IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY, TRENTON DIVISION

NEW JERSEY SECOND AMENDMENT SOCIETY AND MARK CHEESEMAN Plaintiffs, v. CHRISTOPHER S. PORRINO, in his Official Capacity as Acting Attorney General of New Jersey, and COLONEL RICK FUENTES, in his Official Capacity as Superintendent of the New Jersey State Police Defendants.	HON. JUDGE SHIPP, U.S.D.J. Case No. 3:16-cv-04906-MAS-DEA NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

TO: Clerk of the Court
United States District Court
For the District of New Jersey
Clarkson S. Fisher Building & U.S. Courthouse
402 East Street Street Room 2020
Trenton, NJ 08608

Matthew J. Lynch, Esq.
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

PLEASE TAKE NOTICE that on December 19, 2016, or at such other time as it may please the Court, the undersigned, appearing for Plaintiffs, shall move before the Honorable Judge Michael Shipp, U.S.D.J., for an Order granting

Plaintiff's Motion for Judgment on the Pleadings and all relief sought in their Complaint pursuant to Fed. R. Civ. P. 12(c).

PLEASE TAKE FURTHER NOTICE that the undersigned shall rely upon the brief submitted in support of this Motion.

A proposed form of Order is submitted herewith.

Respectfully submitted,

/s/ Ryan S. Watson
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CERTIFICATE OF SERVICE

I, Ryan S. Watson, counsel of record for Plaintiffs, hereby certify that the foregoing document or pleading has been filed with the Clerk of the United States District Court, District of New Jersey, via ECF and that all counsel of record has received electronic notice of this filing.

Dated: November 13, 2016

/s/ Ryan S. Watson
Ryan S. Watson

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY, TRENTON DIVISION

NEW JERSEY SECOND AMENDMENT SOCIETY AND MARK CHEESEMAN Plaintiffs, v. CHRISTOPHER S. PORRINO, in his Official Capacity as Acting Attorney General of New Jersey, and COLONEL RICK FUENTES, in his Official Capacity as Superintendent of the New Jersey State Police Defendants.	HON. JUDGE SHIPP, U.S.D.J. Case No. 3:16-cv-04906-MAS-DEA BRIEF IN SUPPORT OF PLAINTIFFS MOTION FOR JUDGMENT ON THE PLEADINGS Hearing: December 19, 2016

BRIEF ON BEHALF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Plaintiffs New Jersey Second Amendment Society (hereafter "NJ2AS") and Mark Cheeseman (hereafter "Cheeseman") seek to purchase, own and carry Tasers for self-defense. Plaintiffs filed their Complaint on August 11, 2016 [ECF #1]. The declarations provided by NJ2AS and Mark Cheeseman are attached to the Complaint as Exhibits A and B, respectively. Mr. Cheeseman attempted to purchase a Taser Pulse on August 10, 2016, but was declined due to New Jersey's ban on stun guns and Tasers. ECF No. 1-4. Both Mr. Cheeseman and NJ2AS members would own stun guns or Tasers if they were not illegal in New Jersey.

After the Complaint was served on August 15, 2016, Defendants moved for a Clerk's Order extending time to respond to the Complaint. ECF No. 6. On September 20, 2016, Defendants moved for additional time to respond to the Complaint. ECF No. 9. That request was granted. On October 21, 2016, Defendants again requested an additional thirty days to respond to the Complaint. ECF No. 14. That request was opposed by Plaintiffs. ECF No. 15. The Court granted in part Defendants' request for additional time and gave another fifteen days. ECF No. 16. The Defendants answered the Complaint on November 10, 2016. ECF No. 18.

Between requesting extensions and answering the Complaint on November 10, 2016, Defendant Christopher Porrino, in a case styled *State of New Jersey v.*

Kevin Lambert, Docket No. A-1996-15T5 (attached), conceded that the State of New Jersey's "… stun-gun statute violates the Second Amendment…" *Id*. at 10. Further, the Attorney General's concluded that "For all the foregoing reasons, this Court should rule that defendant's conviction for possession of a stun-gun violates the Second Amendment…" *Id*. at 16. This concession came three days *before* the Defendants in the instant case filed their Answer; essentially denying that the stun gun ban violates the Second Amendment.

LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 12(c), a motion for judgment on the pleadings will be granted only if "the movant clearly establishes there are no material issues of fact, and he is entitled to judgment as a matter of law." *Sikirica v. Nationwide Ins. Co*., 416 F.3d 214, 220 (3d Cir. 2005) (citations omitted). The Court must view "the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id*. "In deciding a motion for judgment on the pleadings, the court considers the pleadings and attached exhibits, undisputedly authentic documents relied on by plaintiffs and attached to the motion, and matters of public record." *Est. of Rosario v. Paterson Police Dept*., CV 14-5167 (WJM), 2016 WL 6540447, at *2 (D.N.J. Nov. 3, 2016) (citations omitted).

ARGUMENT

a. Plaintiffs are Entitled to Judgment as a Matter of Law

The Second Amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const., Amend. II. The Second Amendment guarantees individuals a fundamental right to keep and carry arms for self-defense and defense of others in the event of a violent confrontation. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Caetano v. Massachusetts*, 577 U.S. __ (2016). The Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. *Heller*, 554 U.S. at 582; *Caetano*, slip op. at 1 (per curiam).

Given the decision in *Heller*, New Jersey may not completely ban the keeping and bearing of arms for self-defense that are not unusually dangerous, deny individuals the right to carry arms in non-sensitive places, deprive individuals of the right to keep or carry arms in an arbitrary and capricious manner, or impose regulations on the right to keep and carry arms that are inconsistent with the Second Amendment. *See Caetano v. Massachusetts*, 577 U.S. ___ (2016); *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015); *Palmer v. District of Columbia*, 59 F.Supp.3d 173 (2014).

N.J. Stat. Ann. § 2C:39-1 defines "Stun gun" to mean "any weapon or other device which emits an electrical charge or current intended to temporarily or permanently disable a person." This same statute includes stun gun in the definition of a "weapon." N.J. Stat. Ann. § 2C:39-3(h) provides that "[a]ny person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree." Thus, New Jersey outlaws the private possession by plaintiffs of a Taser or stun gun within the state.

A first violation of New Jersey's complete ban on the ownership or possession of Tasers or stun devices by non-law enforcement personnel is punishable as follows: "[i]n the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months." N.J. Stat. Ann. § 2C:43-6. A fine may also be levied "not to exceed … $10,000.00." N.J. Stat. Ann. § 2C:43-3(b)(2).

The State of New Jersey has conceded, given the Supreme Court's guidance in *Caetano v. Massachusetts*, 577 U.S. __ (2016), that its ban on stun guns violates the Second Amendment. See *State of New Jersey v. Kevin Lambert*, Docket No. A-1996-15T5, attached. There are no genuine issues of material facts taken in the light most favorable to the nonmovant which changes the outcome of New Jersey's concession that its stun gun ban violates the Second Amendment.

In *Caetano*, the Supreme Court summarily reversed the Supreme Judicial Court of Massachusetts' holding that:

> ... a stun gun is not the type of weapon that is eligible for Second Amendment protection." … The court reasoned that stun guns are unprotected because they were "not 'in common use at the time' of enactment of the Second Amendment," … and because they fall within the "traditional prohibition against carrying dangerous and unusual weapons[.]"

Id. (citations omitted).

Justice Alito, joined by Justice Thomas, concurred and applied the Court's reasoning to argue that the "pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today." (Alito, J. Concurring). The facts in *Caetano* demonstrated that "approximately 200,000 civilians owned stun guns as of 2009." *Caetano*, 577 U.S. at 1032-33. The concurrence stated, "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Id*. Additionally, as Justice Alito stated, "As the per curiam opinion recognizes, [dangerous and unusual] is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Id*. at 1031. The Supreme Court reiterated that the "Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 1027.

In a recent Fifth Circuit Court of Appeals case, the Fifth Circuit cited approvingly to *Caetano* for the proposition that stun guns are protected arms under the Second Amendment:

> In addressing whether stun guns are in common use, Justice Alito, joined by Justice Thomas, implied that the number of states that allow or bar a particular weapon is important:
>
> > [T]he number of Tasers and stun guns is dwarfed by the number of firearms. This observation may be true, but it is beside the point.... The more relevant statistic is that [200,000] ... stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States.... While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.
>
> *Caetano*, 136 S.Ct. at 1032–33 (citations omitted). These two justices suggested that the 200,000 absolute number, plus that 45 states have "accepted [stun guns] as a legitimate means of self-defense," was enough to determine that the stun gun is in common use.

Hollis v. Lynch, 827 F.3d 436, 449 (5th Cir. 2016). The District of Columbia was recently faced with a similar issue in *Crystal Wright, et al. v. District of Columbia, et al*., Civil Action No. 1:16-cv-1556 (JEB), which was filed on August 2, 2016. Wright challenged the legality of the District of Columbia's ban on stun guns and Tasers, similar to the current ban in New Jersey. A Stipulation of Relief was entered into on September 26, 2016 and now the District of Columbia is revising its statute to allow for some type of ownership of these weapons.

CONCLUSION

The instant case demonstrates a pure question of law: whether New Jersey's ban on possession of stun guns and Tasers violates the Second Amendment. New Jersey, in the *Lambert* case, agreed and conceded that it does. As such, Plaintiffs are entitled to judgment as a matter of law immediately for all relief sought in their Complaint.

Respectfully submitted,

/s/ Ryan S. Watson
RYAN S. WATSON

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CERTIFICATE OF SERVICE

I, Ryan S. Watson, counsel of record for Plaintiffs, hereby certify that the foregoing document or pleading has been filed with the Clerk of the United States District Court, District of New Jersey, via ECF and that all counsel of record has received electronic notice of this filing.

Dated: November 13, 2016

/s/ Ryan S. Watson
Ryan S. Watson

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY, TRENTON DIVISION

NEW JERSEY SECOND AMENDMENT SOCIETY AND MARK CHEESEMAN Plaintiffs, v. CHRISTOPHER S. PORRINO, in his Official Capacity as Acting Attorney General of New Jersey, and COLONEL RICK FUENTES, in his Official Capacity as Superintendent of the New Jersey State Police Defendants.	) HON. JUDGE SHIPP, U.S.D.J.) Case No. 3:16-cv-04906-MAS-DEA) FORM OF ORDER

THIS MATTER having come before the Court on a motion by Plaintiffs, New Jersey Second Amendment Society and Mark Cheeseman, by their counsel, for an order granting them Judgment pursuant to Fed. R. Civ. P. 12(c); and the Court having considered the papers submitted in favor and in opposition to the motion; and upon good cause shown;

IT IS on this ____ day of _____, 2016,

ORDERED that Plaintiffs' Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c) is hereby **GRANTED**.

_____
Honorable Michael A. Shipp
United States District Judge

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
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November 7, 2016

LETTER AND APPENDIX IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v. Kevin Lambert (Defendant-Appellant)
Docket No. A-1996-15T5

Criminal Action: On Appeal From a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Middlesex County.

Sat Below: Hon. Lorraine Pullen, J.S.C.
Hon. Dennis V. Nieves, J.S.C.

Honorable Judges:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter in lieu of formal brief is submitted on behalf of the State.

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COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

On December 9, 2009, Middlesex Indictment No. 09-12-02063 was filed, charging defendant, Kevin Lambert, with third-degree possession of cocaine, N.J.S.A. 2C:35-10a(1) (count one); third-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(3) (count two); third-degree possession of cocaine with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7 (count three); fourth-degree possession of a stun gun (the stun-gun statute), N.J.S.A. 2C:39-3h (count four); and second-degree possession of a stun gun while engaged in drug-distribution related activity, N.J.S.A. 2C:39-4.1(c) (count five). (Da1-2).

On November 4, 2015, defendant pleaded guilty to third-degree possession of cocaine (count two) and fourth-degree possession of a stun gun (count four) before the Honorable Dennis V. Nieves, J.S.C.[2] (1T3-16 to 24); (Da3-9). The prosecutor

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[1] The following citation form is adopted:
Da - Defendant's appendix
Db - Defendant's brief
Pa - State's appendix
PSR - Defendant's presentence report
1T - Plea transcript, November 4, 2015
2T - Sentencing transcript, November 10, 2015

[2] According to the unpublished opinion cited in defendant's brief, a jury had convicted defendant of third-degree possession of cocaine (count one), third-degree possession with intent to distribute less than one-half ounce of cocaine (count two), fourth-degree possession of a stun gun (count four), and second-degree possession of a stun gun while engaged in the course of distributing a controlled dangerous substance (count five). State v. Kevin Lambert, No. A-02698-12T1 (App. Div. April 9, 2015); (Db2). Defendant was sentenced to an aggregate term of thirteen years. This Court reversed defendant's convictions for reasons unrelated to any issue raised in this present appeal. Ibid.

agreed to recommend an extended term of seven-years' imprisonment, with three-and-a-half years' parole ineligibility for third-degree possession of cocaine, concurrent to a term of eighteen months' imprisonment for fourth-degree possession of a stun gun. (1T10-4 to 21); (Da5).

Defendant did not, at any point before the trial court, argue that the charge of possessing a stun gun violated his Second Amendment rights, and he did not preserve any such issue on appeal. The plea form indicates that defendant agreed that he was waiving his right to appeal the denial of any pretrial motions, (Da3), and defendant did not enter a conditional plea at his plea colloquy. (1T).

On November 10, 2015, Judge Nieves sentenced defendant to an extended term of seven-years' imprisonment, with three-and-a-half years' parole ineligibility for third-degree possession of cocaine, concurrent to a term of eighteen months' imprisonment for fourth-degree possession of a stun gun. (2T28-19 to 24); (Da9). Defendant was entitled to 384 days of jail credit and 1,089 days of prior service credit. (Da11). The court imposed appropriate fines and assessments. (Da10). The court dismissed the remaining charges in the indictment. (2T31-19 to 21); (Da9).

Defendant filed a notice of appeal on January 20, 2016. (Da13). This matter was originally placed on the Sentencing Oral Argument Calendar, (Da14), but was transferred to the plenary calendar. (Da15-17).

STATEMENT OF FACTS

At his plea colloquy, defendant admitted that on October 10, 2009, he was driving in New Brunswick, when he came into contact with the police. (1T12-11 to 20). The police found an electric scale and cocaine in his car. Defendant admitted that he planned to share the cocaine with other people. He also admitted that he possessed a stun gun, and he had no lawful purpose in possessing the stun gun. (1T12-21 to 13-17).

Judge Nieves accepted this colloquy as establishing a factual basis for third-degree possession of cocaine and for fourth-degree possession of a stun gun. (1T14-6 to 7).

This appeal follows.

LEGAL ARGUMENT

POINT I

THOUGH DEFENDANT'S CLAIMS CONCERNING THE CONSTITUTIONALITY OF NEW JERSEY'S STUN-GUN STATUTE WOULD ORDINARILY BE BARRED ON APPEAL, AS DEFENDANT DID NOT RAISE THIS CLAIM BEFORE THE TRIAL COURT AND DID NOT ENTER A CONDITIONAL PLEA, THE STATE WAIVES THESE PROCEDURAL BARS IN THIS SPECIFIC INSTANCE AND AGREES THAT THE STUN-GUN STATUTE VIOLATES THE SECOND AMENDMENT. (Not raised below).

Defendant is prohibited from raising a constitutional claim for the first time on appeal for two reasons. First, this claim was never presented to the trial court, and it is not ripe for appellate review. Second, defendant entered an unconditional guilty plea, and this claim is thus waived on appeal.

The State nonetheless agrees to waive these procedural bars in this limited instance for two reasons. First, the State

agrees with defendant that New Jersey's stun-gun statute, N.J.S.A. 2C:39-3h, is unconstitutional in light of Caetano v. Massachusetts, 136 S. Ct. 1027 (2016), and defendant's conviction under that statute should be vacated in the interests of justice. Second, defendant's conviction for third-degree possession of cocaine remains undisturbed, and the State thus retains a substantial benefit from its plea agreement with defendant.

A. Defendant's challenge to the constitutionality of a statute, raised for the first time on appeal and not preserved by a conditional guilty plea, is waived.

As noted, defendant's belated arguments challenging the constitutionality of the stun-gun statute are waived on appeal for two reasons. First, defendant never challenged the constitutionality of the stun-gun statute before the trial court, and second, defendant entered an unconditional guilty plea.

As to the first point, issues not raised in the trial court, even constitutional issues, will not be considered on appeal unless the issue is jurisdictional or presents a matter of true public importance. See State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below."); State v. Crawley, 149 N.J. 310, 316 (1997) ("Generally, a defendant who pleads guilty is prohibited from raising, on appeal, the contention that the State violated his constitutional rights prior to the plea."); Deerfield Estates, Inc. v. East Brunswick, 60 N.J. 115, 120 (1972) ("[T]he general rule of appellate practice, that ordinarily no issue will be considered by the

reviewing court unless raised and argued below, is true of a constitutional issue, unless it goes to the question of jurisdiction or presents a matter of real public importance."); see also Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 2:6-2 (2015) (recognizing that "[i]ssues not raised below, even constitutional issues, will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest"). Neither exception is satisfied here. Defendant's claim does not present a jurisdictional question, and he has not asserted that his claim presents a matter of true public interest. Defendant's constitutional claim is thus barred from consideration on appeal.

Defendant cites State v. Barcheski, 181 N.J. Super. 34, 38 (App. Div. 1981), to suggest that this Court could consider his claim, but this case does not support this position. There, the defendant, prior to trial in the municipal court, moved to dismiss the complaint, contending that the administrative code section was invalid, and he prevailed in that claim. Id. at 36-37. The Law Division then incorrectly transferred the appeal to the Appellate Division, and this Court remanded the matter to the Law Division "for disposition on the merits." Id. at 37. Here, by contrast, defendant did not present this claim before the Law Division. Barcheski does not set forth any further exceptions to the general prohibition against raising claims for the first time on appeal.

As to the second point, defendant's unconditional guilty

plea further bars consideration of his unpreserved claims. Defendant's guilty plea was not entered on the record as a conditional plea. See R. 3:9-3(f) ("With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea."). The Supreme Court has applied this Rule to bar evidentiary challenges, see State v. Knight, 183 N.J. 449, 471 (2005), and this Court has applied this Rule to constitutional challenges. See State v. Raymond, 113 N.J. Super. 222, 226 (App. Div. 1971) (holding that the defendant waived his right to challenge the constitutionality of the abortion statute he was charged with violating when he pleaded guilty); cf. State v. Wearing, 249 N.J. Super. 18, 25 (App. Div. 1991) (noting "serious reservations about whether a defendant . . . can challenge the constitutionality of N.J.S.A. 2C:35-12 following imposition of a sentence pursuant to a negotiated disposition under that statute"). In short, defendant's unconditional plea bars consideration of his unpreserved constitutional challenge.

For these two reasons, defendant's constitutional claim are waived on appeal. The State urges this Court to reaffirm these principles while also recognizing that, for the reasons discussed below, the State agrees to waive these procedural bars only in this specific case.

B. The State agrees to waive these procedural bars in this specific case because it agrees that New Jersey's stun-gun statute is unconstitutional and the State still retains the benefit from the plea agreement with defendant.

The State agrees to waive the above-noted procedural bars in this specific case for two reasons. First, the State agrees with defendant that New Jersey's stun-gun statute is unconstitutional in light of Caetano, 136 S. Ct. 1027, and defendant's conviction should be vacated in the interests of justice. Second, defendant's conviction for third-degree possession of cocaine remains undisturbed, and the State thus retains a substantial benefit from defendant's plea agreement.

First, the State agrees with defendant's reading of United States Supreme Court precedent. To briefly recap Second-Amendment jurisprudence, the United States Supreme Court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," District of Columbia v. Heller, 554 U.S. 570, 582 (2008), and that this "Second Amendment right is fully applicable to the States[.]" McDonald v. Chicago, 561 U.S. 742, 750 (2010).

The Supreme Court, in a per curiam ruling, has effectively extended the Second Amendment to stun guns. Caetano, 136 S. Ct. 1027. Caetano possessed a stun gun in a supermarket parking lot and was convicted of possessing the stun gun. Commonwealth v. Caetano, 26 N.E.3d 688, 689 (Mass. 2015). The Massachusetts statute prohibiting possession of stun gun stated that "[n]o person shall possess a portable device or weapon from which an

electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill[.]" Mass. Gen. Laws, ch. 140, § 131J (2014) ("the Massachusetts stun-gun statute"). Caetano challenged the constitutionality of the Massachusetts stun-gun statute, and the Supreme Judicial Court of Massachusetts, holding that a "stun gun is not the type of weapon that is eligible for Second Amendment protection[,]" affirmed her conviction. Ibid.

The United States Supreme Court disagreed with the Massachusetts court's reasoning, vacated its judgment, and remanded the matter for further proceedings not inconsistent with this opinion. Caetano, 136 S. Ct. at1028. In doing so, the Supreme Court held that the Massachusetts court's three reasons to support its holding "contradict[ed] this Court's precedent." Ibid.

First, Supreme Judicial Court of Massachusetts ruled that stun guns are not protected because they "were not in common use at the time of the Second Amendment's enactment." 26 N.E.3d 688, 691 (2015). But this ruling was inconsistent with Heller's clear statement that the Second Amendment "'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" Caetano, 136 S. Ct. at 1028 (quoting Heller, 554 U.S. at 582).

Second, the Massachusetts court attempted to apply one "important limitation on the right to keep and carry arms," namely, the "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Heller, 554 U.S. at 627; 26

N.E.3d at 694. The Massachusetts court held that stun guns are "unusual" because they are "a thoroughly modern invention." 26 N.E.3d at 693-94. Yet because the Massachusetts court equated "unusual" with "in common use at the time of the Second Amendment's enactment," the Supreme Court held that this second explanation "is the same as the first" and that "it is inconsistent with Heller for the same reason." Caetano, 136 S. Ct. at 1028.

Third, the Massachusetts court used "a contemporary lens" to find that there is "nothing in the record to suggest that [stun guns] are readily adaptable to use in the military." 26 N.E.3d at 694. But Heller rejected this reasoning as well, and the Caetano ruling again rejected the proposition "'that only those weapons useful in warfare are protected.'" Caetano, 136 S. Ct. at 1028 (quoting Heller, 554 U.S. at 624-25).

For these reasons, the Court vacated the Massachusetts court's ruling as inconsistent with Heller. Though the Supreme Court's per curiam opinion does not explicitly state that Massachusetts' categorical ban of stun guns violates the Second Amendment, the effect of the ruling is nearly the same.

Justice Alito, joined by Justice Thomas, wrote a pointed and detailed concurrence, specifically holding that Massachusetts' categorical ban of stun guns violates the Second Amendment. This concurring opinion further notes, in part, that "'[h]undreds of thousands of Tasers and stun guns have been sold to private citizens,' who it appears may lawfully possess them in 45

States." Caetano, 136 S. Ct. at 1032-33 (Alito, J., concurring) (emphasis added). Justice Alito cited statistics revealing that "approximately 200,000 civilians owned stun guns" as of 2009, and that they are "widely owned and accepted as a legitimate means of self-defense across the country." This concurrence further adds to the argument that New Jersey's stun-gun statute is unconstitutional.

The State is unaware of any legitimate basis to distinguish New Jersey's stun-gun statute from Massachusetts' statute. The New Jersey stun-gun statute, like the Massachusetts statute, criminalizes mere possession of a stun gun. The New Jersey stun-gun statute states that "[a]ny person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree." N.J.S.A. 2C:39-3h. A stun gun is defined as "any weapon or other device which emits an electrical charge or current intended to temporarily or permanently disable a person." N.J.S.A. 2C:39-1t. A "weapon" is defined as "anything readily capable of lethal use or of inflicting serious bodily injury[,]" and specifically includes stun guns. N.J.S.A. 2C:39-1r. Since both statutes criminalize mere possession of a stun gun, for the reasons outlined in Caetano, New Jersey's stun-gun statute, like Massachusetts's statute, violates the Second Amendment.

Since the State agrees with defendant that Jersey's stun-gun statute violates the Second Amendment, the State is waiving the above-noted procedural bars. The interests of justice compel that, despite defendant's waiver of these claims, defendant's

conviction for possessing a stun gun should be overturned. For this reason, in the context of this specific case alone, the State is not asserting its waiver claims.

The State also agrees to not pursue its waiver claims here because the State retains a substantial benefits from defendant's plea agreement. If defendant had challenged the constitutionality of the stun-gun statute in the trial court and lost, the State would have been on notice that defendant intended to pursue such a claim. With such knowledge, the State could have factored defendant's claim into its plea negotiations, and either accepted a plea to a different charge or negotiated a conditional plea. Nonetheless, defendant's drug conviction remains unchallenged. The State thus retains a substantial benefit from its bargain with defendant.

In sum, the State urges this Court to reaffirm that defendant's challenge to the constitutionality of a statute, which was not raised before the trial court nor preserved in a conditional plea, is waived on appeal. In the specific circumstances of this case, however, the State waives these procedural bars. The State agrees that New Jersey's stun-gun statute, N.J.S.A. 2C:39-3h, violates the Second Amendment, and that defendant's conviction under this statute must be vacated.

POINT II

THE STATE AGREES THAT THE SENTENCING COURT MISCONSTRUED N.J.S.A. 2C:35-12, AND THE MATTER MUST BE REMANDED FOR RESENTENCING. (2T12-11 to 13-3).

The State agrees that the sentencing court mistakenly believed that it had no discretion to deviate from the negotiated sentence. The court stated that "Brimage ties [its] hands" and that it was "impotent" to impose a different sentence other than that which the parties negotiated. (2T12-11 to 13-3). The sentencing court was incorrect, and defendant is entitled to be resentenced.

Defendant pleaded guilty to a third-degree offense and was to be sentenced to an extended term, making the sentencing range between five and ten years. N.J.S.A. 2C:43-7a(4). Defendant's term of imprisonment was, pursuant to N.J.S.A. 2C:43-6f, to include the imposition of a minimum term between one-third and one-half of the base term, or three years, whichever is greater. The negotiated sentence and parole-ineligibility term was within the normal extended-term range: seven years' imprisonment, with three-and-a-half years' parole ineligibility.

Since the negotiated plea with defendant was for a sentence and period of parole ineligibility within the normal extended-term range, the sentencing court retained discretion to deviate from the negotiated sentence and impose a sentence and term of parole ineligibility within the extended-term range and the mandates of N.J.S.A. 2C:43-6f. State v. Thomas, 253 N.J. Super.

368, 370 (App. Div. 1992). On the other hand, if the negotiated agreement had been for a sentence below the extended-term range, the sentencing court would not have had discretion to deviate from it. See N.J.S.A. 2C:35-12; State v. Bridges, 131 N.J. 402, 414 (1993).

The sentencing court mistakenly believed that it did not have discretion to deviate from the negotiated sentence. The State thus agrees that defendant is entitled to be resentenced.

POINT III

THOUGH THIS ISSUE IS MOOTED BY THE NEED FOR RESENTENCING, DEFENDANT MISREADS ALLEYNE V. UNITED STATES. (Not raised below).

The State's agreement that defendant must be resentenced moots this last point at this time. This Court should refrain from issuing an advisory ruling. State v. Harvey, 176 N.J. 522, 528 (2003) ("[T]his Court will not render advisory opinions or exercise its jurisdiction in the abstract[.]").

Nonetheless, defendant misreads Alleyne v. United States, 133 S. Ct. 2151 (2013). Defendant's sentence, with a parole disqualifier of one-half of his base term, comports with the rulings in Alleyne and Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, 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 proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Alleyne, the Court extended this holding to

mandatory minimum sentences. Alleyne, 133 S. Ct. at 2158.

Here, defendant's mandatory minimum term – between one-third and one-half of the sentence imposed by the court or three years, whichever is greater – results from his prior conviction of a similar crime. N.J.S.A. 2C:43-6f. See (1T4-8); (PSR at 4). This prior conviction falls within the "fact of a prior conviction" set out in Apprendi. Cf. State v. Pierce, 188 N.J. 155, 169-71 (2006) (rejecting defendant's constitutional challenge to extended-term sentence because the defendant was subject to extended term due to prior conviction). The court, at resentencing, may exercise its discretion in choosing a term within that range. See State v. Grate, 220 N.J. 317, 336-37 (2015) (recognizing, in light of Alleyne, a sentencing judge's continued ability to exercise discretion based on judicially-found facts "within the statutory range).

The Court's ruling in Alleye would be violated here if, for example, the statute allowed a minimum of only one-third of his sentence, but the sentencing judge further increased the minimum based on other judicially-found facts or the weighing of aggravating and mitigating factors. Alleyne, 133 S. Ct. at 2162 (recognizing that because an act – brandishing – aggravated the legally prescribed range of allowable sentences, "it constitute[d] an element of a separate, aggravated offense that must be found by the jury" and that "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment"). But here, defendant

was exposed to an elevated mandatory minimum term solely as a result of his prior conviction, and the sentencing court retained discretion to sentence within that elevated range.[3]

This Court should thus reject defendant's interpretation of Alleyne.

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[3] In State v. Evans, No. A-0771-13T1, 2016 N.J. Super. Unpub. LEXIS 771, *10-13 (App. Div. Apr. 8, 2016), the defendant raised the very same argument, and this Court correctly rejected it. (Pa1-6). The State is unaware of any contrary authority.

CONCLUSION

For all the foregoing reasons, this Court should rule that defendant's conviction for possession of a stun-gun violates the Second Amendment and that the matter must be remanded for resentencing.

Respectfully submitted,

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DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: November 7, 2016

*2016 N.J. Super. Unpub. LEXIS 771, **

STATE OF NEW JERSEY, Plaintiff-Respondent, v. WAYNE M. EVANS, a/k/a BRUCE EVANS, LAMAR EVANS, LAMAR GREEN, DWAYNE EDWARDS, IAMAR GREEN, SHAWN SPELLMAN, MARK THOMPSON, WAYNE TOLLER, BRUCE A. EVANS, WAYNE E. EVANS, WAYNE L. EVANS, WAYNE Z. EVANS, WAYNE MEACHUM EVANS, Defendant-Appellant.

DOCKET NO. A-0771-13T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2016 N.J. Super. Unpub. LEXIS 771

January 11, 2016, Argued
April 8, 2016, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

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SUBSEQUENT HISTORY: Certification denied by State v. Evans, 2016 N.J. LEXIS 1025 (N.J., Sept. 26, 2016)

PRIOR HISTORY: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 10-06-0661.

CORE TERMS: sentence, sentencing, mere presence, prescribed, cocaine, constructive possession, prior conviction, mandatory, extended term, judicially-found, map, possession of cocaine, jury charge, minimum sentences, distribute, selecting, exposure, console, parole, merged, feet, zone, baggie, jury instruction, school purposes, beyond a reasonable doubt, statutory maximum, minimum term, mitigating factors, post-argument

COUNSEL: Joshua D. Sanders, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Sanders, of counsel and on the briefs).

Jeffrey P. Mongiello, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Mr. Mongiello, of counsel and on the briefs).

JUDGES: Before Judges Sabatino, O'Connor and Suter.

OPINION

PER CURIAM

In this direct appeal, defendant Wayne M. Evans raises various arguments contesting his conviction and sentence for possession of cocaine with the intent to distribute it and other related offenses. We affirm.

The State's proofs at the jury trial established the following pertinent facts. At about 1:00 a.m. on March 4, 2010, police officers on routine patrol in Hillside observed a Ford Explorer idling in the middle of the street. Defendant was behind the wheel of the vehicle and its sole occupant. When the police asked defendant to get out, he immediately activated the remote automatic door lock to prevent them from entering the vehicle, an act that raised the officers' suspicions.

Defendant **[*2]** admitted to the officers that the Explorer was not his vehicle, that he did not have a driver's license, and that he did not know the location of the vehicle's registration. The officers consequently went inside the vehicle to look for the registration. At that point an officer discovered a

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plastic baggie containing what appeared to be cocaine. The baggie was found in a cup holder inside the console, about six inches from the driver's seat. The baggie was confiscated. Its contents were tested, and confirmed to be about twenty grams of cocaine.

A grand jury indicted defendant and charged him with third-degree possession of a controlled dangerous substance (cocaine), *N.J.S.A.* 2C:35-10(a)(1) (count 1); second-degree possession of cocaine with intent to distribute it, *N.J.S.A.* 2C:35-5(a)(1) and *N.J.S.A.* 2C:35-5(b)(2) (count 2); and third-degree possession of cocaine with intent to distribute it within 1,000 feet of a school, *N.J.S.A.* 2C:35-7 (count 3). After defendant unsuccessfully moved to suppress the fruits of the warrantless vehicle search[1], the case was tried before a jury over four days in April and May 2013. The jury found defendant guilty of all three counts of the indictment.

FOOTNOTES

1 Defendant does not challenge on appeal the legality of the search of the vehicle, nor **[*3]** does he contest the quantity of cocaine that was found.

Following the jury's verdict, the trial judge granted the State's motion for an extended term in light of defendant's prior criminal record. The judge imposed a sixteen-year custodial sentence with an eight-year parole disqualifier on count two. The judge merged count one into count two, and imposed a concurrent five-year sentence on count three. This appeal ensued.

Defendant contends that:

POINT I

THE TRIAL COURT COMMITTED STRUCTURAL, REVERSIBLE ERROR WHEN IT PRESENTED AN OVERLY BROAD AND VAGUE INSTRUCTION ON THE LAW OF CONSTRUCTIVE POSSESSION. (Not Raised Below).

POINT II

BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. EVANS WAS GUILTY OF THE SCHOOL ZONE OFFENSE, THAT CONVICTION MUST BE DISMISSED AS A MATTER OF LAW. (Not Raised Below).

POINT III

THE SENTENCING COURT SHOULD HAVE MERGED THE CONVICTION FOR DISTRIBUTION WITHIN 1000 FEET OF A SCHOOL ZONE WITH THE POSSESSION WITH INTENT CONVICTION.

POINT IV

THE IMPOSITION OF A DISCRETIONARY PERIOD OF PAROLE INELIGIBILITY IS UNCONSTITUTIONAL AND MUST BE STRICKEN BY THIS COURT.

A. *N.J.S.A.* 2C:43-6(b)[2] Violates The Sixth Amendment Because It Allows For Increased Punishment Based On A Fact Found By A Judge Rather **[*4]** Than A Jury.

B. Background.

C. *Alleyne v. United States*

D. Mr. Evans's Sentence.

POINT V

MR. EVANS'S SENTENCE IS EXCESSIVE, UNDULY PUNITIVE, AND MUST BE REDUCED.

The State concedes the merger point regarding count three, although that does not affect defendant's aggregate sentence because the sentence on that count was concurrent. For the reasons that follow, we reject defendant's remaining points.

FOOTNOTES

2 After this court inquired of counsel regarding the applicable subsection of the extended term statute, defendant clarified that he was relying on *N.J.S.A.* 2C:43-6(f), rather than *N.J.S.A.* 2C:43-6(b). We have considered the post-argument supplemental briefs on this issue, which the parties submitted at our invitation.

Defendant first challenges the court's jury charge as to possession. In particular, he argues that the court prejudicially erred in failing to state during the portion of the charge that explained the concept of constructive possession that a defendant's "mere presence" at the location of contraband is insufficient to establish guilt of such possession. We reject this argument, which notably was not raised below and thus is considered under a "plain error" scope of review. *State v. Walker*, 203 N.J. 73, 89-90, 999 A.2d 450 (2010).

Although the law does recognize that a defendant's **[*5]** mere presence is not sufficient to support an inference of possession, *see State v. Jackson*, 326 N.J. Super. 276, 280, 741 A.2d 128 (App. Div. 1999), the charge provided by the court here was adequate under the circumstances. The charge essentially tracked the applicable model charge for possession. *Model Jury Charge (Criminal)*, "Possession (*N.J.S.A.* 2C:2-1)" (2005). "[O]rdinarily the model jury instruction leaves no 'room to doubt that "mere presence" [is] insufficient to bring about a finding of the necessary elements of possession.'" *State v. Randolph*, 441 N.J. Super. 533, 559, 120 A.3d 237 (App. Div. 2015) (second alteration in original) (quoting *State v. Montesano*, 298 N.J. Super. 597, 612-15, 689 A.2d 1373 (App. Div.), *certif. denied*, 150 N.J. 27, 695 A.2d 670 (1997)).

Defendant claims that the model charges are per se defective because they do not explicitly instruct the jury that "mere presence" is insufficient to support a finding of constructive possession. He argues that this omission could have led the jury in this case to incorrectly find that he constructively possessed the cocaine simply because he was present in the vehicle where the cocaine was found, regardless of whether he had the right to control those drugs. He asserts, by analogy, that the model charge could support a weapons conviction of a person simply because he was standing in proximity to a police officer's sidearm. We reject this fanciful argument.

To be sure, under certain factual **[*6]** circumstances, a jury instruction on "mere presence" may be appropriate in a contraband possession case. *See, e.g., Randolph, supra*, 441 N.J. Super. at 559-60 (finding that a "mere presence" instruction was necessary in that case, where there was a "paucity of proofs connecting [the] defendant to . . . CDS found in [an] apartment" and where the jury requested clarification on constructive possession); *Jackson, supra*, 326 N.J. Super. at 281-82 (finding that the jury charge regarding possession was inadequate because it failed to distinguish between CDS found on the defendant's person and CDS found in an apartment in which there was no evidence linking defendant to it beyond being an overnight guest). However, our review of a jury charge on appeal should focus upon the actual facts and circumstances of the case, rather than upon broad assertions based on inapposite hypotheticals. *See State v. Lenihan*, 219 N.J. 251, 269, 98 A.3d 533 (2014) (observing, by analogy, that a party seeking to test a law for vagueness must base his or her challenge "only with respect to his or her particular conduct" and that "multiple hypotheticals about the law's potential vagueness are irrelevant").

Here, defendant was indisputably parked in a vehicle with the engine running in the middle of a street late at night. He was alone in the vehicle **[*7]** and could not produce any driving credentials after being pulled over by police. He had locked the vehicle immediately after being ordered to step out of it, and refused to unlock it despite multiple requests from the officers at the scene. The cocaine was found by police in plain view in a cup holder in the center console of that vehicle, a few inches from where defendant had been sitting. No evidence was produced to the contrary.

Given these facts, there was clearly sufficient evidence to support a reasonable inference that defendant knew the drugs were present, understood their nature, and both intended and had the capacity to exercise control over them. *See State v. Spivey*, 179 N.J. 229, 236-37, 844 A.2d 512 (2004). This is not a case where there was a "paucity of proofs" connecting defendant to the vehicle and the drugs within it that may have led the jury, in the absence of an explicit instruction on mere presence, to find constructive possession of the drugs solely from his presence. *See Randolph, supra*, 441 N.J. Super. at 559-60; *Jackson, supra*, 326 N.J. Super. at 281-82. The fact that defendant did not own the Ford Explorer does not exonerate him of constructive possession of the drugs found within it. Indeed, his conduct in locking the vehicle to impede police entry into it is strongly supportive of his intent **[*8]** to maintain dominion and control over the drugs located in the center console.

Defendant's criticisms of the model charge are unavailing in this factual setting. Even if, for the sake of discussion, we agreed with his criticisms, there was no error "clearly capable of producing an unjust result," considering the strength of the State's case and the lack of evidence refuting the State's account of the incident. *Walker, supra*, 203 N.J. at 90.

Defendant's second point is that there was insufficient proof he possessed the drugs within the 1,000 foot radius of a school because the record does not show that the school depicted on the State's map, which was admitted into evidence without objection, was "regularly, consistently, and actually" used for school purposes on the date of his conduct. He also complains that the municipal ordinance adopting the map was not admitted into evidence. This argument also fails.

The parties stipulated that the map in evidence "constitutes *an official finding and accurate record* as to the location and boundaries . . . of property owned by or leased to any elementary or secondary school or school board *which is used for school purposes*." (Emphasis added). No evidence to the contrary was **[*9]** elicited. The State's evidence that defendant was found within 1,000 feet of the school, as depicted on the map, was also uncontroverted. Given the stipulation and the absence of competing proof, the jury was entitled to adopt the presumption of his possession within a school zone. *See State v. Thomas*, 132 N.J. 247, 258-59, 624 A.2d 975 (1993); *N.J.S.A.* 2C:35-7(f). In any event, as conceded by the State, this particular conviction in count three has merged into the conviction on count two.

With respect to his sentence, defendant maintains that the parole disqualifier of one-half of his base term imposed by the trial court pursuant to *N.J.S.A.* 2C:43-6(f) is unconstitutional in light of the United States Supreme Court's holding in *Alleyne v. United States*, U.S. , 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). We disagree.

In *Apprendi*, the United States Supreme 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 proved beyond a reasonable doubt." *Apprendi, supra*, 530 U.S. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455. Thirteen years later, in *Alleyne*, the Court extended the holding in *Apprendi* to encompass *mandatory* minimum sentences. *Alleyne, supra*, U.S. at , 133 S. Ct. at 2158, 186 L. Ed. 2d at 324. The Court was careful to note, however, that neither *Apprendi* nor *Alleyne* are meant to eliminate a judge's "broad sentencing discretion, informed by judicial factfinding" **[*10]** in selecting "a sentence *within the range* authorized by law." *Id.* at , 133 S. Ct. at 2163, 186 L. Ed. 2d at 330 (emphasis added); *see also Apprendi, supra*, 530 U.S. at 481, 120 S. Ct. at 2358, 147 L. Ed. 2d at 449 (same).

Here, defendant was exposed to the mandatory minimum term pursuant to *N.J.S.A.* 2C:43-6(f) solely due to his prior conviction of a similar crime, a circumstance that falls within the "fact of a prior conviction" exception expressed in *Apprendi*. *See State v. Thomas*, 188 N.J. 137, 151-52, 902 A.2d 1185 (2006). The trial judge then exercised discretion based on other judicial findings in selecting a sentence *within* the sentencing range authorized by subsection 6(f).

Our Supreme Court rejected a similar claim of unconstitutionality in *State v. Pierce*, 188 N.J. 155, 169-71, 902 A.2d 1195 (2006). In *Pierce*, the defendant challenged his extended term because the judge had imposed the sentence using the familiar aggravating and mitigating factors found under *N.J.S.A.* 2C:44-1(a) and (b). The Court held that the application of New Jersey's sentencing scheme in that setting was constitutional because the defendant was subject to an extended term due to a prior conviction, and the judge was permitted to use other judicially-found facts in selecting a sentence

within that statutory range. *Pierce*, *supra*, 188 N.J. at 168-71.

In his supplemental post-argument brief, defendant quarrels with the definition of the term "prescribed statutory range," as it was used by the United States Supreme Court **[*11]** in *Apprendi* and *Alleyne*. He contends that, because subsection 6(f) requires a minimum term of between one-third and one-half of the sentence imposed, the alleged effective "range" for purposes of Sixth Amendment analysis begins at one-third of the sentence. Therefore, he asserts, sentencing him to a minimum of one-half of his total sentence changes that "range." This flawed reasoning misinterprets *Alleyne*'s holding.

The constitutional violation in *Alleyne* was an aggravation of a defendant's sentencing *exposure* based on judicially-found facts, above what was prescribed by the Legislature as the minimum for the specific crime committed in the absence of those facts:

> While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant *is exposed* and do so in a manner that aggravates the punishment.
>
> [*Alleyne, supra*, 133 S. Ct. at 2158, 186 L. Ed. 2d at 324 (emphasis added).]

This analytic focus on a defendant's mandatory minimum exposure, rather than on the sentence actually imposed, is expressed in several other parts **[*12]** of the Court's opinion in Alleyne. For example:

> Similarly, because the fact of brandishing aggravates *the legally prescribed range of allowable sentences*, it constitutes an element of a separate, aggravated offense that must be found by the jury, *regardless of what sentence the defendant might have received if a different range had been applicable*. Indeed, if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range[.]
>
> [*Id.* at 2162, 186 L. Ed. 2d at 329 (emphasis added).]

Here, the fact of defendant's prior conviction rendering him a persistent offender required a mandatory minimum sentence, as prescribed by statute, of one-third to one-half of his base term. The trial judge appropriately exercised his discretion in choosing a term within that range. *See State v. Grate*, 220 N.J. 317, 336-37, 106 A.3d 466 (2015) (recognizing, in light of *Alleyne*, a sentencing judge's continued ability to exercise discretion based on judicially-found facts "within the statutory range"). This is not a case where a statute prescribed a minimum of only one-third of his sentence, but the judge further increased the limits of the range based on other **[*13]** judicially-found facts. Defendant's exposure, as articulated by the one-third-to-one-half range was determined solely by a fact explicitly allowed for by both *Apprendi* and *Alleyne*.

Defendant's final argument contending that his sentence is manifestly excessive lacks sufficient merit to warrant extensive comment. *R.* 2:11-3(e)(2). Defendant has nine prior indictable convictions, including several very serious offenses such as kidnapping and aggravated assault. We discern no abuse of discretion in the court's weighing of the aggravating factors and the non-existent mitigating factors in reaching the sentence that was justifiably imposed for this chronic repeat offender. *State v. Case*, 220 N.J. 49, 64-65, 103 A.3d 237 (2014); *State v. Bieniek*, 200 N.J. 601, 608-09, 985 A.2d 1251 (2010).

Affirmed.

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