, both in the aggregate and for individuals. The most common finding across countries, groups, and historical periods shows that crime – especially 'ordinary' or 'street' crime – tends to be a young person's activity." Jeffery T. Ulmer & Darrell Steffensmeier, "The Age and Crime Relationship: Social Variation, Social Explanations," *The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality*, 393-94 (Kevin M. Beaver, et al., eds. 2015) (citing numerous longitudinal and cross-sectional studies).

A comprehensive study by the United States Sentencing Commission is particularly instructive. U.S. Sentencing Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017).[3] Among other findings, the Commission reported that "[o]lder offenders were substantially less likely than younger offenders to recidivate following release." *Id.* at 3. Specifically, "[o]ver an

[2] This is not to suggest, of course, that no older people recidivate. *Amicus* acknowledges that they do. But, absent some *particularized* showing of a likelihood of reoffense – absent in this case – a sentencing court cannot ignore the rarity of older people committing crimes.

[3] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

eight-year follow-up period, 13.4 percent of offenders age 65 or older at the time of release were rearrested compared to 67.6 percent of offenders younger than age 21 at the time of release." *Id.* Critically, "across age groupings . . . recidivism measured by rearrest, reconviction, and reincarceration declined as age increased." *Id.*[4]

Four particular findings are especially relevant here: First, the reincarceration rate for people released from federal prison at age 65 or older is a miniscule 4.1 percent, compared to 38.6 percent for people between ages 21 and 24. *Id.* at 23. Second, for defendants convicted specifically of robbery offenses, older people (60 years old and older), had a recidivism rate less than half that of the age bracket most likely to reoffend. *Id.* at 25. For people with the most significant criminal histories, people 60 years old and older have a recidivism rate of 37.7 percent as compared to a 53 percent rate for people under 30. *Id.* Finally, while recidivism rates following release from state prison are uniformly higher

[4] These measures reflect both the behavior of defendants and the actions of law enforcement. That is, recidivism rates measure who has been rearrested (and, later, reconvicted and reincarcerated); where there exist disparities in the enforcement of crime, those disparities are amplified in recidivism data. *See, e.g.*, Radley Balko, *The Washington Post*, "There's overwhelming evidence that the criminal-justice system is racist." Sept. 18, 2018 (compiling evidence of racial disparities at the arrest, pretrial, charging, and sentencing and other stages of the criminal justice process) available at https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/.

than after release from federal prison, the trend that older people reoffend at lower rates than their young peers holds true in state prisons. *Id.* at 27.

The Sentencing Commission's study is no outlier. Criminologists recognize that "most forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence (the peak age varies depending on the specific type of risky activity) and declining thereafter." Laurence Steinberg, "The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability," 14 *Neuroscience* 513, 515 (2013).[5] What is true for risk-taking generally is also true of crime specifically: "Involvement in violent and nonviolent crime also follows this pattern and is referred to as the 'age-crime curve.'" *Id.*

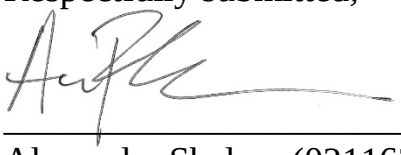
The significant evidence that older people are unlikely to commit crimes simply cannot be squared with a finding that Defendant, when he will be released at age 77, would pose a particularly high likelihood of recidivism.

[5] Although *amicus* contends that age alone counsels against the finding of aggravating factor three in this case, age alone should not serve as a basis for the finding of the factor in other cases. In addition to the failure of such categorical determinations to provide for individualized sentencing, they would also ignore a fundamental precept of recent Supreme Court jurisprudence: that young people, though generally more impulsive, more susceptible to peer pressure, and less responsible, are also more capable of rehabilitation than older people. *Miller v. Alabama*, 567 U.S. 460, 472 (2010). Because young people are better able to reform, courts must consider any statistical increase in recidivism rate alongside decreased moral blameworthiness and an individualized consideration of the risk of recidivism.

## Conclusion

To ensure that aggravating factors meaningfully differentiate between defendants and crimes, reviewing courts must ensure that they are neither omnipresent nor directly contradicted by evidence. Because those problems permeated Defendant's sentence, and because the court failed to consider the overall fairness of the sentence, the Court should remand for resentencing.

Respectfully submitted,



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