FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1867-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Order of the Superior Court of New Jersey,
v.	:	Law Division, Essex County
VAUGHN SIMMONS,	:	
		Indictment No. 10-06-1540-I
	:	
Defendant-Appellant.	:	
		Sat Below:
	:	Hon. Mark S. Ali, J.S.C., Hon. Joseph V. Isabella, J.S.C., and a Jury

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BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 8

LEGAL ARGUMENT 9

POINT I

BECAUSE THE SENTENCING COURT'S ANALYSIS OF THE STATE V. YARBOUGH FACTORS WAS IMPERMISSIBLY BASED ON DISMISSED CHARGES AND SPECULATION NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD AND BECAUSE THE COURT OFFERED NO OTHER VALID BASIS FOR THE IMPOSITION OF A CONSECUTIVE SENTENCE, THIS COURT SHOULD REVERSE AND DIRECT THE TRIAL COURT TO IMPOSE THE CERTAIN PERSONS SENTENCE CONCURRENTLY TO THE ROBBERY SENTENCE. (Da44-52) 9

A. The Sentencing Court Erred In Finding Yarbough Factors 3A And 3C As It Relied On (1) A Dismissed Charge And (2) Speculation With No Basis In The Record That Mr. Simmons Possessed The Handgun For A Meaningful Period Before Or After The Robbery. 11

B. The Certain Persons Statute Would Not Be "Neutered" By The Imposition Of A Concurrent Sentence. 21

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

C. The Sentencing Court's Final Justifications For Imposing A Consecutive Sentence—That The Certain Persons Offense Is A Separate And Distinct Offense From Robbery And Would Be A "Free Crime" If Run Concurrent—Are Not A Valid Bases For Imposing A Consecutive Sentence. 30

D. This Court Should Reverse And Remand, Directing The Trial Court To Impose The Certain Persons Sentence Concurrently To The Robbery Sentence. 34

E. If This Court Does Not Order The Imposition of Concurrent Sentences Under Point D, Supra, Another Basis For Reversal And Resentencing Are The Error's In The Court's Overall Fairness Assessment. 40

1. Extending Mr. Simmons's existing twenty-year sentence by imposing this sentence consecutively would have no added deterrent effect. 42

2. Because the age-crime curve demonstrates that the risk of recidivism declines dramatically as age increases and is exceptionally low at the age that Mr. Simmons will complete his twenty-year NERA sentence, the goal of incapacitation cannot justify imposing a consecutive sentence. 45

3. The sentencing court's fairness analysis was based on erroneous and impermissible considerations and failed to adequately address Defendant's arguments regarding deterrence and incapacitation. 48

FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

CONCLUSION 50

FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

TABLE OF JUDGMENTS, RULINGS, AND ORDERS BEING APPEALED

Decision to Run the Sentence on Indictment 10-6-1540-I Consecutive to the Sentence on Indictment 10-6-1539-I Da44-52

Judgment of Conviction (March 2, 2018) Da28-31

INDEX TO APPENDIX

PAGE NOS.

Essex County Indictment No. 10-06-1540-I Da1-3

Verdict Sheet Da4

Judgment of Conviction for Initial Sentencing - February 3, 2012
(Indictment No. 10-06-1540-I, count 1) Da5-7

Judgment of Dismissal - February 1, 2013
(Indictment No. 10-06-1540-I, count 2) Da8-10

State v. Simmons, No. A-4938-12, 2016 N.J. Super. Unpub.
LEXIS 306 (App. Div. Feb. 11, 2016) Da11-18

Judgment of Conviction - Resentence - April 15, 2016
(Indictment No. 10-06-1540-I, count 1) Da19-22

Change of Judgment of Conviction to Reflect
No Prior Service Credits - August 18, 2016
(Indictment No. 10-06-1540-I, count 1) Da23-26

State v. Simmons, No. A-5166-15, unpub. SOA order
(App. Div. May 3, 2017) Da27

Judgment of Conviction - Resentence - March 2, 2018
(Indictment No. 10-06-1540-I, count 1) Da28-31

State v. Simmons, No. A-2107-19 (App. Div. Mar. 3, 2022) Da32-43

Sentencing Court Opinion Reimposing Consecutive Sentence
(Feb. 9, 2023) Da44-51

Sentencing Court Order Reimposing Consecutive Sentence
(Feb. 15, 2023) Da52

Notice of Appeal, Docket No. A-1867-22 .... Da53-56

Appellate Division Order Denying Motion To Transfer To Plenary
(Apr. 12, 2023) Da57

INDEX TO APPENDIX (CONT'D)

PAGE NOS.

Appellate Division Order Removing Case From SOA Calendar and Ordering Plenary Briefing (Oct. 31, 2023 .... Da58

Legislative History for L. 1979, c. 179 .... Da59-85

Final Text Of Bill (S. 3329) Da60-79

Sponsor Statement to S. 3329 .... Da80-82

Sponsor Statement to A. 3352 .... Da83-85

Legislative History for L. 1992, c. 74 .... Da86-92

Final Text Of Bill Da87-90

A. Jud., Law, Pub. Safety & Def. Comm. Statement to S. 184 (June 1, 1992) Da91-92

Legislative History for L. 2001, c. 216 .... Da86-92

Final Text Of Bill Da93-95

S. Law & Pub. Safety Comm. Statement to S. 1504 (Mar. 15, 2001) Da96

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A. 11 (introduced May 11, 2000) Da98-103

Defendant's Sentencing Court Brief Arguing Overall Fairness (July 14, 2022)[1] Da104-120

[1] Trial court brief included because "the brief is referred to in the decision of the court" and to show that social science regarding deterrence and incapacitation, which are "germane to the appeal," were "raised in the trial court." R. 2:6-1(a)(2).

TABLE OF AUTHORITIES

PAGE NOS.

Cases

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State in the Interest of C.A.H. & B.A.R., 89 N.J. 326 (1982) 42

State v. Adams, 320 N.J. Super. 360 (App. Div. 1999) 18

State v. Anderson, 198 N.J. Super. 340 (App. Div. 1985) 32

State v. Baylass, 114 N.J. 169 (1989) 38

State v. Case, 220 N.J. 49 (2014) 15, 16

State v. Cassady, 198 N.J. 165 (2009) 17

State v. Copling, 326 N.J. Super. 417 (App. Div. 1999) 34

State v. Cuff, 239 N.J. 321 (2019) 33

State v. Davis, 68 N.J. 69 (1975) 32

State v. Dillihay, 127 N.J. 42 (1992) 28

State v. Espino, 264 N.J. Super. 62 (App. Div. 1993) 18

State v. Flowers, No. A-2401-09T3 (App. Div. 2013) 21

State v. Fuentes, 217 N.J. 57 (2014) 37, 42

State v. Gardner, 113 N.J. 510 (1989) 42

State v. Ghertler, 114 N.J. 383 (1989) 17

State v. Green, 62 N.J. 547 (1973) 14

State v. Harmon, 104 N.J. 189 (1986) 26

FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

State v. Jarbath, 114 N.J. 394 (1989) 35, 42

State v. Johnson, 309 N.J. Super. 237 (App. Div. 1998) 18

State v. K.S., 220 N.J. 190 (2015) .... passim

State v. Kromphold, 162 N.J. 345 (2000)..36

State v. Lee, 96 N.J. 156 (1984)..27

State v. Liepe, 239 N.J. 359 (2019) 38

State v. List, 270 N.J. Super. 169 (App. Div. 1993) 18

State v. Lopez, 417 N.J. Super. 34 (App. Div. 2010)...28

State v. Louis, 117 N.J. 250 (1989) 34

State v. Megargel, 143 N.J. 484 (1996)...42

State v. Molina, 168 N.J. 436 (2001)...39

State v. Mosch, 214 N.J. Super. 457 (App. Div. 1986)......................................32

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State v. Rogers, 124 N.J. 113 (1991) 33

State v. Roth, 95 N.J. 334 (1984) 35, 36

State v. Simmons, No. A-2107-19 (App. Div. Mar. 3, 2022).................... passim

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ABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

State v. Sterling, 215 N.J. 65 (2013)....................26

State v. Streater, 233 N.J. Super. 537 (App. Div. 1989)....................19

State v. Torres, 246 N.J. 246 (2021).................... 6, 38, 40, 41

State v. Walker, 322 N.J. Super. 535 (App. Div. 1999)....................17

State v. Yarbough, 100 N.J. 627 (1985).................... passim

Statutes

L. 1978, c. 95....................22

L. 1979, c. 179.................... 22, 23

L. 1992, c. 74.................... 23, 24

L. 2001, c. 216....................24

N.J.S.A. 2C:12-1....................1

N.J.S.A. 2C:12-3....................29

N.J.S.A. 2C:15-1....................1, 29

N.J.S.A. 2C:39-4....................1

N.J.S.A. 2C:39-4.1....................28

N.J.S.A. 2C:39-5.................... passim

N.J.S.A. 2C:39-6....................26

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

N.J.S.A. 2C:39-7 .... passim

N.J.S.A. 2C:43-6 .... 25, 27

N.J.S.A. 2C:44-1 35

N.J.S.A. 2C:44-3 3

N.J.S.A. 2C:44-5 .... 28, 37

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PAGE NOS.

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FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

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PAGE NOS.

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FILED, Clerk of the Appellate Division, January 18, 2024, **A-001867-22**

PROCEDURAL HISTORY

In 2010, an Essex County Grand Jury issued Indictment No. 10-6-1539-I, charging Vaughn Simmons with two counts of first-degree robbery, N.J.S.A. 2C:15-l (counts one and five); two counts of fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-l(b)(4) (counts two and six); two counts of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (counts three and seven); and two counts of second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts four and eight). State v. Simmons, No. A-4938-12, 2016 N.J. Super. Unpub. LEXIS 306 (App. Div. Feb. 11, 2016). (Da12)[2] Counts one through four stemmed from a robbery of a Family Dollar store on December 3, 2009, while counts five through eight stemmed from a robbery of an Autozone Store on December 5, 2009. (Da12) Mr. Simmons was separately charged under

[2] The following abbreviations will be used:
Da - Defendant-Appellant's Appendix
1T - Feb. 3, 2012 (original sentencing)
2T - Apr. 25, 2016 (first resentencing, after remand from No. A-4938-12)
3T - May 3, 2017 (SOA)
4T - Mar. 2, 2018 (second resentencing, after remand from No. A-5166-15)
5T - Mar. 11, 2019 (PCR)
6T - Feb. 8, 2021 (SOA)
7T – July 7, 2022 (oral argument for third resentencing, after remand from A-2107-19)
8T – Sept. 30, 2022 (status conference for third resentencing)
9T – Oct. 31, 2023 (SOA)
PSR - Presentence Report

Indictment No. 10-6-1540 with two counts of second-degree unlawful possession of a firearm by a person convicted of certain crimes, N.J.S.A. 2C:39-7(b); count one pertained to the Family Dollar robbery, and count two pertained to the Autozone robbery. (Da1-3,12) This appeal concerns the sentence from count one of Indictment No. 10-6-1540. (Da32)

The State agreed to sever the counts related to the Autozone from the counts related to the Family Dollar robbery and tried the Family Dollar robbery first. (Da12) On December 14, 2011, a jury found Mr. Simmons guilty of counts one through four under Indictment 10-6-1539-I. (Da5,13) Immediately thereafter, the State proceeded to try Mr. Simmons before the same jury on count one of Indictment 10-6-1540-I. (4T12-1 to 4) Because the jury had already convicted Mr. Simmons of count three—unlawful possession of a handgun under N.J.S.A. 2C:39-5(b)—the only additional evidence the State had to present was Mr. Simmons's prior conviction that rendered him a "certain person" under N.J.S.A. 2C:39-7(b). (4T9-22 to 10-3) The same jury convicted Mr. Simmons of count one of Indictment 10-6-1540-I—certain persons not to possess firearms. (4T13-17 to 20) (Da13) All counts related to the Autozone robbery were dismissed. (Da18; PSR12)

Mr. Simmons was sentenced by Judge Joseph Isabella, J.S.C. on February 3, 2012. (1T) The State moved for a discretionary extended term

under the persistent offender statute, N.J.S.A. 2C:44-3(a), and the court found that Mr. Simmons met the statutory criteria. (1T5-18 to 19, 16-18 to 21) The court found aggravating factors three, six and nine and no mitigating factors and imposed an aggregate sentence of thirty years with twenty-two years of parole ineligibility. (1T15-10 to 18) On Indictment 10-6-1539-I, the court sentenced Mr. Simmons on count one (first-degree robbery) to twenty years with seventeen years parole ineligibility pursuant to the No Early Release Act. (1T17-15 to 19) The court merged counts two (aggravated assault by pointing a firearm) and four (possession of a firearm for an unlawful purpose) with count one and imposed a concurrent ten-year term on count three (possession of a handgun without a permit). (1T17-24 to 18-13) On count one of Indictment 10-6-1540-I (second-degree certain persons not to possess firearms), the court imposed a ten-year term with five years of parole ineligibility to run consecutive to the twenty-year NERA term. (1T18-14 to 19) The court did not give any reasons for its decision to run that count consecutive to Indictment 10-6-1539-I, stating merely, "[t]hat shall run consecutive." (1T18-19) On appeal, this Court affirmed Mr. Simmons's convictions but remanded for the trial court to reconsider its decision to run the certain persons conviction consecutive to the robbery "because the trial

court failed to explain the reasons for imposing a consecutive sentence." Simmons, 2016 N.J. Super. Unpub. LEXIS 306 at *21-22). (Da18)

On remand, the case was again before Judge Isabella for resentencing. (2T) The court again ran the certain persons offense consecutive to the robbery, reasoning:

> I ran the possession of a weapon concurrent to the first-degree robbery because the weapon was used in the robbery and it should run concurrent. However, a certain person is a separate and distinct offense apart from possession of a weapon. Its own distinctive element of having a previous conviction, a felony conviction, which would not allow a person to have a gun. And that being a separate crime, pursuant to State versus Yarbough,[3] separate crime, separate instances deserve consecutive sentences which is why I imposed it.
>
> [(2T5-4 to 14)]

The Judgment of Conviction gave additional reasons:

> Pursuant to State v. Yarbough, "there can be no free crimes in a system for which the punishment shall fit the crime." Running the sentence concurrently would render meaningless the certain person offense. Furthermore, the Legislature has a clear intent to specifically deter those who have a criminal history from possessing guns.
>
> [(Da19)]

[3] State v. Yarbough, 100 N.J. 627 (1985).

On appeal on the Sentencing Oral Argument calendar, this Court again reversed and remanded because "the court did not provide adequate findings to support imposition of consecutive terms." (Da27)

On remand for the second time, Hon. Mark S. Ali, J.S.C. resentenced Mr. Simmons on March 2, 2018. (4T) After reciting the Yarbough guidelines, the court analyzed each of the "facts relating to the crimes" under guideline 3 and found that none supported a consecutive sentence. (4T16-6 to 18-4) With respect to factor (3)(a)—"the crimes and their objectives were predominantly independent of each other"—the court stated, "This could be argued both ways, but if the possession of the gun was to fulfill the robbery, then it would be the same." (4T17-15 to 19) After finding that none of these factors supported a consecutive sentence, the court referred back to the "no free crimes" prong of Yarbough and reasoned that the certain persons statute "would essentially be moot" if the certain persons sentence were not run consecutive to the sentence for a substantive offense committed with the firearm. (4T18-5 to 19-4)

On appeal, after plenary briefing, this Court reversed the sentence "because the court did not explain whether factor 3A applied, and if so, the weight it was given." State v. Simmons, No. A-2107-19 (App. Div. Mar. 3, 2022) (slip op at 12). (Da43) This Court also observed that in reimposing the

consecutive sentence, the sentencing court "not[ed] how otherwise the statute would be moot[] but did not explicitly state that it relied on 'no free crimes' or the crimes being separate offenses with distinct elements." Id. (slip op. at 11). (Da42) This Court remanded for resentencing and ordered the trial court to "identify whether 3A applies, and also include comparisons to the factual record of this case, and provide '[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant.'" Id. (slip op. at 12) (quoting State v. Torres, 246 N.J. 246, 268 (2021)). (Da43)

On remand, defendant argued that factor 3A supported concurrent sentences because "the gun was used in the course of the robbery for the purpose of consummating the robbery. . . . [T]he only possession that was proven was the possession during the course of the robbery, and the objective was clearly to consummate the robbery." (7T 7-14 to 22) After oral argument, the court stated,

> [T]he thing that I have . . . trouble wrapping my arms around . . . is that essentially if you look . . . purely at the Yarbough factors particularly 3A it would run concurrent, but then wouldn't that just neuter or make meaningless that statute. And Mr. Welfel . . . says the law is the law, [you] may not like Yarbough, but this is [the] law. And in addition, it doesn't really neuter the statute. I find that hard to accept.
>
> [(8T 4-12 to 20)]

The sentencing court then took an about face with respect to factor 3A in its February 9, 2023, written opinion, finding that Yarbough factors 3A and 3C supported a consecutive sentence because the record did not support a finding that Mr. Simmons obtained the handgun in order to carry out the Family Dollar robbery and because he possessed the handgun at a time prior to and subsequent to the Family Dollar robbery. (Da47-48) The court further justified the consecutive sentence by reasoning that, "were the certain persons conviction not consecutive, the effect would be to neuter the statute itself, rendering it essentially meaningless." (Da49) The court did not resentence Mr. Simmons or issue a new Judgment of Conviction, but merely issued an order that "the Court's sentence previously imposed on March 2, 2018 stands as previously imposed." (Da52)

Mr. Simmons appealed and the case was scheduled for the October 31, 2023 Sentencing Oral Argument Calendar. (Da53-57) On November 13, the SOA panel issued an order moving this case to the plenary calendar for briefing. (Da58) This brief follows.

STATEMENT OF FACTS

This Court's unpublished opinion affirming Mr. Simmons's conviction sets forth the relevant facts of the robbery as follows:

> [T]he State presented evidence which established that on December 3, 2009, an African-American male entered the Family Dollar store in Newark. He stood near the entrance, complained that the lines were too long, and left the store soon after. Later that day, at around 5:30 p.m., F.M., the store's manager, observed that the individual who entered the store earlier had returned and was attempting to take one of the cash registers.
>
> R.H., the store's security guard, attempted to stop the man from carrying away the register. R.H. and the perpetrator fell to the floor. F.M. pressed the store's 'panic button' alarm. When he turned around, F.M. observed that the perpetrator had gotten up from the ground and was pointing a handgun at him. F.M. turned again, and the man fled the store with the register. He had taken $125.
>
> [Simmons, 2016 N.J. Super. Unpub. LEXIS 306 at *2-3. (Da12)]

LEGAL ARGUMENT

POINT I

BECAUSE THE SENTENCING COURT'S ANALYSIS OF THE STATE V. YARBOUGH FACTORS WAS IMPERMISSIBLY BASED ON DISMISSED CHARGES AND SPECULATION NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD AND BECAUSE THE COURT OFFERED NO OTHER VALID BASIS FOR THE IMPOSITION OF A CONSECUTIVE SENTENCE, THIS COURT SHOULD REVERSE AND DIRECT THE TRIAL COURT TO IMPOSE THE CERTAIN PERSONS SENTENCE CONCURRENTLY TO THE ROBBERY SENTENCE. (Da44-52)

After three decisions from this Court reversing three sentencing court decision to make Mr. Simmons's conviction for the offense of certain persons not to possess firearms under Indictment 10-6-1540-I consecutive to the sentence under Indictment 10-6-1539-I, the sentencing court on a fourth occasion again failed to conduct a proper analysis under State v. Yarbough, 100 N.J. 627 (1985). Part A explains that the court's findings of Yarbough factors 3A and 3C were impermissibly based on its belief that Mr. Simmons had committed an additional robbery charged under counts of the indictment that were dismissed in violation of State v. K.S., 220 N.J. 190 (2015). They were also based on speculation not supported by competent credible evidence in the record.

Parts B and C demonstrate that the sentencing court's other reasons for imposing a consecutive sentence were equally problematic. The court once again reasoned that running the certain persons conviction concurrent to the robbery would render the certain persons statute meaningless, purporting to refer to the statute's legislative history and intent but failing to actually cite any legislative history or intent. In Part B, an actual review of the legislative history and intent reveals that the purpose of the certain persons statute is to criminalize the possession of a handgun by a person under circumstances that would be lawful for someone without a predicate conviction, and to enhance the sentence for a felon who possesses a firearm beyond the sentence for ordinary unlawful possession of firearms—not to ensure that a "certain person" who commits a substantive crime with a firearm is incarcerated for longer than a person without a predicate conviction. Thus, running the certain persons sentence concurrent to the sentence for the substantive crime would not render the certain person statute meaningless.

Part C explains how the court's final two rationales—"no free crimes" and "separate and distinct offenses"—also fail to justify a consecutive sentence. As this Court noted in its opinion reversing the previous imposition of a consecutive sentence in this case, because the "no free crimes" principle is always present and thus cannot serve to distinguish between crimes, and because the Code does

not create a general presumption of consecutive sentences, this guideline can never alone justify a consecutive sentence. The separate and distinct crimes rationale suffers the same fate. Crimes are separate and distinct when they have separate and distinct elements and do not merge. Because merged offenses do not receive separate sentences, sentencing courts are only called to decide between concurrent and consecutive sentences for crimes that do not merge. If the mere fact that two offenses are separate and distinct and do not merge were sufficient basis, to impose consecutive sentences, this would effectively create a presumption of consecutive sentences in contravention of the Code.

Part D argues that because none of the "facts relating to the crimes" would support a consecutive sentence in this case, and because no judge in four sentencing proceedings has been able to justify a consecutive sentence, this court should reverse direct the trial court to order that the sentence on Indictment 10-6-1540-I be served concurrent to the sentence under Indictment 10-6-1539-I, rather than remanding for resentencing.

A. The Sentencing Court Erred In Finding Yarbough Factors 3A And 3C As It Relied On (1) A Dismissed Charge And (2) Speculation With No Basis In The Record That Mr. Simmons Possessed The Handgun For A Meaningful Period Before Or After The Robbery.

In justifying reimposing the certain persons sentence of ten years to be served consecutively to the twenty-year sentence for the robbery, the

sentencing court "applied Yarbough guideline 3A to its analysis when determining the Defendant's sentence and found 3A so compelling and heavily weighted as to support consecutive sentencing of the certain persons offense." (Da51) The court found factor 3A—that "[n]othing in the record suggests that Defendant obtained the handgun in order to carry out a robbery at the Family Dollar"—for three reasons: (1) Mr. Simmons did not immediately brandish the handgun upon attempting to obtain the cash register drawer from Family Dollar but only pulled the gun out after the security guard had wrestled him to the floor; (2) "he obtained the gun at an unknown time [and so] it cannot be assumed he obtained it in order to rob the Family Dollar;" and (3) Mr. Simmons was charged with robbing an Autozone two days later in which he similarly "brandish[ed] his handgun in order to flee the premises" after being restrained. (Da47-48)

Although the sentencing court's conclusion does not mention Yarbough factor 3C, in its earlier discussion of the Yarbough factors the court stated that "the facts also support a finding that the case-at-bar meets Yarbough guideline 3C, 'the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.'" (Da48) The Court concluded that Yarbough factor 3C applied because "Defendant committed [the certain persons] crime at the time

he obtained the handgun, prior to the Family Dollar Robbery." (Da48) This stands in stark contrast to the court's finding in 2018 that under factor C, whether "the crimes are committed at different times or separate places," "[t]hat is not the case here." (4T 17-22 to 18-1); Mr. Simmons, No. A-2107-19 (noting that the court "did not find factors 3B-E). (Da38, 41)

The court erred in finding factors 3A and 3C because (1) the court relied on dismissed charges, (2) the court relied on speculation not supported by competent, credible evidence in the record, and (3) the actual record does not support a finding of factors 3A or 3C in light of published case law.

First, reversal is required because the court relied on a dismissed charge in finding factors 3A and 3C. The sentencing court found "that Defendant possessed the gun with a general objective to have on his person when committing robberies, but not with the specific objective in mind that he would use it to rob the Family Dollar Store" because "two days after the Family Dollar incident Defendant was alleged to have robbed an Autozone in a similar manner;" "only after struggling with the cashier and being restrained by another employee did Defendant brandish his handgun in order to flee the premises." (Da47-48) The court relied on the Autozone allegations contained in counts five through eight of Indictment 10-06-1539-I and count two of

Indictment 10-06-1540-I even though all those counts related to the alleged Autozone robbery were dismissed. (Da12; PSR12)

The Supreme Court has held that "prior dismissed charges may not be considered for any purpose" unless "the reason for consideration [is] supported by undisputed facts of record or facts found at a hearing." K.S., 220 N.J. at 199.[4] The dismissed Autozone allegations were central to the court's findings of factor 3C—that Mr. Simmons possessed the handgun at a time other than his robbery of the Family Dollar—and factor 3A—that his objective in possessing the firearm was a "general objective" to have it on him when committing robberies but not for the specific purpose of the Family Dollar robbery. At no point during these proceedings was there any hearing where Mr. Simmons admitted to the Autozone robbery, nor is the Autozone robbery "supported by undisputed facts of record or facts found at a hearing." K.S.,

[4] While K.S. involved a prosecutor's consideration of dismissed charges in the context of a PTI decision, the Court explicitly stated that that it was overruling State v. Green, 62 N.J. 547 (1973), which had allowed the consideration of dismissed charges in the context of sentencing. 220 N.J. at 199. The Green Court had permitted consideration of dismissed charges because "the sentencing judge might find it significant that a defendant who experienced an unwarranted arrest was not deterred by that fact from committing a crime thereafter." 62 N.J. at 571. The K.S. Court explicitly stated, "We disapprove of those statements in Brooks and Green because deterrence is directed at persons who have committed wrongful acts . . . . Accordingly, we hold that when no [] undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose." 220 N.J. at 199.

220 N.J. at 199. Thus, the court's findings and its justification for the consecutive sentence must be reversed.

Second, the Court's analysis of Yarbough factors 3A and 3C was based on speculation rather than on facts found by the jury. Findings of any factors "must be supported by competent, credible evidence in the record" to ensure that "[s]peculation and suspicion [do] not infect the sentencing process." State v. Case, 220 N.J. 49, 64 (2014). The only evidence presented at trial regarding Mr. Simmons's possession of a gun was that he possessed it during the robbery; no surveillance video captured Mr. Simmons possessing a handgun either before or after the robbery, nor did any witness testify that they saw Mr. Simmons possess a handgun before or after the robbery. (Da12) When Mr. Simmons was arrested twenty days later he was not found in possession of a handgun, a search of the apartment where he was staying did not yield a handgun, and the person with whom he had been staying said she had never seen him with a gun. (PSR4) Accordingly, the evidence at trial does not support a finding that Mr. Simmons committed the certain persons offense at any time or place other than at the same time and place as the robbery (factor 3C) or that he possessed the firearm for any purpose other than to consummate the Family Dollar robbery (factor 3A). The fact that Mr. Simmons did not pull out the gun until it became necessary to do so to aid him in completing the

robbery shows just that—that his purpose in possessing the gun was to aid him in completing the robbery if necessary. The court's findings to the contrary were based solely on "[s]peculation and suspicion." Case, 220 N.J. at 64.

Furthermore, the court's reason for finding that the objective of possessing the handgun was different from the objective of the robbery would lead to a perverse consequence. The court reasoned that because Mr. Simmons did not immediately brandish the firearm upon commencing the robbery, but rather only displayed it to aid his flight from the robbery after he fell, the facts suggested that he did not obtain the handgun for the purpose of carrying out the robbery at the Family Dollar Store. (Da47) This logically entails that the court would have found Mr. Simmons's objective in possessing the handgun was to carry out the Family Dollar Store robbery if Mr. Simmons had drawn his handgun immediately upon entering the store and brandished it during the entirety of the robbery. In that scenario, the court would not find that "the crimes and their objectives were predominantly independent of each other," and thus would not find that factor 3A supported a consecutive sentence. This would lead to the perverse consequence that a robber who acted more aggressively and subjected the victim to more danger by brandishing the gun through the entirety of the robbery would be more likely to receive concurrent sentences. (7T 27-17 to 28-11)

A review of the published cases assessing factor 3A reveals that crimes and their objectives have been found to be primarily independent only where (1) they did not happen simultaneously but rather involved separate and distinct acts; (2) there were multiple victims, or (3) the motives were distinct and were formulated at separate times. See State v. Cassady, 198 N.J. 165, 181 (2009) (finding the bank teller robbery and the car salesman robbery were "two separate incidents separated by approximately an hour and each had a different motive, (1) to steal money from a bank, and (2) to steal a car from a car dealership."); State v. Perry, 124 N.J. 128, 177 (1991) (finding the crimes of murder and hindering apprehension were predominantly independent because defendant made decision and took action to hide the body after he had already killed the victim, and as such "the crimes of murder and hindering apprehension involve[d] similar yet distinct acts"); State v. Ghertler, 114 N.J. 383, 391-392 (1989) (finding that the crimes were "predominantly independent of each other" because they "were committed at different times and separate places"); State v. Walker, 322 N.J. Super. 535, 557 (App. Div. 1999) (finding "that the Pollenitz murder and McClendon robbery were 'predominantly independent' of each other" where defendant committed the McClendon robbery at 12:35 a.m. and then killed Pollenitz during a separate attempted robbery between 1:00 and 1:30 a.m.); State v. Johnson, 309 N.J. Super. 237,

271 (App. Div. 1998) (finding that the crimes and their objectives were predominantly independent of each other where "defendant's original objective was robbery to obtain money for purchase of drugs . . . [which] could have been realized without the carjacking and kidnapping of Gail and A.S" and because "[t]he subsequent, violent sexual assault of Gail Shollar was not a natural progression of the robbery, and her vicious murder was by defendant's admission motivated by his desire to avoid identification and apprehension"); State v. List, 270 N.J. Super. 169, 176 (App. Div. 1993) (finding that the murders were predominantly independent because "[e]ach was committed at a different time on successive victims in separate circumstances").

By contrast, where the crimes involved a single victim, were committed at the same time, or had the same underlying motive/were in furtherance of the same underlying criminal purpose, courts have held that the offenses were not predominantly independent. See State v. Adams, 320 N.J. Super. 360, 370 (App. Div. 1999) (finding that the "offenses here involved a single victim and may be seen to have occurred so closely together in time and place, that they may not be subject to characterization as predominantly independent"); State v. Espino, 264 N.J. Super. 62, 74 (App. Div. 1993) (finding that the attempted escape and aggravated assault committed during the course of the assault "were not predominantly independent of each other"); State v. Streater, 233

N.J. Super. 537, 546 (App. Div. 1989) (finding that the conspiracy to commit theft by deception and bringing stolen property into New Jersey were not "predominantly independent of each other" because the "[t]he offense of bringing stolen property into New Jersey was one of the overt acts committed in furtherance of the conspiracy").

In this case, there was a single criminal act—an armed robbery. (Da12) Mr. Simmons's objective in possessing the handgun was to accomplish the robbery, and the fact that he possessed the handgun is what made the robbery a first-degree robbery. This was not a case where the two crimes happened at different times, involved separate and distinct acts or multiple victims, or had distinct motives formulated at separate times. Mr. Simmons was not arrested at a later time or date with the handgun, nor were there any surveillance videos or witnesses to establish that he possessed the firearm at any time other than during the Family Dollar robbery. Had he been convicted of possessing the handgun at a different time and or place, the court could have certainly found Yarbough factor 3C. But that is not the record in this case.

It is no surprise that the sentencing court's analysis of the Yarbough factors was erroneous and does not justify a consecutive sentence. The court revealed on September 30 that the court believed the Yarbough factors—

especially factor 3A—supported a concurrent sentence, but that the court found it hard to accept that it was bound by the Yarbough factors:

> And the thing that I have trouble wrapping my arms around and what the State is asserting is that essentially if you look purely at the Yarbrough factors particularly 3A it would run concurrent, but then wouldn't that just neuter or make meaningless that statute. . . . Mr. Welfel vehemently disagrees with that. He says the law is the law, [you] may not like Yarbough, but this is a law. And in addition, it doesn't really neuter that statute. I find that hard to accept.
>
> [(8T 4-12 to 20)]

Because the sentencing court found it "hard to accept" the result compelled by Yarbough—a result it felt would "neuter or make meaningless" the certain persons statute—the court proceeded to impermissibly rely on dismissed charges and speculation not based in competent, credible evidence in order to arrive at the contorted conclusion in its written opinion that Yarbough factors 3A and 3C did support a consecutive sentence. (8T 4-17)

Accordingly, this Court should find that the certain persons offense was not predominantly independent from the robbery and find that the certain persons offense and the robbery were committed at the same time and place; the Court should thus find that neither Yarbough 3A nor 3C supports a consecutive sentence.

B. The Certain Persons Statute Would Not Be "Neutered" Or Rendered Meaningless By The Imposition Of A Concurrent Sentence.

As revealed in both the September 30 conference and its written opinion, the court's true motivation for imposing a consecutive sentence was the court's belief that "were the certain persons conviction not consecutive, the effect would be to neuter the statute itself, rendering it essentially meaningless." (Da49; 8T 4-17). The court cited this same rationale to justify imposing the consecutive sentence during the 2018 resentencing: "if I didn't rule in this manner for this particular case, for this particular crime, "it would render that statute—that is the certain persons to have a weapon, moot." (4T18-5 to 19-4, 20-10 to 13) This rationale also appeared in the 2016 judgment of conviction. (Da19) It is noteworthy that both the 2016 and 2018 sentences were reversed by this Court.

In the 2022 resentencing, the sentencing court asserted that the "legislative history of N.J.S.A. 2C:39-7" and "legislative intent behind the certain persons statute . . . justifies a consecutive sentence." (Da49) The court did not cite any legislative history but instead quoted the following language from an unpublished Appellate Division case, <u>State v. Flowers</u>, No. A-2401-09T3 (App. Div. 2013): "the nature of the certain persons crime . . . is intended as a <u>further</u> deterrent to criminal weapons possession" and thus "giving a

concurrent sentence rather than a consecutive sentence would frustrate the deterrent effect of the certain persons statute and the legislative intent to further protect the public." (Da49) (emphasis in original) The sentencing court did not provide Flowers's explanation for claiming that concurrent sentences would frustrate the legislative intent, and it is unclear whether Flowers contains any basis at all for this claim, as Flowers is not available on Westlaw, was not cited by either party, the court did not provide counsel with a copy of this case. (Da49)

A review of the actual legislative history behind the certain persons not to possess firearms offense, N.J.S.A. 2C:39-7(b), does not reveal any intent by the legislature that a person with a prior felony conviction who commits a substantive offense with the firearm receive consecutive sentences for the substantive offense and the certain persons offense. N.J.S.A. 2C:39-7 was not contained in the original version of the Criminal Code enacted by L. 1978, c. 95, but was enacted the following year, in section 6 of L. 1979, c. 179. (Da59-60, 67) The first version of N.J.S.A. 2C:39-7 contained a fourth-degree crime for the possession of any weapon by a person previously convicted of certain crimes or having previously been committed to a mental institution, without distinguishing between the possession of firearms or other weapons. L. 1979, c. 179, § 6. (Da67) The sponsor statement said nothing about consecutive

sentences or wanting to impose an additional penalty beyond the substantive offense; it merely stated that the bill:

> adds a new section to Chapter 39 which punishes, as a crime of the fourth degree, the possession of weapons by certain persons. Although new to the Code, section 7, except for word changes to reflect Code crimes, follows exactly the language of the present statute, N.J.S. 2A:151-8.
>
> [Sponsor's Statement, A. 3352 (Introduced May 21, 1979). (Da84)]

At that time, unlawful possession of a handgun without a permit under N.J.S.A. 2C:39-5(b) was a third-degree crime. L. 1979, c. 179 § 4. (Da63)

The Legislature amended N.J.S.A. 2C:39-7 to create the separate, second-degree crime of possession of a firearm by certain persons with prior convictions—subsection (b)—in 1992. L. 1992, c. 74, § 3. (Da86-87, 89-90) The main purpose of this bill was to create a provision in chapter 58 (N.J.S.A. 2C:58-3.1) allowing for the lawful, temporary transfer of a firearm to a person without a firearms purchaser identification card or a handgun carry permit at a firing range, law enforcement agency, or a rifle or pistol club. L. 1992, c. 74, § 1. (Da87) The law was clear that persons temporarily receiving a firearm in compliance with the law's provisions could not be prosecuted under N.J.S.A. 2C:39-5 but could be prosecuted under N.J.S.A. 2C:39-7(b) if they had a prior criminal conviction that completely disqualified them from ever possession a

firearm under any circumstances. L. 1992, c. 74, §§ 1(d), 2(g). (Da87, 89) The Legislature's only commentary on the amendment to N.J.S.A. 2C:39-7 was to note that the bill "provide[s] that a person convicted of" one of several enumerated crimes "who purchases, owns, possesses or controls a firearm is guilty of a crime of the second degree." A. Jud., Law, Pub. Safety & Def. Comm. Statement to S. 184 2 (June 1, 1992). (Da92) Also noteworthy is that the bill kept the gradation of unlawful possession of a handgun without a permit under N.J.S.A. 2C:39-5(b) as a third-degree crime. L. 1992, c. 74, § 2. (Da88-89)

In 2001, the Legislature amended N.J.S.A. 2C:39-7(b) by adding the sentencing enhancement of a mandatory parole disqualifier of five years for a conviction for certain persons in possession of a firearm. L. 2001, c. 216. (Da93-95) The original bill had proposed instead to increase the Graves Act parole disqualifier from three to five years for convictions for specified offenses with a firearm. A. 11 (introduced May 11, 2000). (Da98-103) However, the Senate Law and Public Safety Committee amended the bill on March 15, 2001, to apply the five-year parole disqualifier to the certain persons statute instead. S. Law & Pub. Safety Comm. Statement to S. 1504 (Mar. 15, 2001). (Da96) The Committee described the purpose of the bill and the amendments as follows:

> As amended and released by the committee, this bill would impose a mandatory minimum sentence of five years imprisonment, without eligibility for parole, on a person who is convicted of purchasing, owning, or possessing a firearm and who had previously been convicted of a violent crime or certain crimes involving controlled dangerous substances. According to the sponsor's statement, federal legislation known as "Project Exile" would provide $100 million in firearms enforcement grants to states that require a mandatory minimum sentence of five years without parole to be imposed on persons who use or carry firearms during violent crimes. It is the committee's understanding that the purpose of this bill is to ensure that this State qualifies for any Project Exile funding that may become available under federal law. As introduced, the bill increased the mandatory minimum term of imprisonment currently required under the "Graves Act" (N.J.S.2C:43-6) for using or possessing a firearm in the course of committing certain violent crimes. The committee amended the bill to ensure that it would fulfill its stated objective.
>
> [Ibid. (Da96)]

Acting Governor Donald T. DiFrancesco stated that the purpose of the law was to "put[] violent criminals or those convicted of drug offenses on notice that they can't purchase, own, possess or control a firearm" because "the best way to reduce crime is to ensure that we keep guns out of the hands of those who Shouldn't have a gun in the first place." Press Release, Office of the Governor, "Difrancesco Signs Law To Keep Guns Out Of The Hands Of Violent Criminals, Establishes Mandatory Minimum Five-Year Prison Terms" (Aug. 21, 2001). (Da97) Thus, the intent of N.J.S.A. 2C:39-7(b) was clearly to

enhance the penalty when convicted felons merely possess a firearm; it was not targeted at increasing the penalty for convicted felons who use a firearm.

In sum, the legislative history of N.J.S.A. 2C:39-7(b) reveals that the purpose of this statute is twofold: (1) it criminalizes all possession of firearms by persons with predicate convictions even under circumstances where they would be exempt from prosecution under N.J.S.A. 2C:39-5; and (2) punishes simple possession of a firearm by persons with disqualifying convictions more harshly than unlawful possession of a firearm by persons without predicate convictions. Examining the first purpose, there are several exemptions to prosecution for unlawful possession of a handgun without a permit in addition to the firing range temporary transfer provision discussed above. A person without a handgun carry permit is exempt from prosecution under N.J.S.A. 2C:39-5(b) if he possesses the firearm in his home. N.J.S.A. 2C:39-6(e); see also State v. Harmon, 104 N.J. 189, 198-99 (1986); State v. Navarro, 310 N.J. Super. 104, 108 n.1 (App. Div. 1998). But a person with a predicate conviction who possesses a handgun in his home may be prosecuted under the certain persons statute. N.J.S.A. 2C:39-7(b)(1); see State v. Sterling, 215 N.J. 65, 82 n.3 (2013).

Turning to the second purpose, the certain persons statute enhances the penalty for possession of a firearm by a person with a predicate conviction in

several ways. First, unlawful possession of a rifle or a shotgun is only graded as a third-degree crime, whereas possession of a rifle or shotgun by a certain person is a second-degree crime. Compare N.J.S.A. 2C:39-5(c) with N.J.S.A. 2C:39-7(b)(1). Second, a conviction for possession of a handgun without a permit or possession of a handgun for an unlawful purpose carry a mandatory minimum period of parole ineligibility of forty-two months, while a conviction for certain persons not to possess firearms carries a mandatory minimum period of parole ineligibility of five years. Compare N.J.S.A. 2C:43-6(c) with N.J.S.A. 2C:39-7(b)(1). Thus, viewing the certain persons statute in light of the legislative history and in the context of the Legislature's "carefully constructed scheme" of firearms regulations, State v. Lee, 96 N.J. 156, 160 (1984), its purpose is clearly to (1) criminalize and (2) punish more harshly mere possession of a firearm by a defendant with a predicate conviction.

Not only does the legislative history fail to support the sentencing court's assertion the legislative intent of the certain persons statute was to provide a further deterrent in the form of a consecutive sentence, but the fact that N.J.S.A 2C:39-7 lacks a provision mandating or even creating a presumption of a consecutive sentence makes it clear that the Legislature did not intend sentences for certain persons convictions to always or even usually be served consecutively. State v. Lopez, 417 N.J. Super. 34, 37 n.2 (App. Div.

2010) ("[T]here is no statutory mandate that the court impose a consecutive sentence for a certain persons conviction."). In contrast, the Legislature explicitly mandated that a sentence for possession of a firearm in the course of committing a controlled dangerous substance offense "be served consecutively to that imposed for any conviction for a violation of any of the sections of chapter 35 or chapter 16 referred to in this section." N.J.S.A. 2C:39-4.1(d). Likewise, the Legislature created a presumption of consecutive terms for offenses committed while on probation, parole, or pretrial release. N.J.S.A. 2C:44-5(c), (f), (h). If the Legislature had intended that certain persons offenses be run consecutively, it would have included language similar to that in Section 39-4.1(d). Cf. State v. Dillihay, 127 N.J. 42, 49 (1992) ("Had the Legislature intended multiple punishment [for school zone and ordinary CDS distribution charges stemming from the same transaction], it could have explicitly authorized consecutive sentencing for related Section 5 and Section 7 offenses.")

Accordingly, a consecutive sentence is not necessary to further the legislative intent of the certain persons statute nor to ensure that the certain persons statute is not "neutered" because (1) its purpose was to criminalize and enhance the penalty for simple possession—not use—of a firearm by a convicted felon, and (2) the Legislature did not create any presumption or

mandate that a certain persons conviction run consecutive to any substantive offense committed with the firearm. Similarly, the purpose of the terroristic threats statute, N.J.S.A. 2C:12-3, is to prosecute certain verbal acts—even if not accompanied by physical acts—to deter, for example, verbal threats to kill another person. But if a defendant verbally threatens to kill a victim while simultaneously shooting the victim, the sentence for terroristic threats does not need to be consecutive to the sentence for attempted murder to give meaning to the terroristic threats statute. The terroristic threats statute ensures that dangerous verbal threats will be punished when there is no attempt to physically harm the victim, but where there is physical harm to the victim, the sentence punishing the physical harm is sufficient to accomplish the Legislature's objectives.

In looking specifically at the sentence Mr. Simmons received, both elements of the certain persons offense—the possession of a firearm as well as the fact of the defendant's prior conviction—were already accounted for in the twenty-year sentence for the robbery. The element of possession of a firearm elevated the robbery from a second-degree to a first-degree, thereby increasing Mr. Simmons's sentencing exposure by 10 years. N.J.S.A. 2C:15-1. Additionally, the fact of Mr. Simmons's prior convictions was considered by the original sentencing court when the court found aggravating factor six and

relied in large part on this factor to impose the maximum permissible sentence within the first-degree range—twenty-years. Simmons, 2016 N.J. Super. Unpub. LEXIS 306 at *18. (Da17) Accordingly, defendant did not get a "free pass" for his certain persons conviction—his twenty-year sentence on the first-degree robbery was based both on his possession of a firearm as well as his prior criminal record.

For all these reasons, this Court should reject the trial court's conclusion that a consecutive sentence is necessary to fulfill the legislative intent behind the certain persons statute and that a concurrent sentence would render the certain persons statute meaningless.

C. The Sentencing Court's Final Justifications For Imposing A Consecutive Sentence—That The Certain Persons Offense Is A Separate And Distinct Offense From Robbery And Would Be A "Free Crime" If Run Concurrent—Are Not A Valid Bases For Imposing A Consecutive Sentence.

The sentencing court's final rationales for imposing a consecutive sentence were that a certain persons offense is a separate and distinct offense from robbery and that it would be a "free crime" if run concurrent:

> Going back to the separate and distinct offense . . . [a] certain persons is a separate and distinct statutory crime from robbery. . . .
>
> [R[egardless of whether the gun was to be used to fulfill this particular robbery, the fact that Defendant had the gun in the first place for any purpose is prohibited by

> statute due to his prior felony convictions. This renders the certain persons conviction an inherently separate offense distinct from the offense during which the gun was discovered.
>
> . . .
>
> The Defendant's charges related to his gun possession on the December 3 robbery already merged with the robbery count, and all four counts ran concurrently. All that remained was the distinct and separate certain persons offense for which Defendant was charged, tried, and found guilty. The certain persons count would be a free crime if merged with the rest of the offenses charged stemming from the Defendant's having that same gun that same time.
>
> [(Da51)]

This Court already rejected the "no free crimes" rationale as insufficient to justify a consecutive sentence on its own:

> Under the first Yarbough guideline, "there can be no free crimes in a system for which the punishment shall fit the crime." Id. at 643. The Court never intended an interpretation where any concurrent sentence would be a free crime nor for the elimination of concurrent sentences. "No free crimes" is always present in convictions for more than one offense, so it cannot stand alone to support consecutive sentences. Otherwise, every sentence would be presumed as consecutive, which is not the statutory framework.
>
> [Simmons, No. A-2107-19 (slip op. at 10). (Da41)]

This Court should reaffirm that "no free crimes" is not a sufficient basis alone to impose a consecutive sentence.

The "separate and distinct" rationale is really just a shorthand way of saying that the certain persons offense has separate distinct elements from the other offenses and thus it does not merge with any of the other offenses. See, e.g., State v. Anderson, 198 N.J. Super. 340, 358-59 (App. Div. 1985) ("[I]llegal possession of a firearm should not merge with first degree armed robbery" because "the possessory offense requires proof of an additional element from the possessory element of first degree armed robbery," namely "that he lacked a permit."); State v. Mosch, 214 N.J. Super. 457, 465 (App. Div. 1986) ("[T]he two crimes for which defendant was convicted involve separate and distinct elements which do not merge.") But the fact that two offenses do not merge does not mandate that they receive consecutive sentences. See Anderson, 198 N.J. Super. at 345 (defendant received concurrent terms for possession of a handgun and robbery although the offenses did not merge).

When offenses merge, the court may not impose any sentence on the merged count—concurrent or consecutive—because "if an accused has committed only one offense, he cannot be punished as if for two." State v. Davis, 68 N.J. 69, 77 (1975). Thus, the only situation in which a court is called to decide between concurrent and consecutive sentences is for offenses that do not merge. If all "separate and distinct" offenses that do not merge required

consecutive sentences, this would mean that a court could never impose concurrent sentences. But the Legislature "did not intend nor did the Legislature require that under the Code every additional crime in a series carry its own increment of punishment (else there would have been no provision made in the Code for concurrent sentencing in the first place)." State v. Rogers, 124 N.J. 113, 119 (1991).

The sentencing court's "no free crimes" and "separate and distinct" rationales are identical to those rejected by the Supreme Court in State v. Cuff, 239 N.J. 321 (2019):

> In sentencing defendant to consecutive terms for offenses committed within a single criminal episode, however, the trial court set forth findings that do not satisfy Yarbough, warranting a remand for resentencing with respect to those offenses. For his conviction of second-degree unlawful possession of a weapon in connection with the February 28, 2011 incident in Cherry Hill, the trial court imposed a sentence consecutive to defendant's sentences for first-degree kidnapping and other crimes committed in that incident. The court's findings in support of that consecutive sentence were limited to a comment that "[t]he elements of this offense are separate and distinct from the charges of kidnapping. The defendant possessed the weapon and did not have a permit for it, and there can be no free crimes." . . . On remand, the court should reconsider its determination that defendant's sentence for unlawful possession of a weapon in that incident should be consecutive to his sentences for other crimes committed on the same date.
>
> [Id. at 349-51 (emphasis added).]

Accordingly, this Court should reject the sentencing court's "no free crimes" and "separate and distinct crimes" rationales for imposing a consecutive sentence.

D. This Court Should Reverse And Remand, Directing The Trial Court To Impose The Certain Persons Sentence Concurrently To The Robbery Sentence.

Two different judges have now failed to come up with a lawful justification for a consecutive sentence over four separate sentencing proceedings. After reviewing the record in its entirety, this Court should find that there simply is no legal basis under the sentencing provisions of the Code to impose a consecutive sentence in this case. Additionally, "in light of the long history of this case"—and in particular the four defective sentencing proceedings, this Court should "resolve[] not to remand for further proceedings" State v. Louis, 117 N.J. 250, 257 (1989). Instead, this Court should order the trial court to impose the certain persons sentence under Indictment 10-6-1540-I to be served concurrently to the sentence under Indictment 10-6-1539-I. See State v. Copling, 326 N.J. Super. 417, 441-442 (App. Div. 1999) (holding that "[t]he conviction for unlawful possession [of a firearm] must be served concurrently to the conviction for murder.").

Requesting this Court find that the certain persons offense in this case does not meet the criteria for a consecutive sentence is distinct from asking the

Court to exercise original jurisdiction and sentence Mr. Simmons anew. We recognize that "the exercise of appellate original jurisdiction over sentencing should not occur regularly or routinely; in the face of deficient sentences, a remand to the trial court for resentencing is strongly to be preferred." State v. Jarbath, 114 N.J. 394, 411 (1989). Trial courts are given discretion in choosing a sentence within the statutory range; so long as a trial court "appl[ies] correct legal principles in exercising its discretion" "based upon findings of fact that are grounded in competent, reasonably credible evidence," appellate courts must "avoid the substitution of appellate judgment for trial court judgment." State v. Roth, 95 N.J. 334, 363-65 (1984) . Thus, the exercise of original jurisdiction in sentencing on appeal is limited to circumstances where "the application of the guidelines to the facts of this case makes the sentence clearly unreasonable so as to shock the judicial conscience." Roth, 95 N.J. at 364-65.

In contrast, there are certain circumstances in which analysis of the legal principles is amenable to only one result. This is most evident where the trial court erroneously found an aggravating factor that the appellate court held could not be found under the facts. See, e.g., Jarbath, 114 N.J. at 404-05 ("The harm to the victim in this case cannot be included as an aggravating factor under N.J.S.A. 2C:44-1a(2)" because that would result in the death of the

victim "being counted twice, once in determining the degree of culpability of the crime and, again, as an aggravating factor."); State v. Kromphold, 162 N.J. 345, 358 (2000) ("The sentencing court improperly double-counted defendant's level of intoxication as an aggravating factor."). In that scenario, because the reviewing court's ruling on the aggravating factor does not determine a particular numerical sentence, the ordinary remedy is to remand for resentencing with instructions that the trial court may not find that aggravating factor on remand. See Kromphold, 162 N.J. at 359.

The concurrent/consecutive determination also has clear criteria that are susceptible to uniform application under the law—the Yarbough factors. While the presence of any Yarbough factors authorizes, but does not compel, a consecutive sentence, the absence of any Yarbough factors supporting a consecutive sentence means that a concurrent sentence is required.

In the very first case in which the Supreme Court interpreted the sentencing provisions of the New Jersey Criminal Code (the "Code") enacted in 1978, the Court recognized that "central to the reform of sentencing procedures is provision for appellate review of sentences to provide a greater degree of uniformity." Roth, 95 N.J. at 361. To achieve the paramount goal of greater uniformity "the drafters of our Code replaced 'the unfettered sentencing discretion of prior law with a structured discretion designed to

foster less arbitrary and more equal sentences.'" State v. Fuentes, 217 N.J. 57, 71 (2014) (quoting State v. Natale, 184 N.J. 458, 485 (2005)). The Code "channels the discretion of sentencing judges in fixing the terms of sentences" through a structured system of (1) sentence ranges for offenses of each degree and (2) a process of weighing aggravating and mitigating factors to determine where within the range the sentence should fall. Yarbough, 100 N.J. at 635-36; Fuentes, 217 N.J. at 72-73.

However, "the Code does not define with comparable precision the standards that shall guide sentencing courts in" determining whether sentences of imprisonment for multiple offenses shall run concurrently or consecutively." Yarbough, 100 N.J. at 636. The statute governing the decision to impose sentences concurrently or consecutively simply states that "multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." N.J.S.A. 2C:44-5(a). The Court recognized that "the failure to provide guidelines for sentencing judges faced with a choice between consecutive and concurrent sentences undermines both the objective of fair allocation of punishment and the principle of retribution." Yarbough, 100 N.J. at 638 (internal quotation marks omitted). Thus, "[t]o further the Legislature's goal" that "'our judicial system should attain a predictable degree of uniformity,'" the Court in Yarbough set forth six guidelines to channel the

discretion of trial courts in determining whether to impose concurrent or consecutive sentences. State v. Liepe, 239 N.J. 359, 372 (2019) (quoting Yarbough, 100 N.J. at 637).

Looking at the Yarbough factors themselves, this Court has already held that "'[n]o free crimes' is always present in convictions for more than one offense, so it cannot stand alone to support consecutive sentences." Simmons, No. A-2107-19 (slip op. at 10). (Da41) Turning to the remaining Yarbough factors, "[f]actors two, four, and five do not relate directly to the facts of the offense and hence have little utility in the threshold assessment of whether to impose consecutive or concurrent sentences." Torres, 246 N.J. at 266 (citing Carey, 168 N.J. at 423). Thus, the concurrent/consecutive decision really begins with an assessment of Yarbough factor three, which "contains the evaluative core to a Yarbough analysis: it identifies five sub-factors that 'generally concentrate on such considerations as the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and whether they involve numerous or separate victims.'" Id. at 266-67 (quoting State v. Baylass, 114 N.J. 169, 180 (1989)). Through evaluating these facts, "a court determines whether [Yarbough factor three] 'renders the collective group of offenses distinctively worse than the group of offenses would be were that circumstance not

present.'" Id. at 267 (citing Carey, 168 N.J. at 428)).

While the Court has held that "a sentencing court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences," id. at 427-28, or even where only one factor supports consecutive sentences, State v. Molina, 168 N.J. 436, 442-43 (2001), no court has held that a court may impose consecutive sentences where none of the Guideline 3 factors support a consecutive sentence. The reason that a court may not impose a consecutive sentence where none of the Guideline 3 factors are present is identical to the reason that a court may not impose a consecutive sentence based solely on the "no free crimes prong;" such a result would (1) undermine uniformity by allowing a consecutive sentence based on factors other than those articulated by the Court and (2) undermine the statutory framework of neutrality between concurrent and consecutive sentences by effectively creating a presumption in favor of consecutive sentences. Thus, once a court determines that none of the Yarbough factors support a consecutive sentence, the court is compelled to impose concurrent sentences.

For all the reasons set forth in Part A, supra, this Court should reject the sentencing court's findings of Yarbough factors 3A and 3C. This Court should further find that the record in this case does not support the finding of any of Yarbough factors 3A through 3E. Once the Court makes that determination,

this Court should order that the certain persons sentence be served concurrently to the sentence for the robbery. This Court should not merely remand for the trial court to attempt to find some other justification for consecutive sentences; because under these facts there is no possible valid justification for consecutive sentences under Yarbough, this court should direct the trial court to order that the sentences be served concurrently.

E. If This Court Does Not Order The Imposition of Concurrent Sentences Under Point D, Supra, Another Basis For Reversal And Resentencing Are The Error's In The Court's Overall Fairness Assessment.

In its 2022 reversal and remand for resentencing, this Court ordered the sentencing court to "provide '[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant' pursuant to Torres, 246 N.J. at 268." Simmons, No. A-2107-19 (slip op. at 12). (Da43) In its fairness assessment, the sentencing court concluded that the consecutive sentence was fair "was fair because Defendant's argument of low recidivism is not persuasive and the gun possession charges had already merged." (Da50) The court failed to meaningfully grapple with the social science Mr. Simmons presented (Da104-120), repeated its erroneous view that the legislative intent of the certain persons statute was to impose a sentence beyond that of the substantive offense committed with the firearm, and again impermissibly relied on dismissed charges in violation of K.S.

(Da50-51)

The fairness assessment required by Torres is not an abstract assessment of fairness akin to asking whether the sentence shocks the conscience but instead is informed by specific considerations. Specifically, "the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness." 246 N.J. at 272. In particular, the sentencing goals of deterrence, incapacitation, and proportionality spelled out in subsections (3) and (4) of N.J.S.A. 2C:1-2(b) are highly relevant, as the overall fairness evaluation must "contextualize[e] the individual sentences' length, deterrent value, and incapacitation purpose and need." Id. at 271.

Mr. Simmons argued that because he would be fifty-eight years old upon completing his twenty-year NERA sentence, the fairness assessment should point toward a concurrent sentence because a consecutive sentence was neither necessary nor would be effective to advance the goals of incapacitation or deterrence. (Da104-120) Specifically, he argued that because social science has shown that there is virtually no increased deterrence from extending a lengthy sentence, the goal of deterrence does not justify imposing the certain persons sentence consecutively. (Da113-117) Because the risk of recidivism declines dramatically as age increases, is exceptionally low at age fifty-eight, the goal of incapacitation does not justify a consecutive sentence. (Da117-120)

1. Extending Mr. Simmons's existing twenty-year sentence by imposing this sentence consecutively would have no added deterrent effect.

Deterrence "has been repeatedly identified in all facets of the criminal justice system as one of the most important factors in sentencing" and "is the key to the proper understanding of protecting the public." State v. Megargel, 143 N.J. 484, 501 (1996) (citing State in the Interest of C.A.H. & B.A.R., 89 N.J. 326, 334 (1982)); accord Fuentes, 217 N.J. at 78-79. Deterrence incorporates two "interrelated but distinguishable concepts": the sentence's "general deterrent effect on the public [and] its personal deterrent effect on the defendant." Jarbath, 114 N.J. at 405 (citing C.A.H., 89 N.J. at 334-45)); accord Fuentes, 217 N.J. at 79. On its own, general deterrence "has relatively insignificant penal value," Jarbath, 114 N.J. at 405 (citing State v. Gardner, 113 N.J. 510, 520 (1989)), and so sentencing courts should focus on specific deterrence. Fuentes, 217 N.J. at 79.

Social scientists have analyzed data before and after various changes in sentencing law in an attempt to determine the deterrent effect of those laws, including: California's Three Strikes law, F.E. Zimring, G. Hawkins, & S. Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001), L. Stolzenberg & S.J. D'Alessio, Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates, 43 Crime & Delinq. 457 (1997), P. Greenwood and A. Hawken, An Assessment of the Effect of

California's Three Strikes Law (2002), E. Helland & A. Tabarrok, Does Three Strikes Deter? A Nonparametric Estimation, 42 J. Hum. Resources 309 (2007); and sentencing enhancements for the use of a gun, C. Loftin D. McDowell, One with a Gun Gets You Two: Mandatory Sentencing and Firearms Violence in Detroit, 455 Annals Am. Acad. Political & Soc. Sci. 150 (1981), C. Loftin D. McDowell, The Deterrent Effects of the Florida Felony Firearm Law, 75 J. Crim. L. & Crimonology 250 (1984), C. Loftin et al., Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control, 17 L. & Soc'y Rev. 287 (1983), J. Ludwig & S. Raphael, Prison Sentence Enhancements: The Case of Protect Exile, in Evaluating Gun Policy: Effects on Crime & Violence (J. Ludwig & P.G. Cook, eds., 2003).

Scientists have also examined whether the heightened threat of imprisonment that attends coming under the jurisdiction of the adult courts at the age of majority has any deterrent effect. D.S. Lee & J. McCrary, The Deterrent Effect of Prison: Dynamic Theory and Evidence (2009), R. Hjalmarsson, Crime and Expected Punishment: Changes in Perceptions at the Age of Criminal Majority, 11 Am. L. & Recon. Rev. 209 (2009). Finally, scientists have examined the deterrent effect of certain, swift, and short periods of confinement (1-2 days) for probation violations. M.A.R. Kleinman, When Brute Force Fails: How to Have Less Crime and Less Punishment (2009); A. Hawken & M. Kleiman, Managing

Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE (2009), A. Hawken, Behavioral Triage: A New Model for Identifying and Treating Substance-abusing Offenders, 3 J. Drug Pol'y Analysis 1 (2010).

The upshot of these studies on deterrence, as outlined by the heralded National Academies of Sciences report on mass incarceration, is that the relationship between sentence length and crime rate is nonlinear, but rather decreases in slope as the sentence length increases. National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 138-39 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014). That means that as sentences get longer, the deterrent effect of extending the sentence decreases—for each additional month or year added to a long sentence, the marginal increased deterrent value of that additional month or year becomes less and less, approaching zero. Id. at 139. The report concluded that "increasing already long sentences has no material deterrent effect." Id. at 140.

Here, Mr. Simmons is already serving a twenty-year NERA sentence for the robbery. To assess whether a consecutive certain persons offense sentence is necessary for deterrence, we must start from the deterrent value of the twenty-year sentence. This is by far the longest sentence Mr. Simmons has ever served in his life; previously, the longest sentence Mr. Simmons had served in custody was a six year sentence with three years of parole ineligibility on Essex Indictment

98-09-3830-I. (PSR10) Thus, this court must inquire whether imposing the sentence on the certain persons offense consecutive to the sentence on the robbery would further deter Mr. Simmons from committing future crimes. While the social science presented above does not yield a formula for determining the marginal increase in deterrence for each additional year, depending on the length of the initial sentence, the social science does lead to the conclusion that Mr. Simmons's twenty-year sentence qualifies as a long sentence and increasing it would have no material deterrent effect. The Growth of Incarceration in the United States at 140. Accordingly, the sentencing goal of deterrence cannot and does not support the imposition of a consecutive sentence.

2. Because the age-crime curve demonstrates that the risk of recidivism declines dramatically as age increases and is exceptionally low at the age that Mr. Simmons will complete his twenty-year NERA sentence, the goal of incapacitation cannot justify imposing a consecutive sentence.

The sentencing goal of incapacitation is held to further public safety by reducing crime through the physical separation of convicted offenders from the rest of society. National Research Council, The Growth of Incarceration at 131, 140. While measuring the precise impact of increased incarceration on the reduction of crime is an area with significant disagreement, see id. at 140-41, this Court need not resolve that disagreement here. Instead, this Court should look at whether the goal of incapacitation would be furthered by keeping Mr. Simmons incarcerated

beyond the age of fifty-eight, which is how old he will be when he completes his previously imposed twenty-year sentence.

Studies of the rate of criminal offending show that it is not constant over the life span of a person, but rather peaks early on and then "declines sharply with age." Id. at 143-45. Our Supreme Court has recognized studies showing "that as individuals age, their propensity to commit crime decreases and, in particular, that elderly individuals released from prison tend to recidivate at extremely low rates." Acoli v. New Jersey State Parole Bd., 250 N.J. 431, 469 (2022). While the defendant's relevant age in Acoli was seventy-nine years old, the studies cited by Acoli all demonstrate the "age-crime curve" that crime decreases as age increases. See ibid. (citing National Research Council, The Growth of Incarceration at 155; United States Sentencing Commission, The Effects of Aging on Recidivism Among Federal Offenders 3 (Dec. 2017) (finding that that "[o]lder offenders were substantially less likely than younger offenders to recidivate following release"); N.J. Dep't of Corrections, State Parole Bd., Juv. Just. Comm'n, Release Outcome 2007: A Three-Year Follow-Up 15 ("Multivariate statistics indicated that age was inversely related to the odds of rearrest; for every one-year increase in age, the offender's odds of a new arrest decreased by a factor of .95.")).

Many studies in addition to those cited by Acoli have observed the same phenomenon and reached the same conclusion. See, e.g., Gary Sweeten, Alex R.

Piquero, & Laurence Steinberg, Age and the Explanation of Crime, Revisited, 42 J. Youth Adolescence 921, 921 (2013); Farrington, Age and Crime; T.E. Moffitt, "Life-Course-Persistent" and "Adolescence-Limited" Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674 (1993); Alex R. Piquero, David P. Farrington, & Alfred Blumstein, The Criminal Career Paradigm, 30 Crime & Jus. 359 (2003); Alex R. Piquero, David P. Farrington, & Alfred Blumstein, Key Issues in Criminal Careers Research: New Analysis from the Cambridge Study In Delinquent Development (2007). Accordingly, "offending rates of prison inmates . . . for the period immediately prior to their incarceration will tend to substantially overstate what their future offending rate will be, especially in their middle age and beyond." National Research Council, The Growth of Incarceration at 145.

The age-crime curve holds true when looking specifically at rates of recidivism. In other words, "recidivism rates decline markedly with age." Id. at 155. In a 2017 study, the United States Sentencing Commission found that defendants released at age twenty-one to twenty-four had a 38.6 percent rate of re-incarceration, but that defendants released at age fifty-five to fifty-nine years had only a 9 percent rate of re-incarceration and defendants released at ages sixty to sixty-four had only an 8.8 percent rate of re-incarceration. The Effects of Aging on Recidivism Among Federal Offenders at 23. Thus, "because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison

sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation." National Research Council, The Growth of Incarceration at 155.

Mr. Simmons's twenty-year NERA sentence guarantees his incarceration until the age of fifty-eight. The risk of recidivism at age fifty-eight is much smaller than the risk of recidivism at the age when Mr. Simmons committed the offense, and the risk of recidivism does not discernably change between age fifty-eight and age sixty. Because the risk that Mr. Simmons will recidivate is very low at both ages fifty-eight and sixty, and is virtually indistinguishable between those two ages, this Court should find that the sentencing goal of incapacitation does not justify imposing a consecutive sentence.

3. The sentencing court's fairness analysis was based on erroneous and impermissible considerations and failed to adequately address Defendant's arguments regarding deterrence and incapacitation.

Despite the robust social science on deterrence presented by Mr. Simmons, the sentencing court entirely failed to address deterrence in its fairness assessment. (Da50-51) The court rejected Mr. Simmons's argument regarding incapacitation without assessing the social science presented (Da50-51); instead, the court relied on numerous dismissed charges, again violating K.S.

First, the Court referenced a description of a 1998 charge under Indictment

98-09-3830-I that appears on page 8 of Mr. Simmons's Presentence Report, alleging that Mr. Simmons "brandish[ed] a gun, approached his former coworker demanding the coworker hand over the keys to his car," and "fractured his former coworker's nose and left him with facial bruising." (Da50; PSR8) The court noted that Mr. Simmons had been charged with carjacking under that indictment. (Da50) However, the PSR indicates that the carjacking charge was dismissed and that Mr. Simmons was only convicted of second-degree robbery under that indictment. (PSR10) The description of this crime was likely taken from a police report rather than defendant's plea colloquy, and as such it does not constitute "undisputed facts of record or facts found at a hearing." K.S., 220 N.J. at 199. In the absence of reviewing Mr. Simmons's actual plea colloquy for that case, the court was permitted to consider only that Mr. Simmons was convicted for second-degree robbery.

The court also considered that Mr. Simmons "has been arrested for multiple robberies and assaults." (Da50) While this is a true statement, Mr. Simmons has never been convicted of a single count of assault, as they were all dismissed. (PSR7-12) Additionally, the majority of Mr. Simmons's prior robbery charges were dismissed or downgraded; prior to the conviction for first-degree robbery under Indictment No. 10-6-1539-I, Mr. Simmons had only one prior robbery conviction—for second-degree robbery under Indictment

98-09-3830-I. This is yet another instance of the court impermissibly considering dismissed charges in violation of K.S.

Because the sentencing court disregarded the clearly established social science of deterrence and incapacitation and instead impermissibly relied on dismissed charges, this court must reverse and remand for resentencing.

CONCLUSION

For the aforementioned reasons, this Court should reverse the judgment of the trial court and remand, directing the trial court to order that the certain persons sentence under Indictment 10-6-1540-I be served concurrently to the sentence under Indictment 10-6-1539-I.

Respectfully submitted,

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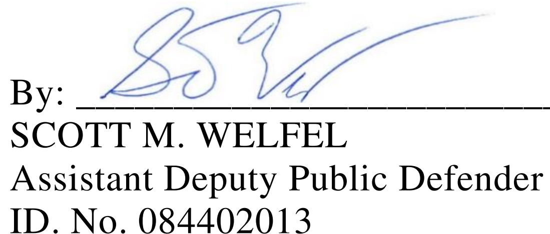

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Date: December 31, 2023

Superior Court of New Jersey – Appellate Division

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Respondent,	:	DOCKET NO. A-1867-22
v.	:	
VAUGHN SIMMONS,	:	CRIMINAL ACTION
Defendant-Appellant.	:	

On Appeal from an Order
of the Superior Court of
New Jersey, Law Division,
Essex County.

Sat Below:
Hon. Mark S. Ali, J.S.C.,
Hon. Joseph V. Isabella, J.S.C.,
and a Jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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Table of Contents

Counter-Statement of Procedural History 1

Counter-Statement of Facts 9

Legal Argument 11

Point I

The sentencing court properly sentenced defendant and this Court should affirm defendant's sentence........ 11

A. The sentencing court properly found that factors 3A and 3C applied........ 12

B. It was proper for the sentencing court to consider the legislative history of the statute, defendant's stated purpose of the statute is inaccurate, and the court below did not indicate consecutive sentences are necessary or required when sentencing a defendant under the statute 17

C. The sentencing court did not rely solely on the justification that there should be no free crimes in order to impose consecutive sentences 20

D. The sentencing court's overall fairness assessment was thorough and proper 23

Conclusion 26

FILED, Clerk of the Appellate Division, April 22, 2024, **A-001867-22**

Index to Appendix

State v. Flowers, No. A-2401-09T3, 2013 N.J. Super. Unpub. LEXIS 1962 (App. Div. Aug. 5, 2013) Pa1-9

Table of Authorities

Cases

State v. Baylass, 114 N.J. 169 (1989) 14

State v. Carey, 168 N.J. 413 (2001) 14, 15

State v. Cuff, 239 N.J. 321 (2019) 15, 22

State v. Harper, 153 N.J. Super. 86, 89 (App. Div. 1977)............................ 20

State v. Harris, 466 N.J. Super 502 (App. Div. 2021) 25

State v. Jones, 198 N.J. Super. 553 (App. Div. 1985) 18, 19

State v. K.S., 220 N.J. 190 (2015) 15, 16

State v. Liepe, 239 N.J. 359, 377-78 (2019) 16

State v. Lopez, 417 N.J. Super 34 (App. Div. 2010) 21

State v. Molina, 168 N.J. 436, 442-43 (2001) 16

State v. Yarbough, 100 N.J. 627 (1985) 4, 8, 13, 23

State v. Torres, 246 N.J. 246 (2021) 6, 14, 15, 23

State v. Wright, 155 N.J. Super. 549 (App. Div. 1978) 19

Statutes

N.J.S.A. 2A:151-41 19

N.J.S.A. 2C:39-7 8

N.J.S.A. 2C:44-5a 14

FILED, Clerk of the Appellate Division, April 22, 2024, **A-001867-22**

Counter-Statement of Procedural History

In 2010, an Essex County Grand Jury issued Indictment No. 10-06-1539-I, charging Vaughn Simmons ("defendant") with two counts of first-degree robbery; two counts of fourth-degree aggravated assault with a firearm; two counts of second-degree unlawful possession of a handgun; and two counts of second-degree possession of a handgun for an unlawful purpose. (Da12). Counts one through four arose from a robbery of a Family Dollar store in Newark on December 3, 2009. (Da12). Counts five through eight stemmed from a robbery of an AutoZone store on December 5, 2009. (Da12).

Defendant also was charged under Indictment No. 10-06-1540 with two counts of second-degree unlawful possession of a firearm by a person convicted of certain crimes. (Da12). The State agreed to sever the charges related to the robbery of the AutoZone store, and defendant was tried on the Family Dollar store charges: first on the charges in Indictment No. 10-06-1539, and thereafter on the charges in Indictment No. 10-06-1540. (Da12).

Defendant was found guilty on all counts of Indictment No. 10-06-1539. (Da13). Following the separate trial for the charge in Indictment No. 10-06-1540, the jury also found defendant guilty of possession of a weapon by a person previously convicted of certain crimes. (Da13).

Defendant was sentenced by the Honorable Joseph Isabella, J.S.C., on February 3, 2012. (1T).[1] The State moved for a discretionary extended term under the persistent offender statute. The court found that the statute clearly applied, but stated, "I'm going to show you some mercy and even though you've given up on yourself, I will not give up on you as a human being." (1T 16:18-17:13).

The court found aggravating factors three, six, and nine, and no mitigating factors. (1T 15:10-19). On Indictment No. 10-06-1539-I, the court sentenced defendant on count one to twenty years with seventeen years parole ineligibility pursuant to the No Early Release Act. (1T 17:14-21). The court merged counts two and four with count one and imposed a concurrent ten-year term on count three. (1T 17:24-18:13). On Indictment No. 10-06-1540, which was the certain persons not to possess a weapon, the court sentenced defendant to a consecutive term of ten years with five years parole ineligibility. (1T 18:14-19).

On appeal, this Court affirmed defendant's convictions and sentence, but remanded the case for the trial court to reconsider its determination that the ten-year sentence imposed on Indictment No. 10-06-1540 was to be served consecutively to the sentences imposed on Indictment No. 10-06-1539; the

[1] The State adopts defendant's transcript designation codes at (Db1 n.1).

Court noted that if the court decided again that the sentences should run consecutively, the court should set forth its reasons as required by State v. Yarbough, 100 N.J. 627 (1985). (Da18).

At the resentencing, Judge Isabella again ran the certain persons offense consecutive to the robbery, stating:

> I ran the possession of a weapon concurrent to the first degree robbery because the weapon was used in the robbery and it should run concurrent. However, a certain person is a separate and distinct offense apart from possession of a weapon. Its own distinctive element of having a previous conviction, a felony conviction, which would not allow a person to have a gun. And that being a separate crime, pursuant to State versus Yarborough,[sic] separate crime, separate instances deserve consecutive sentences which is why I imposed it.
>
> [(2T 5:4-14).]

The court noted defendant's prior convictions, and that defendant is a "serial larcenist at best and sometimes he uses violence or force for those robberies, sometimes he doesn't." (2T 5:22-24). The court continued, "[b]ut the bottom line is under the circumstances and based upon his prior record and the fact that certain persons is a separate and distinct crime apart from possession of a weapon, I ran it consecutive." (2T 5:24-6:3).

On appeal on the Sentencing Oral Argument calendar, this Court again remanded the case for a resentencing to conduct an analysis to justify

consecutive sentences because "the court did not provide adequate findings to support imposition of consecutive terms." (Da27).

At the second remand, the Honorable Mark S. Ali, J.S.C., resentenced defendant. (4T). The court started its analysis by stating the standard and factors under Yarbough. (4T 16:3-17:11). The court conducted an analysis, and looking at factor 3A, whether the crimes and their objectives are predominantly independent of one another, stated, "[t]his could be argued both ways, but if the possession of the gun was to fulfill the robbery, then it would be the same." (4T 17:14-19). The court then found the other facts relating to the crime under factor 3 did not apply. (4T 17:20-18:4). The court then went "back to part one, there should be no free crimes in a system for which the punishment shall fit the crime." (4T 18:5-7).

The court then stated, "the legislative purpose of the certain persons not to have weapons, 2C:39-7, was to create [an] enhanced penalty for those who had certain convictions -- and it's not every indictable conviction, but certain convictions, not to possess a firearm." (4T 18:8-12). The court reasoned that while there are circumstances where it would be appropriate to run the sentence concurrently, the court noted that "if I didn't rule in this manner for this particular case, for this particular crime, it would render that statute -- that

is the certain persons to have a weapon, moot," and found a consecutive sentence was appropriate. (4T 19:15-16; 20:10-13).

On appeal, after plenary briefing, this Court remanded for resentencing, stating, "[w]e reverse and remand for resentencing because the court did not explain whether factor 3A applied, and if so, the weight it was given. On remand, the court shall identify whether 3A applies, and also include comparisons to the factual record of this case, and provide '[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant' pursuant to Torres, 246 N.J. [246,] 268 [(2021)]." (Da43).

Judge Ali issued a written order and opinion on February 15, 2023, imposing sentence. (Da44-52). In this comprehensive opinion, Judge Ali concluded:

> [T]he court applied Yarbough guideline 3A to its analysis when determining the Defendant's sentence and found 3A so compelling and heavily weighted as to support consecutive sentencing of the certain persons offense. The court also finds, for the foregoing reasons, that, due to the Defendant's criminal history, the particular facts of this case, and the legislative intent behind the certain persons statute, the aggregate thirty-year sentence is fair to the interests of justice and to the Defendant.
>
> [(Da51).]

The sentencing court first found that guideline 3A of Yarbough, that "the crimes and their objectives [are] predominantly independent from one another,

applied to the present circumstances. (Da46). The court went through an extensive analysis of its reasons for applying factor 3A noting "the certain persons crime is inherently distinct and separate from the robbery itself, and the objectives are distinct and separate from one another – the objective for the former is general and that for the latter is subjective." (Da46). The court gave that factor "hefty weight" in support of consecutive sentencing. (Da46).

The court next went through the facts of the case, specifically finding, "[n]othing in the record suggests that Defendant obtained the handgun in order to carry out a robbery at the Family Dollar." (Da47). The court stated:

> [T]he facts here suggest the opposite. He entered the store, and attempted to carry the entire cash register drawer and its contents out of the store. He did not brandish the gun in order to wrest control of the cash register drawer. He did not pull it out when the cashier slapped his hands off the cash register. He did not pull out the gun when the security guard wrestled him to the floor. The [d]efendant only pulled out the gun after he had fallen to the floor and the store manager called the police. The chain of events suggests that the [d]efendant intended to grab the drawer and run out of the store with it, but only after store personnel intervened and had wrestled him onto the floor did he resort to brandishing the gun. And, even though the facts suggest he did not intend to use the gun to carry out this particular robbery, the [d]efendant was guilty of a certain persons offense before he even entered the store.
>
> [(Da47).]

Furthermore, the court found that defendant was guilty of a certain persons offense "the moment he obtained this handgun," and because that occurred at an unknown time, "it cannot be assumed he obtained it in order to rob the Family Dollar." (Da47). Finally, the court held that, "Again, only after struggling with the cashier and being restrained by another employee did [d]efendant brandish his handgun in order to flee the premises," and so, "[d]efendant possessed the gun with a general objective to have on his person when committing robberies, but not with the specific objective in mind that he would use it to rob the Family Dollar Store – the robbery for which he was found guilty at trial." (Da48).

Next, the court found that the facts also supported a finding of factor 3C, "the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." Yarbough, 100 N.J. at 643-44. The court concluded that defendant committed the certain persons crime at the time he obtained the handgun, knowing he was prohibited from possessing one as a convicted felon, and proceeding to carry it on his person, nonetheless. (Da48).

The court then considered the legislative history of N.J.S.A. 2C:39-7, finding that the legislative intent behind the certain persons statute viewed in the light of defendant's criminal history and the facts of this case, weighs in

favor of consecutive sentences. (Da49). The court properly noted "[t]he statute and case law show a legislative will to a) deter convicted felons from obtaining and possessing firearms and b) penalize those who would knowingly obtain and possess a firearm in defiance of their certain persons status." (Da49-50).

Finally, the court noted it did not find defendant's argument that data suggests if he were to be resentenced concurrently, he would get out of prison around age fifty-eight – an age bracket correlated with a general downturn in recidivism unpersuasive because (1) defendant was 40 when he committed this offense, and (2) has a criminal record stretching back to 1983. (Da50). The court stated bluntly, "[t]he specific content contained within the Defendant's record is alarming to the court." (Da50).

The court's opinion held that the previous sentence stands as imposed on March 2, 2018. (Da52). Defendant appealed and this case was scheduled for the October 2023 Sentencing Oral Argument Calendar. (Da52-57). On November 13, 2023, the panel issued an order moving this case to the plenary calendar for briefing. (Da58).

Counter-Statement of Facts

This Court's opinion affirming defendant's conviction sets forth the facts of the robbery as follows:

> [T]he State presented evidence which established that on December 3, 2009, an African-American male entered the Family Dollar store in Newark. He stood near the entrance, complained that the lines were too long, and left the store soon after. Later that day, at around 5:30 p.m., F.M., the store's manager, observed that the individual who entered the store earlier had returned and was attempting to take one of the cash registers.
>
> R.H., the store's security guard, attempted to stop the man from carrying away the register. R.H. and the perpetrator fell to the floor. F.M. pressed the store's 'panic button' alarm. When he turned around, F.M. observed that the perpetrator had gotten up from the ground and was pointing a handgun at him. F.M. turned again, and the man fled the store with the register. He had taken $125.
>
> F.M. immediately called 9-1-1 and provided a description of the robber. He described the perpetrator as an African-American male, between 5 feet and 7 or 8 inches, who weighed approximately 140 to 150 pounds. At trial, F.M. also said the perpetrator had braided hair and had been wearing a black Yankees hat.
>
> [...]
>
> On December 16, 2009, an officer showed F.M. an array of photos for purposes of identifying the perpetrator of the robbery. The officer instructed F.M. that he need not pick a photograph, as the perpetrator may not be in the photo array. F.M. positively

identified defendant as the man who robbed the store, and signed the back of the photograph with the date. At trial, F.M. identified defendant as the person who committed the robbery on December 3, 2009, and pointed the handgun at him.

On the day of the robbery, R.H. also provided the police with a description of the perpetrator. She described the robber as an African-American male, who was approximately 5 feet, 9 inches tall, and weighed about 150 pounds. R.H. said he had braided hair, and was wearing a short sleeved-shirt, a vest, and a Yankees cap. R.H. also was shown a photo array, but she was unable to identify the perpetrator. However, on December 26, 2009, R.H. identified defendant from a different photo array, which was shown to her by another officer. At trial, R.H. identified defendant as the man who robbed the store.

[(Da12).]

Legal Argument

Point I

The sentencing court properly sentenced defendant and this Court should affirm defendant's sentence.

This is the third time defendant has been resentenced, and again the court ordered the Certain Persons Not to Possess Firearms under Indictment No. 10-06-1540 to run consecutive to the sentence under Indictment No. 10-06-1539. Two separate judges have presided over defendant's sentencing, and both of those judges have found it proper to impose consecutive sentences. After hearing argument prior the last resentencing, Judge Ali issued a comprehensive and thorough opinion which laid out the court's reasons for again imposing a consecutive sentence. Judge Ali found that because Yarbough guidelines 3A and 3C applied, and based on the legislative history behind the statute, defendant's criminal history, and the facts of this case, the aggregate thirty-year sentence is fair to the interests of justice and to defendant.

Defendant takes issue with the entirety of Judge Ali's decision and asks this Court to now order the imposition of concurrent sentences for a fourth time. Alternatively, defendant asks this Court to reverse and remand his sentence by asserting the sentencing court's overall fairness evaluation was flawed. Both arguments lack merit, and because Judge Ali followed this

Court's order to identify whether Yarbough factor 3A applies, include comparisons to the factual record of this case, and provide an evaluation of the overall fairness of the sentence pursuant to State v. Torres, this Court should affirm defendant's sentence.

A. The sentencing court properly found that factors 3A and 3C applied.

The sentencing court properly found that factor 3A, whether the crimes and their objectives are predominantly independent of one another, and factor 3C, the crimes were committed at different times or separate places, rather than being committed so closely in time as to indicate a single period of abhorrent behavior, applied in this case. See (Da44-51); Yarbough, 100 N.J. at 643-45.

The Court in Yarbough identified the following factors for sentencing courts to consider as a guide when determining whether to make sentences concurrent or consecutive: (1) there can be no free crimes in a system for which the punishment shall fit the crime; (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision; (3) some reasons to be considered by the sentencing court should include facts relating to the crimes; (4) there should be no double counting of aggravating factors; (5) and, successive terms for the same offense should not ordinarily be equal to the punishment for the first offense. 100 N.J.

at 643-45. Following the decision in Yarbough, the Legislature amended N.J.S.A. 2C:44-5a to provide that "[t]here shall be no overall outer limit on the cumulation of consecutive sentences," thereby eliminating guideline number six. State v. Carey, 168 N.J. 413, 423 (2001) (citing L. 1993, c. 223, § 1).

Factors two, four, and five do not relate directly to the facts of the offense and do not assist the court assessing whether to impose consecutive or concurrent sentences. See Carey, 168 N.J. at 423, ("the second, fourth, fifth, and sixth guidelines . . . establish certain procedural requirements.").

Factor three identifies five sub-factors that "generally concentrate on such considerations as the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and whether they involve numerous or separate victims." State v. Baylass, 114 N.J. 169, 180 (1989). "[T]he five 'facts relating to the crimes' contained in Yarbough's third guideline should be applied qualitatively, not quantitatively." Carey, 168 N.J. at 427. Consequently, it follows that a sentencing court may impose consecutive sentences "even though a majority of the Yarbough factors support concurrent sentences." Id. at 427-28.

"The Yarbough criteria were adopted to channel [a court's] discretion, not to withdraw it." Torres, 246 N.J. at 269. "This Court has made clear that while Yarbough guides a court's sentencing decision, it does not control it."

Ibid. See also Carey, 168 N.J. at 427 ("We begin our analysis by stressing that the Yarbough guidelines are just that - guidelines."). "Instead, a 'sentencing court's determination regarding consecutive and concurrent terms ... turns on a careful evaluation of the specific case.'" Ibid. (quoting State v. Liepe, 239 N.J. 359, 377-78 (2019)).

The Yarbough factors "are qualitative, not quantitative; applying them involves more than merely counting the factors favoring each alternative outcome." State v. Cuff, 239 N.J. 321, 348 (2019) (citing State v. Molina, 168 N.J. 436, 442-43 (2001); Carey, 168 N.J. at 427-28).

The court properly found that factors 3A, and 3C applied and relied on appropriate facts in its opinion. Defendant contends that the court relied on a dismissed charge and speculation, rather than facts found by the jury, to find factor 3A and 3C. This claim is meritless.

First, the case cited by defendant in support of his conclusion that the court improperly relied on a dismissed charge is State v. K.S., 220 N.J. 190 (2015). The Court in that case stated, "we hold that when no such undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose." Id. at 199. However, that case is inapplicable here because the Court was considering only:

> [W]hether it was proper for the Somerset County Prosecutor to rely upon adult criminal charges that had

> been dismissed and juvenile charges of possession of a weapon, assault, fighting, and harassment that had been diverted and dismissed in rejecting defendant's application for admission into the Somerset County Pretrial Intervention Program (PTI).
>
> [Id. at 194.]

Defendant's argument that K.S. signifies the sentencing court improperly relied on dismissed conduct fails because that case does not apply in sentencing matters.

Even so, the court did not rely on a dismissed charge to find factor 3A or 3C. When mentioning the AutoZone robbery, the court only noted that, "[i]n fact, two days after the Family Dollar incident Defendant was alleged to have robbed an Autozone in a similar manner," and then proceeded to mention how defendant only brandished the handgun only after struggling with the employees. (Da47).

Before this brief comment, the sentencing court went over the facts of the case, specifically finding, "[n]othing in the record suggests that Defendant obtained the handgun in order to carry out a robbery at the Family Dollar." (Da47). The court stated the facts of the case suggested the opposite findings, in part because "[h]e entered the store, and attempted to carry the entire cash register drawer and its contents out of the store. He did not brandish the gun in order to wrest control of the cash register drawer." (Da47). He did not pull out

the gun when the cashier slapped his hands off the cash register or when the security guard wrestled him to the floor. Defendant only pulled out the gun after he had fallen to the floor, and the store manager called the police. "The chain of events suggests that the [d]efendant intended to grab the drawer and run out of the store with it, but only after store personnel intervened and had wrestled him onto the floor did he resort to brandishing the gun." (Da47).

The court used these facts, and the fact that "[d]efendant was guilty of a certain persons offense the moment he obtained this handgun," to determine that factor 3A and 3C applied.

Furthermore, the court did not rely on speculation to find that defendant did not intend to use the gun to carry out this particular robbery as defendant argued. As stated above, the court relied on the facts of this case to make this conclusion, and that "[d]efendant was guilty of a certain persons offense before he even entered the store." (Da47). Additionally, the court found that because "certain persons is a separate and distinct statutory crime from robbery, it follows that [d]efendant committed this crime at the time he obtained the handgun, prior to the Family Dollar robbery." (Da48).

B. It was proper for the sentencing court to consider the legislative history of the statute, defendant's stated purpose of the statute is inaccurate, and the court below did not indicate consecutive sentences are necessary or required when sentencing a defendant under the statute.

First, it should be noted that it was not "the court's true motivation" to impose consecutive sentences because it was concerned that to do otherwise would render the statute meaningless, as defendant claims. (Db21). Although the court made that comment, as stated above, it gave a thorough and comprehensive opinion laying out its reasons for imposing consecutive sentences. Defendant cannot point to small instances in the transcript to belie that fact.

Moreover, the court did not improperly rely on the legislative intent behind the certain persons statute as the sole basis for imposing consecutive sentences. The intent behind the statute was only one piece of the court's opinion and so was not improperly considered. (Da44-51).

Defendant's argument is that the purpose of the statute is to "(1) criminalize and (2) punish more harshly mere possession of a firearm by a defendant with a predicate conviction." (Db27). He argues the penalty is enhanced by increasing the mandatory minimum period of parole ineligibility from 42 months to five years. Reviewing case law, defendant's claims are inaccurate.

In State v. Jones, this Court found the "clear legislative purpose" of the certain persons statute is "to prevent possession of dangerous weapons by previously convicted persons." 198 N.J. Super. 553, 565 (App. Div. 1985). The Court also stated, "the clear statutory purpose is to 'deter those previously convicted of serious crimes from possessing dangerous weapons.'" Id. at 563 (citing State v. Harper, 153 N.J. Super. 86, 89 (App. Div. 1977)). The courts do not place any emphasis on the possession element of the offense.

Additionally, in State v. Wright, while addressing previous analogous statutes, the Court indicated, "[t]here is a strong legislative policy in this State with respect to gun control, designed to protect the public, which places restrictions on those who may carry such weapons and is intended to prevent criminal and other unfit elements from acquiring and possessing them." 155 N.J. Super. 549, 553 (App. Div. 1978). Additionally, when discussing whether to merge the certain persons offense with the weapons possession conviction, the Court in Wright stated, "[t]he Legislature could not have intended that a convicted felon who possesses or carries an operable gun in a place not excepted from the permit requirements of N.J.S.A. 2A:151-41(a), be treated the same as a defendant who is not such a felon." Id. at 555.

The sentencing court below pointed to State v. Flowers to demonstrate "[t]he statute and case law show a legislative will to a) deter convicted felons

from obtaining and possessing firearms and b) penalize those who would knowingly obtain and possess a firearm in defiance of their certain persons status." (Da49-50). The court chose this case in order to highlight that this Court upheld an imposition of a consecutive sentence for a certain persons offense in a factually similar case.

In Flowers, the defendant and his codefendant robbed a deli, brandished his handgun at the deli employees, and hit an employee on the head with that handgun. No. A-2401-09T3, 2013 N.J. Super. Unpub. LEXIS 1962, at *2 (App. Div. Aug. 5, 2013), certif. denied, 217 N.J. 588 (2014).The defendant was sentenced to an extended term of 35 years for the robbery charged pursuant to the No Early Release Act, a concurrent term of five years for the unlawful possession of a weapon charge, and a consecutive ten-year term with five years parole ineligibility for the certain persons possessing firearm charge. Ibid.

Defendant complains that the sentencing court "did not provide Flowers's explanation for claiming that concurrent sentences would frustrate the legislative intent." (Db22). However, the Court in Flowers very clearly noted:

> The judge's reasoning for [imposing consecutive sentences] was wholly appropriate. She noted that the crime was a separate offense from the robbery and served a different legislative purpose. The judge's

> decision was in accord with the principles articulated in Yarbough, supra, 100 N.J. at 643-44. The nature of the certain persons crime itself necessitates a prior conviction and is intended as a further deterrent to criminal weapons possession.
>
> [Id. at *19 (emphasis added).]

Flowers reveals the proper purpose of the statute, clearly and simply, and showcases the imposition of a consecutive sentence in a factually similar case.[2]

Finally, while it is true that there is no statutory mandate that the court impose a consecutive sentence for a certain persons conviction, State v. Lopez, 417 N.J. Super 34, 37 n.2 (App. Div. 2010), the sentencing court did not suggest there was. The lower court did not indicate a consecutive sentence was necessary to fulfill the Legislative purpose behind the certain persons statute. The court only used the purpose of the statute as one consideration in its decision to reimpose a consecutive sentence.

C. The sentencing court did not rely solely on the justification that there should be no free crimes in order to impose consecutive sentences.

Defendant asserts the sentencing court erred because it ordered consecutive sentences based solely on the rationale that there be "no free crimes." (Db31). He argues it is impermissible for a trial court to impose

[2] The State respectfully reminds this Court that it charged the sentencing court to, in part, "include comparisons to the factual record of this case," during the remanded resentencing. The court used Flowers to provide that comparison for this Court. (Da43).

consecutive sentences based on the "no free crimes" guideline alone. (Db31). However, the court did not simply rely on the "no free crimes" provision under Yarbough. The court considered the "no free crimes" provision, how all the Yarbough factors applied in this particular case, defendant's criminal history, and the purpose behind the certain persons statute.

Defendant focuses on the sentencing court's use of the phrase "separate and distinct," but the court uses that phrase when discussing whether factors 3A and 3C apply and has nothing to do with the "no free crimes" determination. See (Da46) "This guideline is met because the certain persons crime is inherently distinct and separate from the robbery itself."); (Da48) ("Going back to the separate and distinct offense, the facts also support a finding that the case-at-bar meets Yarbough guideline 3C.")).

Defendant points to State v. Cuff to argue that "the sentencing court's 'no free crimes' and 'separate and distinct' rationales are identical to those rejected by the Supreme Court." (Db33). Defendant misconstrues the holding in that case. The Supreme Court held that in one part of the defendant's sentence, the court had failed to satisfy Yarbough because "[t]he court's findings in support of that consecutive sentence were limited to a comment that '[t]he elements of this offense are separate and distinct from the charges

of kidnapping. The defendant possessed the weapon and did not have a permit for it, and there can be no free crimes.'" 239 N.J. at 350-51 (emphasis added).

The Court remanded for resentencing with respect to those offenses because the court below only mentioned that the elements are separate and distinct and there can be no free crimes, indicating that this rationale, without more, is not sufficient. That is not the case here. Again, the sentencing court's opinion was thorough and sufficiently laid out varied and proper reasons for imposing a consecutive sentence.

Based on the court's statements, it is clear that more than the "no free crimes" factor was considered when imposing sentence. While the New Jersey Supreme Court created the Yarbough factors to achieve the Code's goal "that there be a predictable degree of uniformity in sentencing," 100 N.J. at 630, it "did not supplant the 'long-standing common-law principle' that 'sentencing courts have discretion to impose consecutive sentences in appropriate cases.'" Torres, 246 N.J. at 269 (quoting State in Interest of T.B., 134 N.J. 382, 385 (1993)). This is such a case.

D. The sentencing court's overall fairness assessment was thorough and proper.[3]

The sentencing court followed this Court's order to "provide '[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant' pursuant to Torres, 246 N.J. at 268. Defendant mistakenly quotes a subpoint heading in the sentencing court's opinion as the statement of fairness required by Torres.[4] In fact, the court's overall fairness evaluation was stated in the opinion's conclusion:

> [T]he court applied Yarbough guideline 3A to its analysis when determining the Defendant's sentence and found 3A so compelling and heavily weighted as to support consecutive sentencing of the certain persons offense. The court also finds, for the foregoing reasons, that, due to the Defendant's criminal history, the particular facts of this case, and the legislative intent behind the certain persons statute, the aggregate thirty-year sentence is fair to the interests of justice and to the Defendant.
>
> [(Da51) (emphasis added)]

This statement clearly is consistent with Torres, and adequately explains the overall fairness of defendant's sentence.

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[3] This subpoint responds to subpoint E of defendant's brief.

[4] Defendant stated, "[i]n its fairness assessment, the sentencing court concluded that the consecutive sentence was fair 'was fair because Defendant's argument of low recidivism is not persuasive and the gun possession charges had already merged.'" (Da50)

Furthermore, the court adequately addressed defendant's argument that data suggests if he were to be resentenced concurrently, he would get out of prison around age fifty-eight – an age bracket correlated with a general downturn in recidivism. The sentencing court found this argument unpersuasive and gave numerous reasons why he came to that conclusion.

The court went through defendant's lengthy criminal record, calling it "alarming," and indicating "defendant never went more than six years without obtaining new charges, with the gap in new offenses mainly attributable to his having spent the majority of that time incarcerated." (Da50). The court also considered that defendant was forty when he committed this offense. (Da50). Finally, the court concluded, "[b]ecause the [d]efendant was not a youthful offender at the time of the Family Dollar robbery and because his record suggests persistent and consistent criminality, much of it violent, the court does not find the Defendant's argument against the likelihood of recidivism persuasive." (Da50-51). This court must defer to that finding. See State v. Harris, 466 N.J. Super 502, 553 (App. Div. 2021) ("we generally defer to a sentencing court's findings of fact…").

Finally, the court did not impermissibly rely on dismissed charges in its opinion. The court noted defendant's record includes seven juvenile adjudications and twenty adult arrests resulting in eight indictable convictions

including the two at issue. Additionally, he has two disorderly persons convictions and a violation of probation. (Da50).

State v. K.S. does not apply here as it was a case concerning a denied application for Pretrial Intervention. Defendant argues that the court should not have referred to the circumstances of his 1998 conviction, because he was "only convicted of second-degree robbery under that indictment," instead of the originally charged carjacking. Clearly, even if the prohibition in K.S. applied here, this is not dismissed conduct.

Conclusion

For the foregoing reasons and authorities cited in support thereof, the State respectfully requests that this Court affirm defendant's judgement of conviction in all respects.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1867-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Final Order Of The Superior Court of New Jersey,
v.	:	Law Division, Essex Vicinage
VAUGHN SIMMONS,	:	
		Indictment No. 10-06-1540-I
	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. Mark S. Ali, J.S.C., Hon. Joseph V. Isabella, J.S.C., and a Jury

Your Honors:

This reply letter-brief and appendix are submitted on behalf of Defendant in lieu of a formal brief pursuant to R. 2:6-2(b).

FILED, Clerk of the Appellate Division, June 28, 2024, **A-001867-22**

TABLE OF CONTENTS

LEGAL ARGUMENT 1

POINT I

BECAUSE THE SENTENCING COURT'S ANALYSIS OF THE STATE V. YARBOUGH FACTORS WAS IMPERMISSIBLY BASED ON DISMISSED CHARGES AND SPECULATION NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD AND BECAUSE THE COURT OFFERED NO OTHER VALID BASIS FOR THE IMPOSITION OF A CONSECUTIVE SENTENCE, THIS COURT SHOULD REVERSE AND DIRECT THE TRIAL COURT TO IMPOSE THE CERTAIN PERSONS SENTENCE CONCURRENTLY TO THE ROBBERY SENTENCE. 1

A. The Sentencing Court Erred In Finding Yarbough Factors 3A And 3C As It Relied On (1) A Dismissed Charge And (2) Speculation With No Basis In The Record That Mr. Simmons Possessed The Handgun For A Meaningful Period Before Or After The Robbery. 3

B. The Certain Persons Statute Would Not Be "Neutered" Or Rendered Meaningless By The Imposition Of A Concurrent Sentence. 8

C. The Sentencing Court's Final Justifications For Imposing A Consecutive Sentence—That The Certain Persons Offense Is A Separate And Distinct Offense From Robbery And Would Be A "Free Crime" If Run Concurrent—Are Not A Valid Bases For Imposing A Consecutive Sentence. 12

TABLE OF CONTENTS (CONT'D)

CONCLUSION 12

INDEX TO REPLY APPENDIX

State v. Thompson, No. A-5288-17, 2022 WL 610326
(N.J. Super. Ct. App. Div. Mar. 2, 2022) Dra1-28

State v. Andrews, No. A-3320-18, 2021 WL 6139754
(N.J. Super. Ct. App. Div. Dec. 30, 2021) Dra29-33

State v. Dalzell, No. A-5481-16T1, 2020 WL 3459465
(N.J. Super. Ct. App. Div. June 25, 2020) Dra34-40

State v. Miller, No. A-3777-20, 2023 WL 4759467
(N.J. Super. Ct. App. Div. July 26, 2023) Dra41-61

State v. Green, No. A-1158-19, 2023 WL 2764036
(N.J. Super. Ct. App. Div. Apr. 4, 2023) Dra62-77

State v. Murrell, No. A-1960-19, 2021 WL 5365325
(N.J. Super. Ct. App. Div. Nov. 18, 2021) Dra78-89

State v. Weekes, No. A-2524-18, 2021 WL 4535329
(N.J. Super. Ct. App. Div. Oct. 5, 2021) Dra90-112

State v. Cooper, No. A-2695-18, 2021 WL 1289602
(N.J. Super. Ct. App. Div. Apr. 7, 2021) Dra113-124

State v. Williams, No. A-2256-15T3, 2020 WL 546001
(N.J. Super. Ct. App. Div. Jan. 30, 2020) Dra125-130

State v. Williams, No. A-2256-15T3, 2018 WL 2292999
(N.J. Super. Ct. App. Div. May 21, 2018).. Dra131-134

State v. Gonzalez, No. A-4390-13T1, 2015 WL 8079170
(N.J. Super. Ct. App. Div. Dec. 8, 2015) Dra135-141

LEGAL ARGUMENT

POINT I

BECAUSE THE SENTENCING COURT'S ANALYSIS OF THE STATE V. YARBOUGH FACTORS WAS IMPERMISSIBLY BASED ON DISMISSED CHARGES AND SPECULATION NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD AND BECAUSE THE COURT OFFERED NO OTHER VALID BASIS FOR THE IMPOSITION OF A CONSECUTIVE SENTENCE, THIS COURT SHOULD REVERSE AND DIRECT THE TRIAL COURT TO IMPOSE THE CERTAIN PERSONS SENTENCE CONCURRENTLY TO THE ROBBERY SENTENCE.

In 2022, this Court reversed the sentencing court's decision to impose Vaughn Simmons's ten-year sentence for the certain persons conviction to run consecutive to the twenty-year sentence for the robbery conviction because it found that sentencing court's reasoning did not comport with State v. Yarbough, 100 N.J. 627 (1985). State v. Simmons, No. A-2107-19 (App. Div. Mar. 3, 2022) (slip op. at 11-12). (Da42-43)[1] Specifically, this Court ordered the sentencing court on remand "to identify whether 3A applies, and also include comparisons to

[1] The following abbreviations will be used:
Sb – State's Response Brief
Pa – State's Response Appendix
Db – Defendant-Appellant's Initial Brief
Da – Defendant-Appellant's Initial Appendix
Dra – Defendant's Reply Appendix

the factual record of this case, and provide '[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant' pursuant to State v. Torres, 246 N.J. 246, 268 (2021).'" Ibid.

In light of this Court's directive in ordering resentencing, the sentencing court's rationale for applying Yarbough factor 3A is the most critical component of its decision. As set forth in Point I.A. of Simmons's initial plenary brief and this reply brief, the court's findings of Yarbough factor 3A (and 3C) was impermissibly based on its belief that Mr. Simmons had committed the Autozone armed robbery that had been dismissed, as well as on speculation not supported by competent credible evidence in the record. Because the sentencing Court's Yarbough reasoning was erroneous and impermissible, this Court must reverse the sentence on that basis alone.

Although the sentencing court's erroneous Yarbough reasoning requires a reversal, because the sentencing court gave additional reasons for requiring a consecutive sentence beyond its finding that Yarbough factor 3A applied, Simmons explained in Points I.B and I.C of his initial brief as well as this reply brief why none of these other reasons are sufficient to sustain a consecutive sentence.

A. The Sentencing Court Erred In Finding Yarbough Factors 3A And 3C As It Relied On (1) A Dismissed Charge And (2) Speculation With No Basis In The Record That Mr. Simmons Possessed The Handgun For A Meaningful Period Before Or After The Robbery.

Simmons argued in Point I.A of his initial brief that the trial court's findings of factors 3A and 3C under Yarbough, violated State v. K.S., 220 N.J. 190 (2015) because the Court found those factors in reliance on its assumption that Simmons had committed a second robbery separate from the one of which he was convicted (the Autozone robbery), even though the Autozone robbery charges had been dismissed and the court did not hear any evidence in support of those charges. (Db11-21) The State responded by asserting that K.S. does not apply to sentencing decisions. (Sb14-15) This is patently incorrect. As noted in Defendant's initial brief, while the specific issue before the Court in K.S. involved a prosecutor's consideration of dismissed charges in the context of a PTI decision, the Court explicitly stated that that it was overruling the holding of State v. Green, 62 N.J. 547 (1973) that had permitted the consideration of dismissed charges in the context of sentencing. 220 N.J. at 199. The Green Court had permitted consideration of dismissed charges during sentencing decisions because "the sentencing judge might find it significant that a defendant who experienced an unwarranted arrest was not deterred by that fact

from committing a crime thereafter." 62 N.J. at 571. The K.S. Court stated, "We disapprove of those statements in Brooks and Green because deterrence is directed at persons who have committed wrongful acts . . . . Accordingly, we hold that when no [] undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose." 220 N.J. at 199.

The Court confirmed that K.S. applies to sentencing proceedings in State v. Tillery, 238 N.J. 293 (2019). In that case, defendant argued that in sentencing him, "the court improperly cited his conduct relating to charges on which the jury deadlocked." Id. at 325. The Court rejected this contention, holding:

> When a judge presides over a jury trial regarding multiple offenses, he or she has the opportunity to evaluate the credibility of witnesses and to assess the evidence presented as to each of those offenses. If a jury is unable to return a verdict as to some offenses and convicts the defendant of others, and the State requests that the court consider evidence presented as to offenses on which the jury deadlocked, such information may constitute competent, credible evidence on which the court may rely in assessing the aggravating and mitigating factors. . . . And consideration of competent evidence presented in support of charges—even if the jury does not go on to convict defendant on those charges—does not raise concerns about drawing inferences from the mere fact that charges had been brought, a practice we found improper in State v. K.S., 220 N.J. 190 (2015).
>
> [Id. at 326.]

Thus, the Court distinguished between circumstances in which a court (1) hears evidence in support of charges that do not result in a conviction—in which case the court may consider such evidence in sentencing; and (2) considers charges or allegations against a defendant that have not resulted in a conviction and for which the court has not heard evidence—which is prohibited by K.S. In this case, the court did not hear any evidence in support of the Autozone robbery, and its assumption that Simmons committed the Autozone robbery therefore violated K.S.

Perhaps the reason that the State in this and other cases continues to erroneously assert that K.S. does not apply to sentencing is because this Court has made this same mistake in three unpublished decisions. State v. Thompson, No. A-5288-17, 2022 WL 610326, at *19 (N.J. Super. Ct. App. Div. Mar. 2, 2022); State v. Andrews, No. A-3320-18, 2021 WL 6139754, at *3 (N.J. Super. Ct. App. Div. Dec. 30, 2021); State v. Dalzell, No. A-5481-16T1, 2020 WL 3459465, at *4 (N.J. Super. Ct. App. Div. June 25, 2020). (Dra1-40) However, the other seven panels of this Cour that have considered this issue have recognized that K.S. does apply to sentencing decisions. State v. Miller, No. A-3777-20, 2023 WL 4759467, at *13 (N.J. Super. Ct. App. Div. July 26, 2023), cert. denied, 255 N.J. 412 (2023); State v. Green, No. A-1158-19, 2023 WL 2764036, at *11 (N.J. Super. Ct. App. Div. Apr. 4, 2023), cert. denied, 255 N.J.

505 (2023); State v. Murrell, No. A-1960-19, 2021 WL 5365325, at *6 (N.J. Super. Ct. App. Div. Nov. 18, 2021); State v. Weekes, No. A-2524-18, 2021 WL 4535329, at *13 (N.J. Super. Ct. App. Div. Oct. 5, 2021); State v. Cooper, No. A-2695-18, 2021 WL 1289602, at *8 (N.J. Super. Ct. App. Div. Apr. 7, 2021); State v. Williams, No. A-2256-15T3, 2020 WL 546001, at *2 (N.J. Super. Ct. App. Div. Jan. 30, 2020)[2]; State v. Gonzalez, No. A-4390-13T1, 2015 WL 8079170, at *3 n.1 (N.J. Super. Ct. App. Div. Dec. 8, 2015). (Dra41-141_ But because of continued confusion on this issue, this Court should consider publishing this decision to clearly state that K.S. prohibits the consideration of dismissed charges during sentencing decisions to resolve any lingering confusion.

Even aside from the court's impermissible reliance on the dismissed Autozone robbery, Simmons separately argued that the sentencing court's finding of Yarbough factors 3A and 3C were based on the "[s]peculation and suspicion" that Simmons possessed the gun at some time other than the robbery and did not acquire it for the specific purpose of carrying out the robbery. State v. Case, 220 N.J. 49, 64 (2014). (Db15) In response, the State

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[2] An earlier panel deciding this case had also held that K.S. applies to sentencing decisions. State v. Williams, No. A-2256-15T3, 2018 WL 2292999, at *4 (N.J. Super. Ct. App. Div. May 21, 2018), rev'd and remanded, 240 N.J. 225 (2019). (Dra131-134)

does not point to any facts in the record to support the court's findings but rather simply quotes the court's recitation of the sequence of events that transpired during the Family Dollar robbery. (Sb15-16)

Particularly problematic are the court's and State's assertions that the court's finding of factor 3A was justified because "[n]othing in the record suggests that Defendant obtained the handgun in order to carry out a robbery at the Family Dollar." (Da47; Sb15) This suggests that in the absence of evidence to negate a finding of factor 3A—"the crimes and their objectives were predominantly independent of each other"—a court should find factor 3A and use it to justify a consecutive sentence. This is not how the Yarbough factors work. Each of the five factors describes a circumstance that if affirmatively found supports a consecutive sentence. "The finding of any factor must be supported by competent, credible evidence in the record." Case, 220 N.J. at 64. Thus, if there is not competent, credible evidence in the record supporting a Yarbough factor, it may not be found. The sentencing court here erred in finding Yarbough factor 3A based on its reasoning that there was nothing in the record to support a finding of the negation of factor 3A. (Da47)

Because the sentencing court's findings of Yarbough factors 3A and 3C were erroneous, the consecutive sentence cannot be sustained.

B. The Certain Persons Statute Would Not Be "Neutered" Or Rendered Meaningless By The Imposition Of A Concurrent Sentence.

In attempt to rebut Simmons's argument that the legislative history of N.J.S.A. 2C:39-7 demonstrates that purpose of the certain persons statute is to (1) criminalize and (2) punish more harshly (via the longer parole disqualifier) mere possession of a firearm by a defendant with a predicate conviction (Db27), the State fails to respond to any of the legislative history cited by Simmons or point to any additional legislative history. (Sb17-20) Rather, the State cites two published Appellate Division cases, State v. Jones, 198 N.J. Super. 553 (App. Div. 1985) and State v. Wright, 155 N.J. Super 549 (App. Div. 1978), and the unpublished case cited by the trial court, State v. Flowers, No. A-2401-09, 2013 N.J. Super. Unpub. LEXIS 1962 (App. Div. Aug. 5, 2013).[3] (Sb17-20). None of these cases undermines Simmons's assertions.

The language quoted by the State from Jones and Wright supports rather than undermines Simmons's position because the quotations speak to possession of firearms by certain persons rather than use in a crime. (Sb18)

[3] As noted in Simmons's initial brief, Flowers was not cited by either party below and the sentencing court did not provide a copy of the opinion to undersigned counsel; because the Office of the Public Defender provides its attorneys with a Westlaw subscription only, and this case is apparently exclusively available on Lexis, undersigned counsel's first opportunity to read this case was when the State included the case in the appendix to its response brief.

Jones is completely unhelpful to deciding between concurrent and consecutive sentences because it neither involved a firearm nor discussed concurrent or consecutive sentences. In that case the defendant was charged under the certain persons statute for carrying a twelve-inch kitchen knife in his gym bag and the State appealed from an order of the trial court granting defendant's motion to dismiss the indictment on the ground that the statute was overbroad and unduly vague. 198 N.J. Super. at 557. This Court reversed and reinstated the indictment but did not discuss anything concerning the implications of the purpose of the of the certain persons statute on sentencing. Id. at 557-566.

Wright involved an interpretation of the pre-Code certain persons statute, N.J.S.A. 2A:151-8, rather than the statute at issue in this case, N.J.S.A. 2C:39-7. 155 N.J. Super. at 554. The question at that case was whether the certain persons statute, N.J.S.A. 2A:151-8, merges with the unlawful possession without a permit statute, N.J.S.A. 2A:151-41(a); this Court held that the two offenses do not merge. Ibid. However, the Court's brief comments on the legislative purpose support Simmons's argument; the Court noted that although there is an exemption to the crime of carrying a firearm without a permit "in one's dwelling or place of business," a person who has been convicted of a crime "covered by N.J.S.A. 2A:151-8 . . . may not possess such weapon in any place, even his dwelling or place of business." Ibid. This is

precisely the purpose of the certain persons statute identified by Simmons in his initial brief. (Db26) The Wright Court's only comment on a consecutive versus concurrent sentence was that "[t]he additional penalty under N.J.S.A. 2A:151-8 may either be concurrent with, or consecutive to, that for the conviction under N.J.S.A. 2A:151-41(a)." Id. at 555. The Court did not set forth any criteria to distinguish between circumstances where the sentence for a conviction under N.J.S.A. 2A:151-8 should run concurrent or consecutive to a sentence for a conviction under N.J.S.A. 2A:151-41(a), and, more importantly, this Court's decision in Wright preceded the Supreme Court's Yarbough decision.

Finally, this Court's unpublished decision in Flowers is neither binding nor persuasive. Most importantly, the facts of Flowers distinguish that case from this case because the defendant in Flowers was apprehended after the robbery a loaded handgun in his possession in the trunk of his vehicle. 2013 N.J. Super. Unpub. LEXIS 1962 at *4. (Pa3) Thus, there was at least some evidence in that case that Flowers had possessed the handgun separate in time from the robbery, thus justifying a finding of Yarbough factor 3C. Separately, the Flowers Court offered only a single paragraph justifying the determination to run the certain persons sentence consecutive, which carries no persuasive force. Id. at *19. (Pa9) If the Court's reasoning were accepted—that the certain

persons crime was a separate offense from the robbery and that the statute serves a different legislative purpose and is intended as a further deterrent—this would justify always imposing a consecutive sentence on a certain persons conviction. Ibid. (Sb19-20) But if the Legislature had wanted to mandate consecutive sentences for a certain persons conviction or even to create a presumption of a consecutive sentence, it would have included language in N.J.S.A. 2C:39-7 mandating a consecutive sentence—as it did in N.J.S.A. 2C:39-4.1(d)—or creating a presumption of a consecutive sentence—as it did for offenses committed while on probation, parole, or pretrial release. N.J.S.A. 2C:44-5(c), (f), (h). Cf. State v. Dillihay, 127 N.J. 42, 49 (1992). Moreover, the Flowers Court's only cited authority for its assertion is Judge Landau's partial concurrence from State v. Soto, 241 N.J. Super. 476 (App. Div. 1990) (a case ruling that the sentence under N.J.S.A. 2C:35-7 should not have been imposed consecutively to the sentence under N.J.S.A. 2C:35-5), in which Judge Landau merely noted that a certain persons conviction does not merge with unlawful possession of a firearm. Flowers at *19 (citing Soto, 241 N.J. Super. at 481-82). (Pa9) Thus, this Court should reject Flowers.

Because the legislative history of N.J.S.A. 2C:39-7 does not support a conclusion that the statute would be "neutered" or moot without the imposition of a consecutive sentence, this Court should find that this rationale does not

separately support the imposition of a consecutive sentence.

C. The Sentencing Court's Final Justifications For Imposing A Consecutive Sentence—That The Certain Persons Offense Is A Separate And Distinct Offense From Robbery And Would Be A "Free Crime" If Run Concurrent—Are Not A Valid Bases For Imposing A Consecutive Sentence.

The State misconstrues Simmons's arguments in Point I.C of his initial brief. Simmons was not arguing that the sentencing court's reference to the "no free crimes" and "separate and distinct" rationales were separate bases on which to reverse. Rather, Simmons argued that if this Court agrees with Simmons that the sentencing court's findings for Yarbough factors 3A and 3C were erroneous, this Court cannot nonetheless find that the "no free crimes" and "separate and distinct" rationales were alternative sufficient bases on which the consecutive sentencing decision could be sustained.

CONCLUSION

For the aforementioned reasons, as well as those set forth in Defendant's initial brief, this Court should reverse the judgment of the trial court and remand, directing the trial court to order that the certain persons sentence under Indictment 10-6-1540-I be served concurrently to the sentence under Indictment 10-6-1539-I.

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Respectfully submitted,

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