

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-37-17 (079832)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KAREEM T. TILLERY,

Defendant-Petitioner.

CRIMINAL ACTION

ON APPEAL FROM THE SUPERIOR
COURT OF NEW JERSEY,
APPELLATE DIVISION

App. Div. Docket No.
A-0682-15T3

Sat Below:

Marie E. Lihotz and Mary
Gibbons Whipple, J.J.A.D.

BRIEF AND APPENDIX OF AMICUS CURIAE,
THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

This case raises two important questions for the Court's consideration. First, Defendant raises a significant issue regarding the admissibility of inculpatory statements absent an express waiver under *Miranda v. Arizona*. However, in the event the Court does not grant Defendant relief on that claim, it must confront a serious question of first impression before this Court regarding sentencing: specifically, whether to adopt a decision of the United States Supreme Court that has been harshly criticized, which allows a defendant's sentence to be dramatically increased based on conduct that a jury considered but on which it chose not to convict him. It is that latter question *amicus* addresses herein.

In this case, the jury convicted Defendant of a single sale of a firearm and did not convict him of four additional sales of firearms. Notwithstanding the jury's inability to reach a verdict the trial judge believed he was entitled to consider all five sales in determining the appropriate sentence for Defendant. Indeed, the trial judge made clear he could have considered the other sales even if the jury had acquitted the Defendant. Although federal law allows such a flawed result, New Jersey law does not. (Point I, A).

Federal law can provide useful guidance, but because this Court bears "ultimate responsibility for the safe passage of our ship" as we navigate constitutional waters, it does not control.

As explained herein, this case falls within those areas that this Court has found the state constitution to provide greater protection to its residents than its federal counterpart. To safeguard important constitutional rights of New Jerseyans by ensuring that the judicial sentencing process is not the tail that wags the dog of jury determinations of guilt, this Court must reject any invitations to adopt the federal rule. (Point II, B).

The Appellate Division attempted to minimize the error by noting that while the sentencing judge relied on the hung conduct, it did not serve as "the sole basis used to apply any aggravating factor." That justification answers the wrong question. The result here could not have been reached without (improper) reliance on hung or acquitted conduct, as the other factors alone do not justify the harsh sentence imposed.

Specifically, Defendant's criminal history - while serious enough to meet the minimum standards for a discretionary extended term - cannot justify a maximum extended term sentence, with a maximum period of parole ineligibility. (Point II, A). The sentencing court also found that Defendant had an extra need to be deterred because he went to trial and then failed to take responsibility for the conduct for which he was convicted. However, such a finding improperly impinges on a defendant's right to go to trial and to not incriminate himself. The court erred in considering it. (Point II, B). The trial court also determined

that Defendant was a so-called sovereign citizen who, because he refused to acknowledge the authority of the court, was unlikely to comply with the law. The court did so despite Defendant's vocal objection to this characterization. Defendant should have been given an opportunity to address the court's depiction of him. But, even if the sentencing court was empowered to consider that fact, it was insufficient to justify such a lengthy sentence. (Point II, C).

In short, even given these other factors, had the sentencing court focused on the crime for which Defendant was convicted as opposed to hung or acquitted conduct, it could not support such a severe sentence. As a result, the Court should vacate the sentence and remand for resentencing.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this brief, *amicus* American Civil Liberties Union of New Jersey adopts the Statement of Facts and Procedural History set forth by Defendant in his brief before the Appellate Division. *Amicus* adds only the following:

Before his sentencing in the instant case, Defendant had twice been sentenced as a result of convictions for indictable offenses: on June 7, 2006, he was sentenced to a term of imprisonment in Virginia for series of counts of grand larceny. PSR 9-10; 11T 30:11-23.¹ Those convictions appear to have been entered on two separate dates - October 8, 2005 and January 10, 2006 - but they were all sentenced on the same date. *Id.* On those charges, Defendant received a ten-year sentence of imprisonment, nine and a half years of which was suspended. Thus, Defendant was required to serve only six months in prison. On March 22, 2013, Defendant received two years of probation for possession of CDS. PSR at 11; 11T 30:24-31:3.

In the instant case, Defendant was charged with an eight-count indictment, which alleged that on five separate occasions he possessed and transferred firearms to other people. DA 73-74. The jury convicted him of only one such act. *Id.* at 74. At the

¹PSR refers to the Presentence Report.

11T refers to the transcript from the pretrial detention hearing, dated September 18, 2015.

DA refers to the Defendant's Appellate Division Appendix.

sentencing hearing the court indicated that he would consider all five incidents: "the court is permitted to consider charges for which the defendant was acquitted or for which no verdict could have been reached." 11T 36:16-18. The sentencing court explained that in "*United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court held that a verdict of acquittal does not prevent a federal sentencing court from considering conduct underlying the acquitted charge." *Id.* at 19-22.

The court also considered Defendant's so-called sovereign citizen status in determining the weight to be afforded to certain aggravating factors. The court began "in correspondence to this court, uh, he -- he communicated that he was, in fact, a sovereign citizen, that he was a ..." *Id.* at 42:19-21. Defendant interrupted and noted "I never said I was sovereign citizen." *Id.* at 42:22-23. The court explained why this factor was relevant: "The court views that fact as likely as -- as pretending [sic] strongly that the defendant . . . will not . . . comply with the laws . . . of the state as he finds himself or he views himself as being not subject to those laws." *Id.* at 43:6-16. The court later amplified its justification explaining, "denial of jurisdiction thereby increases the likelihood that defendant will reoffend." DA 78.

Ultimately, the court imposed the maximum sentence on Defendant: "The court has determined that an extended term is appropriate. And the court will sentence to the maximum term within that extended term of 20 years' New Jersey State Prison, 10-year period of parole ineligibility pursuant to the Graves Act on count-2." 11T 44:13-18.

ARGUMENT

I. DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.

Under any rationale sentencing scheme, the worst punishments must be reserved for the most culpable defendants. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.") (internal quotations omitted); see also *Weems v. United States*, 217 U.S. 349, 367 (1910) (limitation on cruel and unusual punishment requires "that punishment for crime should be graduated and proportioned to [the] offense."). In New Jersey, it is axiomatic that among the "paramount sentencing goals" of the Code of Criminal Justice is that "punishment fit the crime, not the criminal[.]" *State v. Yarbough*, 100 N.J. 627, 630 (1985). Thus, courts should reserve the harshest punishments for defendants convicted of the worst crimes, not just those with the longest criminal records.

In this case, neither the crime for which Defendant was convicted nor his criminal history make him among the most culpable second-degree offenders; his sentence at the top of the extended-term range with the maximum parole ineligibility is plainly excessive. The Appellate Division aptly explained the harms associated with giving maximum sentences to defendants who are not the most culpable in an unpublished opinion: "To condone such a

sentence under these circumstances results in two wrongs. First, it unduly and excessively punishes defendant; and second, it denigrates the legal efficacy and moral force of a truly deserving maximum sentence." *State v. Rivera-Ramos*, 2009 N.J. Super. Unpub. LEXIS 1436, *9 (App. Div. 2009).²

As discussed in greater depth below (*infra*, Point II, A), Defendant's juvenile delinquency and criminal history, while existent, can hardly be described as among the worst that sentencing judges see. The sentencing court found no aggravating factors related to the offense itself. DA 76. So, how then, could Defendant wind up with the most severe extended term sentence accompanied by the longest period of parole ineligibility? It happened here because the court considered information that it should not have.

**A. The Sentencing Court Improperly Considered Conduct
On Which the Jury Failed to Reach a Verdict.**

Some judges fail to explain adequately their reasons for imposing a particular sentence. *See, e.g., State v. Pennington*, 301 N.J. Super. 213, 220 (App. Div. 1997) ("Inadequate explanation

²Pursuant to R. 1:36-3 counsel includes the unpublished opinion in an appendix. Counsel is aware of numerous Appellate Division decisions that have found that extreme sentences do not shock the judicial conscience. Those opinions are not appended here as *Rivera-Ramos* is not cited for any broad proposition. Instead, it is cited for its concise explanation of the harms of such sentences. Counsel is aware of no cases that are contrary to that limited proposition.

of the sentencing judge's reasons for each of the sentences prevents us from exercising meaningful review"), *modified* 154 N.J. 344 (1998); *State v. Watson*, 224 N.J. 354, 363 (App. Div. 1988) ("Without the requisite particularized statement of reasons by the sentencing court, appellate review is futile"). Judge Cronin committed no such error; he explained his sentencing decision thoroughly and completely. While the record is clear, it also clearly reveals that the court considered inappropriate factors.

Judge Cronin explained:

This is a situation where the jury was unable to find unanimously beyond a reasonable doubt that he sold the other four guns. So, because the jury's . . . inability to do that, I don't see how that in any way precludes or should preclude the court if the court makes a finding by a preponderance of the evidence that Mr. Tillery did, in fact, sell those other guns.

[11T 13:7-14.]

Defense counsel explained that Defendant had been "convicted for the possession and distribution of one gun. [And] to sentence him contemplating other guns sold for which he was not convicted . . . on . . . different dates, would essentially [amount to] bypassing the jury process." *Id.* at 14:1-10. The court explained that it believed that argument "was rejected in [*United States v.*] *Watts*[, 519 U.S. 148 (1997)] and [*State v.*] *Van Hise*[, 2010 N.J. Super. Unpub. LEXIS 1513 (App. Div. 2010)]." *Id.* at 17-18. But Judge Cronin overstated the case: New Jersey courts have not determined

that conduct presented to a jury, about which the jury did not return a conviction, can be used to aggravate a sentence.

1. No Binding Authority Exists in New Jersey Regarding the Consideration of Acquitted or Hung Conduct.

There is no doubt that when sentencing in federal courts, judges may consider conduct that did not result in a conviction, including conduct on which a jury failed to reach a verdict or for which a defendant has been acquitted. *Watts*, 519 U.S. at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."). While Judge Cronin identified an unpublished state Appellate Division case which adopted similar reasoning, he failed to identify the other cases which reached contrary results.³

For example, in *State v. Sainz*, this 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 N.J. 58, 71 (2014) (warning that courts "must be careful not to

³It appears that Judge Cronin identified *Van Hise* on his own. 11T 35:9-10. As a result, the obligation under R. 1:36-3 to identify contrary precedent would not have been triggered.

impose a sentence for an offense beyond the scope of the plea). Courts have held that it is improper to sentence a defendant for conduct that is "wholly unrelated to [the defendant's] underlying crime." *State v. Ikerd*, 369 N.J. Super. 610, 621 (App. Div. 2004). In *State v. Bomani*, 2014 N.J. Super. Unpub. LEXIS 415 (App. Div. 2014), another unpublished⁴ 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. It is also worth noting that in 21 years 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 short, it is a vast overstatement to suggest that New Jersey courts have accepted the proposition that hung or acquitted conduct may be considered in sentencing.

2. New Jersey Should Not Adopt the Flawed Federal Rule Announced in United States v. Watts.

It is now axiomatic that the State Constitution may provide greater protection than its federal counterpart in some contexts. It is well established that the United States Supreme Court's interpretation of the Federal Constitution "establish[es] not the ceiling but only 'the floor of minimum constitutional

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

protections'" that this state's residents enjoy. *State v. Eckel*, 185 N.J. 523, 538 (2006) (quoting *State v. Gilmore*, 103 N.J. 508, 524 (1986)). The function of the State Constitution, then, is to serve both "as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law." *State v. Hunt*, 91 N.J. 338, 346 (1982) (internal quotation marks omitted). See also *State v. Baker*, 81 N.J. 99, 126, n.8 (1979) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.") (internal quotation marks omitted).

Thus, this Court has routinely invoked the State Constitution where federal law has been insufficiently protective of the rights of its citizens, most notably in the area of criminal justice. See, e.g., *State v. Pierce*, 136 N.J. 184, 208-13 (1994) (pat-down search permissible under the Fourth Amendment violated the State Constitution); *State v. Hemptele*, 120 N.J. 182, 196-97 (1990) (State Constitution prohibits warrantless searches of garbage bags left on curb for collection, notwithstanding their permissibility under the Fourth Amendment); *State v. Novembrino*, 105 N.J. 95 (1987) (refusing to adopt good faith exception to exclusionary rule as

the United States Supreme Court had done); *State v. Gilmore*, 103 N.J. at 522-23 (State Constitution imposes greater restriction than the federal Equal Protection Clause on using peremptory challenges to dismiss potential jurors for race-based reasons); *State v. Johnson*, 68 N.J. 349, 353 (1975) (requiring a higher standard for waiver of right to withhold consent to a search); see also *New Jersey Coalition Against The War In The Middle East v. J.M.B Realty*, 138 N.J. 326 (1994) (State constitutional free speech protections broader than the First Amendment); *Right to Choose v. Byrne*, 91 N.J. 287 (1982) (State Constitution safeguards greater individual rights to health and privacy); *State v. Alston*, 88 N.J. 211 (1981) (recognizing greater standing to challenge validity of car search under the State Constitution); *In re Grady*, 85 N.J. 235, 249 (1981) (recognizing greater right to privacy under the State Constitution); *State v. Schmid*, 84 N.J. 535, 560 (1980) (recognizing a greater right of free speech on private university campus); *State v. Baker*, 81 N.J. 99, 112-13 (1979) (deviating from United States Supreme Court precedent and finding that the State Constitution prohibits zoning regulations which limit residency based upon the number of unrelated individuals present in a unit); *In re Quinlan*, 70 N.J. 10, 19, 40-41, 51 (1976) (finding a right of choice to terminate life support systems as aspect of right of privacy); *Robinson v. Cahill*, 62 N.J. 473, 482 (1973) (finding a right to education under the State Constitution). See generally S.

Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

Here, there are two factors that favor holding that the State Constitution independently restricts the use of hung or acquitted conduct at sentencing, even if its federal counterpart does not.

First, this case involves a matter of particular state interest and local concern that implicate the state's traditions and public attitudes - the criminal justice system. See *State v. Gerald*, 113 N.J. 40, 76 (1988) ("Resort to a state-constitutional analysis is especially appropriate" in criminal justice matters because they are "of particular state interest or local concern and do[] not require a uniform national policy.") (quoting *State v. Ramseur*, 106 N.J. 123, 167 (1987)).

Indeed, this Court has often parted ways with the United States Supreme Court and interpreted the State Constitution to provide broader constitutional protections for criminal defendants. See cases cited above; see also, e.g., *State v. Norman*, 151 N.J. 5, 25 (1997) (finding greater state constitutional protection for criminal defendants from attorney conflicts of interest); *State v. Hogan*, 144 N.J. 216, 231 (1995) (finding greater state constitutional guarantee of indictment by a grand jury); *State v. Marshall*, 130 N.J. 109, 208-10 (1992) (state

constitution provides greater equal protection rights to criminal defendants facing the death penalty); *Gilmore*, 103 N.J. at 523-24 (recognizing greater rights to a jury representative of the community with respect to peremptory challenges).

Second, New Jersey's courts give a broader construction to state constitutional provisions where federal case law fails to "pay[] due regard to precedent and the policies underlying specific constitutional guarantees." *State v. Baker*, 81 N.J. 99, 112 n.8 (1979) (quoting Brennan, *State Constitutions*, 90 Harv. L. Rev. at 502). Here, as explained below, the consideration of hung or acquitted conduct produces anomalous and unjust results that this Court should not sanction.

This is, in short, a paradigmatic example of a case in which the Court should rely on the State Constitution to protect the rights of New Jerseyans. In this case of first impression, this Court should not hesitate to follow the State Constitution, which independently requires a prohibition on the consideration of hung or acquitted conduct at sentencing.

Commentators have pointed out the folly of sentencing schemes that allow hung or acquitted conduct to be considered as relevant conduct, both before and after the advent of the Federal Sentencing Guidelines and the United States Supreme Court's acceptance of the practice in *United States v. Watts*. See, e.g., Gerald Leonard and Christine Dieter, *Punishment Without Conviction: Controlling the*

Use of Unconvicted Conduct in Federal Sentencing, 17 Berkeley J. Crim. L. 260, 264 (2012) (seeking to answer the question "How does one determine, as a general matter, when an enhancement has crossed the line from appropriately accounting for the convicted offense in its full context to inappropriately punishing for a separate offense, of which the defendant has never been convicted?"); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. Rev. 1179, 1186 (1993) (arguing that "sentencing factors encompassing conduct separately proscribed by criminal statute must be excised from the Guidelines system as unconstitutional."); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523, 524 (1993) (explaining how so-called "sentencing facts," can deviate from or even override fact finding that occurred at trial); Susan N. Herman, *The Tail That Wagged The Dog: Bifurcated Fact-Finding Under The Federal Sentencing Guidelines And The Limits Of Due Process*, 66 S. Cal. L. Rev. 289, 293 (1992) (contending that because "the divergence between the procedures provided at trial and at sentencing is so great," and sentencing ranges may be so large, there exists too much room for game playing to avoid determinations of difficult facts beyond a reasonable doubt).

While scholars identify slightly different issues and propose varied solutions, they address a common problem: defendants can "win" at trial (or, as happens in cases of hung juries, not lose)

and see no benefit at sentencing. For example, both the Leonard & Dieter article and the Lear article reference *United States v. Rivera-Lopez*, 928 F.2d 372 (11th Cir. 1991). In that case, the defendant was charged with three distinct crimes: conspiracy to distribute cocaine and two separate counts of possession. *Id.* at 372. At trial, the jury convicted the defendant of conspiracy and one count of possession; it found her not guilty of the other possession count - that one dealing with three kilograms of cocaine. *Id.* Despite the acquittal, the trial judge included the three kilograms in calculating the weight of the drugs involved in the conspiracy. *Id.* That decision moved the defendant's base offense level from level 28, which would have produced a sentencing range of 78 to 97 months, to level 32, with a sentencing range of 121 to 151 months. Lear, 40 UCLA L. Rev. at 1182. The defendant was no better off as a result of the jury's acquittal.

The unjust results that flow from the consideration of hung or acquitted conduct, as approved in *Watts*, are not limited to federal prosecutions. Imagine a defendant charged in New Jersey with third-degree distribution of a controlled dangerous substance. Assume that defendant admits to possession of the drug, but contends that she was not selling it. The jury convicts her of possession but is unable to reach a unanimous verdict on the distribution count. If *Watts* governed, the hung jury would be irrelevant to the defendant: the trial court could seek to justify

a maximum sentence on its finding - by a preponderance of the evidence - that the defendant had, in fact, distributed the drugs.

Or imagine another situation: a defendant is accused of having intercourse with a person who is under 16 years old. The victim alleges that the defendant was armed with a knife. 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. 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. If the jury convicted the defendant of violating *N.J.S.A. 2C:14-2c(4)*, finding that the victim was under 16, but was unable to reach a verdict on the count alleging he used a weapon, *N.J.S.A. 2C:14-2a(4)* he would be eligible for sentencing in the second-degree range. Of course, the defendant's claim of reasonable mistake of age would not relieve him of liability under *N.J.S.A. 2C:14-2c(4)*, but it could nonetheless be a relevant sentencing factor. If defendant's mistake about the victim's age had been plausible, a sentencing judge might have determined that defendant should receive a sentence toward the bottom of the sentencing range. However, if *Watts* were the governing law, the hung jury would be largely irrelevant as, even if the defendant's mistaken belief regarding the age of the victim were accepted, the sentencing court could still find by a preponderance of the

evidence that defendant had used a weapon in the assault and sentence defendant at the top of the range.

The Appellate Division in the present cause attempted to minimize the reliance on the hung conduct by noting: "the judge's mention of facts surrounding the charges for which the jury could not reach a verdict, which the State dismissed, were not the sole basis used to apply any aggravating factor." *State v. Tillery*, 2017 N.J. Super. Unpub. LEXIS 1790 (App. Div. 2017) at *10. However, as explained below, the other factors considered by the judge could not, by themselves, justify the highest possible sentence, *i.e.* the sentence imposed in this case. Thus, consideration of the hung conduct played an essential (albeit improper) part in the sentence, and consideration of other factors therefore does not cure the use of hung conduct.

B. The Other Factors Considered By the Trial Court Did Not Justify the Severity of the Sentence Imposed.

The trial court did consider factors other than hung conduct. However, those factors did not warrant the maximum sentence available, and some factors should not have been considered at all.

1. Defendant's Criminal History Cannot Support a Maximum Extended Term Sentence.

To be sure, Defendant's juvenile delinquency and criminal history is not enviable; but nor is it egregious. Defendant has some juvenile adjudications but not as many as are often seen.

Compare PSR 6-7 (four juvenile adjudications) with *State v. Wakefield*, 190 N.J. 397, 516 (2007) (44 juvenile adjudications) and *State v. Randolph*, 210 N.J. 330, 335 (2012) (17 delinquency complaints). He was adjudicated for some offenses which if committed by juveniles would amount to crimes, but none that would have been first- or second-degree crimes or crimes subject to the No Early Release Act. Compare PSR 6-7 (adjudications for theft, receiving stolen property, improper behavior and resisting arrest) with *In re J.P.*, 339 N.J. Super. 443, 447 (App. Div. 2001) (juvenile adjudications for shoplifting, receiving stolen property, burglary, theft, robbery and criminal sexual contact) and *State v. Younger*, 2014 N.J. Super. Unpub. LEXIS 818, *43-44 (describing a juvenile record replete with "charges and adjudications as a juvenile for weapons, robbery, sex assault, burglary, aggravated assault, as well as other crimes").⁵ He received juvenile sanctions, but never spent time in the Juvenile Justice Commission's secure facilities. Compare PSR 6-7 (term in Jamesburg suspended) with *State v. Daniels*, 276 N.J.

⁵Pursuant to R. 1:36-3, this opinion is included in an appendix. Counsel is aware of no case that stands for the contrary proposition.

Super. 483, 488 (App. Div. 1994) (three separate commitments to Jamesburg).

As an adult, Defendant had twice been sentenced for indictable offenses. 11T 30:7-10. That is enough to qualify for a discretionary extended term, but it is hardly extreme. *Compare id.* (Defendant sentenced for Virginia grand thefts and CDS possession in New Jersey) *with State v. Drake*, 444 *N.J. Super.* 265, 269 (App. Div. 2016) (Defendant had nine indictable convictions in New Jersey, four Florida convictions, a federal conviction, and four open New Jersey indictments) *and State v. Pennington*, 154 *N.J.* 344, 351 (1998) (defendant had priors for rape while armed, robbery, armed robbery, burglary, aggravated assault, and possession of a weapon for an unlawful purpose). Defendant had been incarcerated, but for a relatively limited period of time. *Compare* PSR 9-11 (six months of incarceration for convictions) *with State v. Capers*, 2013 *N.J. Super.* Unpub. LEXIS 904, *13 (App. Div. 2013)⁶ (defendant spent "most of his adult life in prison.").

Thus, the question is whether Defendant's criminal history is sufficient to justify *both* the granting of a discretionary extended term *and* a maximum sentence. "The defendant's prior record of conviction has been taken into account in deciding whether to

⁶ Pursuant to R. 1:36-3, this opinion is included as an appendix. Counsel is aware of no case that stands for the contrary proposition.

impose an extended term and presumably would not have the same qualitative weight in grading the range of the extended sentence." *State v. Dunbar*, 108 N.J. 80, 91-92 (1987). Thus, "[o]nce the decision to impose an extended term has been made, the court should then return its focus primarily to the offense." *Id.* at 91. This does not mean that the court cannot consider "other aspects of the defendant's record, which are not among the minimal conditions for determining persistent offender status." *Id.* at 92.

In this case that would leave the court to consider an imperfect, but not unusually bad juvenile record and a violation of probation. Additionally, the court might consider the multiple Virginia convictions sentenced on the same day.⁷ These facts augur against a minimum sentence, but hardly support a sentence at the very top of the vast sentencing range. *Cf. State v. Pierce*, 188

⁷ While it is fair to consider the multiple counts of grand theft for which Defendant was convicted, it is also critical to place the Virginia statute into context. In Virginia, the threshold for grand theft - a crime that carries up to twenty years imprisonment - is a mere \$200. Graham Moomaw, *Legislation to Raise Virginia's Grand Larceny Threshold From \$200 to \$500 Dies in House Panel*, Richmond Times-Dispatch, Feb. 15, 2018, available at: http://www.richmond.com/news/virginia/legislation-to-raise-virginia-s-grand-larceny-threshold-from-to/article_2b63fe28-6f26-5618-a8d9-c3c67a6728b2.html. Thus, while Defendant stands convicted of several offenses, it is possible that some of them would have been treated as fourth-degree convictions in New Jersey. Incidentally, New Jersey joins Virginia with the lowest felony theft threshold in the nation. Justice Forward Virginia, *Larceny Threshold*, available at: <https://www.justiceforwardva.com/larceny-threshold/>. In many states these crimes might not have even been felonies.

N.J. 155, 172 (2006) (permissible range of sentences available runs from bottom of ordinary term to top of the extended-term range). In determining the appropriate sentence within the wide range, "the primary focus [should] be on the conduct that occasions the sentence." *Dunbar*, 108 *N.J.* at 92. Without consideration of the acts about which the jury could not reach a verdict, the court could not justify a maximum sentence.

*2. The Sentencing Court Improperly Considered
Defendant's Failure to Admit Guilt As an
Aggravating Factor.*

The sentencing court explained why it felt Defendant particularly needed deterrence:

there's a deterrent need here for two things. Um, here, the defendant at no time in the proceedings has acknowledged responsibility for his conduct in any sales.⁸ Um, the defendant proceeded to trial, as is his right, which was respected and provided to him in this court. Um, the absence of responsibility or remorse is a factor the court can consider in -- in determining the need to deter, uh, likelihood of future misconduct.

[11T 42:8-16.]

That is, however, not an accurate statement of law. After a defendant has been convicted at trial, the court cannot use as an aggravating factor the fact that he has not admitted his guilt. *State v. Marks*, 201 *N.J. Super.* 514, 539-40 (App. Div. 1985). Such

⁸ It is particularly worrisome that the sentencing court expected Defendant to acknowledge responsibility for *all* the sales at a time when four of the charges remained active.

a rule makes good sense because "when the defendant has already been convicted, an admission of guilt is of doubtful value." *State v. Poteet*, 61 N.J. 493, 497 (1972). Indeed, "a confession at that point is of little rehabilitative significance." *Id.* Our sentencing scheme explicitly forbids consideration of a defendant's willingness to accept responsibility through a guilty plea. N.J.S.A. 2C:44-1c(1) ("A plea of guilty by a defendant or failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment.").

Courts cannot hold defendants' silence against them. *Mitchell v. United States*, 526 U.S. 314, 327-29 (1999). Instead courts permit consideration of defendants' failure to express remorse only in extraordinary situations. *See, e.g., State v. Rivers*, 252 N.J. Super. 142, 153-54 (App. Div. 1991) (deterrence needed where a defendant admitted his guilt in the presentence interview, and then denied it at sentencing); *State v. Carey*, 168 N.J. 413, 427 (2001) (defendant denied responsibility for fatal crash and failed to acknowledge that he had an alcohol problem; defendant encountered victim's mother before sentencing and "acted in a manner indicative of denial."); *State v. Rice*, 425 N.J. Super. 375, 382 (App. Div. 2012) ("aggravating factor three applied because defendant did 'not tell[] the truth' when testifying before the jury, lacked any remorse and took no responsibility for his actions."). Such a unique need to deter is not present in this

case. Instead it appears that Defendant was punished for going to trial and for remaining silent.

3. Consideration of Defendant's Claimed "Sovereign Citizen" Status Was Improper and Insufficient to Support a Maximum Extended Term Sentence.

The final factor upon which the sentencing court relied was the belief that Defendant purported to be a so-called sovereign citizen.⁹ The sentencing court explained its rationale:

[D]efendant . . . in correspondence to this court,¹⁰ uh, he -- he communicated that he was, in fact, a sovereign citizen, that he was a . . . nation unto himself. . . . And, therefore . . . not subject to either personal or subject matter jurisdiction of this court. The court views that fact as likely as -- as pretending [sic] strongly that the defendant will not comply with the laws . . . of the state as he finds himself or he views himself as being not subject to those laws. Um, it is his right to -- to maintain that he is a separate state, but there's consequences of it, and that's applied through the sentencing here.

⁹ According to the FBI, "[s]overeign citizens are anti-government extremists who believe that even though they physically reside in this country, they are separate or "sovereign" from the United States. As a result, they believe they don't have to answer to any government authority, including courts, taxing entities, motor vehicle departments, or law enforcement." Federal Bureau of Investigation, *Domestic Terrorism: The Sovereign Citizen Movement*, April 13, 2010, available at: https://archives.fbi.gov/archives/news/stories/2010/april/sovereigncitizens_041310/domestic-terrorism-the-sovereign-citizen-movement.

¹⁰ The nature of that correspondence is not immediately apparent from the records. The record does include correspondence Defendant had with a Superior Court Judge in another case. DA 79-82. Whether or not Defendant told the sentencing judge, at some point during the trial that he was a sovereign citizen, at sentencing he denied it. At a minimum, the court was obligated to inquire to resolve any discrepancy.

[11T 42:18-43:19.]

The court's factual findings, unwillingness to allow Defendant to address the finding, and logic were all flawed. Moreover, even if the court's findings had been appropriate, it gave far too much weight to this factor.

As the court was explaining that it believed Defendant was a sovereign citizen, Defendant was actively disputing it. *Id.* Defendant contended "I never said I was sovereign citizen. . . I didn't say that." *Id.* at 42:22-25. He exclaimed "He can't declare that . . . I'm a sovereign citizen." *Id.* at 43:11-13. The sentencing court never sought to resolve the dispute. Earlier in the sentencing hearing, the court expressed concern that that presentence report (PSR) contained no information about Defendant's citizenship status. *Id.* at 6:7-7:5. Although Defendant failed to address his citizenship status with respect to the PSR, he certainly indicated a willingness to address the issue with the court later in the hearing. When faced with Defendant's explicit denial, the court should have engaged in further inquiry.

Even if the court had reached the correct conclusion about Defendant's status as a sovereign citizen - and even if the court had given Defendant an appropriate opportunity to object to the classification - the court reached an erroneous conclusion about the implications of such a finding. People follow laws - and

disobey laws - for a host of reasons. See, e.g., Jonathan Jackson, et al., *Why do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions*, 52 *The British J. of Criminology* 1051-71 (2012) (finding compliance with law occurs both when people feel a duty to obey and when they believe government acts with a shared moral purpose with its citizens). Indeed, as noted above (*supra*, Point II, A), while Defendant's criminal history suggests some violations of the law, it is hardly characterized by continuous disobedience. Thus, it cannot be said that if Defendant were a sovereign citizen it would necessarily lead to lawless behavior in the future.

Also, critically, the question in this case was never whether Defendant should be incarcerated. It was certain that he would be. Instead the question was the quantum of incarceration. Thus, when the court noted that "I think it's virtually certain that unless he's incarcerated," 11T 44:1-2, he will reoffend, the court asked the wrong question. Just as a finding of aggravating factor 11 ("The imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others as merely part of the cost of doing business"), *N.J.S.A. 2C:44-1a(11)* is inapplicable where the court is not considering a non-custodial option, here the court did not need to consider whether non-imprisonment was a bad idea: it only needed to determine how much incarceration was appropriate. See *State v.*

Dalziel, 182 N.J. 494, 502 (2005) ("by its very terms, [this] provision is inapplicable unless the judge is balancing a non-custodial term against a prison sentence."); see also *State v. Rivera*, 351 N.J. Super. 93, 110 (App. Div. 2002), *aff'd on other grounds*, 175 N.J. 612 (2003) (factor "ordinarily inapplicable unless the court is being asked to overcome the presumption" of imprisonment). The court was fixated with the need to incarcerate Defendant, but the court never made a finding that *maximum* incarceration was required to prevent Defendant from committing another offense.

In short, without consideration of the conduct for which Defendant was not convicted, the sentencing court could not justify a maximum extended term sentence with the maximum period of parole ineligibility.

CONCLUSION

For the foregoing reasons, at a minimum, this Court should reverse Defendant's sentence and remand for a resentencing hearing at which a proper weighing of appropriate aggravating and mitigating factors occurs.



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