SUPREME COURT OF NEW JERSEY
DOCKET NO: 089188

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction
	:	in the Superior Court of New Jersey
v.	:	Law Division-Criminal Part,
	:	Middlesex Vicinage
ZAIRE J. CROMEDY,	:	
	:	Sat Below:
Defendant-Appellant.	:	
	:	Hon. Jack M. Sabatino, P.J.A.D.
		Hon. Hany A. Mawla, P.J.A.D.
		Hon. Joseph L. Marczyk, J.A.D.

BRIEF OF AMICUS CURIAE ASSOCATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

MAZRAANI & LIGUORI, LLP
57 PATERSON STREET
NEW BRUNSWICK, NJ 08901
P. (732) 951-3100; F. (732) 951-3101

Joseph M. Mazraani, Attorney ID: 0237282004
Of counsel
jmazraani@mllawnj.com
Jeffrey S. Farmer, Esq., Attorney ID: 061112013
On the brief
jfarmer@mllawnj.com

DEFENDANT IS PRESENTLY CONFINED

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STATEMENT OF PROPOSED AMICUS CURIAE ACDL-NJ

Proposed amicus curiae Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has more than 500 members across New Jersey. Our courts have found that ACDL-NJ has the special interest and expertise to serve as an amicus curiae per Rule 1:13-9 in numerous cases throughout the years. See, e.g., State v. Rivas, 251 N.J. 132 (2022); State v. Bailey, 251 N.J. 101 (2022); State v. Lane, 250 N.J. 84 (2022); State v. Ramirez, 246 N.J. 61 (2021); State v. Garcia, 245 N.J. 412 (2021).

Accordingly, ACDL-NJ asks that its motion for leave to participate as amicus curiae be granted.

LEGAL ARGUMENT

POINT I

THE MANDATORY PERIOD OF PAROLE INELIGIBILITY UNDER THE GRAVES ACT DOES NOT APPLY TO CONVICTIONS UNDER N.J.S.A. 2C:39-5(j) AND THE CASE MUST BE REMANDED FOR RESENTENCING.

For all the reasons espoused by the defendant, 2C:39-5(j) is clearly a substantive crime, not a sentencing enhancement. There is no dispute that subsection (j) was not included in the Graves Act. Even if the Court believes that the omission of 2C:39-5(j) was due to some unconscious legislative error, the Court cannot perform judicial surgery, inserting (j) into a statute where it does not exist. Indeed, our appellate courts have always been "reluctant to declare an amendment by implication[.]" Park v. Park, 309 N.J. Super., 312 (App. Div. 1998)(citing *Sutherland Statutory Construction* § 22.13 at 215–216 (5th Ed.1993)).

In the early days of the No Early Release Act (NERA), for example, the statute applied the eighty-five percent parole disqualifier to crimes "in which the actor causes death, causes serious bodily injury as defined in subsection b. of N.J.S. 2C:11-1, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:43-7.2(d)(eff. June 9, 1997), and was silent on attempts or conspiracies to commit those crimes. Id. The Appellate Division—"consistent with the principle that penal statutes are to be strictly construed[,]" State v.

Galloway, 133 N.J. 631, 658-59 (1993)—refused to read attempts to cause serious bodily injury into the definition of "violent crime" under N.J.S.A. 2C:43-7.2(d). State v. Staten, 327 N.J. Super. 349, 354-55 (App. Div.), certif. den. 164 N.J. 561 (2000). "Where the Legislature has carefully employed a term in one place, yet excluded it in another, it should not be implied where excluded." Ibid. (citations omitted). The remedy was specifically reserved for the Legislature and, in 2001, subsection (d) was amended to list the crimes to which NERA applied and specifically provided that the parole bar applied to "an attempt or conspiracy to commit any of th[ose] crimes[.]" N.J.S.A. 2C:43-7.2(d)(eff. June 29, 2001).

The Appellate Division wrestled with a similar Legislative oversight in State v. Olsvary, 357 N.J. Super. 206 (App. Div.), certif. den., 177 N.J. 222 (2003). In that case, the defendant pleaded guilty to fourth-degree violation of a prior sentence of community supervision for life under N.J.S.A. 2C:43-6.4(d). Id. at 207. N.J.S.A. 2C:43-6.4(e)(1) provided under certain circumstances (which were present in this case) for a mandatory extended term of imprisonment for a violation of N.J.S.A. 2C:43-6.4(d). Ibid. N.J.S.A. 2C:43-7(a)(5), the statute establishing the parameters of extended terms for fourth-degree offenses, omitted a specific term applicable to N.J.S.A. 2C:43-6.4(e)(1), while clearly setting the terms of imprisonment for other fourth-degree offenses. Id. at 209. The trial court found that "despite this legislative oversight, it is clear to this Court that three years [the

penalty argued for by the State] is an appropriate penalty in this case that would not deviate from the Legislative scheme in imposing extended terms." Id. at 211.

The Appellate Division reversed. It found that there was no ambiguity in the statute. Id. at 212. Simply, the only statutory provision that could supply the necessary parameters for an extended term sentence had failed to do so. Ibid. While it was "loathe to frustrate the plain intent of N.J.S.A. 2C:43-6.4(e)(1)[,]" the panel was "convinced that omission of the parameters within which a sentencing judge may impose an extended term [was] fatal." Id. at 214. The defendant's three-year sentence was vacated and a period of probation ordered to be imposed, consistent with alternative sentencing under the plea agreement. Id. Again, it was left to the Legislature to fix the problem, and it did. In 2004, the Legislature amended N.J.S.A. 2C:43-7(a)(5) to provide for an extended term of three to five years in prison "in the case of a crime of the fourth degree *pursuant to any other provision of law* . . ." N.J.S.A. 2C:43-7(a)(5)(eff. Jan. 14, 2004).

N.J.S.A. 2C:39-5(j) is a first-degree crime. "Except as *otherwise provided*, a person may be sentenced . . . [i]n the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years[.]" N.J.S.A. 2C:43-6(a)(1). It is not otherwise provided that someone convicted of subsection (j) should be sentenced to anything other than a flat term of imprisonment between 10 and 20 years. Whether the Legislature

intended to omit (j) from the Graves Act, or whether it inadvertently failed to include it is immaterial. Graves does not apply. The only remedy is Legislative enactment.

Moreover, the trial court and the Appellate Division in this case found that N.J.S.A. 2C:39-5(j) is merely a sentencing enhancement, and not a substantive crime. That same argument was considered—and flatly rejected—by another panel in State v. Mack, No: A-3423-16T1)(App. Div. Oct. 11, 2017)("We hold that N.J.S.A. 2C:39-5(j) is a substantive statute identifying a separate crime subject to indictment and trial by jury"). (Da36-Da39). It went on to note that sentencing enhancements like N.J.S.A. 39-5(i), for example, specifically mention "[t]he sentencing court." (Da36). "In contrast, subsection j never mentions a sentencing court. Instead, the statute plainly states that it is creating a 'first degree crime.'" (Da36).

At the very least, the Mack holding illustrates that the N.J.S.A. 2C:39-5(j) is unconstitutionally vague. Statutes are unconstitutional when they deny fair notice and permit arbitrary and discriminatory action by those that enforce and apply said statute. City of Chicago v. Morales, 527 U.S. 56, 119 (1999). To satisfy the requirements of due process, a statute must provide meaningful standards to guide the application of its laws. Kolender v, Lawson, 461 U.S. at 358 (1983). A statute that lacks such standards is void-for-vagueness. The void-for-vagueness doctrine

applies not only to laws that proscribe conduct, but also to laws that vest discretion without standards in fixing a penalty. United States v. Batchhelder, 442 U.S. 114, 123 (1979). Thus, vague sentencing provisions can violate the due process if they do not state with sufficient clarity the consequences of violating a given criminal statute. Indeed, "[p]enal statutes are to be strictly construed, and while it may be said that it is to be presumed that the Legislature would not denounce certain acts without providing a penalty, yet penal consequences cannot rest upon a mere presumption. Such legislative purpose must be expressed, and in clear and direct language." State v. Fair Lawn Service Center, 20 N.J. 468, 472 (1956).

Here, if the legislature did intend to include subsection j in the Graves Act, it did not draft the statute so as to provide notice that it was doing so. The plain language of the statute clearly supports the reasonable interpretation that one who is convicted of subsection j would be subject to a flat term in state prison.

CONCLUSION

For the foregoing reasons, the ACDL requests that this Court reverse the judgment of the Appellate Division and remand this case for resentencing.

Respectfully submitted,

MAZRAANI & LIGUORI
Attorneys for defendant

By: */s/ Jeffrey Farmer*
_____
Jeffrey S. Farmer
Of counsel and on the brief

Joseph M. Mazraani, *of counsel*

CC: Hon. Jack M. Sabatino, P.J.A.D.
Hon. Hany A. Mawla, P.J.A.D.
Hon. Joseph L. Marczyk, J.A.D.
All counsel of record (*via electronic filing*)