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**Re: State v. Thomas Hawkins, Docket No. A-5777-17T5,
Indictment No.: 12-02-0380-Z**

Honorable Judges of the Appellate Division:

Amicus curiae the American Civil Liberties Union of New Jersey (ACLU-NJ) relies on its brief filed before the Law Division on May 8, 2018. It further notes that the United States Supreme Court recently heard oral argument in *United States v. Haymond*, Dkt. No. 17-1672. The question presented in that case was:

Whether the court of appeals erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. 3583(k) that required the district court to revoke respondent's ten-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography.

[*United States v. Haymond*, Pet. for Cert. at I.¹]

¹ The Petition for Certification is available here: <https://www.supremecourt.gov/DocketPDF/17/17->

As noted in Defendant's brief before this Court, there are critical distinctions between supervised release in the federal system and probation in New Jersey. DBr² 9-10. Those distinctions suggest that if - as many pundits predict (see, e.g., Amy Howe, Argument analysis: Court poised to rule for challenger in dispute over constitutionality of sex-offender law, *SCOTUS Blog*, Feb. 26, 2019, available at: <https://www.scotusblog.com/2019/02/argument-analysis-court-poised-to-rule-for-challenger-in-dispute-over-constitutionality-of-sex-offender-law/>) - the Supreme Court holds that revocation of supervised release implicates the Sixth Amendment, the same would be true of New Jersey's probation revocation scheme.

The plane to "Appendi-land"³ has too frequently taken off before New Jersey courts have boarded. After the United States Supreme Court decided in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) that facts that elevate a maximum sentence must be found by a jury and proven beyond a reasonable doubt, New Jersey has been dragged along in applying the Sixth Amendment's guarantee of jury

[1672/50322/20180615152107152_United%20States%20v.%20Haymond%20-%20Pet.pdf](https://www.scotusblog.com/2019/02/argument-analysis-court-poised-to-rule-for-challenger-in-dispute-over-constitutionality-of-sex-offender-law/).

² DBr refers to Defendant's brief dated November 28, 2018.

³ Concurring in *Ring v. Arizona*, Justice Scalia advised a colleague who disapproved of judicial sentencing in capital cases, but rejected the basic holding of *Apprendi* that he was "on the wrong flight; he should either get off before the doors close, or buy a ticket to *Appendi-land*." 536 U.S. 584, 613 (2002) (Scalia, J, concurring).

fact finding, doing so only when faced with cases directly analogous to holdings by the United States Supreme Court. *Compare United States v. Booker*, 543 U.S. 220, 244 (2005) (applying *Apprendi* rule to Federal Sentencing Guidelines and crafting remedy) *with State v. Natale*, 184 N.J. 458, 466 (2005) (after *Booker*, making the same finding and applying the same remedy to New Jersey's sentencing scheme); *compare Alleyne v. United States*, 570 U.S. 99, 103 (2013) (extending logic of *Apprendi* to mandatory minimum sentences) *with State v. Grate*, 220 N.J. 317, 323-324 (2015) (applying *Alleyne* to N.J.S.A. 2C:39-5(i)). The time has come for New Jersey to embrace the spirit of the Sixth Amendment's protections and prohibit judicial fact finding that allows defendants to receive a harsher punishment than authorized by the jury's verdict alone. This case presents an opportunity to address fundamental constitutional flaws in New Jersey's sentencing scheme before the United States Supreme Court makes explicit that the existing system of probation revocation cannot stand.

Respectfully submitted,



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