APL-2015-00321 & APL-2016-00078

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

SEAN GARVIN,

Defendant-Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

PHILLIP WRIGHT,

Defendant-Appellant.

PROPOSED BRIEF FOR *AMICI CURIAE*
IN SUPPORT OF DEFENDANT-APPELLANTS

LINDSAY A. LEWIS
VICE CHAIR, AMICUS CURIAE
COMMITTEE OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS
29 Broadway, Suite 1412
New York, New York 10006

RICHARD D. WILLSTATTER
CHAIR, AMICUS CURIAE COMMITTEE
OF THE NEW YORK STATE
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601

MARK G. MATUSCHAK
TIFFANY E. PAYNE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

Attorneys for Movants National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers

July 28, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), the National Association of Criminal Defense Lawyers ("NACDL") and the New York State Association of Criminal Defense Lawyers ("NYSACDL") provide the following corporate disclosure statements:

The National Association of Criminal Defense Lawyers is a non-profit organization with no parents, subsidiaries, or business affiliates.

The New York State Association of Criminal Defense Lawyers is a non-profit organization with no parents, subsidiaries, or business affiliates.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

James Austin et al., *How New York City Reduced Mass Incarceration: A Model for Change?*, Brennan Center for Justice, at 6 (2012), http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf (accessed July 27, 2017) 6

John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (2017) 5, 7

Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 Geo. L.J. 103 (1998) 6

Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 Stan. L. & Pol'y Rev. 65 (1999) 6

Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 Marq. L. Rev. 523 (2014).....6

New York State Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population As of January 1, 2016* (Apr. 2016), http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf (accessed July 27, 2017).....3

Ryan S. King & Marc Mauer, *Aging Behind Bars: "Three Strikes" Seven Years Later*, The Sentencing Project (Aug. 2001), http://www.drugpolicy.org/docUploads/3strikes7years.pdf (accessed July 27, 2017).....4

The Sentencing Project, *Still Life: America's Increasing Use of Life and Long-Term Sentences* (2017), http://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf (accessed July 27, 2017).....4, 6

Thomas P. DiNapoli, *New York State's Aging Prison Population*, Office of the New York State Comptroller (Apr. 2017), https://www.osc.state.ny.us/reports/aging-inmates.pdf (accessed July 27, 2017) 5

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a non-profit membership organization of more than 750 criminal defense attorneys who practice in the State of New York and is the largest private criminal bar association in the State. Its purpose is to assist the criminal defense bar in enabling its members to better serve the interests of their clients and to

enhance their professional standing. NYSACDL is dedicated to assuring the protection of individual rights and liberties for all.

NACDL and NYSACDL have a particular interest in this case as they are deeply committed to advancing the efficiency and fairness of the criminal justice system, and accordingly file this brief in support of Defendant-Appellants Sean Garvin and Phillip Wright.

PRELIMINARY STATEMENT

A. Background

The persistent felony offender statute, Penal Law § 70.10 (hereinafter, the "Statute"), permits increased prison sentences for individuals with certain prior convictions. According to a 2016 New York State Department of Corrections report, almost all of the 142 individuals then serving persistent felony offender sentences stood convicted of Class D felonies.[1] Individuals convicted of Class D felonies normally can be sentenced to one to seven years in prison, Penal Law § 70.00(2)(d) & (4), though New York also permits probation for all of the current underlying offenses.[2] An individual sentenced under the Statute, by contrast, must serve fifteen years to life in prison, or at least twice the maximum sentence for the offense standing alone. Penal Law § 70.10. More than half of individuals sentenced as persistent felony offenders are serving this protracted sentence because of a conviction for third-degree burglary, another non-violent property crime (*e.g.*, forgery, grand larceny), driving while intoxicated, or drug possession.[3] And all of them will be incarcerated for at least fifteen years for an offense that,

---

1 New York State Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population As of January 1, 2016*, at 19 (Apr. 2016), http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf (accessed July 27, 2017).

2 None of the crimes listed for non-violent, persistent felony offenders require a prison sentence and are probation-eligible. *See* N.Y. Penal Law §§ 60.05(4) & (5); 65.00(1)(a).

3 *Under Custody Report*, *supra* note 1, at 19.

standing alone, carries no required prison time. Moreover, disparities in who is arrested and convicted for those types of felonies, in particular felony drug offenses,[4] has meant that minorities are more likely candidates for recidivist sentences.[5]

One of the primary goals of recidivist sentencing is to deter criminal behavior. However, repeat offender laws have the greatest impact on the demographic that is already the least likely to recidivate—older individuals. Research shows that most crimes are committed by individuals under the age of twenty-four,[6] and the likelihood of reoffending begins to decline as early as his or her forties.[7] By the time an individual is convicted under a repeat offender statute,

---

[4] *See, e.g.*, ACLU, *10 Reasons to Oppose "3 Strikes, You're Out*," https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out (accessed July 24, 2017) ("Although studies show that drug use among blacks and whites is comparable, many more blacks than whites are arrested on drug charges . . . because the police find it easier to concentrate their forces in inner city neighborhoods, where drug dealing tends to take place on the streets, than to mount more costly and demanding investigations in the suburbs, where drug dealing generally occurs behind closed doors.").

[5] See *id*. (stating that habitual offender laws that include drug offenses as prior "strikes" will subject more black than white offenders to life sentences); Ryan S. King & Marc Mauer, *Aging Behind Bars: "Three Strikes" Seven Years Later*, The Sentencing Project at 13 (Aug. 2001), http://www.drugpolicy.org/docUploads/3strikes7years.pdf (accessed July 27, 2017) (finding that "three strikes" laws enhance racial disparities within the prison system).

[6] *See* Dr. James Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, at 35-36 (2016), https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf (accessed July 27, 2017) (citing an economic study that people aged 15-24 were most likely to commit crimes and a sociological study finding that individuals aged 18-24 were more likely to commit crimes than older individuals).

[7] *See* The Sentencing Project, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, at 6 (2017), http://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf (accessed July 27, 2017) ("[T]he impulse to engage in crime, including violent crime, is

he or she is likely aging out of his or her estimated offending years.[8] New York State incarcerates these older, lower risk offenders at great cost. One ACLU study examining the effects of three strikes laws found that "[t]he estimated cost of maintaining an older prisoner is three times that required for a younger prisoner . . ."[9] on account of increased healthcare costs.[10] Overall healthcare costs for New York State prison inmates reached $380.6 million in 2016, a 20.4% increase from 2013.[11]

Another goal of recidivist sentencing is to reduce crime. Research consistently shows, however, that repeat offender laws do not have a significant effect on crime rates. Some studies show that repeat offender laws may lead to "a small decrease in [certain theft-related crimes]," but "[they] have had no detectable

---

highly correlated with age, and by one's early 40s even those identified as the most chronic 'career criminals' have tapered off considerably."); *see also* Thomas P. DiNapoli, *New York State's Aging Prison Population*, Office of the New York State Comptroller, at 3 (Apr. 2017), https://www.osc.state.ny.us/reports/aging-inmates.pdf (accessed July 27, 2017) (noting that recidivism rates for offenders released in 2011 ages 16-20 was more than half, for offenders ages 50-64 was one-third, and for offenders over 65 was less than 10%); Austin et al., *supra* note 6, at 36 (citing a study finding that "people over the age of 55 are 10 times less likely to commit crimes than those aged 23, even for individuals who had committed crimes earlier on in life"); ACLU, *supra* note 4 ("Only one percent of all serious crimes are committed by people over age 60.").

8 *See* John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, 192-93 (2017) (noting that by the time there is sufficient information about an individual's offending patterns, the person is likely to be on the verge of aging out of crime or will have already aged out of peak offending years).

9 ACLU, *supra* note 4.

10 DiNapoli, *supra* note 7, at 2 (reporting that aging inmates in New York State are more costly to incarcerate due to increased need for medication and other medical care).

11 *Id.*

impact at all on crime in some states . . . where they have been used most aggressively."[12] The minimal impact of repeat offender laws may be because individuals convicted of more than one felony are already spending most of their adult lives in prison.[13] Moreover, other studies suggest that unnecessary time behind bars "harms defendants and may actually increase crime."[14] In New York, the length of prison sentences and time served has steadily increased since 1990,[15] and New York is home to the third largest life sentence population in the country.[16] This trend goes against current criminological and social science research, which demonstrates that "in the worst case scenario, longer length of stay produces higher

---

[12] Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 Marq. L. Rev. 523, 538 (2014); *see also* Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 Stan. L. & Pol'y Rev. 65, 68 (1999) (finding "virtually no evidence supporting the [California] Three Strikes law's deterrent . . . effect").

[13] *See, e.g.*, Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 Geo. L.J. 103, 138 (1998) (arguing that because most high-rate offenders already spend most of their lives in prison, repeat offender laws will not lead to a significant reduction in crime); King & Mauer, *supra* note 5, at 11 (noting that most offenders sentenced under habitual offender laws would have gone to prison for some significant period with or without the recidivist sentence).

[14] Editorial Board, *A Formula to Make Bail More Fair*, N.Y. Times (Sept. 16, 2016), http://www.nytimes.com/2016/09/17/opinion/a-formula-to-make-bail-more-fair.html?_r=1 (accessed July 24, 2017); *see also* Austin et al., *supra* note 6, at 36 (citing studies indicating that "the longer one stays in prison, the more likely he or she is to reoffend upon release").

[15] *See* James Austin et al., *How New York City Reduced Mass Incarceration: A Model for Change?*, Brennan Center for Justice, at 6 (2012), http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf (accessed July 27, 2017) ("Sentence lengths and time served in prison in New York City and the state as a whole increased from 1990 to 2010.").

[16] Sentencing Project Report, *supra* note 7, at 7 (reporting that New York has 9,889 individuals serving life sentences, behind only Louisiana and California).

recidivism rates, while the best case scenario points to diminishing returns of incarceration on public safety."[17]

Penal Law § 70.10 vests prosecutors with the exclusive power to pursue or decline a persistent felony offender sentence, because adjudication under the Statute occurs ***only*** if the prosecutor requests that the court hold a hearing. In practice, prosecutors can leverage the possibility of lengthier sentences under the Statute in order to obtain longer sentences in plea bargaining,[18] even though many statutory maximums are greater than what prosecutors themselves think are generally just.[19]

New York's persistent felony offender sentencing scheme thus offers limited public safety benefits at a high socio-economic cost. While this Court may consider these high costs and limited benefits of the Statute to be a matter of legislative prerogative, the United States Supreme Court's most recent decision in

---

17 *See* Austin et al., *supra* note 6, at 37.

18 *See*, *e.g.*, William T. Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in Bordenkircher v. Hayes*, 6 Hastings Const. L.Q. 269, 283 (1979) (footnote omitted) ("Because of the tremendous leverage they give a prosecutor, habitual offender statutes [like New York's] are frequently and primarily used for plea bargaining purposes."); Pfaff, *supra* note 8, at 135-136 (citing William Stuntz's argument that "legislators likely pass tough sentencing laws *hoping* that prosecutors will use them only as threats to get (less-harsh) plea deals…." (emphasis in original)).

19 *See* Pfaff, *supra* note 8, at 135-136 (citing William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev 2548 (2004), for the argument that prosecutors may actually value longer sentences negatively).

this area, as shown below, compels the reversal sought by Defendant-Appellants here.

B. *Hurst v. Florida*

Last year, the United States Supreme Court decided *Hurst v. Florida,* 136 S.Ct. 616 (2016). Although mentioned in passing in this court's most recent decision regarding the Statute in *People v. Prindle,* -- N.E.3d --, 2017 WL 2799824 (N.Y. June 29, 2017), the applicability of *Hurst* to the Statute was not addressed in that case.

Hurst, like the Statute, involved a two-part sentencing scheme. In that sentencing scheme at issue in *Hurst*, the jury first made a recommendation of whether the defendant should be sentenced to life imprisonment or death. Second, the judge considered that recommendation, but made his or her own findings of aggravating and mitigating factors in determining the ultimate sentence. *Hurst*, 136 S. Ct. at 620.

The Florida Supreme Court upheld the constitutionality of that scheme, relying in part on two earlier United States Supreme Court decisions approving its constitutionality. *Id.* at 620-621. On appeal, the United States Supreme Court reversed, finding that the judge's role in sentencing a defendant violated the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. *Hurst*, 136 S. Ct. at 621-23. In so doing, the Supreme Court explicitly

noted that "[t]he State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* at 622 (emphasis in original).

As set forth below, the two-part scheme of the Statute likewise provides for the "central and singular role" of the judge. Put simply, under the Statute and its implementing procedure set forth in CPL § 400.20, a recidivist ***cannot*** be given an enhanced sentence without a preliminary hearing at which the ***judge*** alone makes a statement as to "[t]he 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." CPL § 400.20(3)(b). In practice, then, it is at this preliminary hearing – after a jury trial, and at which no fact need be proven beyond a reasonable doubt – that the judge alone decides whether to impose an enhanced persistent felony offender sentence. Just as in *Hurst,* the New York discretionary persistent felony offender statute "does not make a defendant eligible for [an enhanced sentence] until 'findings by the court.'" 136 S. Ct. at 622. Indeed, on this seminal point, there is no dispute. *See* Respondent's Br. (Wright) at 53 (under CPL § 400.20(9) "in order to sentence a defendant as a persistent felony offender, a court [must] … conclude that a persistent felony

offender sentence is warranted."). Accordingly, the New York judge acting in this "central role" determines in practice whether a defendant will be sentenced as a persistent felony offender or not, based on factual findings not made by a jury and not made beyond a reasonable doubt. Under *Hurst*, this is an unconstitutional deprivation of Defendant-Appellants' Sixth Amendment and Due Process rights.

ARGUMENT

I. Under Penal Law § 70.10 and CPL § 400.20, a Court May Sentence a Convicted Felon with Prior Felony Convictions as a "Persistent Felony Offender" Only upon Findings Made by a Judge under a Preponderance of the Evidence Standard.

The State Legislature enacted Penal Law § 70.10, titled "Sentence of imprisonment for persistent felony offender," in 1965. Under the Statute, a criminal sentence may be increased beyond the sentence authorized by the statute(s) underlying the offense(s) – up to life imprisonment – where a person is convicted of a felony and has certain previous felony convictions. The Statute includes two sections. Section 1 defines a "persistent felony offender" as "a person, other than a persistent violent felony offender defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies . . . ." Sub-paragraphs (b) and (c) of section 1 describe the types of previous non-violent felony convictions that qualify under the definition.

Section 2, titled "Authorized sentence," sets forth the circumstances under which a court may adjudicate a person and ultimately impose on him or her an

enhanced sentence under the Statute. Unlike Penal Law § 70.08, relating to a persistent ***violent*** felony offender, the Statute contains an ***additional*** predicate required for a court to impose a sentence thereunder. That is, the court must find that the defendant is a "persistent felony offender," *and* "[be] 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." Penal Law § 70.10.[20]

The Statute references CPL § 400.20, which provides the procedures for a judge to determine whether to sentence a person as a persistent felony offender or pursuant to the statute governing the offense for which the person was convicted. CPL § 400.20(1) mirrors section 2 of the Statute, requiring the court to find that the individual is a "persistent felony offender" under the Statute and be "of the opinion 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" and further providing that to impose a sentence under the Statute, a judge must order a preliminary hearing. CPL § 400.20(2). In connection with the preliminary hearing, "[t]he court must annex to and file with the order [directing a hearing] a

[20] *Compare with* Penal Law § 70.08 ("Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent violent felony offender the court must impose an indeterminate sentence of imprisonment, the maximum term of which shall be life imprisonment.").

statement setting forth the following: "(a) [t]he dates and places of the previous convictions which render the defendant a persistent felony offender . . . and (b) ***[t]he 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***." CPL § 400.20(3) (emphasis added).

If at the preliminary hearing the individual "wishes to controvert any allegation made in the statement" and "the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant is a persistent felony offender," "or where the uncontroverted allegations with respect to the defendant's history and the nature of his prior criminal conduct do not warrant sentencing him as a persistent felony offender," or when the individual wishes to present evidence on the issue of whether he is a persistent felony offender or on the question of his background and criminal conduct," then the judge may order a further hearing.[21] CPL § 400.20(7), (9). "At the conclusion of the [further] hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, ***must then make***

[21] CPL § 400.20(8) ("Where the uncontroverted allegations in the statement of the court are sufficient to support a finding that the defendant is a persistent felony offender and the court is satisfied that (a) the uncontroverted allegations with respect to the defendant's background and the nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender, and (b) the defendant either has no relevant evidence to present or the facts which could be established through the evidence offered by the defendant would not affect the court's decision, the court may enter a finding that the defendant is a persistent felony offender and sentence him in accordance with the provisions of subdivision two of section 70.10 of the penal law.").

such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted." CPL § 400.20(9) (emphasis added).

While the judge must find that a person meets the definition of "persistent felony offender" "based upon proof beyond a reasonable doubt," the judge need only base his or her findings with respect to the second part, *i.e.*, "the defendant's history and character and the nature and circumstances of his criminal conduct," on a "preponderance of the evidence." CPL § 400.20(5). If the court terminates either a preliminary hearing or a further hearing "without making any findings," then "unless the court recommences the proceedings and makes the necessary findings, the defendant may ***not*** be sentenced as a persistent felony offender." CPL § 400.20(10) (emphasis added).

It was in accordance with CPL § 400.20, described above, that the trial courts sentenced Defendant-Appellants Garvin and Wright as persistent felony offenders under the Statute.[22]

[22] Respondent's Br. (Wright) at 18-20; Defendant-Appellant Br. (Garvin) at 27.

II. New York's Sentencing Scheme under the Statute and the CPL Is Functionally the Same as the Statutory Scheme Found Unconstitutional by the United States Supreme Court in *Hurst v. Florida.*

It has been over 17 years since the United States Supreme Court held in *Apprendi*, 530 U.S. at 490 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 proved beyond a reasonable doubt." In the years since deciding *Apprendi*, the Supreme Court has reaffirmed its holding and expanded—not limited—*Apprendi*'s applicability. *See Hurst*, 136 S. Ct. 616 (sentencing scheme under Florida death penalty statute); *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (statutory mandatory minimum sentences); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (criminal fines); *Cunningham v. California*, 549 U.S. 270 (2007) (California's determinate sentencing law); *United States v. Booker*, 543 U.S. 220 (2005) (federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296 (2004) (sentencing term beyond the statutory maximum of the standard range); *Ring v. Arizona*, 536 U.S. 584 (2002) (sentencing scheme under Arizona death penalty statute).

This Court has considered and rejected *Apprendi* challenges to the Statute and CPL § 400.20 on several occasions, most recently in *Prindle*, 2017 WL 2799824. *See also People v. Quinones*, 12 N.Y.3d 116, 906 N.E.2d 1033, 879 N.Y.S.2d 1 (2009); *People v. Rivera*, 5 N.Y.3d 61, 833 N.E.2d 194, 800 N.Y.S.2d

51 (2005); *People v. Rosen*, 96 N.Y.2d 329, 752 N.E.2d 844, 728 N.Y.S.2d 407 (2001). In none of those cases, however, did this Court analyze the effect of *Hurst*. *Amici* respectfully urge this Court to reconsider its prior decisions in *Prindle, Quinones, Rivera,* and *Rosen* in light of *Hurst.* As the Supreme Court reiterated in *Hurst*, "in the *Apprendi* context, we have found that '*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law.'" 136 S. Ct. at 623-24.

A. Similar to the judicial sentencing proceeding found unconstitutional in *Hurst*, under the Statute, "the judge makes the ultimate sentencing determinations"

In applying *Hurst* here, the first step is understanding the role, if any, of a judge under the Statute and the CPL. While the Statute does not involve any jury role like the non-determinative jury recommendation of life imprisonment or death under the Florida sentencing scheme in *Hurst*,[23] the Supreme Court's rationale does not rest in any way on the type of penalty (death vs. sentencing as persistent felony offender), but instead hinges on the judge's ultimate fact-finding role in imposing the penalty. *Id.* at 622. As in *Hurst*, the fact of prior convictions satisfying the definition of "persistent felony offender" under the Statute is non-

[23] *See United States v. Gonzalez*, 420 F.3d 111, 128 (2d Cir. 2005) ("[D]evelopments in Apprendi jurisprudence suggest that the rule in that case may well reach more broadly than courts had originally understood. . . . [V]arious pluralities of the Supreme Court, consisting of eight of the nine Justices, have persisted in using broad language . . . ."); *Portalatin v. Graham*, 624 F.3d 69, 80-81, 83 (2d Cir. 2010) (en banc) (describing *Ring* as "reinforce[ing]" *Apprendi*, *Blakely* as "expand[ing] on the principle announced in *Apprendi*," and *Cunningham* as "reaffirm[ing] the principle announced in *Blakely*").

determinative for the sentencing judge, who alone determines whether to sentence a defendant as a persistent felony offender after making the requisite findings enumerated in CPL § 400.20.[24] The judge's critical fact-finding role in the discretionary persistent felony sentencing scheme is underscored by the fact that even if a defendant has qualifying prior convictions, the judge is free to find that the circumstances do ***not*** warrant sentencing the defendant as a persistent felony offender.[25] The judge who sentenced Defendant-Appellant Wright confirmed as much when he stated during the hearing, "now we go to the second part of this as to whether I should sentence him as a persistent felony offender. Just because he is eligible for it doesn't mean I have to do it…." Respondent's Br. (Wright) at 19. Thus, the sentencing judge acknowledged that, as in *Hurst,* he had the last word on whether the enhanced sentence would be imposed.

This Court's past decisions have focused their *Apprendi* analysis on what makes a person eligible for an enhanced sentencing range, rather than on what the necessary determinants are for an enhanced penalty to be imposed. *See*

---

[24] Section 400.20, which sets forth the procedures for the persistent felony offender hearing, is titled "Procedure for determining whether defendant should be sentenced as a persistent felony offender," implying that the hearing before the judge is the determinative factor. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (citing *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528–529 (1947)) ("The title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about the meaning of a statute.").

[25] *See* Respondent's Br. (Wright) at 51-52 (citing *People v. Sailor*, 65 N.Y.2d 224, 234, 480 N.E.2d 701, 708-709, 491 N.Y.S.2d 112, 120 (1985) ("[the court] can refuse to impose a persistent felony offender sentence even when the defendant 'is a persistent felon."')).

Respondent's Br. (Wright) at 46-53. Under the Statute and the CPL, it is undisputed that previous felony convictions that qualify under the definition of "persistent felony offender" trigger the statutorily mandated hearing(s), which then results in the court imposing a sentence within an enhanced range based on its findings, *i.e.*, as a "persistent felony offender" or as an ordinary convicted offender. *Prindle*, 2017 WL 2799824, at *__. This is no longer permitted under *Hurst.*

That threshold inquiry under the Statute, in which prior qualifying felony convictions must meet the Statute's definition for a defendant to be eligible to receive a persistent felony offender sentence, is plainly analogous to the Florida requirement of a first-degree murder conviction for a defendant to be eligible for the death penalty in that state. But under *Hurst*, the inquiry does not end with a finding that a defendant is eligible for an enhanced sentence (in *Hurst,* death). Instead, in *Hurst*, the Court looked past the factors which merely triggered a sentence enhancement, and held that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose [the enhanced sentence]." 136 S. Ct. at 619.

In Florida, even though Timothy Hurst was ***eligible*** for an enhanced sentencing range (life in prison or death) based on qualifying conduct and an advisory jury recommendation, the enhanced sentence ***could not be imposed***

without judicial findings of fact. *Id.* at 620. Likewise, as the People concede in these cases, even though Defendant-Appellants were each ***eligible*** for an enhanced sentencing range (15 years to life in prison) based on prior qualifying convictions, their enhanced sentences also ***could not be imposed*** without judicial findings of fact "in deciding whether a persistent felony offender sentence is warranted in a given case." Respondent's Br. (Wright) at 59. Moreover, as the People likewise agree in both cases, ***a defendant may not be sentenced as a persistent felony offender until the judge completes a hearing and issues a statement of his or her findings***. CPL § 400.20(3), (9), (10); *see* Respondent's Br. (Wright) at 75 ("As is required by Criminal Procedure Law section 400.20, upon receiving information prior to sentencing indicating that defendant qualified as a persistent felony offender, the court ordered a hearing…."); Respondent's Br. (Garvin) at 96 ("The court must then consider other enumerated factors to determine whether it is of the opinion that a persistent felony offender sentence is warranted… ."). *Hurst* makes clear that the ***imposition*** of an enhanced sentenced based on judicial findings is the constitutional linchpin, not merely the ***eligibility*** for an enhanced sentencing range based on qualifying conduct. 136 S. Ct. at 622. Under the *Hurst* test, the Statute fails to pass constitutional muster.

B. Prior convictions are not the sole finding that a judge must make in determining whether a defendant may be sentenced as a persistent felony offender

The next step is addressing whether the judge's requisite findings to impose a sentence under the Statute and the CPL involve more than a finding of prior convictions, which *Amici* do not dispute are exempted from *Apprendi*'s reach. This Court has repeatedly held that prior convictions are the "'*sole determinant*' of whether a defendant is subject to recidivist sentencing as a persistent felony offender."' *Prindle*, 2017 WL 2799824, at *__ (citing *Rivera,* 5 N.Y.3d at 66, 800 N.Y.S.2d 51, 833 N.E.2d 194, citing *Rosen*, 96 N.Y.2d at 335, 728 N.Y.S.2d 407, 752 N.E.2d 844). The plain language of both the Statute and the CPL, however, make clear that to sentence a defendant as a persistent felony offender, the court must make findings in two areas: (1) the defendant meets the definition of "persistent felony offender" *and* (2) "the history and character of the defendant and the nature and circumstances of his criminal conduct." CPL § 400.20(1); Penal Law § 70.10(2).

The necessity of the second set of findings is dictated both by statutory construction and how the Statute and Criminal Procedure Law have been applied. New York State courts have overturned persistent felony offender sentences based on insufficient judicial findings that focused only on the prior convictions. For example, in *People v. Truesdale*, 44 A.D.3d 971, 972 (N.Y. 2d Dept. 2007), where

the trial court "based [the] adjudication [of the defendant as a persistent felony offender] solely upon the defendant's criminal record of misdemeanors and low-level felonies involving primarily pickpocketing offenses," the Appellate Division found that the fact of previous convictions was an insufficient basis for adjudicating the defendant as a persistent felony offender.

While the People concede that the judge makes certain findings relevant to sentencing beyond the fact of prior convictions, they argue that those facts need not be put before a jury, because they are traditional sentencing factors, or in this Court's words, "the most traditional discretionary sentencing role of the judge." Respondent's Br. (Garvin) at 100; Respondent's Br. (Wright) at 59; *Prindle*, 2017 WL 2799824, at *__ (quoting *Rivera*, 5 N.Y.3d at 69, 833 N.E.2d 194, 800 N.Y.S.2d 51). The People attempt to distinguish "quintessential fact questions" from traditional sentencing factors, Respondent's Br. (Garvin) at 107, and argue that the sentencing judge is not required to make any findings if he or she "conclude[s] that a persistent felony offender sentence is warranted." Respondent's Br. (Wright) at 53 (citing CPL § 400.20(9)). The People ignore the preceding clause in the statute, which states that the judge "***must then make such findings of fact*** as it deems relevant to the question of ***whether a persistent felony offender sentence is warranted***." CPL § 400.20(9) (emphasis added).

In other words, not only do judges applying the Statute and the CPL make factual findings, but those findings go to the same "existence of mitigating or aggravating circumstances" as Florida judges were required to find under the sentencing scheme found unconstitutional in *Hurst*. 136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005) (internal quotations omitted). Aggravating factors under the Florida statute included, in relevant part, previous felony convictions (Fla. Stat. Ann. § 921.141 (6)(a) & (b)), gang membership (*Id.* (6)(n)), and an "especially heinous, atrocious, or cruel" crime (*Id.* (6)(h)).

New York judges consider many of these same variables at a persistent felony offender hearing. For example, a New York Supreme Court Justice listed the following previous felony, gang-related, and cruelty factors to be considered at a persistent felony offender hearing: "[w]hether…the defendant pleaded guilty in Illinois to aggravated unlawful use of a weapon;" "[w]hether the defendant, was convicted in California in 1996, for possession of a concealable firearm…;" "[w]hether the defendant was or is a member of any street gang…;" and "[w]hether the facts of the case at bar…show that the defendant exhibited a callous disregard for the life of his victim." *People v. Flowers*, No. 033442005, 2007 WL 8093325, at *1 (N.Y. Sup. Ct. May 11, 2007). Fact finding like this is indistinguishable from what the judge performed in *Hurst*. 136 S. Ct. at 620. The judge who sentenced

Defendant-Appellant Wright considered similar factors during sentencing, including juvenile delinquency adjudications and possession of a weapon, even though Defendant-Appellant Wright was acquitted of the weapons charge by the trial court. Defendant-Appellant Br. (Wright) at 15, 19-20. In the sentencing judge's own words, "I can consider any facts in addition to what he has been convicted of that would reflect on his character where there is a preponderance of evidence that establishes those facts." *Id.* at 17-18.

These examples demonstrate that factual findings are fundamental to a judge's opinion that an extended sentence will serve the public interest and his or her ultimate conclusion that an increased sentence is warranted. The People argue that "*Apprendi* and its progeny do not diminish the authority of judges 'to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute'" and "the requirement of Penal Law section 70.10(2) that the sentencing court reach an opinion whether an enhanced sentence is warranted 'is merely another way of saying that the court should exercise its discretion."' Respondent's Br. (Wright) at 48 (citing *Rivera*, 5 N.Y.3d at 71), 60. But a judge's finding of "traditional" discretionary factors – en route to forming his or her opinion and ultimate sentencing conclusion – is precisely what the Supreme Court found unconstitutional in *Hurst*. The Statute and the CPL's requirement of judicial fact-

finding underlying a court's opinion of "the history and character of the defendant and the nature and circumstances of his criminal conduct" – based upon a preponderance of the evidence and above and beyond the finding of prior convictions – is unconstitutional under *Hurst*.

C. *Prindle* addressed mandatory minimums, not the sentencing factors discussed in *Hurst*

This Court's recent decision in *Prindle* does not foreclose the issues raised here. *Prindle* considered whether the Statute and the CPL violated *Apprendi* in light of *Alleyne*. *Prindle*, 2017 WL 2799824, at *__. This Court found that its statutory construction withstood *Alleyne* because *Alleyne* applied *Apprendi* to facts that increase a minimum sentence, and the Statute leaves the minimum sentence unchanged. *Prindle*, 2017 WL 2799824, at *__.

As discussed above, under *Hurst*, the Sixth Amendment and the Due Process Clause require a jury to make the critical findings necessary to impose a greater punishment. The Statute and the CPL, even as constructed by this Court in *Prindle*, do not meet this constitutional requirement as articulated in *Hurst,* which was not addressed in *Prindle*. *Prindle*, 2017 WL 2799824, at *__. While prior convictions may make a defendant eligible for an enhanced sentence, the Statute and the CPL require a judge to make certain findings, not just the fact of prior convictions, before he or she may impose a sentence within that increased range. That is precisely what *Hurst* found unconstitutional. 136 S. Ct. at 624.

CONCLUSION

For the foregoing reasons, NACDL and NYSACDL urge the Court to hold the applicable provisions of the Statute and the CPL violate the Sixth Amendment and the Due Process Clause of the Constitution of the United States, and vacate the sentences imposed below.

Respectfully submitted,

Dated: July 28, 2017

LINDSAY A. LEWIS
VICE CHAIR, AMICUS CURIAE
COMMITTEE OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS
29 Broadway, Suite 1412
New York, New York 10006

RICHARD D. WILLSTATTER
CHAIR, AMICUS CURIAE COMMITTEE
OF THE NEW YORK STATE
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601

MARK G. MATUSCHAK
TIFFANY E. PAYNE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

Attorneys for Movants National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers