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Hon. Robert J. Jones, Jr., J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, NJ 08903

Re: State v. Thomas Hawkins, Indictment No.: 12-02-0380-Z

Dear Judge Jones:

Please accept this letter brief in lieu of a more formal submission from amicus curiae the American Civil Liberties Union of New Jersey (ACLU-NJ) in support of Defendant's Motion to Correct an Illegal Sentence.

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STATEMENT OF FACTS/PROCEDURAL HISTORY

For the purposes of this brief, Amicus accepts the statement of facts and procedural history found in Defendant's brief in support of his motion. (Hereinafter "DBr").

ARGUMENT

I. N.J.S.A. 2C:45-3(A)(3) VIOLATES THE SIXTH AMENDMENT BECAUSE IT ALLOWS FOR GREATER SENTENCES THAN WOULD BE AUTHORIZED BY A JURY VERDICT ALONE BASED ON FACTS FOUND BY A JUDGE AND PROVEN BY LESS THAN THE BEYOND A REASONABLE DOUBT STANDARD.

Amicus adopts the well-reasoned position put forth by Defendant in his brief and simply adds the following.

The *Apprendi*-line of cases is a complex one, but also one that has been confronted by New Jersey courts numerous times over the last several decades. Thus only certain fundamental legal principles bear repeating: First, findings of fact that allow for a more onerous sentence range must be found by a jury (or admitted by the defendant) and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000). Second, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis original). Those principles, coupled with certain inarguable facts about the application of New Jersey sentencing law, make clear that the sentence imposed in this case violates the Sixth Amendment.

Having been convicted of a second-degree crime, the maximum sentence Defendant could have received based on a jury verdict alone was 10 years. *N.J.S.A. 2C:43-6(a)(2)*. Alternatively, at the time of sentencing the court could have suspended the sentence and

imposed a term of probation. *N.J.S.A.* 2C:45-1. But the jury verdict (or facts admitted to as part of a guilty plea) *alone* allowed for only one of the two options, not both. In order to impose upon Defendant both a term of probation (here, nearly five years) *and* an eight-year term of incarceration, the court needed to engage in further fact finding ("the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order" *N.J.S.A.* 2C:45-3(a)(3)). That fact finding, done by a judge by a preponderance of the evidence, resulted in a thirteen year sentence (five years of probation plus imposition of an eight year term of incarceration), *i.e.*, a sentence beyond the maximum permitted by the jury verdict alone. That is exactly what *Apprendi* and its progeny prohibit.

As Defendant points out (DBr at 9-10), there exist two ways the constitutional infirmity might be solved. First, the court could determine that here - and in any case where a probationer at a revocation hearing faces a penalty that will result in an aggregate penalty greater than the prescribed statutory maximum - Defendant is entitled to a jury trial and its attendant beyond-a-reasonable-doubt standard. Or the court could construe the statute in order to avoid a constitutional problem. *See State v. Pomianek*, 221 *N.J.* 66, 90-91 (2015) ("The doctrine of constitutional avoidance comes into play when a statute is susceptible to two reasonable interpretations, one constitutional and one not. We

then assume that the Legislature would want us to construe the statute in a way that conforms to the Constitution.”) (internal citations omitted). In order to do this, the court could credit Defendant for the time he spent on probation and reduce his incarceratory terms by that amount, so that the total punishment he receives does not exceed ten years. Here, for example, after having served almost five years on probation, the incarceratory term could not exceed an additional five years.

Amicus takes no position at this time regarding the appropriate remedy, but should the Court agree that the sentencing imposed herein violates the Sixth Amendment, and should the Court seek further briefing or argument regarding remedy, *Amicus* stands ready to provide guidance.

CONCLUSION

For the reasons set forth above, the Court should grant Defendant’s motion to correct an illegal sentence and resentence Defendant to a sentence that conforms with the Sixth Amendment’s requirements.



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