

JUN 21 2021

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No. 21-5193

IN THE
SUPREME COURT OF THE UNITED STATES

Vernon A. Collins — PETITIONER
(Your Name)

vs.

State of New Jersey — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Superior Court of New Jersey Appellate Division
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Vernon A. Collins
(Your Name)

P.O. Box 861
(Address)

Trenton, New Jersey 08625
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTIONS PRESENTED

I. DID THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION ERR IN CONCLUDING CONSECUTIVE SENTENCES IMPOSED OUTSIDE PETITIONER'S PRESENCE IN OPEN COURT SOME NINETEENTH DAYS AFTER THE ORIGINAL SENTENCES HAD BEEN IMPOSED IN OPEN COURT WITHOUT SPECIFICATIONS WAS NOT COGNIZABLE TO CONSTITUTE AN ILLEGAL SENTENCE CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DECIDED BY THE SUPREME COURT FOR THE REASONS BELOW?

A. During the Original May 5, 1989 Sentencing Proceeding When The Law Division Court Was Afforded Two Choices In Considering Whether Defendant's Should Serve The New Jersey Sentence Consecutive Or Concurrent With His Maryland Sentence As The Sentencing Transcript Reflects Judge Schroth Did Not Choose The Former Contrary To The Appellate Division Erroneous Conclusions.

B. No Provisions In The New Jersey Code Or Rules Affords The Law Division Judge With Legal Authority To Choose To Increase The Original Sentence Out Of His Presence In Open Court To Run Consecutive With The Maryland Sentence Some Nineteenth Days After The Defendant Had Left The Courtroom.

C. The Prosecution Had Not Raised Any Procedural Claims In The Law Division Court In Opposition To The Defendant's Motion To Correct An Illegal Sentence Nor Were There Any Adjudicate In That Court Or Raised As A Claim On Appeal.

D. The Superior Court Appellate Division Commit Error In Sua Sponte Concluding That The Petitioner's Appeal Was Procedurally Barred For Several Reasons.

E. Petitioner's Motion To Correct An Illegal Sentence As Grounds Why The

New Jersey Sentence Should Run Concurrent To His Maryland Sentence Were Completely Distinguishable Claims And Did Not Represent A Renewing Of Claims Previously In Adjudicated In Collins,

F. Alternatively The Conclusion Reached in Collins, I, Cannot Procedurally Barred The Collins From Raising Other Claims Why The Consecutiveness Of The Two Sentences Constitute An Illegal Sentence.

II. DID THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION ERR IN CONCLUDING CUNNINGHAM V. CALIFORNIA WAS FACTUALLY DISTINGUISHABLE AND RULED A CHALLENGE IS NOT COGNIZABLE BY WAY OF A MOTION TO CORRECT AN ILLEGAL SENTENCE SINCE THOSE CONCLUSIONS WERE CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DECIDED BY THE SUPREME COURT?

A. The Appellate Division's Conclusions That The U.S. Supreme Court Holdings In Cunningham Were Factually Distinguishable From The Collins's Case Are Contrary To Clearly Establish Federal Law As Decided By The Supreme Court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the Supreme Court of New Jersey Criminal Division court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was 3-23-2021, 3-26-2021.
A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

14-Amendment of the United States Constitution.

STATEMENT OF THE CASE

The genesis of the statement of the case relevant to Petitioner Collins' convictions are discussed at length in Collins' initial direct appeal, State v. Collins, No. A-5173-88 (App. Div., July 21, 1992) certif. denied, 130 N.J. 601, (Collins 1) The petitioner Collins was indicted in 1986 for possession of a controlled dangerous substance (CDS), N.J.S.A. 24:21-20(a)(2), (count one); possession of CDS with intent to distribute, N.J.S.A. 24:21-19(a)(1), (count two); unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), (count three); and possession of hollow point bullets, N.J.S.A. 2C:39-3(f), (count four). In 1988, Collins was found guilty on each count by a jury.

At Petitioner Collins's sentencing proceedings, conducted on May 5, 1989, the Petitioner did not exercise his right under Rule 3:21-4(b) to allocution, before Judge David J. Schroth of Mercer County Superior Court Law Division imposed a prison term of life, with a twenty-five-year parole ineligibility period on count two. Judge Schroth directed the petitioner Collins to serve a consecutive seven-year term on count one and a five-year term on count three, concurrent to the sentences imposed on counts one and two. Also Judge Schroth merged count four into count three at sentencing.

On May 5, 1989 as sentencing transcript verified the Superior Court of New Jersey, Law Division, Mercer County, Judge Schroth did not articulate on the record in the presence of the defendant that the New Jersey sentences imposed were to run consecutive with the petitioner's State of Maryland sentence of 35 years. However, some nineteen days after the petitioner had originally been sentenced on May 5, 1989 and left the courtroom, Judge Schroth out of the petitioner presence on May 24, 1989 increased the

original aggregate prison term of life, with a twenty-five-year parole ineligibility on count two by executing the judgment of conviction (JOC) to reflect the New Jersey to run consecutive with the petitioner Collins's 35-year sentence imposed in the State of Maryland. On direct appeal, the Superior Court of New Jersey Appellate Division affirmed the petitioner's conviction, but remanded to the Law Division for "merger of the court for possession of heroin into the count for possession with intent to distribute, and for amendment of the judgment of conviction and sentence imposed pursuant thereto. Collins I, slip op. at pages 5 and 16, Appendix (E). On September 14, 1992 upon the limited remand, Mercer County Superior Court out of the presence of Petitioner, Amended the Original JOC to reflect the Appellate Division remand that Count 1 is merged with Count 2 and dismissed. Appendix (F).

Petitioner Collins filed in August 2017 a Rule 3:2-10 motion, arguing his sentence was illegal based upon a number of grounds. The Mercer County Superior Court Law Division, motion judge on June 19, 2019 denied Collins motion to correct an illegal sentence based upon the enumerated reasons set forth in its opinion. Appendix (B). Collins timely appealed the Mercer County Superior Court Law Division, judge on June 19, 2019 denied Collins motion to correct an illegal sentence.

On appeal, to the appellate division, Collins raised a number arguments, for that court's consideration. The Appellate Division held in denying the appeal that based on our careful review of the record, as well as this matter's extensive procedural history, we find these arguments unpersuasive. Here, it is uncontested that defendant was present at his original sentencing and was afforded the opportunity to say to Judge Schroth whatever he wanted to say. Further, it is evident that Judge Schroth had two choices when considering whether defendant should serve his New Jersey sentence consecutively or concurrently to his Maryland sentence. Judge Schroth chose the former. In Collins I., we found defendant's argument that his New Jersey sentence should be modified to run concurrently to his

Maryland sentence was without merit. Accordingly, we entered a remand under limited to merger of defendant's punishment of CDS and possession with intent to distribute charges. Given this procedural history, defendant is procedurally barred under Rule 3:22-5 from renewing the argument that his New Jersey sentence should run concurrent to his Maryland sentence, simply by labeling his 1989 sentence "illegal." Likewise, since the 1993 resentence superseded the 1989 sentence, the same analysis applies.

The appellate division in concluding held that to the extent defendant references Cunningham v. California, 549 U.S. 270 (2007) and argues Judge Schroth imposed an illegal sentence by improperly finding aggravating and mitigating factors not found by the jury, we disagree. Not only is Cunningham factually distinguishable from this case, but our courts have consistently recognized that trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Additionally, judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[.] and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010). We are satisfied Judge Schroth adhered to those principles, that his findings of fact concerning aggravating and mitigating factors were based on ample credible evidence and that he applied the correct sentencing guidelines enunciated in the Code, both in 1989 and on remand in 1993. According, we decline to find defendant's sentence or resentence was illegal. To the extent we have not addressed defendant's remaining arguments, we find they do not warrant further discussion in a written opinion. R. 2:11-3(e)(2). Appendix (A) pages 1-9.

The Petitioner timely petitioned the Supreme Court of New Jersey for certification of the judgment in A-005136-18 and after having been submitted, and that Court having considered same, Ordered on March 23, 2021 that the petition for certification is denied, actual date of denial March 26, 2021. Appendix (C).

REASONS FOR GRANTING THE PETITION

- I. To Resolve And Determine Whether New Jersey Superior Court Appellate Division Erred In Concluding Petitioner's Motion To Correct An Illegal Sentence Claims That Consecutive Sentence Imposed Outside His Presence In Open Court Some Nineteenth Days After The Original Sentence Had Been Imposed In Open Court Without Any Specification Whether They Were To Run Consecutive Or Concurrent With His Maryland Sentence Were Not Cognizable Claims To Raise Under That Motion Contrary To Clearly Established Federal Law As Decided By The Supreme Court That Criminal Sentences Imposed Outside A Defendant's Presence In Open Court Violate His Right To Be Present And Are Constitutionally Illegal Sentences.**
- II. To Resolve And Determine Whether The New Jersey Superior Court Appellate Division Violated Clearly Established Federal Law As Decided By The Supreme Court In Excising Sua Sponte Authority In Ruling Petitioner Was Procedurally Barred When The Prosecution Had Not Raised Those Claims On Appeal In Opposition To His Appeal From The Denial Of His Motion To Correct An Illegal Sentence.**
- III. To Resolve And Determine Whether The New Jersey Superior Court Appellate Violated Clearly Established Federal Law As Decided By The Supreme Court In Concluding Cunningham Was Distinguishable From The Case Of Petitioner Since Cunningham v. California, 549 U.S. 270 (2007) Was Decided Upon The Very Same Principles Decided In Apprendi v. New Jersey That Prohibited The Imposition Of Sentence Upon Aggravators Not Found By The Jury.**

ARGUMENT:

I. DID THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION ERR IN CONCLUDING CONSECUTIVE SENTENCES IMPOSED OUTSIDE PETITIONER'S PRESENCE IN OPEN COURT SOME NINETEENTH DAYS AFTER THE ORIGINAL SENTENCES HAD BEEN IMPOSED IN OPEN COURT WITHOUT SPECIFICATIONS WAS NOT COGNIZABLE TO CONSTITUTE AN ILLEGAL SENTENCE CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DECIDED BY THE SUPREME COURT FOR THE REASONS BELOW?

A, During the Original May 5, 1989 Sentencing Proceeding When The Law Division Court Was Afforded Two Choices In Considering Whether Defendant's Should Serve The New Jersey Sentence Consecutive Or Concurrent With His Maryland Sentence As The Sentencing Transcript Reflects Judge Schroth Did Not Chose The Former Contrary To The Appellate Division Erroneous Conclusions.

Although the original May 5, 1989 sentencing transcript reflects that when Collins was present in open court, Law Division Court of Mercer County, Judge Schroth when imposing sentencing was constitutionally authorized to choices as to whether the New Jersey state sentences were to be serve consecutive or concurrent with the federal sentences previously imposed in the United States District Court for the District of Maryland. Did not exercise either one of those two constitutional authorized choice in open court in Collins's presence on May 5, 1989

Nonetheless the Appellate Division in affirming on August 17, 2020 Collins's Appeal of the Law Division Court's denial of his motion to correct an illegal sentence ruled as follows:

Here, it is uncontested that defendant was present at his original sentencing and was afforded the opportunity to say to Judge Schroth whatever he wanted to say. Further, it is evident that Judge Schroth had two choices when considering whether defendant should serve his New Jersey sentence consecutively or concurrently to his Maryland sentence. Judge Schroth chose the former.

Appendix (A) at Pg. 7.

Those conclusions were in direct conflict with the sentencing transcript of May 5, 1989 that reflects the Mercer County Superior Court Judge did not exercise either of the two constitutional choices of discretion. May 5, 1989 sentencing transcript of pg. 13, lines 14-25; pg. 14, lines 1-25; and pg. 15, lines 1-13. Appendix (D). To the contrary, the Mercer County Superior Court instead elected to exercise one of those two constitutionally choices of discretion to imposed consecutive sentences on May 24, 1989, some nineteenth days after Collins had already left the courtroom as the Appellate Division Per Curiam Opinion acknowledged.

At his sentencing on May 5, 1989, defendant exercised his right to allocution, under Rule 3:21-4(b), before Judge David J. Schroth imposed a prison term for life, with a twenty-five-years parole ineligibility period on count two.¹⁷ The judge also directed defendant to serve a consecutive seven-year term on count one and a five-year term on count three, concurrent to the sentences imposed on counts one and two. Also, the judge merged count four into count three at sentencing. On May 24, 1989, Judge Schroth executed a judgment of conviction (JOC) reflecting this sentence; and as we observed in Collins I, per the JOC, defendant was directed to serve his aggregate sentence, "consecutive to a previous thirty-five-year sentence for a Maryland conviction.

At pg. 2, paragraph 3; and at pg. 3, paragraph 1 and -2. Appendix (A)

In that light at that point when Collins was no longer present in open court and had already left the courtroom some 19 days earlier, the exercise of such constitutional discretion to impose consecutive sentences was legally no longer available to the Mercer County Superior Judge. Since that Court was constitutionally required to exercised such

FN1. Contrary to the appellate division's opinion, It should be judicially noted Collins did not allocute but instead declined as the May 5, 1989 sentencing transcript reflect at pg. 8, lines 6-9. Appendix (D).

discretion in Collins's presence in open court as to whether he should serve the Jersey sentences consecutively or concurrently with his Maryland federally imposed sentence. Thus Judge Schroth's exercise of one of those two authorities constitutional choices of discretionary to impose consecutive sentences outside Collins's presence in open court on May 24, 1989 some nineteenth days after he had originally been sentenced earlier on May 5, 1989 and left the courtroom without any specification as to how the Jersey state sentence were to run with his federally imposed sentences. Constitutes an illegal increasing of Collins's sentence originally imposed on May 5, 1989 because the sentence was imposed in direct violation of his constitutional right to be present and therefore was imposed contrary to clearly established federal law as established by the Supreme Court. See Diaz v. United States, 223 U.S. 442, (1912) (As has been so often point out, a criminal defendant right to be present at every stage of his trial is a common law right, is to some extent protected by the 14th Amendment to the U.S. Constitution.) at 445; United States v. Faulks, 201 F.3d 208 (3d Cir. 1999) "We began our analysis by noting that "one of the most basic of the rights guaranteed by the Confrontation Clause is the accused right to be present in courtroom at every stage of his trial "Illinois v. Allen, 397 U.S. 337, 338, 25 L.Ed. 2d 353, 90 S.Ct. 136, 1057 (1970) (citing Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136, (1892)); the defendant's right against being subject to double jeopardy. State v. Roth, 95 N.J. 334, 344-345, 471 A.2d 370 (1984).; also see State v. Rodriguesz, 97 N.J. 263, 478 A.2d 408 (1984), the double jeopardy protection generally prohibits an increase in sentence following the commencement of execution. See e.g., North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 LEd.2d 656 (1969) (due process).

B. No Provisions In The New Jersey Code Or Rules Affords The Law Division Judge With Legal Authority To Choose To Increase The Original Sentence Out Of His Presence In Open Court To Run Consecutive With The Maryland Sentence Some Nineteenth Days After The Defendant Had Left The Courtroom.

Although all sentences imposed in the State of New Jersey become final on the date of sentencing, with the one exception being when the sentence is imposed pursuant to N.J.S.A. 2C:44-1(f)(2) that sentence does not become final until 10 days later. See Rule 3:21-4(g) that readies in pertinent part:..

(g) Sentence Imposed Pursuant to N.J.S.A. 2C:44-1(f)(2). In the event the court imposes sentence pursuant to N.J.S.A. 2C:44-1(f)(2), such sentence shall not become final until 10 days after the date sentence was pronounced.

Also see Code of Criminal Justice N.J.S.A. 2C:44-1(f)(2)

If the court does impose sentence pursuant to this paragraph, or if the court impose a noncustodial or probationary sentence upon conviction for a crime of the first or second degree, such sentence shall not become final for 10 days in order to permit the appeal of such sentence by the prosecution.

However, after the original sentence had already been imposed in the presence of Collins on May 5, 1989 without any specification as to whether the state sentences of New Jersey were to run either consecutively or concurrently with the Collins's federally imposed Maryland sentences of thirty-five-years and had become final. Judge Schroth nonetheless on May 24, 1989 some nineteenth days later issued a JOC order outside the present of Collins in open court that increased the original state sentences imposed without any specification on May 5, 1988. By ordering those sentences to now run consecutive with the federally imposed Maryland sentences. Constitutes consecutive sentences not imposed in accordance with the law since with the one exception of a sentence having been imposed in accordance with the provisions of the Code of Criminal Justice N.J.S.A. 2C:44-1(f)(2); also see Rule 3:21-4(g). No provisions in the Code or authorizes or prevents the original sentence imposed in the Petitioner's presence from becoming final on the date of its imposition.

Therefore because the consecutive sentences imposed some 19 days later when Collins was not present in open court they were not imposed in accordance with law because they were imposed without any regard to constitutional safeguard in mind. Such as Collins's constitutional right to be present at sentencing and his right not to be subject to double jeopardy as set forth below as follows: ^{2/}

'1] the defendant's constitutional right to be present at the time of sentencing; Diaz v. United States, 223 U.S. 442, (1912) (As has been so often point out, a criminal defendant right to be present at every stage of his trial is a common law right, is to some extent protected by the 14th Amendment to the U.S. Constitution.) at 445; United States v. Faulks, 201 F.3d 208 (3d Cir. 1999) "We began our analysis by noting that "one of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in courtroom at every stage of his trial "Illinois v. Allen, 397 U.S. 337, 338, 25 L.Ed. 2d 353, 90 S.Ct. 136, 1057 (1970) (citing Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136, (1892)).

'2] the defendant's right against being subject to double jeopardy. State v. Roth, 95 N.J. 334, 344-345, 471 A.2d 370 (1984).; also see State v. Rodriguez, 97 N.J. 263, 478 A.2d 408 (1984), the double jeopardy protection generally prohibits an increase in sentence following the commencement of execution. See e.g., North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 LEd.2d 656 (1969) (due process). ³

FN2 See "Acevedo, 205 N.J. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). That includes a sentence "imposed without regard to some constitutional safeguard." Zuber, 227 N.J. at 437 (quoting State v. Tavares, 286 N.J. Super. 610, 618 (App. Div. 1996)).

FN3. New Jersey CHAPTER III. Rule 3:16; Rule 3:21-4(b); and Rule 3:21 (f), each of those rules works in harmony with the New Jersey State and U.S. Constitutional requirements of a criminal defendant's right to be present before sentence is imposed, and connotes any sentence imposed out the defendants present not imposed in according with law and is a illegal sentence.

Viewing the May 5, 1989 sentencing transcript when the original Life sentence with twenty-five years parole ineligibility was originally imposed orally in open court in the presence of Collins. That transcript reveals the sentences were imposed on the record without any oral specificity as to how the state sentence were to be served with the federally imposed sentences of thirty-five-years. As so the New Jersey sentence of life imprisonment with twenty-five-years parole ineligibility imposed for Collins conviction as to count (2) possession with intent to distribute legally must as a matter of law run concurrently with the federally imposed sentence. See In re De Luccia, 10 N.J. Super. 374, 76 A.2d 304 (Cty Ct, 1950); In re Sbongy, 18 N.J. Super. 334, 87 A.2d 59 (Cty Ct, 1952). also see State v. Pahlabel, 40 N.J. Super. 416, 423, 123 A.2d 391 (App. Div. 1956) transcript remarks control over clerk's records), the judgment of conviction cannot embody as sentence which constitutes an increase above the original imposed by the trial judge, unless the appellate court orders an increase or reconsideration, or unless an illegal sentence is subsequently corrected. See e.g. State v. Rodriguez, *supra*; State v. Roth, *supra*. ^{4/}

In that light the May 24, 1989 'JOC Order' increasing outside Collins's presence in open court the New Jersey state sentence of Life imprisonment with twenty-five years parole ineligibility original imposed without any specification as to how the were to run consecutively or concurrently with the federally imposed Maryland sentence of 35-year on May 5, 1989. Constitutes an illegal sentence because the order issued some 19 days after the original sentence had been imposed making the state sentences to run consecutive were not imposed in accordance with law mandating all sentences shall be imposed in the

FN4. In Collins, I. the appellate court did not orders an increase or reconsider of the original sentence imposed. Instead it merely ordered limited remanded to the Law Division for merger of the count for possession of heroin into the count for possession with intent to distribute, and for amendment of the judgment of conviction and sentence imposed pursuant thereto. See State of New Jersey v. Vernon Collins, Docket No. -5136-18T3, explaining that the remand here was limited. Appendix (E) pages 5 and 16.

presence of a defendant in open court.

C. The Prosecution Had Not Raised Any Procedural Claims In The Law Division Court In Opposition To The Defendant's Motion To Correct An Illegal Sentence Nor Were There Any Adjudicate In That Court Or Raised As A Claim On Appeal.

In the present, the New Jersey Superior Court Appellate Division sua sponte ruled that the Collins under Rule 3:22-5 was procedurally barred from raising the legality of the consecutiveness of his sentences for the following reasons:

In Collins I, we found defendant's argument that his New Jersey sentence should be modified to run concurrent to his Maryland sentence was without merit. Accordingly, we entered a remand order limited to merger of defendant's possession of CDS and possession with intent to distribute charges. Given this procedural history, defendant is procedurally barred under Rule 3:22-5 from renewing the argument that his New Jersey sentence should run concurrent to his Maryland Sentence, simply by labeling his 1989 sentence "illegal." Likewise, since the 1993 resentence superseded the 1989 sentence, the same analysis applies.

Appendix (A) at pages 7-8.

However, the problem with the appellate division's sua sponte reasons for denying Collins's appeal upon grounds he was procedural barred were based on conclusions not raised the prosecution had in the superior court law division as a basis for denying his motion to correct an illegal sentence

Second, Judge Massi of the law division court did not ruled as a basic for denying the defendant's motion to correct an illegal sentence upon grounds that he was procedurally barred. Third the prosecution had not raised as a claim for dismissing the defendant's appeal that the defendant was procedural bar. Viewed with those precepts in mind, the appellate division was without legal authority or jurisdiction to sua sponte declare the defendant was procedurally barred from renewing the argument that his New Jersey

sentence should run concurrent to his Maryland sentence. Since appellate state courts throughout the of the United States have repeatedly held as a matter of general jurisprudence when a question was not presented or not decided in the law division an appellate court does not have appellate jurisdiction to adjudicate the claim or claims. Since the appellate division powers are limited to appellate review of matters adjudicated in the lower courts. Thus the appellate division had no legal authority to sua sponte invade the province of the nisi prius courts (Mercer County Law Division Court) in making an original factual finding in deciding points not presented, raised or decided as a basis in the June 19, 2019 law division court order for denying his motion to correct an illegal sentences or even raised on appeal as a claim.

D. The Superior Court Appellate Division Commit Error In Sua Sponte
Concluding That The Petitioner's Appeal Was Procedurally Barred For
Several Reasons.

In this case, in affirming Collins's Appeal on August 17, 2020, the Appellate Division based on its own conclusions that it previously decided in Collins I, concerning arguments that his New Jersey sentence should be modified to run concurrent to his Maryland sentence was without merit. Erroneously concludes the Collins is procedurally barred under Rule 3:22-5 from renewing the argument that his New Jersey sentence should run concurrent to his Maryland Sentence, simply by labeling his 1989 sentence "illegal." Likewise, since the 1993 resentencing superseded the 1989 sentence, the same analysis applies. Appendix (A) at page 8. As a result those conclusions of the Appellate Division were preposterous for a myriad reasons: Collins's appellant counsel in Collins I, merely argued in Point VI the following grounds:

A. This Sentence Must Run Concurrently With The Federal
(SIC) Defendant Is Serving.

B. The Conviction For Possession Must Merge With The

Conviction For Possession With Intent To Distribute.

C. The Defendant Must Be Given The Opportunity To Elect To Be Sentenced Under The CDRA.

Thus, Collins's appellant counsel with respect to VI (A) merely argued for modification of the consecutive sentence to concurrent were upon grounds that the State of Maryland had not imposed a sentence upon the defendant but instead the federal government had. As so the New Jersey sentence should be modified to run concurrently with his federally imposed sentence of thirty-five-years. To which the appellate division in *Collins I*, ruled without any explanation as follows:

With the exception of Point VI B, we find all of the defendant's contentions to be clearly without merit, R. 2:11-3(e)(2). We agree with him that his conviction for possession of heroin should merge with his conviction for possession with intent to distribute. The State concedes. Affirmed in part, reversed in part. Remanded to the Law Division for merger of the count for possession of heroin into the count for possession with intent to distribute, and for amendment of the judgment of conviction and the sentence imposed pursuant thereto.

Appendix (F): at pages 5 and 16.

Collins's motion to correct an illegal sentence on the other hand filed in 2017 was premised upon completely distinguishable claims of illegality than those claims previously raised on direct appeal in *Collins, I*. Since in the 2017 motion to correct an illegal sentence for instant the claims were base on multiple facias grounds set forth below:

I. THE IMPOSITION OF AN INCREASE SENTENCE OUTSIDE THE DEFENDANT'S PRESENCE BY ADDING A PROVISION TO THE JUDGMENT OF CONVICTION AND ORDER FOR COMMITMENT

FN5. Pursuant to Rule 2:11-3(e)(2) means the argument lacked sufficient merit to warrant discussion in a written opinion. *State v. Muhammad*, 359 N.J. Super at 376.

THAT THE SENTENCES WOULD RUN CONSECUTIVE WITH ALL SENTENCES IMPOSED BY THE STATE OF MARYLAND VIOLATED HIS CONSTITUTIONAL RIGHTS TO BE PRESENT PURSUANT TO RULE 3:16, RIGHT TO ADDRESS THE COURT PURSUANT TO BOTH RULE 3:21-4(b), 2C: 43-2(e), AND RIGHTS PURSUANT TO RULE 3:21-4(e) RENDERS THE SENTENCES IMPOSED ILLEGAL SENTENCES.

(a) Once The Sentences Were Orally Pronounced In Open Court And The Court Stated "You May Go" Only Those Sentences Could Not Be Increased.

(b) Without Recalling Mr. Collins Back To The Courtroom The Sentence Originally Imposed Could Not Been Increasing To Run Consecutive With Any Sentence Previously Imposed By The State Of Maryland By Adding Such Provision To The Judgment of Conviction And Order For Commitment Without Violating His Constitutional Right To Present And Right To Allocution.

(c) Increasing The Orally Pronounced Sentences Out Of The Defendant's Presence By Adding In The Judgment And Order For Commitment The Sentences Are To Run Consecutive With MD Sentences Violated His Constitutional Right To Be Present At Every Critical Stage Of The Sentencing Proceedings And Right To Allocution.

Clearly Collins's 2017 motion to correct an illegal sentence in that light did not constituted a renewing of the original arguments his appellant counsel raised on direct appeal and decided to be without merit or without need for a written explanation. To the contrary, the arguments raised in Collins's 2017 motion were instead completely distinguishable from those claims raised on direct appeal in Collins I.

E. Collins's Motion To Correct An Illegal Sentence As Grounds Why The New Jersey Sentence Should Run Concurrent To His Maryland Sentence Were Completely Distinguishable Claims And Did Not Represent A Renewing Of Claims Previously In Adjudicated In Collins I.

The previously conclusions of the appellate division in Collins I, that his claim VI (A) were without merit does not legally constitute a ruling on the merits. That is a legal prerequisite in order for Rule 3:22-5 to apply that readies in pertinent part as follows:

Rule 3:22-5. Bar of Ground Expressly Adjudicated. A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any postconviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceeding.

Here on direct appeal in Collins I, the previously Appellate Division Court did not in anyway expressed an adjudication on the merits with respect to Collins's Point Vi (A) argument. Instead merely asserted Collins's Point Vi (A) argument was without merit. As a result Rule 3:22-5 does not apply because that New Jersey Rule necessitated as a prerequisite an actually adjudication expressed in the written opinion to constitute a ruling on the merits. In that light, the Appellate Division August 17, 2020 affirming of Collins's appeal from the law division denial of his motion to correct an illegal sentence could not have been procedurally barred under Rule 3:22-5 from renewing an argument that his New Jersey sentence should run concurrent with the federally imposed Maryland sentence of thirty-five-years. Since the Appellate Division's decision was erroneously based on reliance's on New Jersey Rule 3:22-5 that did not apply.

F. Alternatively The Conclusion Reached in Collins, I, Cannot Procedurally Barred The Collins From Raising Other Claims Why The Consecutiveness Of The Two Sentences Constitute An Illegal Sentence.

The conclusions decided in Collins, I, that Point VI (A) was without merit cannot serve to procedurally barred the defendant from raising other claims as to why the consecutiveness of the the New Jersey sentence constitute an illegal sentence. Such as the claims raised in the law division court in defendant's August, 2017 motion to correct an

illegal sentence and on appeal from the denial of those claims. Since a truly illegal sentence can be corrected at any time." State v. Zuber, 442 N.J. Super. 611, 617 (App. Div. 2015), rev'd on other grounds, 227 N.J. 422 (2017); State v. Schubert, 212 N.J. 295, 309 (2012). A sentence is illegal if it 'exceeds the maximum penalty provided in the Code for a particular offense,' is not imposed in accordance with law, or fails to include a mandatory sentencing requirement." State v. Acevedo, 205 N.J. 40, 45 (2011); State v. Locane, 454 N.J. Super. 98, 117 (App. Div. 2018). A sentence "not imposed in accordance with law" includes a "disposition [not] authorized by the Code. State v. Murray, 162 N.J. 240, 247 (2000). Otherwise the motion to correct an illegal sentence would become meaningless.

In sum, considered with all of those important precepts in mind, the conclusions of New Jersey Superior Court Appellate Division for affirming Collins's appeal, were contrary to clearly establish federal law as has been decided by the U.S. Supreme Court with respect to a defendant's constitutional right to be present at the time of sentencing, and one imposed outside the his present constitutes an illegal sentence.

ARGUMENT:

II. DID THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION ERR IN CONCLUDING CUNNINGHAM V. CALIFORNIA WAS FACTUALLY DISTINGUISHABLE AND RULED A CHALLENGE IS NOT COGNIZABLE BY WAY OF A MOTION TO CORRECT AN ILLEGAL SENTENCE SINCE THOSE CONCLUSIONS WERE CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DECIDED BY THE SUPREME COURT?

Here as the basis for denying Collins appeal the appellate division ruled to the extent defendant references Cunningham v. California, 549 U.S. 270 (2007) and argues Judge Schroth imposed an illegal sentence by improperly finding aggravating and mitigating factors not found by the jury, we disagree. Not only is Cunningham factually distinguishable from this case, but our courts have consistently recognized that trial judges have broad

sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Additionally, judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[.] and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). We are satisfied Judge Schroth adhered to those principles, that his findings of fact concerning aggravating and mitigating factors were based on ample credible evidence and that he applied the correct sentencing guidelines enunciated in the Code, both in 1989 and on remand in 1993. According, we decline to find defendant's sentence or resentence was illegal. To the extent we have not addressed defendant's remaining arguments, we find they do not warrant further discussion in a written opinion. R. 2:11-3(e)(2). Appendix (A) at pg 9.

A. The Appellate Division's Conclusions That The U.S. Supreme Court Holdings In Cunningham Were Factually Distinguishable From The Collins's Case Are Contrary To Clearly Establish Federal Law As Decided By The Supreme Court.

Collins argues contrary to the New Jersey Superior Court Appellate Division conclusions with respect to this Court's holdings found and decided in Cunningham v. California, 549 U.S. 270 (2007). Cunningham is neither factually or actually distinguishable from Collins's case as the appellate division erroneously ruled in denying Collins appeal from the denial of his motion to correct an illegal sentence of Life imprisonment with twenty-five years parole ineligibility imposed pursuant to the New Jersey Sentencing Statute 2C-44-1(a). Since Cunningham renders enhanced sentences like those imposed pursuant to 2C-44-1(a) and (b) with twenty-five years parole ineligibility on trial judges findings of statutory and non-aggravating factors upon a standard of proof of a preponderance of the evidence not found by the jury that increases the quantum of punishment constitutes a constitutional illegal sentences. Similar to this Court's landmark decision decided.

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000) in which the Supreme Court held:

Where the defendant Apprendi was convicted of a crime punishable by five to ten years in prison, however, he was sentenced to twelve years based upon a fact, not found by a jury beyond a reasonable doubt. That he committed the crime with the purpose of intimidating protected groups. *Id.* at 470-71. And concluded that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and beyond a reasonable doubt." *Id.* at 490.

Cunningham is thereafter one of a long line of Supreme Court cases decided that involved sentencing proceedings that imposed sentences based on facts not found by the jury. For example the Supreme Court some two years later Apprendi considered a similar question in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). In Ring the jury was instructed on both premeditated murder and felony murder for a death arising from an armed robbery. The jury could not reach a verdict on premeditated murder, but convicted Ring of felony murder, for which the maximum penalty, absent aggravating circumstances and the finding to support them, was life imprisonment. At the sentencing hearing, held by law before the judge alone, the accomplice testified that Ring was planning the robbery for weeks before it occurred, shot the victim with a rifle equipped with a home made silencer, and directed the getaway. *Id.* The sentence judge found two statutory enumerated aggravating factors: "that Ring committed the offense in expectation of receiving something of pecuniary value," and "that the offense was committed in an especially heinous, cruel or depraved manner." *Id.* at 594-95 (citation omitted). The sentencing judge concluded that those two aggravating circumstances, thereby warranting the imposition of the death penalty. *Id.* at 595, 592-593. However, the Supreme Court reached the same result it did in Apprendi and held that imposing the greater sentence only after judicial fact finding was unconstitutional. *Id.* at 609.

Then some three years after Ring was decided, the U.S. Supreme Court took up the question of what constitutes a statutory maximum" for Apprendi purposes in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2005). Blakely kidnapped his estranged wife at knife point and drove her into Montana, threatening her with a shotgun. Id. at 298. He plead guilty to reduced charges and he admitted in his plea only elements of the offense. Id. at 298-99. The statutory maximum for those offenses was ten years under Washington State law, but a sentence above a "standard range" of 49 to 53 months was prohibited absent the sentencing judge finding "substantial and compelling reasons justifying an exceptional sentence" up to ten years." Id. at 299. Blakely was sentenced well above the standard range upon the sentencing judge's finding that he acted with cruelty." Id. at 303.

The Supreme Court held that the "standard range" was the statutory maximum for Apprendi purposes, thus any facts found justifying a sentence above the standard range must be found by a jury. Id. at 303-04. And held in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005) the high court applied the teachings of Apprendi, Ring, and Blakely to the federal sentencing regime. The Court held that the upper end of the then mandatory Federal sentencing guidelines, even though it was below the maximum sentence established by Congress, was the statutory maximum for Apprendi purposes. Thus, judicial fact finding used to justify a sentence above the guidelines range violated the Sixth Amendment. Booker, 543 U.S. at 233-35 (Opinion of Stevens, J.).

Some two years later after Blakely and Booker were decided in 2005 the U.S. Supreme Court in 2007 decided Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed. 2d 856 dealing with California's Code, which established a low, mid, and upper range sentence for the crime codified therein. These were not ranges within which the sentencing judge could exercise his discretion, rather, they were fixed points the sentencing judge was to choose from. Id. at 292. For example, Cunningham's crime of continuing sexual abuse had a lower term of 6 years, a middle term of 12 years, and an upper term of 16 years. Id. at

275. Whereas, California penal code obliged the sentencing judge to impose a middle- term sentence unless the judge, not the jury, found mitigating or aggravating factors. Id. The Supreme Court held:

California's sentencing system was unconstitutional because the judge was required to find the facts necessary to impose a higher sentence than was permissible based on the jury's alone. Cunningham v. California, 549 U.S. 270, Id. at 288-89, 292-93.

Like the former sentencing Code of California this Court decided after Apprendi and other cases that lead a decision in Cunningham declaring California sentencing code unconstitutional. The New Jersey Code N.J.S.A. 2C-44-1 Sentencing Scheme is likewise similar because like California's former sentencing statute it requires the trial judge to taking of additional findings of aggravating factors by the trial judge to determining upon a mere preponderance of the evidence standard of proof whether to increase the quantum range of punishment the defendant would faces beyond those found in the jury's verdict of guilt. A fact Judge Schroth acknowledge during Collins's May 5, 1989 sentencing proceedings as follows:

And, the first decision I'm supposed to make, whether or not this is a jail case. And, if it is, I have to review the aggravating circumstances and the mitigating circumstances to determine whether or not you are entitled to presumptive or greater or lesser sentence. **Appendix (D)** at Pg. 11, paragraph 3, also see 2C:44-1 (a) 1 through 11.

Thus the critical question posed in the case sub judice is because New Jersey sentencing scheme 'N.J.S.A. (2C-44-1)' required the trial judge to make additional findings of aggravating and mitigating circumstances necessary to determine whether a presumptive or a greater or a lesser prison sentences should be imposed, rather than the jury. State v. Sainz, 107 N.J. 283, 526 A.2d 1015 (1987)

We consider first the general purpose of aggravating and mitigating factors under

the Code. Aggravating and mitigating factors are used to insure that sentencing is individualized without being arbitrary. The factors insure that the sentence imposed is tailored to the individual offender and to the particulate crime he or she committed. By establishing under the Code presumptive sentences that could be supplanted only after a finding of a preponderance of aggravating or mitigating factors, the Legislature promoted a uniformity in sentencing practices. See N.J.S.A. 2C:44-1 to 6.

Unlike the situation with Code offenses, there were no presumptive sentences for CDS Act violations. Nevertheless, the determination and weighing of aggravating and mitigating factors in CDS cases can serve the same purpose as in the Code. This process can guide judicial discretion and ensure uniformity and consistency in the exercise of this discretion. As observed by the Appellate Division, the determination and weighing of aggravating and mitigating factors is a "critical guideline for arriving at an appropriate sentence for a CDS Act offense[] [i] order to reduce unacceptable disparity" in sentencing. [FN3] Sainz, *supra*, 210 N.J. Super. at 24, 509 A.2d 192.

Sainz, *supra* 107 N.J. at 287-289. ^{6/}

Mercer County Judge Schroth based upon a mere preponderance of the evidence standard of proof *sua sponte* concluded under those sentencing scheme as follows:

And, the first decision I'm supposed to make, whether or not this is a jail case. And, if it is, I have to review the aggravating circumstances and the mitigating circumstances to determine whether or not you are entitled to a presumptive or a greater or a lesser sentence. In reviewing the aggravating circumstances, I find that number one is present; the nature and circumstances of the offense and the role of the actor herein, including whether or not the crime was committed in an especially heinous, cruel or depraved manner. Not only was there a very large amount of pure narcotics involved, **but you were also stopped while in the process of going for a loaded gun; which your record would indicate you would not hesitate to use.** ^{7/}

Number three is present; the risk that the defendant would commit another offense. That appears to me to be an absolute certainty. You've lived a life of

crime. There's every indication that you would have no intention of doing anything other than to continue living a life of crime. That is your way of existence.

Number six is present; the extent of the defendant's prior criminal record and the seriousness of the offenses of which you have been convicted. You have a disgraceful criminal record. You are obviously a serious threat to the safety of law abiding citizens.

And, number nine is present; the need for deterring the defendant and others from violating the law. You're an individual that has to be stopped, and the only

FN6. N.J.S.A. 24:21-19b(2), prior to its repeal by L. 1987, c. 106, § 25, provided: b. Any person who violates subsection a. with respect to: (2) A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than \$25,000.00, or both. Although none of the sentencing provisions in Title 24, including N.J.S.A. 24-21-19b(2), provided for terms of parole ineligibility, the law is well established that the guidelines for parole ineligibility contained in N.J.S.A. 2C:43-6b apply to sentencing for Title 24 convictions. State v. Reevey, 213 N.J. Super. 37, 41-42, 516 A.2d 269 (App.Div.1986); State v. Flagan, 208 N.J.Super. 573, 576, 506 A.2d 768 (App.Div. 1986); State v. Sobel, 183 N.J. Super. 473, 479n. 1, 444 A.2d 598 (App.Div. 1982). Prior to its amendment in 1981, N.J.S.A. 2C:43-6b provided for the imposition of minimum parole ineligibility terms only with respect to sentences for Title 2C crimes of the first and second degree. In its amended form, however, N.J.S.A. 2C:43-6b now provides: b. As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. See State v. Cacamis, 230 N.J.Super. 1, 552 A.2d 616 (1988) at 6-7; State v. Reevey, 37, 516 A.2d 269 (1986).

way to stop you is to put you behind bars and keep you there. You're a violent and dangerous individual.

I've also reviewed the mitigating circumstances contained in the code and find that absolutely none of them come close to existing.

Mr. Collins has a total contempt for our laws, so the sentence of the Court will be on possession with intent to distribute, Count 2--. This narcotic had a varying degree of value. It had one value in New York where you went to buy it, and then as you cross the George Washington Bridge, you get to Newark, it went up one hundred dollars. And then when you got down to Trenton, it went up another one hundred thousand dollars. When you get to Washington, it goes up another one hundred thousand dollars. So, it's worth at least two hundred fifty thousand dollars according to the testimony here in this area. A quarter of a million dollars, and more valuable as you went south. /

On the possession with intent to distribute pursuant to the statute, you'll be committed to the custody of the Commissioner of the Department of Corrections for a period of life. And, you'll be ineligible for parole for a period of twenty-five years. I'm clearly convinced that the aggravating circumstances substantially outweigh the non-existent mitigating circumstances. This is an extremely serious case and you are an extremely

FN7. It should be judicially noted that Collins had not been charged with of N.J.S.A. 2C:39-4 the use of a weapon in the commission of a crime which is a felony offense under New Jersey law. See State v. Shoats, 339 N.J. Super. 359, 772 A.2d 1, (2001). Nevertheless pursuant to the New Jersey Sentencing Statute 2C:44-1(a), Mercer County Judge Schroth considered this non statutory aggravating circumstance as a aggravating factor for imposing the "Extended Sentence" despite such had not been submit to or found by the jury beyond reasonable.

FN8. It should be judicial noted at the sentencing hearing that Collins object to the use of these statutory and non statutory aggravating circumstances found by Judge Schroth upon a preponderance of the evidence had not been either submitted to, or found by the jury beyond a reasonable doubt. Appendix (D) at Pg. 4, lines 3-12.

dangerous, violent person and you deserve the maximum allowed by law so that society can be protected.

For Count 1, I'm not merging possession because you possessed these narcotics here in New Jersey and you possessed them with the intent to distribute them in another state, ^{9/} so they are separate offenses and do not merge. But, if you'll wait a minute, I have to get something. Sentence of the Court will be that you will be committed to the custody of the Commissioner of the Department of Corrections for a period of seven years, which sentence is to run consecutive to Count 2.

Appendix (D), at pages 11-14..

Clearly, 2C-44-1 [a] of the New Jersey sentencing scheme that permitted based on the trial judge findings of statutory and non statutory aggravating circumstances the imposition of an higher sentence of life with twenty-five years parole ineligibility. Unequivocally was an equivalent of the former California sentencing scheme the Supreme Court in Cunningham v. California, determined to be unconstitutional were the judge was required to find the facts necessary to impose a higher sentence than was permissible based on the jury's verdict alone. *Id.* Cunningham's at 288-89, 292-93. Even the Supreme Court of New Jersey acknowledge same in ruling on the effect Apprendi v. New Jersey had on its sentencing scheme in State v. Johnson, 166 N.J. 523, 766 A.2d 1126 (N.J., 2001):

The sentiments expressed in Apprendi about the actual effect of a sentence are reinforced by the laws and jurisprudence of this State. Concededly, a NERA sentence does not impose an increased maximum prison sentence beyond that otherwise available under the Criminal Code. However, "we have always recognized that real time is the realistic and practical measure of the punishment imposed." State v. Mosley, 335 N.J. Super 144, 157, 761 A.2d 130 (App. Div. 2000). See also State v. Pennington, 154 N.J. 344, 357, 712 A.2d 1133 (1998) (nothing that,

FN9. That was a non statutory aggravating factor that was not submitted to the jury or found by that body beyond a reasonable.

pursuant to N.J.S.A. 2C:44-1c(2), "a sentencing court is required to consider parole consequences in sentencing"); State v. Kovack, 91 N.J. 476, 482, 453 A.2d 521 (1982) ("Under the New Jersey Code of Criminal Justice the parole ineligibility is the backbone of the sentence."); State v. Maguire, 84 N.J. 508, 530, 423 A.2d 294 (1980) ("The reality stressed by [defendant and amicus] is the duration of a sentence, but we suggest that the ultimate reality is the period of actual imprisonment."); (State v. Richardson, 208 N.J. Super. 399, 413-14, 506 A.2d 43 (App. Div.), certif. denied, 105 N.J. 552, 523 A.2d 188 (1986) ("[The period of actual imprisonment before being released on parole is the real sentence.

"). We interpret subsection (e) of NERA to require that a jury determine, beyond a reasonable doubt, that a defendant committed a violent crime within the meaning of NERA before a sentencing court may impose the statute's mandatory minimum sentencing structure.

Johnson, id. 166 N.J. at 1137-1141; also see New Jersey v. Stanton, 770 A.2d 1198 (N.J. Super. Ct. App. Div. 2001) (statute providing for mandatory minimum sentence unconstitutional in light of Apprendi as it permits judge, rather than jury, to make finding that defendant was intoxicated at time of commission of vehicular homicide, even though finding was made beyond a reasonable doubt). The Stanton court" went on to state, we are, of course, bound by Johnson's reading of Apprendi, and as we understand Johnson, even though it was directly addressing only NERA, its underlying holding is not subject to doubt. In sum, as we view Johnson, it holds that if imposition of a statutorily mandated parole ineligibility term is based on the existence of a fact other than a record of a prior conviction, then, as a matter of the imperatives of the Fifth and Sixth Amendments, that fact must be found by a jury beyond a reasonable doubt. Id. at 1202.

Here during the May 5, 1989 sentencing proceedings Mercer County Court Judge Schroth using a preponderance of the evidence standard of proof to determine the existence of four statutory aggravating circumstances and the non statutory aggravators

below as follows:

Statutory Aggravating Circumstances

No. 1, the nature and circumstances of the offense and the role of the actor therein, including whether or not the crime was committed in an especially heinous, cruel or depraved manner. Appendix (D), at Pg. 11, lines 17-25, Pg. 12, line 1.

No. 3, the risk that the defendant would commit another offense. Appendix (D) at pg. 12, lines 2-8.

No. 6, the extent of the defendant's prior criminal record and the seriousness of the offense of which he had been convicted Appendix (D), at Pg. 12, lines 9-14;

No. 9, the need for deterring the defendant and others from violating the law. Appendix (D), at Pg. 12, lines 15-20.

Non Statutory Aggravating Circumstances

No. 1, You were also stopped while in the process of going for a loaded gun; which your record would indicate you would not hesitate to use. Appendix (D), at Pg. 11 paragraph 4, and at Pg. 12, paragraph 1.

No. 2 The narcotics seized had a varying degree of value. It had one value in New York where Mr. Collins allegedly went to buy it, and then when he allegedly cross the George Washington Bridge, and when he allegedly got to Newark, it went up one hundred thousand dollars. And then when you got down to Trenton, it went up another one hundred thousand dollars. When you get to Washington, it goes up another one hundred thousand dollars. So, its worth at least hundred fifty thousand dollars according to the testimony here in this area. A quarter of a million dollars, and more valuable as you went south. Appendix (D), at Pg. 13, paragraph 1.

Based on those statutory and non statutory aggravating circumstances required to

impose a higher sentence than was permissible based on the jury's verdict. The Mercer County Judge stated:

On the possession with intent to distribute pursuant to the statute, you'll be committed to the custody of the Commissioner of the Department of Corrections for a period of life with parole ineligible for a period of twenty-five years. I'm imposing a term of parole ineligibility because he was clearly convinced that the aggravating circumstances substantially outweigh the non-existent mitigating circumstances. Appendix (D) at Pgs. 13, lines 14-25.

Contemplated with those precepts in mind, because the May 5, 1989 sentencing transcript reflects the sentencing proceedings were conducted pursuant to sentencing scheme of 2C:44-1 (a) that required the judge to find the facts necessary to impose a higher sentence than was permissible based on the jury's verdict alone. Establishes beyond any doubt the analogy of Appellate Division in erred in concluding Cunningham was distinguishable from Collins's case. Since the unambiguous language set forth in N.J.S.A. 2C:44-1 [a] was tantamount to California former sentencing system declared unconstitutional in Cunningham v. California, because the statute required the judge to find the facts necessary to impose a higher sentence than was permissible based on the jury's alone. *Id.* at 288-89, 292-93.

In sum, the erroneous findings that New Jersey Sentencing Scheme was distinguishable from the sentencing scheme found to be unconstitutional in Cunningham v. California for denying Collins appeal was contrary to clearly establish federal law as decided by the Supreme Court in Cunningham and those Supreme Court cases cited

FN10. With the exception of part of statutory aggravating No. 6, i.e. the other statutory and non statutory aggravating factors that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) *Id.* at 490.

therein, renders the New Jersey sentencing statute unconstitutional, and must be vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas A. Collins

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