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**Re: State v. Arroyo-Nunez, Docket # A-003746-20T4**

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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## **Preliminary Statement**

After decades of waging a brutal war on drugs - one that has destroyed lives, families, and communities - New Jersey has finally recognized that mandatory minimum sentences create far more harm than benefit. Despite a unanimous recommendation from the Criminal Sentencing and Disposition Commission, the Legislature and the Governor have been unable to agree on a bill to end mandatory minimums for non-violent drug offenses. But their inaction does not change the fact that mandatory minimums fail as a matter of public policy.

If the Attorney General wanted to implement another recommendation of the Commission and alter the mandatory minimum sentences associated with second-degree robbery, he would be without recourse. Separation of powers concerns would prevent the Attorney General from acting unilaterally. But drug crimes are different. For more than three decades prosecutors have been empowered to waive mandatory minimums for drug crimes if their decision to waive or not waive was neither arbitrary nor capricious. The Attorney General merely availed himself of the authority vested in him by the Legislature.

Nine years after the Legislature passed the Code of Criminal Justice replete with harsh mandatory minimum sentences for drug crimes, it created a safety valve that allowed prosecutors to waive the mandatory terms. All mandatory minimum

sentencing schemes transfer power from judges to prosecutors; the safety valve, found in Section 12 of Chapter 35 of the Code, made that transfer explicit. Judges are told that they must impose the sentences found in Chapter 35 unless a prosecutor agrees to waive them. Because the plain language of the section is clear, courts should not look to extrinsic evidence to try to divine the Legislature's intent. (Point I). If a statute's language is clear, it is of no moment that the Legislature may not have intended the exact application of it.

Courts only interfere with clearly written statutes when the literal interpretation would produce an absurd result. This is not such a case. (Point II). Absurd results must mean something more than results with which courts disagree. Courts typically find absurd results only when they can point to anomalous or illogical results or outcomes that are completely at odds with legislative purpose (rather than simply not contemplated by the Legislature). The trial court found that the Attorney General's attempt to waive the mandatory sentences for Mr. Arroyo-Nunez was at odds with the legislative purpose. But in reaching that conclusion, the court focused on the objective behind Chapter 35 generally, without recognizing that Section 12 specifically was designed to mitigate the harsh consequences of purely mandatory sentencing schemes. (Point II, A).

That the Judiciary retains limited role in reviewing waivers of mandatory minimums under Section 12 does not render the literal interpretation of the statute absurd. To prevent separation of powers problems, the New Jersey Supreme Court read a requirement into Section 12 that courts review waiver decisions to ensure that they are neither arbitrary nor capricious. The Judiciary retains that authority here: if the court found that the Attorney General's efforts were unmoored from reason or harmed uniformity, it could intercede. But the court made no such finding. The Attorney General's policy promotes uniformity, a paramount sentencing goal. (Point II, B).

There exists powerful evidence, found by the Sentencing Commission that mandatory minimum sentences for drug crimes accelerate mass incarceration, exacerbate racial disparities, and make our communities less safe. It would be absurd to ignore those realities and relegate hundreds or thousands of New Jerseyans to additional, unnecessary time in prison. The court should remand the case with direction that the court below resentence Mr. Arroyo-Nunez, in accordance with the agreement he reached with the prosecutor.

## Statement of Facts and Procedural History

A 2019 report from the Criminal Sentencing and Disposition Commission made a series of findings regarding the proliferation of mandatory minimum sentences in New Jersey. New Jersey Criminal Sentencing and Disposition Commission, *Annual Report* November 2019.<sup>1</sup> Among the key findings were:

- “Mandatory minimum sentencing provisions dominate New Jersey’s sentencing scheme and have contributed significantly to the number of incarcerated people in our prisons and our jails.” *Id.* at 19.
- Racial disparities, “partly caused and substantially exacerbated” by mandatory minimum sentences, plague New Jersey prisons, and do so at rates far higher than states in our region and the rest of the nation. *Id.* at 19-20.
- Mass incarceration, driven by mandatory minimums, is not an effective or necessary means to keep our communities safe . . .” and has a devastating effect on families and communities. *Id.* at 20.

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<sup>1</sup> Available at [https://www.njleg.state.nj.us/OPI/Reports to the Legislature/criminal sentencing disposition ar2019.pdf](https://www.njleg.state.nj.us/OPI/Reports%20to%20the%20Legislature/criminal%20sentencing%20disposition%20ar2019.pdf).

The Commission recommended eliminating mandatory minimum sentences for non-violent drug offenses. *Id.* at 21-23. Despite efforts to effectuate the Commission's recommendations, after a political squabble unrelated to drug offenses, the Legislature and Governor were unable to pass a bill. John Heinis, *Hudson County View*, "Murphy, Sacco feud underway after governor conditionally vetoes mandatory minimums bill," April 19, 2021 (addressing conflict over official misconduct sentences).<sup>2</sup>

In response, the Attorney General issued Law Enforcement Directive 2021-4.<sup>3</sup> The Directive recognized that "drug crimes differ from the State's other mandatory minimum offenses in one key respect: the period of mandatory parole ineligibility can be waived . . . [u]nder N.J.S.A. 2C:35-12 ("Section 12"). . . ." *Id.* at 2. More than two decades ago, the New Jersey Supreme Court mandated that the Attorney General, as the chief law enforcement officer in the state, give guidance to prosecutors about when to seek waivers. *State v. Brimage*, 153 N.J. 1, 23 (1998). Directive 2021-4 provides that guidance. The Directive "establishe[d] statewide rules that require prosecutors to seek the waiver of mandatory parole disqualifiers for non-violent

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<sup>2</sup> Available at <https://hudsoncountyview.com/murphy-sacco-feud-underway-after-governor-conditionally-vetoes-mandatory-minimums-bill/>.

<sup>3</sup> Available at <https://www.nj.gov/oag/newsreleases21/AG-Directive-2021-4-Mandatory-Minimum-Drug-Sentences.pdf>.

drug crimes during plea negotiations, following a probation violation, and after conviction at trial.” *Id.* at 5. Also, as relevant here, the Directive required prosecutors, upon a defendant’s request, “to file a joint application to modify the sentences of inmates currently incarcerated” and serving mandatory minimum sentences for non-violent drug crimes. *Id.*

Diego Arroyo-Nunez sought modification of his original sentence of 11 years, 24 months without parole. *State v. Arroyo-Nunez*, UNN-19-000234 (Law Div. Aug. 24, 2021) at 5. Pursuant to Directive 2021-4, the State agreed to file a joint application with Mr. Arroyo-Nunez. *Id.* at 6. After receiving briefing, the motion court declined to resentence Mr. Arroyo-Nunez. *Id.* at 23. Although the court agreed that the motion was procedurally proper, *Id.* at 17, that there existed good cause to resentence Mr. Arroyo-Nunez, *id.* at 16, and that the plain language of the statute allowed for the resentencing, *id.* at 19-20, it found that application of the Directive would create absurd results. *Id.* at 20-21.

This appeal follows. The American Civil Liberties Union of New Jersey filed a Motion to Participate as *Amicus Curiae* simultaneous with this brief. R. 1:13-9(f).



## Argument

Chapter 35 of the Code of Criminal Justice contains a series of mandatory sentences. In exacting these provisions, the Legislature could have made - and for several years did make - those sentences mandatory in every case. But, nine years later it enacted N.J.S.A. 2C:35-12 (Section 12), which provides an opportunity for relief from mandatory minimum sentences for drug crimes. Section 12 does not grant courts the authority to waive mandatory minimum sentences: the Legislature delegated authority exclusively to prosecutors to make decisions about whether or not impose the harshest sentences.

It is axiomatic that sentencing is usually a judicial function. "The delegation of sentencing power to the prosecutor is . . . exceptional. . . . [Placing t]he power in the prosecutor directly or indirectly to *mandate* a minimum prison term is extraordinary." *State v. Vasquez*, 129 N.J. 189, 204 (1992). To prevent separation of powers problems, courts have held that "judicial oversight was 'mandated to protect against arbitrary and capricious prosecutorial decisions.'" *State v. Brimage*, 153 N.J. 1, 10 (1998) (*quoting Vasquez*, 129 N.J. at 196).

The text of Section 12 is straightforward: it instructs judges to impose mandatory sentences and fines in every case, unless a prosecutor agrees to a lesser sanction. N.J.S.A. 2C:35-

12. Even where a prosecutor agrees to a penalty less than that mandated by statute, the court still may not impose a sentence lower than that to which the prosecutor has agreed. *Id.* There is no dispute that this is how the statute works. Judge Steele explained that "under N.J.S.A. 2C:35-12, a prosecutor may, through a negotiated plea agreement or a post-conviction agreement with a defendant, waive the mandatory minimum sentence specified for any offense under the Comprehensive Drug Reform Act of 1987." *Arroyo-Nunez* at 11. Judge Steele further noted that *Vazquez* requires judicial review to prevent separation of powers problems. *Id.* Notwithstanding the clarity of Section 12, Judge Steele declined to apply it in Mr. Aroyo's case. That was error.

**I. Because the plain language of the statute is clear, legislative intent should play no role in the interpretation of the statute.**

It is not the function of courts to "rewrite a plainly-written enactment of the Legislature [ ] or presume that the Legislature intended something other than that expressed by way of the plain language." *O'Connell v. State*, 171 N.J. 484, 488 (2002). It is a court's "duty . . . to construe and apply the statute as enacted." *In re Closing of Jamesburg High School*, 83 N.J. 540, 548 (1980). Legislative interpretation should not look beyond the language of the statute and "resort to extrinsic interpretative aids" when "the statutory language

is clear and unambiguous, and susceptible to only one interpretation. . . ." *Lozano v. Frank DeLuca Const.*, 178 N.J. 513, 522 (2004) (internal quotations omitted).

This is true even where a law's language does not match a court's perception of what the legislature hoped to achieve: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law. . . ." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020). In *Bostock*, employers who sought to discriminate against LGBTQ employees "contend[ed] that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons." *Id.* at 1749. Accepting that historical perspective as accurate, the United States Supreme Court nonetheless rejected their claim because "people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.* Put differently, "'in the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'" *Id.* (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

Judge Steele did not dispute that Section 12's clear language delegated authority to waive mandatory minimums to prosecutors. *Id.* at 18. But the court nonetheless resorted to

extrinsic evidence, contending that a plain reading of the statute led to an absurd result. *Id.* at 20 (citing *DiProspero v. Penn*, 183 N.J. 477, 492-93 (2005)). But an unanticipated result is not an absurd one. As will be discussed below, refusal to apply Section 12 because the Attorney General is seeking waiver in more cases than the court believed the Legislature would have anticipated, substitutes the court's judgement for the Attorney General's, despite the Legislature's deliberate delegation of that role to the Executive Branch.

**II. Interpreting the statute using its plain language does not create absurd results.**

**A. Allowing prosecutors to waive mandatory minimum sentences does not create absurd results.**

Citing to cases and legislative committee comments, the motion court determined that "the primary purpose of Section 12 was to incentivize defendants to cooperate with law enforcement and unburden the system." *Id.* at 17. As a result, the court was troubled by "how broadly [S]ection 12 is to be interpreted." *Id.* But finding that a statute reaches a situation not contemplated by the Legislature, does not mean that the result is an absurd one. As Justice Scalia explained for a unanimous Court in *Pennsylvania Dep't of Corr. v. Yeskey*, when faced with unambiguous text, the fact that Congress had not envisioned the reach of the law is irrelevant. 524 U.S. at 212. "[T]hat a statute can be applied in situations not expressly anticipated

by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (internal quotations and citation omitted)).

Indeed, when one looks at instances where the New Jersey courts have found a literal interpretation of a statute to be absurd, the reasoning typically speaks of anomalies, illogical results, and outcomes that are completely at odds with legislative purpose. See, e.g., *State v. Rodriguez*, 238 N.J. 105, 118 (2019) (finding that allowing people subject to periods of parole ineligibility to serve intermittent sentences would "create[] an illogical result that cannot [have] be[en] the intention of the Legislature."); *Kocanowski v. Twp. of Bridgewater*, 237 N.J. 3, 14 (2019) (holding that it would create "an illogical result" if two firefighters who took the same risks received vastly different disability benefits because one had trivial outside employment); *McClain v. Bd. of Rev., Dep't of Lab.*, 237 N.J. 445, 461-62 (2019) (declining to interpret a statute a way that would allow people to collect unemployment benefits if they were fired on their first day of work, but disallow benefits if the job offer were rescinded immediately before they began, because it would be incompatible with the purpose of the unemployment act and therefore absurd); *State v. Harper*, 229 N.J. 228, 232 (2017) (avoiding absurd interpretation that would allow "violent criminals to carry weapons in public

with impunity, for almost 180 days, and remain free from prosecution so long as they transferred or voluntarily surrendered their firearms just before the end of the amnesty period.”); *Sussex Commons Assocs., LLC v. Rutgers*, 210 N.J. 531, 548 (2012) (explaining specific absurd result that would exist if public law school clinics were subject to OPRA and private law school programs were not); *Wilson ex rel. Manzano v. City of Jersey City*, 209 N.J. 558, 585-86 (2012) (describing absurd result where 9-1-1 operators would receive indemnification in some circumstances but not others); *In re Young*, 202 N.J. 50, 69 (2010) (avoiding an absurd interpretation that would bar school “districts from disciplining a teacher for unbecoming conduct merely because it did not rise to the level of abuse or neglect under N.J.S.A. 9:6-8.21.”); *State v. Marquez*, 202 N.J. 485, 507 (2010) (describing situations that would arise if police were merely required to “inform” drivers of their obligation to submit to sobriety tests as “Kafkaesque” and pointing out that that interpretation would allow officers to read the standard warnings to hearing impaired drivers who could not read lips); *Burnett v. Cty. of Bergen*, 198 N.J. 408, 424-26 (2009) (explaining that it would be absurd if the Legislature allowed people convicted of identity theft to obtain Social Security numbers under the Open Public Records Act); *Correa v. Grossi*, 458 N.J. Super. 571, 582 (App. Div. 2019) (explaining that “it

makes no sense to provide bilingual sample ballots because voters are not fluent in English, but to expect those same voters to navigate an official balloting process that is English-only"); *State v. Drake*, 444 N.J. Super. 265, 276-77 (App. Div. 2016) (pointing out anomaly that, under a literal reading of the statute, defendants would not be subject to NERA unless they simultaneously committed a second crime, and avoiding that absurd result).

This should come as no surprise, as "standard interpretive doctrine . . . defines an 'absurd result' as an outcome so contrary to perceived social values that Congress could not have 'intended' it." John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2390 (2003). There must exist distance between what a legislature *could have* intended and what it intended. Otherwise, courts would regularly rewrite statutes and not rely on the belief that "the best indicator of [legislative] intent is the plain language chosen by the Legislature." *State v. Gandhi*, 201 N.J. 161, 176-77 (2010) (*citing DiProspero*, 183 N.J. at 492). Courts do not invoke the absurdity doctrine where they merely disagree with the way a statute will function. Courts cannot strike down laws because they "may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

Here, the court did not mention a single anomaly or illogical result that would come from allowing the waiver of the mandatory minimum. The motion court even suggested appreciation for the results that would flow from a proposed reading of the statute. *Arroyo-Nunez* at 23 (noting that the court respects the Attorney General's effort to effectuate the recommendations of the Criminal Sentencing and Disposition Commission). Instead, the court found that the parties' interpretation was at odds with the statutory scheme. According to the motion court, the parties' interpretation of Section 12 is "simply unreasonable as it squarely challenges the strong legislative intent to address the pervasive drug crisis pending at the time the statute was enacted." *Id.* at 20. The court cited to the statements of legislative intent incorporated directly into Chapter 35. *Id.* at 9 (*citing* N.J.S.A. 2C:35-1.1b and N.J.S.A. 2C:35-1.1c). *Amicus* does not contest that the Code of Criminal Justice, of which Chapter 35 was a critical part, was signed into law as part of the nationwide effort to enforce the prohibition of drugs through harsh criminalization and severe penalties. The legislative history of Chapter 35 points squarely in that direction.

But Section 12 was not passed at the same time, drafted by the same Legislature, or even signed into law by the same governor. It became law nine years later, so reference to the



"legislative intent . . . at the time the statute was enacted" (Arroyo-Nunez at 20) cannot mean the same thing for Chapter 35 as it does for Section 12.<sup>4</sup> Whereas Chapter 35 generally talks about the need for "strict punishment, deterrence, and incapacitation[,]" Section 12 does not make any sanction harsher: it serves only as a safety valve, allowing prosecutors to provide for *less harsh* punishment than would be otherwise required by the Code of Criminal Justice. The 1987 Legislature

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<sup>4</sup> It is hard enough to divine legislative intent that differs from the plain language of a statute when a single legislature votes on a single bill. After all:

It may be true that a majority of legislators, perhaps a large majority, would sometimes prefer statutory results different from those required by the statutory text. But legislative preferences do not pass unfiltered into legislation; they are distilled through a carefully designed process that requires legislation to clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices that temper unchecked majoritarianism. Hence, the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision.

[Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. at 2390.]

That task becomes even more complicated when considering multiple laws, passed over multiple years by multiple legislatures.

could have limited relief from mandatory sentences only for some statutorily defined group of defendants (for example, those who cooperate with law enforcement), but instead it vested the authority to decide when to waive mandatory sentences in the Executive Branch. The parties' interpretation of the statute - one that relies on a plain reading of the statutory language - is perfectly in line with the statutory scheme: the Attorney General, as the chief prosecutor in the state, has used the very discretion invested in him by the Legislature.

**B. The Judiciary's role in evaluating waivers of mandatory minimums under Section 12 does not change the analysis.**

After Section 12 became law, defendants challenged its unique structure. They contended that by empowering prosecutors to decide whether to waive mandatory minimums the law violated the separation of powers requirements of the State Constitution. *State v. Vasquez*, 129 N.J. 189, 195-96 (1992); see also *State v. Peters*, 129 N.J. 210, 218 (1992). The New Jersey Supreme Court, relying on its earlier decision in *State v. Lagares*, 127 N.J. 20, 31, which considered a similar challenge to N.J.S.A. 2C:43-6f, held that absent any guidelines or avenue for effective judicial review, Section 12 would be unconstitutional. *Vasquez*, 129 at 195-196. To avoid the constitutional problem, the Court construed the statute to require the State to place on the record its reasons for waiving or not waiving a mandatory

sentence. *Id.* at 195. This process, the Court held, would “permit effective review of prosecutorial sentencing decisions,” and avoid the unconstitutionality. *Id.* Using the newly mandated statement of reasons, courts could reject decisions not to waive mandatory minimums where a “defendant . . . shows clearly and convincingly that the exercise of discretion was arbitrary and capricious.” *Id.* at 196. The Court also mandated that the Attorney General promulgate and prosecutors follow written guidance on when to waive mandatory minimum sentences. *Id.*

That a court maintains the ability to review waiver decisions *for arbitrariness or capriciousness* does not mean that courts have free reign to question the wisdom of waiver decisions. Recognizing the unique nature of Section 12, and the ways in which mandatory sentences divest courts of typical sentencing powers, the Court set a high bar for judicial interference with prosecutorial waiver decisions: defendants must “show[] clearly and convincingly that the exercise of discretion was arbitrary and capricious [to] . . . be entitled to relief.” *Id.* Here, the motion court did not suggest that Attorney General Law Enforcement Directive 2021-4 allowed for arbitrary or capricious results. And because individual prosecutors are divested of the authority to weigh individual considerations, it cannot be plausibly suggested that the decision to approve a waiver is in any way random. *Cf. Woodson*

*v. North Carolina*, 428 U.S. 280, 303 (1976) (finding that mandatory death penalty scheme failed to curb arbitrariness of unbridled jury discretion because juries maintained the ability to, and often did, acquit defendants to avoid a death sentence).

Six years after *Vasquez*, in *Brimage*, the Court required the Attorney General to promulgate new guidelines to avoid intercounty disparities in the waiver of mandatory sentences. 153 N.J. at 3-4. In *Brimage*, as in *Vasquez* and *Peters*, the Court sought to promote the central goal of sentencing under the Code: uniformity in sentencing. *Id.* at 12-13. Here, again, there can be no suggestion that the Attorney General's policy of supporting waiver harms uniformity; the new Directive provides far more uniformity than before by requiring waivers in all applicable cases, rather than allowing individual prosecutors to weigh factors to decide whether to grant a waiver.

### **Conclusion**

The question presented here is not an academic one. Real people, real families, and real communities will be impacted by it. If the Court either ignores the plain language of the statute or finds that a prosecutor using the power delegated to him by the statute creates absurd results, people will be condemned to spend more time in prison than is necessary. That creates deep harm - disproportionately for New Jerseyans of color - without advancing public safety. The Court should take

the Legislature's delegation of discretion to prosecutors seriously and remand the matter for resentencing consistent with the joint application of the State and Mr. Arroyo-Nunez.

Respectfully submitted,



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