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Re: State v. Michelle Paden-Battle, Docket # A-001320-17

Honorable Judges:

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

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Summary of Argument

This case requires the Court to confront a rarely used sentencing practice that unconstitutionally depreciates the role of juries as fact finders. Generally, sentencing judges should consider all evidence of a defendant's conduct and character to develop a picture of the "whole person" in order to arrive at a just sentencing outcome. This case, however, compels the Court to probe and define the outer limits of that consideration. Are there circumstances where the tail of sentencing wags the dog of acquittal in a way that offends the State Constitution?

Amicus American Civil Liberties Union of New Jersey contends that where juries have been asked to consider particular conduct and have acquitted the defendant of that conduct, judges cannot disregard the jury's determination and sentence the defendant as if he had been convicted on the acquitted charges.

In this brief, *amicus* summarizes why this result is commanded by: 1) the *Apprendi*-line of cases, 2) principles of due process, and 3) the doctrine of fundamental fairness (Point I). *Amicus* then focuses on the policy rationales supporting limitations on the consideration of acquitted conduct in sentencing; specifically, the negative impact such rare and abnormal sentencing practice has both on defendants' decisions to proceed to trial and their strategy at trial (Point II).

Lastly, *amicus* argue that where defendants fear they might be punished based on acquitted conduct, they are more likely to plead guilty than go to trial—even when they have meritorious defenses—further driving down already low rates of defendants exercising their right to a jury trial (Point III, A). Those defendants who do choose to go to trial in front of judges who are empowered to sentence based on acquitted conduct face the additional burden of having to persuade two different decision makers based on two different standards of proof, thus compromising the defendant's trial strategy (Point III, B).

Statement of Facts and Procedural History

Amicus accepts the statement of facts and procedural history contained within Defendant's Appellate Division brief.

Argument

I. Punishing defendants for acquitted conduct undermines the import of jury verdicts, deprives defendants of due process, and is fundamentally unfair.

Limiting the use of acquitted conduct at sentencing does not end the practice that allows sentencing judges to consider the "whole person" at sentencing; it simply imposes a critical limitation. The destabilizing effect of considering acquitted conduct strips a defendant of the right to a fair trial, is anathema to basic notions of due process, and chills a defendant's ability to present an adequate defense. Accordingly, this court should create a bright line rule disallowing the

consideration of acquitted conduct in sentencing.

A. Punishing defendants for acquitted conduct depreciates the significance of jury verdicts.

New Jersey does not take lightly the role of the jury: "New Jersey has upheld the importance of jury trials in constitutions that date back to the origins of our nation." *Williams v. American Auto Logistics*, 226 N.J. 117, 123 (2016) (citing *N.J. Const. art*. XXII (1776) ("[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); *N.J. Const. art.* I, § 7 (1844) ("The right of trial by jury shall remain inviolate . . . ."); *N.J. Const. art*. I, ¶ 9 (1947) (same). To preserve that important role, the Court should prohibit the use of acquitted conduct in sentencing.

An acquittal is the most sacred part of a jury verdict, " . . . represent[ing] 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. Lay juries, then, "guard against a spirit of oppression and tyranny on the part of rulers." *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995). 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).

Punishing a defendant for acquitted conduct not only violates the protection an acquittal affords, but undermines the very point of the right to trial by jury: to protect the defendant from government overreach. Where a judge disagrees with the jury's verdict and punishes the defendant on that basis, the court disrespects the jury's function and judgment. Here, Defendant was made to answer at sentencing for acquitted crimes, thus gutting the "special significance" of the acquittal. *United States v. Scott*, 437 U.S. 82, 91 (1978).

Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny articulate how the right to a trial by jury must be implemented. In *Apprendi*, the United States Supreme Court held that unless admitted by the defendant, findings of fact that increase the range of punishment for a given crime must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 490. Accordingly, any judicial factfinding[1] increasing a defendant's sentence violates the Sixth and Fourteenth Amendments. *Ibid.*

[1] There exists a limited exception, not applicable here, for fact finding related to a defendant's criminal history. *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

The trial court in the instant case justified Defendant's sentence by *judicial* factfinding — that she was the ringleader who caused the murders to happen — not by facts found by the jury beyond a reasonable doubt. That Defendant's sentence was within the legal range does not remove it from *Apprendi*'s reach; the United States Supreme Court 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. *Blakely v. Washington*, 542 U.S. 296, 299 (2004). Put differently, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose *without any additional findings*." *Id.* at 303-304. (Emphasis added). The question thus becomes: whether the extraordinary sentence Defendant received could have been justified had the court accepted the jury's determination that she participated in, but did not spearhead, the crime? It is hard to imagine sentencing a defendant — who had never been to state prison and not been convicted of a crime in more than fifteen years — to sixty years in prison *unless* the court determined she was the ringleader in the murder. The sentence thus violates *Apprendi* and the Sixth Amendment demands that the Defendant be resentenced.

B. Punishing defendants for acquitted conduct violates due process and is fundamentally unfair.

Sentencing based on acquitted conduct also violates the United States and New Jersey Constitutions' guarantees of due process and 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). Such decency is not evident here, and the practice should be eliminated.

One of the core components of due process is that the State must prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970). The enforcement of the presumption "lies at the foundation of the administration of criminal justice. *Id.* at 358 (internal quotation marks omitted). As the Michigan Supreme Court explained, "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*, 504 Mich. 605, 626 (Mich. 2019). Therefore, 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).

New Jersey would not be alone in prohibiting consideration of acquitted conduct as a violation of due process and as fundamentally unfair as several state courts have already done so. *See Beck*, 504 Mich. at 609 ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."); *State v. Marley*, 321 N.C. 415, 425 (N.C. 1988) (holding that due process and fundamental fairness preclude consideration of acquitted conduct); *State v. Cote*, 129 N.H. 358, 375 (N.H. 1987) (holding that the presumption of innocence is denied when a sentencing court uses charges that have resulted in acquittals to punish the defendant).

Indeed, judges across the country have noted that using acquitted conduct at sentencing erodes the public trust in our legal system because the corrosive effect of sentencing based on acquitted conduct is perceived as fundamentally unfair. *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. 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.'").[2]

[2] Commentators have also criticized the use of acquitted conduct in sentencing. *See, e.g.*, James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 Wm. & Mary L. Rev. 289, 333 (2007); 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); Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L. Rev. 675, 723 (2014).

In federal courts, the consideration of acquitted conduct found seeming approval from the United States Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997). But rejecting *Watts* hardly requires rejection of well-established Supreme Court precedent. As the Michigan Supreme Court explained: "Five justices [of the United States Supreme Court] gave [*Watts*] side-eye treatment . . . and explicitly limited it to the double-jeopardy context." *Beck*, 504 Mich. at 624 (citing *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005)). In the more than two decades since the United States Supreme Court decided *Watts*, no New Jersey Supreme Court or published Appellate Division opinion in New Jersey has explicitly endorsed its holding.

In one unpublished case, a panel of this Court appeared to allow the use of acquitted conduct. *State v. Van Hise*, 2010 N.J. Super. Unpub. LEXIS 1513, *12-13 (App. Div. 2010).[3] But, in *State v. Sainz*, the New Jersey Supreme Court made clear that "when the court goes beyond defendant's admission or factual version[,]" 107 *N.J.* 283, 293 (1987), it must be vigilant to ensure that it does "not sentence defendant for a crime that is not fairly embraced by the guilty plea." *Id. See also State v. Fuentes*, 217

[3] Pursuant to *R.* 1:36-3, this opinion is included in an appendix as AA03-07. Counsel cites cases below that stand for the contrary proposition.

N.J. 58, 71 (2014) (warning that courts "must be careful not to impose a sentence for an offense beyond the scope of the plea).

In *State v. Bomani*, 2014 *N.J. Super.* Unpub. LEXIS 415 (App. Div. 2014), another unpublished Appellate Division case, the court cautioned "the court may not increase a defendant's sentence for crimes or wrongs that have not been proven and that are not part of the charges on which defendant stands convicted." *Id.* at *41.[4] In short, even if *Watts* remains good law, New Jersey courts have not accepted its proposition that acquitted conduct may be considered in sentencing under our own State Constitution.

II. New Jersey judges rarely punish defendants for acquitted conduct.

It is axiomatic that uniformity in sentencing is a paramount goal of our Code of Criminal Justice. *State v. Roth*, 95 N.J. 334, 345 (1984). The Court has explained that "there can be no justice without a predictable degree of uniformity in sentencing." *State v. Hodge*, 95 N.J. 369, 379 (1984). Indeed, sentencing processes that "foster less arbitrary and more equal sentences" represent a "central theme" of New Jersey sentencing jurisprudence. *Roth*, 95 N.J. at 345. When some judges choose to

[4] Pursuant to *R.* 1:36-3, this opinion is included in an appendix as AA08-18. Counsel is aware of no case, other than *Van Hise*, that stands for the contrary proposition.

aggravate defendants' sentences based on acquitted conduct and others do not, uniformity and predictability suffer.

The question at issue in this case – whether a defendant can be sentenced based on conduct for which he has been acquitted – has rarely been considered by appellate courts in this state.[5] *State v. Tindell*, 417 N.J. Super. 530, 538 (App. Div. 2011) (considering trial court's imposition of five consecutive, maximum sentences where the judge determined that the jury erred in acquitting defendant on top charge); *see also State v. Melvin,* 2020 N.J. LEXIS 145, 2020 WL 589570 (2020) (appeal pending at New Jersey Supreme Court raising question of whether a defendant can be sentenced based on acquitted conduct); *State v. Allen*, 2016 N.J. Super. Unpub. LEXIS 689, *5 (App. Div. 2016) (ordering resentencing where judge sentenced a defendant acquitted of robbery but convicted of theft as if he had been convicted of robbery).[6]

In total, appellate courts have considered (or are considering) five cases where judges have relied up facts upon which juries have either been hung or have voted to acquit. The

[5] The related question, whether a defendant can be sentenced based on conduct that a jury considered and upon which it could not reach a verdict, has also rarely been considered in New Jersey. *State v. Tillery*, 238 N.J. 293, 327 (2019) (holding that it was not error for a sentencing court to consider "evidence presented as to offenses on which the jury deadlocked").

[6] Pursuant to *R*. 1:36-3, *amicus* attaches the unpublished opinion here as AA01-02. We are aware of no contrary precedent.

same trial judge imposed sentences in three of them (*Melvin, Paden-Battle*, and *Tillery*). Indeed, those three cases appear to be the *only* ones where the trial court sought to justify the sentence by relying upon *United States v. Watts*, 519 U.S. 148 (1997). In the other two cases, the trial judges sought to sentence defendants whom the judges believed had "gotten away" with crimes; the courts did not seek to apply a legal justification for the sentences that reviewing courts appropriately found unlawful. In other words, it appears that statewide there is only one judge who sentences defendants on the belief that New Jersey law allows consideration of acquitted conduct.

Even if that practice could be squared with the right to a jury trial, due process, fundamental fairness, and good policy, the rarity of its use raises independent concerns. "Random and unpredictable sentencing is anathema to notions of due process." *State v. Moran*, 202 N.J. 311, 326 (2010). Indeed, "[t]here is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Furman v. Ga.*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). Arbitrary or capricious sentencing schemes violate the United States

Constitution's prohibition on cruel and unusual punishment. *Id*. at 309 (Stewart, J., concurring) ("death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual").

Public confidence in the fairness of the criminal justice process suffers when defendants in one courtroom face different rules from those in every other courtroom in New Jersey; such confidence is fully assaulted when different rules are used by those who are should be seen as unbiased arbiters of justice.

III. Punishing defendants for acquitted conduct undermines defense strategy.

Whether defendants plead guilty or go to trial, their strategic decisions will be significantly impacted if the sentencing scheme allows judges to sentence them harshly on one count while relying on the facts of another count, for which they have been acquitted.

A. Punishing defendants for acquitted conduct increases pressure on defendants to plead guilty.

As a result of, among other factors, harsh sentencing practices after trial, jury trials are increasingly rare; but if courts can punish defendants for conduct on which a jury votes to acquit, they will virtually disappear. Of course, not every case should result in a trial. Plea bargaining is a necessary component of our criminal justice system. *State v. McQuaid*, 147 N.J. 464, 485-486 (1997). That is so because defendants

"benefit[] by reducing [their] penal consequences and avoiding the public humiliation" associated with trials and "the State benefits by assuring that a guilty defendant is punished and by protecting valuable judicial and prosecutorial resources." *Id.* A database maintained by the National Center on State Courts demonstrates that in New Jersey less than two percent of criminal cases end in a trial. Court Statistics Project, *Felony Jury Trials and Rates, New Jersey*, 2018 (noting that in 2018 of 44,251 dispositions, there were only 650 criminal jury trials and 106 criminal bench trials).[7]

Indeed, the expansion of the practice of plea bargaining has transformed the criminal justice system from a "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (finding also that in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.

Even those who praise the "mutuality of advantage" that flows from plea bargaining must remain concerned about systems of resolving cases that encourage innocent people to plead

[7] Available at http://popup.ncsc.org/CSP/CSP_Intro.aspx.

guilty. Where prosecutors charge defendants with crimes that carry extremely serious sentences, the incentive to plead guilty—despite factual innocence—increases. *See*, *e.g.*, *Lafler*, 566 U.S. at 185 (Scalia, J., dissenting) ("prosecutorial overcharging []effectively compels an innocent defendant to avoid massive risk by pleading guilty"); Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 83-85 (2011); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014.

This temptation for innocent people to plead guilty reaches its apex where courts consider acquitted conduct at sentencing, creating a virtual "heads I win, tails you lose" scenario for a beleaguered defendant. By way of example: imagine a first-offender accused of having intercourse with a person who is under 16 years old. The victim alleges that the defendant was armed with a knife. As a result, the defendant is charged with first-degree aggravated sexual assault for the use of the knife and second-degree sexual assault based on the victim's age. The State offers Defendant a plea bargain of eight years imprisonment. Defendant acknowledges having had intercourse with the victim, claiming that he reasonably believed that the victim was older, but denies having been armed or otherwise having used force or coercion.

In a system where acquitted conduct could not be used to elevate a sentence, the defendant would have to weigh the likelihood of conviction on only the second-degree charge (with a likely sentence closer to five years as a first offender who has a justification that fails to amount to a complete defense) against the probability of a conviction on the first-degree charge (with a probable sentence above ten years). On the other hand, if the court could consider acquitted conduct, the defendant would have to consider the possibility that the jury would acquit him of the higher charge, but the court would nonetheless determine, by a preponderance of the evidence, that defendant was armed and sentence him to more than ten years.

Under this scenario, if the defendant submits to the State's aggressive offer and pleads guilty, he suffers. If he goes to trial and the jury convicts on the first-degree charges, he loses again. If he goes to trial and persuades a jury that he was not armed, he still comes out behind, so long as the State secures the conviction on a more easily proved offense—albeit, an admitted one—and persuades the sentencing judge of the defendant's guilt on the weapon-based charge by a preponderance of the evidence. Prosecutors are thus incentivized to charge defendants with certain unprovable counts where acquittal of other counts will serve merely as a "speed bump at sentencing." *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015)

(Millett, J., concurring in the denial of rehearing *en banc*). Defendants, for their part, knowing that a partial acquittal will provide little sentencing relief, face additional increased pressure to plead guilty to weak allegations.

Prosecutors have an incentivize to charge defendants with unprovable counts where acquittal of certain counts will serve merely as a "speed bump at sentencing" *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*). Defendants, knowing that a partial acquittal will provide little sentencing relief, face increased pressure to plead guilty to weak allegations. Although our criminal justice system accepts, even appreciates, plea bargaining, it loathes coercive practices that induce innocent people to plead guilty to crimes they did not commit. *Cf.* Diana Dabruzzo, Arnold Ventures, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In.* (Nov 14, 2019) (praising reform to pretrial system that reduced phenomenon of innocent defendants pleading guilty in exchange for time-served offers).[8] Sentencing defendants based on acquitted conduct coerces defendants to avoid trial or else subject themselves to lose-lose scenarios.

[8] Available at https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/.

B. Punishing defendants for acquitted conduct distorts trial strategy, forcing defendants simultaneously to influence two different decision makers.

Trial strategies that appeal to juries may not appeal to judges. Scalia & Garner, *Making Your Case: the Art of Persuading Judges*, 31 (2008) (explaining that a "jury argument" will "almost never" play well to a judge). So too in the other direction. Amsterdam & Hertz, *Trial Manual 6 for the Defense of Criminal Cases* 835 (6th Ed. 2016) (explaining that technical defenses, which might appeal to judges, cause jurors to lose focus and are therefore ineffective). Where courts allow the use of acquitted conduct, attorneys must appeal to two decision makers, whose interests are often contradictory.

By way of example, the decision of whether or not a defendant should testify becomes particularly fraught where acquitted conduct can be considered. There is no doubt that "[t]he decision whether to testify, although ultimately defendant's, is an important strategic[] choice, made by defendant in consultation with counsel." *State v. Savage*, 120 N.J. 594, 631 (1990). But neither counsel nor the defendant can know what to do, where they must please two very different audiences. Many jurors want to hear from defendants because they "expect an innocent person to testify." Amsterdam & Hertz at 834. On the other hand, judges, who are less likely to draw improper adverse inferences from a defendant's election not to

testify, may be more "skeptical of the testimony of the defendant. . . ." *Id.* at 832. Where a defendant must simultaneously convince both the jury and the judge, a difficult decision becomes even harder.

Similarly, defendants must think twice about employing a trial defense that relies simply on holding the State to its burden. To do so risks signaling to a judge that the defendant likely committed the alleged crime and escaped culpability only because of the high standard of proof. Perverse results flow where a defendant's "largely successful effort to escape guilt beyond a reasonable doubt [does] not preclude, and, in its success, actually might . . . contribute[] to, his punishment for those acquitted offenses under a lesser standard of proof . . . ." *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., concurring).

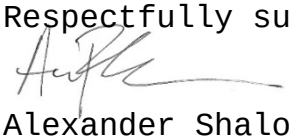
Put simply, trying a criminal case is difficult enough; forcing defense attorneys to satisfy two fact-finders, with two different viewpoints, and subject to two different standards of proof makes the task almost insurmountable.

Conclusion

Sentencing based on acquitted conduct undermines the role of juries, violates due process, is fundamentally unfair, harms uniformity, pressures defendants to plead guilty, and compromises trial strategy. As a result, this Court should

remand for resentencing and create a bright line rule that such practices are fully disfavored.

Respectfully submitted,



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