SUPREME COURT OF NEW JERSEY
DOCKET NO. 078369

STATE OF NEW JERSEY, Plaintiff-Respondent, v. NOAH MOSLEY, Defendant-Appellant.	**CRIMINAL ACTION** ON CERTIFICATION OF A JUDGEMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION. SAT BELOW: Hon. Richard S. Hoffman, J.A.D. Hon. Heidi Willis Currier, J.A.D.

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION

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SUMMARY OF ARGUMENT

This case concerns the nature of the process due probationers before probation may be revoked.

If a probationer, after having served a period of time on probation, can be resentenced to the maximum time statutorily available for his underlying crime without receiving credit for time spent on probation, then he is receiving a sentence beyond the statutory maximum. The United States Supreme Court and this Court have made clear that such a sentence may not be imposed based on judicial fact-finding. Therefore, at the time of resentencing, probationers must either be afforded credit or be entitled to jury trials and their attendant protections, including the exclusion of hearsay and the right to confrontation, before such revocation and resentencing.

Apart from the concerns raised by a judicial fact-finding that increases a sentence above the statutory maximum, the rationale and nature of New Jersey's probation scheme counsels in favor of probationers retaining the rights to confrontation and to findings not based on hearsay. New Jersey courts have limited these rights by following federal precedent without attention to the differences between New Jersey's probation system and the schemes contemplated in those cases.

Finally, if the Court follows the Appellate Division in adopting United States Supreme Court precedent concerning the

rights of probationers before revocation, it is necessary to restore the confrontation requirements the United States Supreme Court has established for these cases. When the State wishes to curtail a probationer's confrontation right, it must show good cause based on danger to a witness in order to do so.

Here, the State used a probation revocation hearing as a low-procedure way to prosecute a separate criminal offense without providing basic due process protections or any reason for departing from them. This result offends the protections for probation revocations the United States Supreme Court has established, and it undermines the procedural protections at the heart of New Jersey's criminal law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

For the purposes of this appeal, *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ) accepts the facts and procedural history as adopted by the Appellate Division in *State v. Mosley*, 2016 *N.J. Super. Unpub. LEXIS* 2043 (App. Div. Aug. 30, 2016) and recounted in the Supplemental Brief on Behalf of Defendant-Appellant Noah Mosley, with the following addition: The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this letter brief. *R.* 1:13-9.

Amicus also restates the following facts for clarity:

On January 6, 2014, Noah Mosley was sentenced to a five-year probation term after pleading guilty to third-degree possession of a controlled dangerous substance under *N.J.S.A.* 2C:35-10(a)(1). On September 7, 2014, an Edison police officer, Officer Zundel, believed that he saw Mosley selling drugs; he arrested Mosley, and he took statements from witnesses. A second officer, Detective Carullo, investigated the case and learned from Officer Zundel what he had seen and what witnesses had said.

Mosley was charged with violating his probation based only on the allegation of the new offense, and he was charged with an additional offense for drug distribution. At the probation

[1] The statement of facts and procedural history have been combined for the convenience of the Court.

revocation hearing, the State called Detective Carullo, who testified about what Officer Zundel had told him he had seen and what Officer Zundel told Detective Carullo the witnesses had told Officer Zundel. *See* Dec. 23, 2014 Tr. at 9:5-9.

When, on cross-examination, defense counsel asked where exactly Mosley had been parked, Detective Carullo gave an explanation of what Officer Zundel had told him, and when asked for clarification, said, "I'm sorry 'cause I wasn't - it's a little difficult for me, 'cause I'm going by his version of events that he told me of." *Id.* at 24:19 - 21. When defense counsel asked about the angle of Officer Zundel's view into the car where Mosley was alleged to have been, the Assistant Prosecutor objected that the question called for "speculation," and Detective Carullo responded, "I wasn't there." *Id.* at 27:5-13. Again, when defense counsel asked how far away the officer was when he observed the transaction, Detective Carullo testified,

> I've never really walked off those spaces, so I couldn't really tell you how large they are to approximate for you . . . I've been in that area, but not since - I haven't really been walking in that parking lot since they relined it and redid the whole parking lot.
>
> [*Id.* at 29:8-16.]

Finally, defense counsel asked what specifically Officer Zundel had seen: "And nowhere in the report did the officer say he saw

any drugs pass?" Detective Carullo answered, "I believe he said he saw a hand to hand - what he believed to be a drug transaction, but I don't know, if you're looking for something explicit, I don't remember seeing . . . anything explicit." *Id.* at 30:8-16.

Defendant objected that this testimony was hearsay, and when the trial court told the Assistant Prosecutor that Mosley wanted the State to produce the officer who had allegedly seen the transaction, the Assistant Prosecutor gave no explanation for why good cause existed to excuse confrontation. Instead, she said, "I will not" produce additional witnesses, because "I believe I have satisfied my burden at this stage. This is a violation of probation hearing. Hearsay is clearly admissible." *Id.* at 36:4-7.

The trial court found that the hearsay was reliable, and on January 15, 2015, the trial court sentenced Mosley to a five-year prison term with a thirty-month parole disqualifier pursuant to *N.J.S.A.* 2C:45-3(b). Mosley received credit for the time he had spent in jail, but he did not receive credit for the time he had served on probation, as the Assistant Prosecutor explained during the January 15, 2015 sentencing hearing: "Judge, I . . . get a total of 79 days. I have 45 days on the underlying offense from 5/1/13 to 6/14/13 . . . and then 34 days from December 12, 2014 until yesterday." Jan. 15, 2015 Tr. at

31:3-8. The eleven-month period from January 6, 2014, when Mosley was sentenced to five years of probation, until December 12, 2014, when he was incarcerated for the probation violation, was not credited to Mosley's five-year sentence of incarceration. As a result, the aggregate sentence Mosley received was eleven months on probation plus five years of incarceration.

Mosley argued before the Appellate Division that, *inter alia*, he should receive a new probation revocation hearing because the trial court improperly relied on hearsay and so deprived him of his right to confrontation. The Appellate Division panel rejected this argument, accepting the trial court's finding that Detective Carullo's testimony was "reliable hearsay" and concluding that the trial court did not err in relying on it. *Mosley*, 2016 *N.J. Super. Unpub. LEXIS* 2043, at *6.

ARGUMENT

I. **THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE BECAUSE IT ENGAGED IN FACT FINDING TO SENTENCE MOSLEY TO A TERM BEYOND THE STATUTORY MAXIMUM, AND SO SHOULD HAVE PROVIDED HIM WITH A JURY TRIAL AND ITS ATTENDANT RIGHTS.**

A. New Jersey's probation revocation statute allows a judge to engage in fact finding that results in a sentence above the statutory maximum and so violates the Sixth Amendment of the United States Constitution.

In New Jersey, the maximum sentence available for third-degree possession of a controlled dangerous substance is five years. *See N.J.S.A.* 2C:43-6(a)(3). The court may suspend the sentence and impose a term of probation as an alternative. *See N.J.S.A.* 2C:45-1. Mosley initially pled guilty to the third degree possession charge and received a five-year period of probation.

Under the New Jersey statute concerning probation,

> At any time before the discharge of the defendant or the termination of the period of suspension or probation . . . [t]he court, if satisfied that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or if he has been convicted of another offense, may revoke the suspension or probation and sentence or resentence the defendant.
>
> [*N.J.S.A.* 2C:45-3(a)(3).]

Furthermore, "[w]hen the court revokes a suspension or probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted." *N.J.S.A.* 2C:45-3(b).

Courts have interpreted the new sentence as being subject to reduction only for time spent in jail, not for time spent on probation. *See, e.g., State v. DiAngelo*, 434 *N.J. Super.* 443, 447 (App. Div. 2014) (A probationer who has been arrested and incarcerated pending a hearing has "the right to receive jail credits against the VOP sentence for [the] period of pre-adjudication custody" beginning when the VOP statement of charges issues.). This interpretation is consistent with *R.* 3:21-8, which provides, "[t]he defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence." *See also, e.g., State v. Towey*, 114 *N.J.* 69 (1989) (no credit for time in psychiatric hospital pursuant to voluntary admission, even where remaining in hospital was a condition of bail); *State v. Hernandez*, 208 *N.J.* 24, 41-47 (2011) (discussing history of jail credit jurisprudence as limited to time spent in jail).

As currently interpreted, the New Jersey probation scheme contemplates imposing up to the maximum sentence available at any time during a probationary period based on judicial fact-

finding that there has been a violation of probation, with no credit toward that sentence for time spent on probation. As a result, the penalty given may be nearly twice the statutory maximum - a defendant who had served four years and eleven months before being found to have committed a probation violation and resentenced to the statutory maximum of five years could serve nearly ten years under criminal sanction, with the increase based on judicial fact-finding.

This sentencing scheme results in an increase in penalty above the statutory maximum based on judicial fact-finding, and so violates the Sixth Amendment of the United States Constitution, as articulated in the line of cases beginning with *Apprendi v. New Jersey*, 530 *U.S.* 466 (2000).

Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 *U.S.* at 489. As the United States Supreme Court explained in *Blakely v. Washington*, 542 *U.S.* 296 (2004), the statutory maximum is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 *U.S.* at 303-04 (emphasis in original). Thus, a sentence may not be "greater than what state

law [would] authorize[] on the basis of the verdict alone." *Id.* at 305.

In this case, after hearing Detective Carullo's testimony, the Court found that Mosley had committed a probation violation, and it sentenced him to a five-year term of incarceration, the maximum term to which he could have been sentenced at the original sentencing hearing, pursuant to *N.J.S.A.* § 2C:45-3. As described above, Mosley did not receive credit for the time he spent on probation. As a result, Mosley received a sentence of five years of incarceration plus eleven months of probation. At the time of Mosley's original sentence, the facts to which he had pled supported only a five-year sentence. *See N.J.S.A.* § 2C:43-6(a)(3). In order to sentence Mosley to the greater term, the Court engaged in fact-finding by a preponderance of the evidence, and so violated the principles articulated in *Apprendi* and *Blakely*, recognized by this Court in *State v. Natale*, 184 *N.J.* 458 (2005).

As a useful point of comparison, federal courts considering the impact of *Apprendi* and *Blakely* on supervised release have held that the sentence the court may give based on the jury's fact-finding includes "the incarcerative term imposed for the crime of conviction (derived from the statute delineating the penalties applicable to that particular offense) and the supervised release term applicable thereto (derived from section

3583)," and so "courts routinely have held that the combined sentence of years of imprisonment plus years of supervised release may exceed the statutory maximum number of years of imprisonment authorized by the substantive statute applicable to the crime of conviction." *United States v. Work*, 409 *F.*3d 484, 489 (1st Cir. 2005). *See also, e.g., United States v. Wirth*, 250 *F.*3d 165 (2d Cir. 2001); *United States v. Dees*, 467 *F.*3d 847 (3d Cir. 2006); *United States v. Huerta-Pimental*, 445 *F.*3d 1220 (9th Cir. 2006).

Supervised release in the federal system is distinguishable from probation in New Jersey in a way that demonstrates the impermissibility of the New Jersey probation scheme as currently interpreted. On the one hand, federal courts are statutorily authorized under 18 *U.S.C.* § 3583 to include a period of supervised release in addition to a term of incarceration based on a finding of guilt by the jury for a particular offense. The total exposure of years of incarceration and years on supervised release - whether served in the community or in prison after a violation - is determined at the outset based on a jury's finding of guilt. On the other hand, under the New Jersey system, the total exposure for a person sentenced to probation is only determined upon a later fact-finding by a judge of whether a violation has occurred. A judge could not, for example, sentence a defendant to a term of four years of

probation to be followed by five years of incarceration after a jury finding of or plea to guilt for a third-degree crime. This sentence is only made possible by later judicial fact-finding. This scheme, which allows later judicial fact-finding to determine the maximum exposure, above the sentence permitted pursuant to the jury's verdict or plea, violates *Apprendi* and *Blakely*. *See Blakely*, 542 *U.S.* at 304 (sentence was impermissible where it could not have been imposed "solely on the basis of the facts admitted in the guilty plea.").

Because any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be found beyond a reasonable doubt and by a jury, under the *Apprendi* line, 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, he is entitled to a jury trial and its attendant beyond-a-reasonable-doubt standard and rights of confrontation and the exclusion of hearsay.

As an alternative, 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 require sentencing judges to credit probationers for the time they have spent on probation and reduce their incarceratory terms by those amounts, so that the total punishment they receive will not exceed the statutory maximums available based on either their pleas or a jury's fact-finding. Under this reading, revocation would not affect the overall sentence length, and a jury trial would not be required at the time of revocation on *Apprendi* grounds.

B. Because the court was required to provide a jury trial to determine the facts that extended the sentence above the statutory maximum, Mosley was entitled to the protections inherent in a jury trial.

Because the court did not credit Mosley for the time he spent on probation, and so sentenced him beyond the statutory maximum, it was required to provide him with a jury trial and its attendant protections.

These protections include the right to confrontation, *see Pennsylvania v. Ritchie*, 480 *U.S.* 39, 52 (1987) ("the right to confrontation is a trial right"), the exclusion of hearsay, *see State v. Branch*, 182 *N.J.* 338, 357 (2005) ("One of the central principles of the law of evidence is that all hearsay is inadmissible unless it falls within one of the many exceptions to the hearsay rule.") (citing *N.J.R.E.* 802); *Idaho v. Wright*, 497 *U.S.* 805, 814 (1990) ("hearsay rules and the Confrontation

Clause are generally designed to protect similar values"); and the right to a finding beyond a reasonable doubt, *see, e.g.*, *Apprendi*, 530 *U.S.* at 484 ("the 'reasonable doubt' requirement has a vital role in our criminal procedure for cogent reasons," and the Court "require[s] this, among other, procedural protections in order to provide concrete substance for the presumption of innocence, and to reduce the risk of imposing [a conviction's attendant] deprivations erroneously") (internal quotation marks omitted); *Blakely*, 542 *U.S.* at 311 ("Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt.").

The Court thus erred in allowing hearsay, failing to provide an opportunity for confrontation, and making a finding by a preponderance of the evidence, because the sentence it imposed went beyond the statutory maximum and thus entitled Mosley to the protections of a jury trial.

II. **DEFENDANTS AT REVOCATION HEARINGS SHOULD RECEIVE THE PROTECTIONS OF THE CONFRONTATION CLAUSE AND EXCLUSION OF HEARSAY BECAUSE REVOCATION HEARINGS ARE CRIMINAL PROCEEDINGS AND SUCH PROTECTIONS ENHANCE THE TRUTH-SEEKING PROCESS AND DO NOT IMPEDE PUBLIC SAFETY INTERESTS.**

As the United States Supreme Court has recognized, "probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *United States v. Knights*, 534 *U.S.* 112, 119 (2001) (internal quotation marks omitted). The United States Supreme Court has reasoned, "[i]nherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" *Knights*, 534 *U.S.* at 119 (quoting *Griffin v. Wisconsin*, 483 *U.S.* 868 (1987)). *See also, e.g., Gagnon v. Scarpelli*, 411 *U.S.* 778, 781 (1973) (probationers enjoy a "conditional liberty").

In determining the nature of the process due probationers before revocation, the Appellate Division has relied on United States Supreme Court precedent. Citing *Gagnon*, the Appellate Division in *State v. Reyes*, 207 *N.J. Super.* 126 (App. Div. 1986) reasoned, "[r]evocation of probation is not a stage in a criminal prosecution, but, rather, a part of the corrections process." *Reyes*, 207 *N.J. Super.* at 134. The Appellate Division panel here in turn applied the reasoning from *Reyes*:

> A charge of VOP is not a criminal prosecution but rather "a part of the corrections process," . . . a defendant accused of violating the terms of probation is not entitled to indictment or trial by jury, and he or she may be found guilty by a simple preponderance of the evidence.
>
> [*Mosley*, 2016 *N.J. Super. Unpub. LEXIS* 2043, at *5 (quoting *Reyes*, 207 *N.J. Super.* at 134) (further internal citations omitted).]

The problem with importing the reasoning from *Gagnon* and *Morrissey v. Brewer*, 408 *U.S.* 471 (1972) to New Jersey without further analysis is that the procedures at issue in *Gagnon* and *Morrissey* differ in fundamental ways from the procedures involved in a probation revocation in New Jersey.

Morrissey dealt with parole, rather than probation, and contemplated a revocation hearing before a parole authority's hearing officer, *see Morrissey*, 408 *U.S.* at 487-88, while probation revocations in New Jersey take place before a judge.

Gagnon, which considered probation, concluded that there was no "difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation." *Gagnon*, 411 *U.S.* at 783. Significantly, this conclusion was based on a probation revocation scheme "where sentence has been imposed previously," *id.* at 783 n.3, which is not the case with probation revocations in New Jersey. In New Jersey, as described above, a probationer faces a resentencing at the time of revocation that may lead to a sentence of

probation and prison greater than the period of incarceration to which the probationer was originally exposed, while a parolee faces only revocation for the remainder of the parole term. As a result, the procedural protections required in New Jersey may be greater for a probationer than for a parolee. Moreover, *Gagnon* assumed that probation revocation hearings would be prosecuted by parole officers, whose function the *Gagnon* Court described as "not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation," and whose attitude it described as "dominate[d]" by "concern for the client." *Gagnon*, 411 *U.S.* at 784 (internal quotation marks omitted). According to the *Gagnon* Court, while "[i]n a criminal trial, the State is represented by a prosecutor . . . [i]n a revocation hearing . . . the State is represented, not by a prosecutor, but by a parole officer with the orientation described above." *Id.* at 788. Finally, the *Gagnon* Court imagined a probation revocation hearing overseen by "an independent decisionmaker" performing a "quasi-judicial role." *Id.* at 786, 788.

In New Jersey, as demonstrated in this case, prosecutors represent the State in revocation hearings, and judges preside over these hearings, where, as described above, defendants face not a revocation for a remaining portion of an original sentence, but the possibility of wholecloth resentencing. Such a proceeding is unquestionably a criminal prosecution,

particularly where, as here, the nature of the probation violation is the allegation that the defendant has committed a separate criminal offense.

The United States Supreme Court has long recognized that the restrictions on liberty during probation "are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Griffin*, 483 *U.S.* at 875. Those restrictions should be tailored to those aims, and, as in New Jersey, where a revocation hearing is a stage in a criminal proceeding, the restrictions should not involve the loss of rights that are central to presenting a criminal defense.

For example, in keeping with the aims of probation, it might be appropriate for probationers to sacrifice their Fourth Amendment rights with respect to probation officers, because a more permissive search regime might facilitate uncovering criminal activity.[2] *See, e.g., Knights*, 534 *U.S.* at 120 ("It was reasonable to conclude that the search condition would further the two primary goals of probation – rehabilitation and protecting society from future criminal violations."); *Griffin*,

[2] The question of probationers' Fourth Amendment rights is not at issue in this case, and *amicus* does not concede that sacrificing such rights is necessary for public safety. Instead, *amicus* recognizes that the United States Supreme Court has concluded that curtailing probationers' right to have police obtain warrants before searching their homes is consistent with the public safety purpose of probation.

483 *U.S.* at 876 ("A warrant requirement would interfere to an appreciable degree with the probation system . . . the delay inherent in obtaining a warrant would make it more difficult for probation officers to respond quickly . . . and would reduce the deterrent effect that the possibility of expeditious searches" creates.).

But the limits on probationers' rights should be based on the public safety interests that give rise to them. The stakes in New Jersey probation revocations and the environment in which revocation hearings are conducted are nearly identical to criminal trials, and so defendants in New Jersey should retain those trial rights that have been found to be central to a criminal defense, including the right to exclude hearsay, the right to confront witnesses against the accused, and the right to a determination of guilt beyond a reasonable doubt. Reserving these rights to probationers in no way impedes any public safety interest.

On the contrary, preserving these rights furthers the public interest the United States Supreme Court and this Court have recognized in accurate determinations before a revocation of probation:

> [S]ociety . . . has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. And

> society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the change of rehabilitation by avoiding reactions to arbitrariness.
>
> [*Morrissey*, 408 *U.S.* at 484 (internal citations omitted).]

See also, e.g., *Gagnon*, 411 *U.S.* at 785 ("Both the probationer . . . and the State have interests in the accurate finding of fact . . . the State [needs] to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community."); *Jamgochian v. New Jersey State Parole Bd.*, 196 *N.J.* 222, 242-43 (2008) ("The common thread running through the parole and probation revocation cases . . . is that even those who possess a conditional or limited freedom have a right to protection from arbitrary government action," in order "to ensure that a parolee or probationer is not erroneously imprisoned . . . .").

The rights to exclude hearsay and confront witnesses serve these truth-seeking aims. In *State v. Roach*, 219 *N.J.* 58 (2014), Justice Albin cautioned in dissent about the danger to truth seeking when a surrogate is allowed to appear on behalf of a witness, thus removing the defendant's confrontation ability:

> Cross-examination has been described as one of the greatest devices ever conceived for the exposition of truth and disclosure of error. Cross-examination is rendered a useless weapon in the truth-seeking process when the person bearing testimonial

> statements against the accused does not have to be called as a witness and when that absent witness's damning testimonial statements can be introduced through a surrogate.
>
> [*Roach*, 219 *N.J.* at 88 (Albin, J., dissenting) (internal citations omitted)]

See also California v. Green, 399 *U.S.* 149, 158 (1970) ("Confrontation . . . forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'"). That danger was borne out here. When defense counsel asked about what exactly had passed between the hands of the people in the car - an important fact when the police officer has alleged he witnessed a drug transaction - the testifying detective couldn't answer. When defense counsel asked about the angle at which the Officer Zundel viewed the person alleged to have been selling drugs - an important fact in a case that relied heavily on Officer Zundel's witnessing the alleged violation - Detective Carullo could not answer, and indeed, the State objected that the question called for Detective Carullo to speculate. Ensuring that defendants are able to confront witnesses against them and are not imprisoned based on hearsay furthers an interest this Court and the United States Supreme Court have repeatedly recognized - accurate determinations in probation revocation proceedings.

None of the possible State interests in allowing hearsay and failing to provide for confrontation overcome that paramount interest. First, the State cannot argue that speedy hearings promote the public safety interest, because where there is probable cause to believe the probationer committed a violation, and thus poses a possible threat to public safety, the Court may hold him in jail pending a revocation hearing. *See N.J.S.A.* 2C:45-3(a)(3). Second, this Court has rejected the State's contention that its interest in lowering prosecution costs may trump defendants' rights. *See State v. One 1990 Honda Accord*, 154 *N.J.* 373, 393 (1998) ("Doubtless, the right to trial by jury will be an inconvenience to the State when it seeks to forfeit innocent property. Mere inconvenience, however, cannot justify the denial of a constitutional right."). Finally, where the alleged violation is an additional criminal act, the State's interest in circumventing traditional trial protections by seeking incarceration through the less onerous method of probation revocation is particularly anathema to the traditional protections of our criminal justice system. *See, e.g., Apprendi*, 530 *U.S.* at 484 ("procedural protections . . . provide concrete substance for the presumption of innocence, and . . . reduce the risk of" erroneous conviction).

III. EVEN UNDER THE LIMITED CONFRONTATION RIGHT RECOGNIZED IN *MORRISSEY*, THE STATE MUST SHOW GOOD CAUSE FOR FAILING TO ALLOW CONFRONTATION, WHICH IT DID NOT DO HERE

In *Morrissey*, the Court identified confrontation as a right held by parolees during revocation hearings, and it identified a narrow exception to this right:

> On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.
>
> [*Morrissey*, 408 *U.S.* at 487.]

The Court later referred to this as "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." *Id.* at 489. In *Gagnon*, the Court held that the "due process prescribed in *Morrissey*" was "applicable to probation revocations." *Gagnon*, 411 *U.S.* at 791.

In *Reyes*, the Appellate Division concluded, "[t]he right of confrontation recognized by the Supreme Court in *Gagnon* and *Morrissey* is not absolute, but rather one element among several to be considered and weighed by the hearing body." *Reyes*, 207 *N.J. Super.* at 138. Here, the Appellate Division panel relied on *Reyes* in its only statement about confrontation: "The right of

confrontation as recognized by the United States Supreme Court is not absolute." *Mosley*, 2016 *N.J. Super. Unpub. LEXIS* at *6.

As described in the facts section above, the State made no showing at the trial court as to why good cause existed to excuse hearsay. Thus, based on *Morrissey*'s narrow exception that confrontation may be excused "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed," the State seeks to avoid the confrontation requirement with respect to an investigating officer, with no showing at all as to why excusing confrontation is necessary. This result is not permitted by *Morrissey*, the only case to offer a theoretical justification for excusing confrontation and the only case on which *Gagnon* and *Reyes* rely for this point.

This Court should not allow *Reyes*'s vague recitation of the limits of the confrontation right the *Morrissey* Court recognized to eviscerate that right in the probation revocation context. At the very least, when the State seeks to present testimony against a probationer without allowing confrontation, it must demonstrate what harm a witness would face if his identity were exposed.

Here, the record contains no evidence of danger to Officer Zundel, and indeed no good cause of any sort to excuse him from testifying. Instead, it is possible that the State did not

present Officer Zundel's testimony because it did not want to make Officer Zundel available for cross-examination in case it later sought to prosecute the alleged drug distribution offense. This kind of gamesmanship to avoid procedural protections when a defendant's liberty is at stake has no place in our criminal justice system. *Cf. Apprendi*, 530 *U.S.* at 476 ("At stake . . . are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6.").

CONCLUSION

For the reasons herein, the admission of hearsay and failure to ensure that Mosley could confront witnesses against him violated his Sixth Amendment right under *Apprendi*, *Blakely*, and *Natale*, and undermined the principles that guide limitations on probationers' rights. *Amicus* respectfully asks that the Court reverse the Appellate Division panel's decision and remand the case for a new revocation hearing.

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