06-3350-PR (L),

07-3588-PR (CON), 07-1599-PR (CON)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

WILLIAM PHILLIPS

Petitioner/Appellant,

-against-

DALE ARTUS, Superintendent, Clinton Correctional Facility, and ANDREW M. CUOMO, New York State Attorney General

Respondents/Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF *AMICI CURIAE* OF THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING THE PANEL OPINION

MARSHALL A. MINTZ
Mintz & Oppenheim LLP
260 Madison Avenue, 17th Fl.
New York, New York 10016
(212) 447-1800

RICHARD D. WILLSTATTER
Chair, Amicus Curiae Committee
New York State Association
of Criminal Defense Lawyers
Vice-Chair, 2nd Circuit Amicus Curiae
Committee
National Association of Criminal
Defense Lawyers
Green & Willstatter
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601
(914) 948-5656

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06-3350-PR (L),

07-3588-PR (CON), 07-1599-PR (CON)

(Caption Continued from Previous Page)

CARLOS PORTALATIN

Petitioner/Appellee,

-against-

HAROLD GRAHAM, Superintendent,
Green Haven Correctional Facility

Respondent/Appellant.

VANCE MORRIS

Petitioner/Appellant,

-against-

DALE ARTUS, Superintendent, Clinton
Correctional Facility, and ANDREW M. CUOMO,
New York State Attorney General

Respondents-/Appellees.

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> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Interest of *Amici Curiae*

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a nonprofit corporation with membership of more than 12,800 attorneys and 94 state, local, and international affiliate organizations with another 35,000 members. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, disseminate and advance knowledge of the law in the area of criminal practice, and to encourage integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its particular concerns is ensuring that all individuals not be subjected to punishment through unconstitutional process.

The New York State Association of Criminal Defense Lawyers (hereinafter "NYSACDL") is a non-profit membership organization of

more than 900 attorneys who practice criminal defense law in the State of New York. Founded in 1986, its purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional standing. NYSACDL therefore has an interest in ensuring that its members clients are not subject to punishment through unconstitutional sentencing laws.

Accordingly, NACDL and NYSACDL, consistent with their mission, jointly file this Brief *Amici Curiae* in support of the Panel's opinion in the consolidated appeals that this Court is hearing *en banc*, respecting the constitutionality of New York's persistent felony offender sentencing statutes – New York Penal Law § 70.10 and New York Criminal Procedure Law § 400.20.

Argument

The Panel Was Correct That The Sixth Amendment Right To a Jury Trial, Applicable to the States as Incorporated by the Fourteenth Amendment, Prohibits the Type of Judicial Fact-Finding Resulting in Enhanced Sentences Under New York State's Persistent Felony Offender Statute

As set forth below, the panel correctly concluded that New York's discretionary persistent felony offender sentencing scheme – embodied in New York Penal Law ("PL") § 70.10 and New York Criminal Procedure Law ("CPL") § 400.20 – and which provides that the upper limit of the sentence authorized is increased based upon facts found by the court, rather than a jury – runs afoul of the Sixth Amendment. *See Besser v. Walsh,* 601 F.3d 163 (2d Cir. 2010).

A. The New York Sentencing Scheme

The discretionary persistent felony offender sentencing scheme is embodied in PL § 70.10 and CPL § 400.20. Under PL § 70.10(1)(a), "[a] persistent felony offender is a person, other than a persistent violent felony offender as defined in [PL §] 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies." That statute also specifies that:

> [w]hen the court has found, pursuant to [CPL § 400.20] that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized [under PL article 70] for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

PL § 70.10(2) (emphasis added).

In addition, CPL § 400.20(1) mandates that:

> [s]uch sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender . . ., and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that [such sentence is] warranted to best serve the public interest.

Id. At that hearing, with respect to "[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct," the burden of proof "shall be a preponderance of

the evidence." CPL § 400.20(5).

As such, the discretionary persistent sentencing scheme differs from New York's other sentence enhancing provisions that are based solely on recidivism. For example, defendants are subject to mandatory sentence enhancements if they have a prior felony conviction ("second felony offender") [PL §70.06]; a prior violent felony conviction ("second violent felony offender") [PL §70.04]; or two prior violent felony convictions ("persistent violent felony offender") [PL § 70.08]. Under each of those recidivist sentencing provisions, the process which culminates in the imposition of an enhanced penalty is initiated by the People, who must file a "statement" setting forth the prior convictions which they contend establish the predicate felony, and the court's required findings are limited to determining the existence and constitutionality of the prior felony convictions. *See* CPL §§ 400.15, 400.16, 400.21.[1]

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[1] At Page 1 of its Petition for Rehearing, the State remarks that the Panel's decision "may result in the early release of many of New York's most dangerous offenders." However, that statement ignores the fact that the "most dangerous offenders" would have been sentenced pursuant to PL §70.08, which applies to persistent violent felony offenders. In addition, as set forth below in section E, one of the

By contrast, it is the court, and not the State, who initiates a persistent felony offender proceeding by filing the pleading that commences the process. CPL § 400.20(2). As such, the court acts as the charging authority and trier of fact with respect to whether an enhanced sentence is "[a]uthorized," PL § 70.10(2), and is only permitted to impose that sentence after finding "that a person is a persistent felony offender and when it is the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest[.]" *Id.* (emphasis added), *see also* CPL §400.20(1) ("[s]uch sentence may not be imposed" unless and until the court makes both of those findings).

The court's initial pleading is in the form of an "order directing a hearing to determine whether the defendant should be sentences as a persistent felony offender[.]" CPL §400.20(3). In addition, the statue directs that:

> the court must annex to and file with the order a

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problems with the discretionary persistent felon sentencing scheme is its application to cases involving low-level offenders.

> statement setting forth the following
>
> > (a) The dates and places of the previous convictions which render the defendant a persistent violent felony offender as defined in subdivision one of section 70.10 of the penal law; and
> >
> > (b) The factors in the defendant's background and prior criminal conduct which the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender.

Id. Those "factors in the defendant's background and prior criminal conduct" are enumerated as the "history and character of the defendant" and "the nature and circumstances of his criminal conduct." CPL § 400.20(1), PL § 70.10 (same).

B. The Sentencing Court's Fact-Finding Obligation

New York Courts have repeatedly stated that "the procedure for determining whether or not a defendant may be subjected to increased punishment as a persistent felony offender mandates a 'two-pronged analysis" requiring judicial determinations of both the prior-conviction element and the history/character/nature/circumstances element (the "history/circumstances element"). *See People v. Murdaugh*, 833

N.Y.S.2d 557, 558 (2nd Dept. 2007), *quoting People v. Gaines*,733, 524 N.Y.S.2d 70 (2nd Dept. 1988); *see also People v. Garcia*, 700 N.Y.S.2d 44 (2nd Dept. 1999) (" Before imposing sentence, the court is obliged to set forth on the record the reasons it found this second element satisfied"); *People v. Perry,* 555 N.Y.S.2d 515 (4th Dept. 1990) (defendant improperly sentenced as persistent felony offender based solely on defendant's criminal conduct, without conducting statutorily required consideration of defendant's history and character).

Moreover, with regard to the history/circumstances element, courts have consistently enforced the requirement that factual findings be made and vacated sentences for the failure to do so. *See People v. Rivera*, 875 N.Y.S.2d 173 (2nd Dept. 2009) (sentence vacated where court failed to state reasons on the record why enhanced sentence was imposed), *affirmed as modified,* 2010 WL 1791007 (2nd Dept. 2010); *People v. Murdaugh*, 833 N.Y.S.2d at 559 (vacating sentence for court's "failure to state 'the reasons for [its] opinion . . . in the record'"), *citing* CPL § 70.10(2); *People v. Saracina*, 748 N.Y.S.2d 109, 110 (4th Dept. 2002) (after an "extensive hearing, the court properly set forth its

findings supporting its determination that persistent felony status was warranted"); *People v. Brown,* 704 N.Y.S.2d 83 (2nd Dept. 2000) (vacating sentence where it was "impossible to ascertain what conduct or circumstances the court relied upon in determining that the second prong . . . was satisfied"); *People v. James*, 674 N.Y.S.2d 809 (3rd Dept. 1998) (characterizing second prong as "finding"); *People v. Whitehead*, 531 N.Y.S.2d 48 (3rd Dept. 1988) ("court failed to particularize the ground or reasons for its finding with sufficient clarity"); *People v. Blackwell*, 302 N.Y.S.2d 78 (4th Dept. 1969) ("[t]he findings are clearly insufficient to warrant such a determination. . . . in essence, the life sentence was imposed upon proof only of three felony convictions").

That requirement that a sentencing court arrive at an "opinion" that the history/circumstances element "warrant[s]" an enhanced sentence makes the court's function equivalent to that which can be exercised by juries in applying aggravating factors. Indeed, in describing the court's function, CPL § 400.20 notes that the imposition of the enhanced penalty requires that the court be "satisfied . . . that the uncontroverted allegations with respect to the defendant's

background and nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender[.]" CPL § 400.20(8) (addressing when a court may dispense with further hearing).[2]

The court arriving at an "opinion" that a particular sentence is "warranted" is especially analogous to the task performed by New York jurors in death-penalty cases. There, after weighing aggravating and mitigating factors, a jury must "unanimously determine" whether a sentence of death "should be imposed." CPL §§ 400.27(10) and (11). In real-life application, there is simply no material difference between twelve jurors agreeing that an enhanced penalty should be imposed and a judge forming an opinion that an enhanced penalty should be imposed.

C. Prior State Court Challenges to the Persistent-Felon Scheme

In the past, the persistent felony offender sentencing scheme has been challenged on equal-protection grounds. *See e.g., People v. Valez*, 620 N.Y.S.2d 931 (S.Ct. N.Y.Cty. 1995); *People v. Mason*, 717 N.Y.S.2d

[2] The verb "satisfy" is one commonly employed by courts in instructing jurors on their decision making role.

130 (1st Dept. 2000). That argument was premised on the theory that a defendant with a record of prior non-violent felonies could receive a higher penalty as a persistent felon than a similarly situated defendant facing sentencing under New York State's persistent violent felony sentencing scheme, set forth in PL § 70.08. In holding that no constitutional issue existed, one court opined that

> [t]here is nothing anomalous about the fact that a persistent felony offender, in certain circumstances, is subject to a higher minimum sentence than a persistent violent felony offender. A persistent violent felony sentence is based entirely on the fact of prior conviction, whereas a persistent felony sentence requires additional findings.

People v. Mason, 717 N.Y.S.2d at 131 (emphasis added), *citing* PL § 70.10(1); CPL § 400.20; *see also People v. Ortiz*, 691 N.Y.S.2d 683 (S.Ct. Bronx Cty. 1998) ("[U]nlike section 70.08 which mandates a persistent felony sentence upon the third violent felony conviction, under section 70.10, three felony convictions, by themselves, is not dispositive. The court must also find that: 'the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are

warranted to best serve the public interest'")

The statute has also been repeatedly challenged on Sixth Amendment grounds. In *People v. Rosen*, 96 N.Y.2d 329 (2001), the New York State Court of Appeals held that "it [is] a defendant's prior felony convictions – an explicitly noted exception to the general rule in *Apprendi* [*v. New Jersey,* 530 U.S. 466 (2000)] – that initially subjected the defendant to enhanced sentencing." *People v. Rosen*, 96 N.Y.2d at 334. In support of that conclusion, the Court of Appeals explained that:

> [u]nder New York law, to be sentenced as a persistent felony offender, the court must first conclude that defendant had previously been convicted of two or more felonies for which a sentence of over one year was imposed. Only after is has been established that defendant is a twice prior convicted felon may that sentencing court, based on the preponderance of the evidence, review "[m]atters pertaining to the nature and circumstances of his criminal condct . . . established by relevant evidence, not legally privileged" to determine whether actually to issue an enhanced sentence.

People v. Rosen, 96 N.Y.2d at 334-335, *quoting* CPL § 400.20(5).

Subsequently, in *People v. Rivera*, 5 N.Y.3d 61 (2005), in a strongly divided decision, the New York State Court of Appeals again

held the discretionary persistent felony provisions constitutional, relying on the same rationale set forth in *Rosen* – that "defendants are eligible for persistent felony offender sentencing based solely on whether they had two prior felony convictions. *People v. Rivera*, 5 N.Y.3d at 67 (emphasis in original).

However, in dissent, Chief Judge Kaye pointed out the logical failings of the majority opinion. Chief Judge Kaye first noted her agreement with the majority that *Rosen* was a reasonable application of the *Apprendi* doctrine at the time it was decided. *People v. Rivera*, 5. N.Y.3d at 70 (Kaye, C.J., dissenting). Next, Chief Judge Kaye explained that the statutory scheme described by the majority was constitutional, but that it was not the one before the court in that case. In fact, and as recognized by Chief Judge Kaye, the statute described in the majority opinion is more akin to New York Penal Law § 70.08 (persistent violent felony offender), which requires a court to impose the increased penalty upon a finding that a defendant has "previously been subjected to two or more predicate violent felony convictions[.]" *Id.*

That statute stands in "stark contrast" to the discretionary persistent felony statute, which specifies that "an enhanced sentence is available only for those who additionally are found to be of such history and character, and to have committed there criminal conduct under such circumstances, that extended incarceration and lifetime supervision will best serve the pubic interest." *People v. Rivera*, 5. N.Y.3d at 73 (Kaye, C.J., dissenting), *citing* PL § 70.10(2); *see also People v. Rosen,* 96 N.Y.2d at 335 (after finding the requisite prior felonies "the court must consider other enumerated factors to determine whether it 'is of the opinion that a persistent felony offender sentence is warrante'"), *quoting* CPL § 400.20(9).

Moreover, that distinction makes clear that the Legislature understood how to structure a statute that authorized the enhanced punishment solely upon the finding of prior convictions, as opposed to the dual-prong analysis mandated in the persistent felony offender sentencing scheme. Thus, it is telling that the Legislature chose to require the additional fact-finding specified in the persistent felony offender statute by providing that the enhanced punishment "may not

be imposed" unless the sentencing court finds the prior convictions element *and* the history/circumstances element. CPL § 400.20(1).

Judge Ciparick recognized as much in his dissent in *Rivera*, explaining that

> [t]he statutory scheme described by the majority is simply not that enacted by the Legislature. Had the legislature intended for the inquiry to end at recidivism, it could, for example, have replicated the language of Penal Law § 10.08, which mandates sentencing for persistent violent felony offenders based solely on recidivism, or it could have used the language of Penal Law § 70.04 and CPL 70.06 as it relates to second felony offenders and second violent felony offenders. Those statutes do not require, as do Penal Law § 70.10 and CPL § 400.20, that to fall subject to an enhanced sentence there needs to be further factual findings by the sentencing judge beyond that of determining the existence and constitutionality of prior convictions beyond a reasonable doubt nor that such further factual findings such as "history and character" be made upon a preponderance of the evidence.

People v. Rivera, 5 N.Y.3d at 80 (Ciparick, J., dissenting).

The New York State Court of Appeals's most recent Sixth Amendment analysis of the discretionary persistent felony offender sentencing scheme, in *People v. Quinones*, 12 N.Y.3d 116 (2009), offered

no new substance, and, as the Panel remarked, "merely reiterate[d] and confirm[ed] the logic of *Rosen* and *Rivera*." *Besser v. Walsh*, 601 F.3d at 185.

However, inasmuch as the discretionary persistent felony offender sentencing statutes authorize an increase in the maximum sentence based on judicial fact-finding by only a preponderance of the evidence, it is now clearer than ever that the decisions in *Rosen* and *Rivera* are contrary to and/or unreasonable applications of *Apprendi* and its progeny. *See Besser v. Walsh,* 601 F.3d at 174 ("it is clear from the statute and from *Rivera* that, absent findings beyond the existence of two or more felony convictions, the Class A-I range may not be imposed, and a defendant must be sentenced within a lesser range").

D. The Application of *Apprendi* to Other State Sentencing Schemes

As is no-doubt well known to this Court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court invalidated a New Jersey "hate crime" statute that authorized an extended term of imprisonment where a judge found, by a preponderance of the evidence, that a defendant had "acted with a purpose to intimidate an individual

or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* at 468-469. In doing so, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 490. Further, the Court stated that in determining whether a finding is an "element" of the offense or a "sentencing factor," the inquiry "is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 494.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that an aggravating factor rendering a defendant death-eligible "operate[s] as the functional equivalent of an element of a greater offense" and, therefore, must be found by a jury." *Id.* at 609 (internal quotations and citations omitted). As the *Ring* Court explained "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Id.* at 604-05, *quoting Apprendi v. New Jersey*, 530 U.S. at 492. Rather, "[t]he

dispositive question . . . 'is one not of form, but of effect.' If 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*, *quoting Apprendi v. New Jersey*, 530 U.S. at 493.[3]

The Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), striking down a statute that permitted a sentencing judge to consider the level of "cruelty" involved in the crime for enhancing a sentence, clearly sounded the death knell for New York's discretionary persistent felon statute. As the Panel correctly noted, "*Blakely* clarified *Apprendi* by making it unambiguously clear that any fact (other than a prior conviction), no matter how generalized or amorphous, that increases a sentence for a specific crime beyond the statutory maximum must be found by a jury." *Besser v. Walsh,* 601 F.3d at 181.

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[3] The jury's finding would be a precondition to the court's exercise of discretion under the New York statutes. As Justice Thomas explained: "the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so-by requiring a prior jury finding of [the] aggravating factor[.]" *Ring v. Arizona*, 536 U.S. at 612 (Thomas, J., concurring) (emphasis in original).

In *Blakely*, the Court held unconstitutional Washington State's sentencing scheme that provided for a certain sentencing range based solely on the jury's verdict, and an increased range if the judge found "substantial and compelling reasons justifying an exception sentence." *Blakely v. Washington,* 542. U.S. at 299, 305. As the *Blakely* court explained, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' . . . and the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. at 304. Further, and fatal to logic of *Rosen* and *Rivera*, whether those judicially found facts make imposition of the enhanced sentence mandatory or permissive is of no import because "[w]hether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." *Blakely v. Washington*, 542 U.S. at 305 n. 8 (emphasis in original).

Subsequently, In *Cunningham v. California*, 549 U.S. 270 (2007), the Supreme Court again struck down the type of judicial fact-finding at issue in New York State's discretionary persistent felon statute. In

Cunningham, the Court noted that under California's determinate sentencing law ("DSL"), an increased penalty may only be imposed when a judge found "circumstances of aggravation," which were based on "facts found discretely and solely by the judge." *Id.* at 288. As such, California's DSL "violate[d] *Apprendi's* bright-line rule: Except for a prior felony conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 288-89, *quoting Apprendi v. New Jersey,* 430 U.S. at 490.

As the Panel recognized,

> the PFO statute cannot be squared with the statement by Justice Ginsburg in her opinion for the Court in *Cunningham*: 'If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.'

Besser v. Walsh, 601 F.3d 163, 188 (2d Cir 2010), *quoting Cunningham v. California*, 549 U.S. 270 (2007).

E. The Impact of the Fact-Finding

In addition, the draconian results of the judge's findings illustrate

the Constitutional dimension of the problem with the discretionary persistent felony sentencing provisions. Once a judge makes the mandated findings, the court is authorized to impose upon the lowest-level felons the same sentence which is authorized for one convicted of second-degree murder. *See e.g., People v. Tuzzio,* 688 N.Y.S.2d 913 (2nd Dept. 1999) (enhanced penalty imposed following conviction for aggravated unlicensed operation of a motor vehicle); *People v. Medina*, 672 N.Y.S.2d 53 (1st Dept. 1998) ("low-level $15 street sale" of drugs); *People v. Williams*, 658 N.Y.S.2d 254 (1st Dept. 1997) (drug addict who went to trial and otherwise faced a maximum of two to four years for Class E felony theft crimes sentenced to 15 years to life).

As the Supreme Court noted in *Blakely* – where the disputed judicial fact-finding led to a prison sentence three-years longer than authorized solely by the crime to which the defendant confessed – "[t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusations to 'the unanimous suffrage of twelve of his equals and neighbors,' rather

than a lone employee of the State." *Blakely v. Washington*, 542 U.S. at 313-314, *quoting* 4 W Blackstone, Commentaries on the Laws of England 343 (1769). As such, there is no doubt that the Framers would be even more troubled by New York's statutes, which have the potential to increase a sentence far in excess of three-years above that authorized by the crime of conviction.

The Supreme Court's admonitions simply can not be any clearer – sentencing schemes which allow sentences greater than those authorized by the facts admitted to by the defendant or found by a jury beyond a reasonable doubt, based instead on facts found by a judge by a preponderance of the evidence, will not pass constitutional muster. Despite the New York Court of Appeals's wishes to the contrary, there is no way to reconcile New York's discretionary persistent felony offender sentencing scheme with the protections guaranteed by the Sixth Amendment.

F. The Collateral Effects of The Persistent-Felon Scheme

The very features of New York's persistent felony offender sentencing scheme that run afoul of the Sixth Amendment also make it

an extremely poor vehicle for the administration of justice. Unlike the Federal criminal justice system, where judges are barred from participating in plea discussions; *see* Fed. R. Crim. P. 11(e), New York judges can and do play an active role in that process. Both on and off the record, New York judges actively participate in an administrative climate that values their skills at disposing of cases.

As such, in reality the statute serves as a plea-bargaining tool and it is not unusual for a judge to warn a defendant of a possible enhanced penalty if that defendant asserts his right to proceed to trial and put the government to their burden of proof. While, as set forth above, the court is not authorized to impose the enhanced punishment unless and until it makes the findings of fact which raise the Constitutional concerns addressed in this brief, such warnings can still be coercive enough to a defendant to induce a plea of guilty. *See People v. Andrews*, 711 N.Y.S.2d 797 (3rd Dept. 2000); *People v. Moore*, 68 N.Y.S.2d 590 (1st Dept. 1997) (defendant pleaded guilty as second felony offender after being warned that he was in "peril" of receiving enhanced sentence but court "could not say whether it would find defendant a persistent felony

offender if he were convicted"); *People v. Chesshier*, 584 N.Y.S.2d 327 (2nd Dept. 1992) (defendant accepted sentence and waived appeal after being promised that persistent-felon treatment would not be pursued); *People v. Fulmore*, 592 N.Y.S.2d 449 (2nd Dept. 1993). On the record, such warnings may be couched in softer terms, but off the record a defendant can be made to believe that an enhanced penalty is an inevitability.

One concern with such warnings is that if a defendant chooses to go to trial and is subsequently convicted, the court's decision to impose an enhanced sentence could be tainted by those prior warnings. A judge may be wary of appearing weak or making empty threats, and could be led – consciously or unconsciously – to lean towards making the findings required to impose the enhanced penalty. *See e.g. People v. Williams,* 621 N.Y.S.2d 875 (1st Dept. 1995) (15-to-life sentence imposed after trial vacated on first appeal, reimposed by trial court on remand and then reduced to 2 to 4 years on subsequent appeal).

Further, from a defendant's standpoint, a statute that can leave a low-level non-violent felon exposed to a sentence equal to that of a

person convicted of murder – based on findings made by a preponderance of the evidence, at a hearing that a judge may or may not choose to initiate after conviction – is not conducive to the voluntary and intelligent exercise of constitutional rights and impairs the ability of defense lawyers to counsel their clients. These problems arise precisely because the facts of a defendant's prior convictions, which can be ascertained at the commencement of a case, are not the determinative factor in the analysis. Rather, it is the additional factual findings made by the sentencing court regarding aggravating factors, not identified to a defendant until after conviction, that trigger the enhanced punishment. *See People v. Rivera*, 736 N.Y.S.2d 751 (3rd Dept. 2002) (defendant induced to plead guilty despite lawyer's belief that case had "some merit to it" after defendant warned by counsel that he was "a possible persistent felony offender").

Thus, a defendant who has a triable case and may wish to put the State to its burden of proof may be caused to waive that right due to the ever-looming possibility that a judge might impose a life term without findings from a jury or decide that the defendant's decision to

proceed to trial is a factor tending to indicate that a life sentence is appropriate.

Such considerations would play no part in a jury's determination and it cannot be argued that juries are less suited that judges to make such findings. *See Ring v. Arizona*, 536 U.S. at 607 ("The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.")

Conclusion

For the reasons set forth above, it is respectfully submitted that this Court should adopt the Panel's reasoning and find New York's persistent felony sentencing scheme unconstitutional in accordance with applicable law.

Dated: New York, New York
June 4, 2010

Respectfully submitted,

Marshall A. Mintz

RICHARD D. WILLSTATTER
Chair, Amicus Curiae Committee
New York State Association
of Criminal Defense Lawyers
Vice-Chair, 2nd Circuit Amicus Curiae
Committee
National Association of Criminal
Defense Lawyers
Green & Willstatter
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601
(914) 948-5656

MARSHALL A. MINTZ
Mintz & Oppenheim LLP
260 Madison Avenue, 17th Fl.
New York, New York 10016
(212) 447-1800

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PORTALATIN,

Petitioner/Appellee, Docket # 07-1599-pr

v.

GRAHAM,

Respondent/Appellant.

The undersigned hereby certifies that this Brief, exclusive of the table of contents and table of authorities, uses New Century Schoolbook, which is a proportional typeface, and is approximately 5,300 words.

Dated: June 4, 2010
New York, New York

Marshall A. Mintz
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MARSHALL A. MINTZ