No. 19-5889

In the Supreme Court of the United States

JONATHAN TORRES-ARROYO,

PETITIONER

V.

STATE OF NEW JERSEY,

RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR THE STATE OF NEW JERSEY IN OPPOSITION

GURBIR S. GREWAL
Attorney General of New Jersey
Counsel for Respondent

LAUREN BONFIGLIO
Deputy Attorney General
Counsel of Record

NEW JERSEY DIVISION OF CRIMINAL JUSTICE
Appellate Bureau
Hughes Justice Complex
PO Box 086
Trenton, NJ 08625
(609) 376-2400
BonfiglioL@njdcj.org

QUESTION PRESENTED

I. May a judge, in sentencing a defendant within a statutory range authorized by a jury's verdict, impose a discretionary period of parole ineligibility based on traditional sentencing factors without offending the United States Constitution and *Alleyne v. United States*, 570 U.S. 99 (2013)?

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The opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. 1a-6a), captioned *State of New Jersey v. Jonathan Torres-Arroyo, a/k/a Jonathan Torres, Jonathan Srroyo, Johmathan Torres-Arroyo, and Jonathan T. Arroyo*, App. Div. No. A-5032-16T4 (decided November 21, 2018), is unpublished but available at *State v. Torres-Arroyo*, 2018 WL 6071589 (N.J. Super. Ct. App. Div. Nov. 21, 2018).

On June 3, 2019, the New Jersey Supreme Court denied certification. *State v. Torres-Arroyo*, 210 A.3d 245 (N.J. 2019). Pet. App. 7a.

JURISDICTION

The Order of the New Jersey Supreme Court denying certification was entered on June 3, 2019. Pet. App. 7a.

The petition for a writ of certiorari was timely filed on September 3, 2019.

Although respondent originally filed a waiver of its right to file a response, the Court has requested that a response be filed. The Clerk's Office granted an extension of time to file a response to December 18, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). But the petition, which is objecting to a discretionary period of parole ineligibility, is moot because petitioner served his minimum term and was released from custody on October 10, 2019. *See* U.S. Const. art. III, § 2, cl. 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The State concurs with the constitutional provisions set forth in the petition.

N.J. Stat. Ann. § 2C:43-7

N.J. Stat. Ann. § 2C:43-7, "Sentence of Imprisonment for Crime; Extended Terms" provides in pertinent part:

> a. In [certain] cases . . . a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment, as follows:
>
> . . . .
>
> (4) In the case of a crime of the third degree, for a term which shall be fixed by the court between five and 10 years;
>
> . . . .
>
> b. As part of a sentence for an extended term and notwithstanding the provisions of 2C:43-9, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligible for parole or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.
>
> [N.J. Stat. Ann. § 2C:43-7 (West 2019).]

STATEMENT OF THE MATTER INVOLVED

1. Following a jury trial, petitioner was convicted of third-degree burglary, in violation of N.J. Stat. Ann. § 2C:18-2, and third-degree theft, in violation of N.J. Stat. Ann. § 2C:20-3, in connection with a residential burglary he committed. Pet. App. 2a. After being away for a Fourth of July weekend, two pastors returned home to find their gate unlocked, front door ajar, and house completely ransacked. Pet. App. 2a. Missing from the house were two laptops, an iPad, an iPhone, cash, and other property. Pet. App. 2a. A soda bottle that did not belong to the pastors was found in the home. Pet. App. 2a. Later DNA testing on the mouth of the bottle matched petitioner. Pet. App. 2a.

2. Because petitioner had an extensive prior record dating back to 2005, including numerous past burglaries, the State moved for a discretionary extended term as a persistent offender under N.J. Stat. Ann. § 2C:44-3(a). Pet. App. 5a. The judge found, and petitioner does not dispute, that he met the minimum criteria for persistent-offender sentencing. Pet. App. 5a. The judge also found three aggravating factors: the risk that defendant would commit another offense, N.J. Stat. Ann. § 2C:44-1(a)(3); the extent of defendant's prior record, § 2C:44-1(a)(6); and the need for deterrence, § 2C:44-1(a)(9). Pet. App. 6a. After finding one mitigating factor, that defendant will compensate the victim, N.J. Stat. Ann. § 2C:44-1(b)(6), the judge determined that "the aggravating factors clearly and substantially outweigh the sole mitigating factor." Pet. App. 6a. The judge thus granted the State's motion for an extended term and sentenced petitioner to an

aggregate seven-year term of imprisonment, with a twenty-eight-month parole disqualifier under N.J. Stat. Ann. § 2C:43-7(b). Pet. App. 5a-6a.

3. In exercising his discretion to impose a twenty-eight-month period of parole ineligibility under N.J. Stat. Ann. § 2C:43-7(b), the sentencing judge found that the three applicable aggravating factors substantially outweighed the sole mitigating factor. Pet. App. 6a.

4. In the trial court, petitioner did not argue that imposing a discretionary parole disqualifier violated *Alleyne v. United States*, 570 U.S. 99 (2013). Petitioner raised this argument for the first time on appeal, and the Superior Court of New Jersey, Appellate Division rejected it in an unpublished per curiam opinion. Pet. App. 5a-6a. The Appellate Division recognized the distinction:

> Those aggravating factors, however, were not based on evidence that constitutionally required a jury finding. They instead emanated from defendant's prior record and his numerous past burglaries, starting in 2005; the judge was constitutionally permitted to rely on the undisputed facts about defendant's past criminal troubles in finding the three aggravating factors that justified the twenty-eight-month period of parole ineligibility. *See Alleyne v. United States*, 570 U.S. 99, 116-17 (2013); *see also Apprendi [v. New Jersey]*, 530 U.S. [466,] 490 [2000]; *State v. Kiriakakis*, [196 A.3d 563, 566 (N.J. 2018)].
>
> [Pet. App. 6a].

The New Jersey Supreme Court denied certification. Pet. App. 7a

REASONS FOR DENYING CERTIORARI

This petition should be denied for several reasons. First, the petition is moot because petitioner has already served the challenged parole disqualifier. Second, on the merits, petitioner's claims are groundless. Third, there is no conflict in the lower courts on these issues, nor does petitioner allege one.

I. THE PETITION IS MOOT BECAUSE PETITIONER HAS ALREADY SERVED THE CONTESTED DISCRETIONARY PAROLE DISQUALIFIER.

As an initial matter, the appeal is moot because petitioner is objecting only to a judicially imposed period of parole ineligibility that he has already served. Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *see United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) ("[W]hen a defendant challenges only an expired *sentence,* no such presumption [of the existence of collateral consequences] applies, and the defendant must bear the burden of identifying some ongoing collateral consequence that is traceable to the challenged portion of the sentence and likely to be redressed by a favorable judicial decision."); *cf. Lane v. Williams*, 455 U.S. 624, 631 (1982) (finding habeas-corpus case moot where prisoners only attacked sentences that expired during course of proceedings). Here, petitioner was released from custody on October 10, 2019, and thus the complaint about his parole disqualifier is moot. *See* N.J. Dep't of Corr., Offender Details, http://www20.state.nj.us/DOC_Inmate/details?x=1379016&n=0 (last visited Dec. 11, 2019).

II. CERTIORARI IS NOT WARRANTED BECAUSE THE TWENTY-EIGHT MONTH PAROLE DISQUALIFIER IMPOSED BY THE JUDGE IN EXERCISING HIS SENTENCING DISCRETION UNDER N.J. STAT. ANN. § 2C:43-7(B) FELL WITHIN THE STATUTORY RANGE AUTHORIZED BY THE JURY'S VERDICT AND THEREFORE DID NOT VIOLATE *ALLEYNE V. UNITED STATES*, 570 U.S. 99 (2013), OR THE SIXTH AMENDMENT.

1. In addition to being moot, petitioner's constitutional challenge to his parole disqualifier under N.J. Stat. Ann. § 2C:43–7(b) is flawed. In issuing a parole disqualifier here, the judge merely identified and weighed traditional sentencing factors to set an appropriate sentence within the statutory range set by the Legislature. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," *Alleyne*, 570 U.S. at 106-08 (plurality opinion), judges have broad discretion to engage in factfinding to determine an appropriate sentence within a statutorily authorized range. *See*, *e.g.*, *id.* at 116 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States v. Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). The petition is objecting only to a purported misapplication of settled law, and should therefore be denied.

The jury convicted petitioner of two third-degree offenses. Based on that jury verdict and petitioner's prior convictions, the judge sentenced petitioner to an extended term of imprisonment as a persistent offender, under N.J. Stat. Ann. §§ 2C:43-7, 2C:44-3(a)—a status petitioner does not challenge. *See* Pet. App. 6. Under N.J. Stat. Ann. § 2C:43-7(a), for a third-degree crime, the judge may impose a prison term between five and ten years, and a minimum period of parole ineligibility not to exceed one-half of the term set, provided the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. N.J. Stat. Ann. § 2C:43-7(b); *State v. Dunbar*, 527 A.2d 1346, 1352-53 (N.J. 1987); *see also* N.J. Stat. Ann. § 2C:43-6(b). The statutory range therefore was five to ten years in prison, and a zero to five-year period of parole ineligibility. *See State v. Kiriakakis*, 196 A.3d 563, 576 (N.J. 2018). The judge sentenced defendant precisely within that range: to seven years' imprisonment with a twenty-eight month parole disqualifier.

The United States Constitution guarantees an accused the right to trial by jury and places the burden on the State to prove every element of an offense beyond a reasonable doubt. *Booker*, 543 U.S. at 230; *see also* U.S. Const. amends. V, VI, XIV. As such, a jury—not a judge—must decide whether the State has proved the elements necessary to convict a defendant of a crime. *Booker*, 543 U.S. at 245. In a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court made clear that judicial factfindings that invade the jury's exclusive role in determining guilt and the punishment range stemming from a guilty verdict violate the Sixth Amendment. *See id.* at 490; *Blakely v. Washington*, 542 U.S. 296, 303

(2004); *Booker*, 543 U.S. at 244. As such, any fact that increases either the ceiling, *Apprendi*, 530 U.S. at 490, or the floor, *Alleyne*, 570 U.S. at 112, of a sentencing range must be found by a jury beyond a reasonable doubt.

Petitioner now tries to further extend these principles, arguing that N.J. Stat. Ann. § 2C:43-7(b), dealing with discretionary parole disqualifiers for persistent offenders after a finding and weighing of traditional sentencing factors, is also unconstitutional. But, unlike these landmark cases, petitioner's sentence here fell *within* the sentencing range authorized by the jury's verdict.

In *Apprendi*, this Court invalidated the New Jersey Hate-Crimes Extended-Term statute because it provided for an enhanced penalty based on judicial factfindings. 530 U.S. at 489. The statutory scheme allowed a jury to convict a defendant of a second-degree offense based on its findings beyond a reasonable doubt, but then, upon the prosecutor's application, required a judge—at a subsequent and separate proceeding—to impose punishment identical to the first-degree range, based on the judge's finding of defendant's purpose or motivation by a preponderance of evidence. *Id.* at 491; *see New Jersey v. Apprendi*, 731 A.2d 485, 498 (N.J. 1999), *rev'd*, 530 U.S. 466 (2000) (providing statutory language at issue). This Court held that any fact, other than a prior conviction, that increases the maximum term of imprisonment for a crime *beyond* the prescribed statutory maximum sentence, must be submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476, 490. In determining what constitutes an element, the dispositive question "is one not of form, but of effect." *Id.* at 494.

Next, in *Ring v. Arizona*, 536 U.S. 584 (2002), this Court invalidated Arizona's capital sentencing scheme that increased a murder defendant's sentence to death solely on judicial findings.[1] Ring's conviction for first-degree felony murder, which based on the jury's verdict alone, carried a maximum punishment of life imprisonment. *Id.* at 597. Under Arizona law, a defendant could not be sentenced to death unless a sentencing judge made further findings after conducting a separate sentencing hearing. *Id.* at 592. Specifically, the judge could impose a death sentence only if he or she finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. *Id.* at 592-93. Importantly, the relevant aggravating circumstances dealt not with traditional sentencing factors, but rather related to specific factual findings equivalent to elements, such as whether the defendant "killed, attempted to kill, or intended to kill." *Id.* at 598. Because the jury had found Ring guilty of felony murder, not premeditated murder, Ring would be eligible for the death penalty only if he was, *inter alia,* the victim's actual killer. *Id.* at 594.

Following such a hearing, Ring was sentenced to death after the judge found two statutory "aggravating circumstances" outweighed a sole mitigating circumstance. *Id.* at 594-95. Specifically, the judge found the aggravating circumstances based on a codefendant's testimony at the sentencing hearing. *Id.* at

[1] In a similar case, this Court invalidated another sentencing scheme that *enhanced* the maximum sentence—from the default of life imprisonment to death—after a judicial finding of sufficient aggravating circumstances. *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 620-22 (2016).

593. The codefendant pleaded guilty in exchange for cooperation only after Ring's jury trial and before the sentencing hearing. *Ibid.*

This Court found the statute unconstitutional because it increased the maximum penalty based solely on judicial factfinding. *Id.* at 597, 609. The statutory maximum for *Apprendi* purposes was life imprisonment and therefore Ring was unconstitutionally sentenced to a penalty *exceeding* the maximum he would have received based on the facts reflected in the jury verdict alone. *Id.* at 604. In other words, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602.

Then, in *Blakely*, this Court invalidated a state statute that permitted a judicial finding of "deliberate cruelty" to increase the maximum prison sentence *beyond* the standard range. 542 U.S. at 303-04. This Court determined "that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303; *see also Cunningham v. California*, 549 U.S. 270, 274 (2007) (holding unconstitutional judicial factfinding permitting elevated "upper term" prison sentence under California's determinate sentencing law); *Booker*, 543 U.S. at 226, 245 (holding unconstitutional judicial factfinding prompting elevated prison sentence under then-mandatory Federal Sentencing Guidelines). In both *Apprendi* and *Blakely*, the sentences were *not* authorized by the jury verdicts or

guilty pleas alone, but were enhanced *beyond* the standard ranges by a specific factual finding of the judge. 530 U.S. at 476-77; 542 U.S. at 303-04.

Finally, in *Alleyne,* this Court extended *Apprendi* to include facts that increase a mandatory-minimum prison sentence. 570 U.S. at 111-12. As this Court explained, "a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." *Id.* at 112. And "because the legally prescribed range *is* the penalty affixed to the crime . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Ibid.* By defining facts that increase a mandatory statutory minimum sentence as part of the substantive offense, defendants will be able to predict the legally applicable penalty from the face of the indictment. *Id.* at 113-14.

Under this Court's jurisprudence, New Jersey's sentencing scheme would violate the right to a jury trial only if it exposed petitioner to a penalty *exceeding* the authorized range. But unlike *Apprendi*, *Ring*, *Blakely*, *Alleyne,* and *Hurst*—where judicial factfindings enhanced the sentences *beyond* the statutory ranges—petitioner's conviction alone independently authorized his sentence. Petitioner was convicted of third-degree burglary and third-degree theft, and sentenced to an extended term of imprisonment as a persistent offender, a status petitioner does not contest. The facts found by the jury and petitioner's prior convictions, standing alone, authorized a term of imprisonment of up to ten years, and a period of parole ineligibility of up to five years. N.J. Stat. Ann. §§ 2C:43-7, 2C:44-3(a). Petitioner

was sentenced precisely within that range: to seven years' imprisonment with a twenty-eight-month parole disqualifier. A twenty-eight-month parole disqualifier is within the sentence range for this third-degree offense, and, as such, was permissible *and* foreseeable. *See Blakely*, 542 U.S. at 309 ("In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail."). Because petitioner was sentenced within the legally prescribed range, he was afforded his Sixth and Fourteenth Amendment rights to have the jury consider all elements of the offense beyond a reasonable doubt. This petition should thus be denied.

III. THE NEW JERSEY SUPREME COURT'S DECISION IN *STATE V. KIRIAKAKIS*, 196 A.3d 563 (N.J. 2018), IS IN LINE WITH THIS COURT'S JURISPRUDENCE, RECOGNIZING THE NECESSARY STRONG JUDICIAL ROLE IN SENTENCING AND THE IMPORTANCE OF MAINTAINING JUDICIAL DISCRETION.

1. As noted above, no specific factual finding is needed to impose a discretionary parole-ineligibility term. The judge is not required to impose a parole-ineligibility term but, instead, has the discretion to impose such a term and to decide the length of the term. Unlike *Apprendi* and *Alleyne*—where a specific factual finding *required* a specific parole term, and the judge had no discretion on its imposition or its length—here, the range of sentence for petitioner's offenses included the possibility of a discretionary parole-ineligibility term, and the range of sentence was not altered or enhanced by any finding of the judge. The discretionary parole disqualifier is thus constitutional, as the New Jersey Supreme Court properly found in *State v. Kiriakakis*, 196 A.3d 563 (N.J. 2018).

In this case, the Appellate Division—an intermediate appellate court, N.J. Const. art. VI, § 5—merely cited *Kiriakakis*, where the New Jersey Supreme Court upheld the imposition of a similar discretionary parole disqualifier. *Id.* at 566. Contrary to petitioner's assertions (Pet. 13-17), the New Jersey Supreme Court in *Kiriakakis* made no invalid distinction between whether findings require or merely authorize an enhanced sentence, but instead, correctly "reject[ed] any suggestion that the judicial finding of aggravating factors within the prescribed sentencing range authorized by a jury's verdict or a defendant's admission at his plea hearing violates the Sixth Amendment when the judge imposes a discretionary sentence." *Id.* at 573.

The complained-of portions of *Kiriakakis* stem from its discussion of cases beginning with *Booker*, where this Court, based on the inherent logic of the *Apprendi* line of cases, struck down the Federal Sentencing Guidelines because they *mandated* judges, based on their own factfindings, to impose sentences *exceeding* the range authorized by the jury's verdict or the defendant's admissions at his plea hearing. *Booker*, 543 U.S. at 226-27. Based on the Guidelines, Booker received a thirty-year term, which was more than eight years longer than the maximum sentence authorized by the jury verdict. *Id.* at 227. To remedy the constitutional infirmity, this Court rendered the Guidelines "advisory" in nature. *Id.* at 245-48.

In *Kirakakis*, the New Jersey Supreme Court then discussed how *Apprendi*, *Blakely*, and *Booker* compelled it to invalidate New Jersey's presumptive sentencing scheme under the New Jersey Code of Criminal Justice (the Code). *State v. Natale*,

878 A.2d 724, 738-39 (N.J. 2005). Like *Booker*, the Code allowed judges to impose sentences *beyond* the then-statutory presumptive term, which was the statutory maximum for *Apprendi* purposes. *Id.* With the elimination of presumptive terms, the New Jersey Supreme Court held that trial judges are still constitutionally permitted to make factual findings regarding the aggravating and mitigating factors for purposes of imposing sentence. *Id.* at 741.

In *Kiriakakis*, the New Jersey Supreme Court went on to discuss how it applied *Alleyne* in striking down a statute that *required* the imposition of a mandatory minimum parole-ineligibility term based upon a judicial finding that a defendant was involved in organized criminal activity. *State v. Grate*, 106 A.3d 466, 476-77 (N.J. 2015).

The purpose of this discussion was to emphasize the necessary strong judicial role in sentencing and the importance of maintaining judicial discretion. *Kiriakakis*, 196 A.3d at 577. *Kiriakakis* is in line with this Court's jurisprudence and there is simply no need for clarification. Indeed, petitioner's expansive interpretation of *Alleyne* is not only unprecedented, it is unworkable. For centuries, "courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246 (1949); *see Kirakakis,* 196 A.3d at 573 ("[I]n a rational system of justice, determining a sentence in a continuum between five and ten years for a second-degree offense requires a judge

to identify the aggravating and mitigating factors and balance them to arrive at a fair sentence.").

2. Regardless, as the New Jersey Supreme Court properly observed, this Court has long recognized that the Constitution does not mandate that traditional sentencing factors be found by a jury beyond a reasonable doubt, and it should continue to so recognize here. *Kiriakakis*, 196 A.3d at 572; *see Booker*, 543 U.S. at 251 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *Blakely*, 542 U.S. at 309 ("In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail."); *Apprendi*, 530 U.S. at 481 (declaring it is not "impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."); *see e.g. United States v. Haymond*, 588 U.S. ___, 139 S. Ct. 2369, 2380 (2019) (plurality opinion) (recognizing at sentencing hearing, not every fact that may affect judge's exercise of discretion within the range of punishments authorized by jury verdict need be found by jury).

In fact, even *Apprendi* made clear that "nothing in [] history" suggests that it is impermissible for judges to consider various factors in exercising their sentencing discretion. 530 U.S. at 481. So too, *Alleyne* emphasized that its holding "does not mean that any fact that influences judicial discretion must be found by a jury." 570

U.S. at 116. And *Alleyne* emphasized and clarified the limits on its holding regarding sentencing discretion:

> In holding that facts that increase mandatory[-]minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. . . . This position has firm historical roots as well.
>
> . . . .
>
> Establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.
>
> [*Id.* at 116–17 (citations and internal quotation marks omitted).]

This Court's jurisprudence thus establishes that while elements of an offense, no matter how they are labeled, must be found by a jury, *Ring*, 536 U.S. at 602, the Constitution permits judges, in exercising their discretion, to take "into consideration various factors relating both to the offense and offender[]in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481. Sentencing factors traditionally include characteristics of the offender, such as recidivism, criminal record, cooperation with law enforcement, and acceptance of responsibility. *United States v. O'Brien*, 560 U.S. 218, 227 (2010); *Castillo v. United States*, 530 U.S. 120, 125 (2000). These are the factors included in N.J. Stat. Ann. § 2C:44-1(a) and (b), and were considered by the judge in this case.

In short, imposing parole ineligibility under N.J. Stat. Ann. § 2C:43–7(b) involves the ordinary weighing of aggravating and mitigating factors used to guide judicial discretion in selecting a punishment within the applicable sentencing range, and is explicitly excluded from *Alleyne's* holding. *See* 570 U.S. at 113 n.2. There is no aggravating fact or circumstance. *Ring*, 536 U.S. at 594-95. There is no finding of defendant's role in the crime. *Ibid.* Nor is there a finding of a defendant's motivation. *Apprendi,* 530 U.S. at 491. And traditional sentencing factors are in no way "the functional equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609 (citing *Apprendi*, 530 U.S. at 494 n.19). Instead, N.J. Stat. Ann. § 2C:43–7(b) involves factfinding used to guide judicial discretion in selecting a punishment *within* limits fixed by law, and is not governed by the Sixth Amendment. Since there is no particular fact that triggers a mandatory parole-ineligibility term, the *discretionary* parole disqualifier is constitutional.

In light of the above, a legally imposed discretionary parole disqualifier could not have violated petitioner's rights to a jury trial or due process because it was within limits fixed by law and it did not depend on the finding of a particular fact by the judge. Because petitioner was sentenced to a twenty-eight-month parole disqualifier—which is within the statutory range available for his third-degree convictions—New Jersey's statutory scheme is constitutional and does not violate *Apprendi* or its progeny. Further, the three aggravating factors in N.J. Stat. Ann. § 2C:44-1(a) that the judge found were a risk of recidivism; prior criminal record; and need to deter, which are those frequently and historically found by sentencing judges

when exercising discretion in sentencing, as discussed in *Alleyne*. *See Apprendi*, 530 U.S. at 481. There is thus no impermissible judicial factfinding, and the twenty-eight-month parole disqualifier falls squarely within constitutional boundaries.

IV. THIS PETITION IS A POOR VEHICLE BECAUSE NO SPECIAL REASONS EXIST FOR CERTIORARI.

No split of authority exists here for this Court to resolve, nor does petitioner allege one. Instead, defendant complains only that the state court erred when it did not correctly apply settled Sixth Amendment jurisprudence already set forth by this Court. But this Court has long held that judges, when exercising discretion to impose a sentence within a statutory range, can consider traditional sentencing factors like those found here: recidivism, criminal record, and the need for deterrence. As the facts of this case call for nothing more than a routine application of well-settled law, there is no need for clarification. And the instant decision of the intermediate state court is unreported. *Cf. Huber v. N.J. Dep't Envtl. Prot.*, 562 U.S. 1302, 1302 (2011) (statement by Alito, J.) (recognizing that it is preferable to grant certiorari from the state's highest court rather than its intermediate appellate court). This record thus presents no clear need for this Court to exercise its discretionary authority. *See* Rule 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GURBIR S. GREWAL
Attorney General of New Jersey
Counsel for Respondent

LAUREN BONFIGLIO
Deputy Attorney General
Counsel of Record

NEW JERSEY DIVISION OF CRIMINAL JUSTICE
Appellate Bureau
Hughes Justice Complex
PO Box 086
Trenton, NJ 08625
(609) 376-2400
BonfiglioL@njdcj.org

DECEMBER 2019