

07-1599-pr

United States Court of Appeals
for the
Second Circuit

CARLOS PORTALATIN

Petitioner/Appellee,

-against-

HAROLD GRAHAM, Superintendent,
Green Haven Correctional Facility,

Respondent/Appellant.

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

BRIEF *AMICI CURIAE* OF THE NEW YORK STATE ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER/APPELLEE

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

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

TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
ARGUMENT	2
<i>A. The New York Sentencing Scheme</i>	2
<i>B. Prior State Court Challenges to the Persistent-Felon Scheme</i>	7
<i>C. Prior Challenges in this Court</i>	12
<i>D. The Application of Apprendi to Other State Sentencing Schemes</i>	13
<i>E. The Practical Effect of The Persistent-Felon Scheme</i>	17
CONCLUSION	21
CERTIFICATIONS	22

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	<i>passim</i>
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	12, 14
<i>Brown v. Greiner</i> , 409 F.3d 523 (2d Cir. 2005)	12
<i>Brown v. Miller</i> , 451 F.3d 54 (2d Cir. 2006)	12
<i>Cunningham v. California</i> , __ U.S. __, 127 S.Ct. 856 (2007)	15
<i>People v. Andrews</i> , 274 A.D.2d 670, 711 N.Y.S.2d 797 (3d Dept. 2000), <i>appeal denied</i> , 95 N.Y.2d 960, 722 N.Y.S.2d 477 (2000)	17
<i>People v. Blackwell</i> , 32 A.D.2d 732, 302 N.Y.S.2d 78 (4 th Dept. 1969)	5
<i>People v. Brown</i> , 268 A.D.2d 593, 704 N.Y.S.2d 83 (2d Dept. 2000), <i>appeal denied</i> , 94 N.Y.2d 945, 710 N.Y.S.2d 2 (2000)	5
<i>People v. Chesshier</i> , 184 A.D.2d 570, 584 N.Y.S.2d 327 (2d Dept. 1992)	18
<i>People v. Fulmore</i> , 189 A.D.2d 823, 592 N.Y.S.2d 449 (2d Dept. 1993)	18
<i>People v. Gaines</i> , 136 A.D.2d 731, 524 N.Y.S.2d 70 (2d Dept. 1988)	5
<i>People v. James</i> , 251 A.D.2d 813, 674 N.Y.S.2d 809 (3d Dept. 1998)	5
<i>People v. Mason</i> , 277 A.D.2d 170, 717 N.Y.S.2d 130 (1 st Dept. 2000), <i>appeal denied</i> , 96 N.Y.2d 785, N.Y.S.2d 650 (2001)	7, 8
<i>People v. Montes</i> , 118 A.D.2d 812, 500 N.Y.S.2d 308 (2d Dept. 1986)	5
<i>People v. Medina</i> , 249 A.D.2d 166, 672 N.Y.S.2d 53 (1 st Dept. 1998), <i>appeal denied</i> , 92 N.Y.2d 901, 680 N.Y.S.2d 66 (1998)	15

People v. Moore, 240 A.D.2d 214, 68 N.Y.S.2d 590 (1st Dept. 1997) 18

People v. Murdaugh, 38 A.D.3d 918, 833 N.Y.S.2d 557 (2d Dept. 2007) 5, 6

People v. Oliver, 96 A.D.2d 1104, 467 N.Y.S.2d 76 (2d Dept. 1983),
affirmed, 63 N.Y.2d 973, 483 N.Y.S.2d 992 (1984) 5

People v. Ortiz, 180 Misc.2d 783, 691 N.Y.S.2d 683 (S.Ct. Bronx Cty. 1998) . . . 8

People v. Rivera, 290 A.D. 730, 736 N.Y.S.2d 751 (3d Dept. 2002) 19

People v. Rivera, 5 N.Y.3d 61, 800 N.Y.S.2d 51 (2005) 9-11

People v. Rosen, 96 N.Y.2d 329, 728 N.Y.S.2d 407 (2001) 9-10

People v. Saracina, 298 A.D.2d 953, 748 N.Y.S.2d 109, (4th Dept. 2002),
appeal denied, 99 N.Y.2d 564, 754 N.Y.S.2d 216 (2002) 6

People v. Tuzzio, 261 A.D.2d 644, 688 N.Y.S.2d 913 (2d Dept. 1999),
appeal denied, 94 N.Y.2d 830, 702 N.Y.S.2d 601 (1999) 15

People v. Valez, 163 Misc.2d 571, 620 N.Y.S.2d 931 (S.Ct. N.Y.Cty. 1995),
affirmed, 241 A.D.2d 331, 659 N.Y.S.2d 32 (1st Dept. 1997),
appeal denied, 91 N.Y.2d 882, 668 N.Y.S.2d 581 (1997) 7

People v. Whitehead, 142 A.D.2d 745, 531 N.Y.S.2d 48 (3d Dept. 1988) 5

People v. Williams, 211 A.D.2d 596, 621 N.Y.S.2d 875 (1st Dept. 1995),
appeal denied, 85 N.Y.2d 981, 629 N.Y.S.2d 741 (1995),
appeal after remand, 239 A.D.2d 269, 658 N.Y.S.2d 254 (1st Dept. 1997) 18

People v. Williams, 239 A.D.2d 269, 658 N.Y.S.2d 254 (1st Dept. 1997) 16

Ring v. Arizona, 536 U.S. 584 (2002) 12, 13

United States v. Booker, 543 U.S. 220 (2005) 12

Statutes

Fed. R. Crim. P. 11(e) 17

New York Criminal Procedure Law §400.15 3

New York Criminal Procedure Law §400.16 3

New York Criminal Procedure Law §400.20 *passim*

New York Criminal Procedure Law §400.20(1) 4, 11

New York Criminal Procedure Law §400.20(3) 3, 4

New York Criminal Procedure Law §400.20(5) 6, 9

New York Criminal Procedure Law §400.20(8) 7

New York Criminal Procedure Law §400.20(9) 10

New York Criminal Procedure Law §400.20(10) 7

New York Criminal Procedure Law §400.20(11) 7

New York Criminal Procedure Law §400.21 3

New York Penal Law §70.06 3

New York Penal Law §70.04 3, 11

New York Penal Law §70.08 3, 8, 10

New York Penal Law §70.10 *passim*

New York Penal Law §70.10(2) 3

Other Authorities

4 W Blackstone, Commentaries on the Laws of England 343 (1769) 16

Constitutional Provisions

Amendment VI

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

INTEREST OF *AMICI CURIAE*

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

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

The New York State Association of Criminal Defense Lawyers (hereinafter “NYSACDL”) is a non-profit membership organization of more than 900 attorneys who practice criminal defense law in the State of New York. Founded in 1986, its purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their

professional standing. NYSACDL therefor has an interest in ensuring that its' members clients are not subject to punishment through unconstitutional sentencing laws.

Accordingly, NACDL and NYSACDL, consistent with their mission, jointly file this Brief *Amici Curiae* in support Petitioner/Appellee Carlos Portalatin in the captioned appeal that this Court is hearing, respecting the constitutionality of New York's persistent felony offender sentencing statutes, New York Penal Law §70.10 and New York Criminal Procedure Law §400.20.

ARGUMENT

As set forth below, because New York's discretionary persistent felony offender sentencing scheme – embodied in New York Penal Law §70.10 and New York Criminal Procedure Law §400.20 – provides that the upper limit of the sentence authorized is increased based upon facts found by the court, rather than a jury, it is submitted that the scheme runs afoul of the Sixth Amendment.

A. The New York Sentencing Scheme

The discretionary persistent felony offender sentencing scheme – embodied in New York Penal Law §70.10 and New York Criminal Procedure Law §400.20 – differs from New York's other sentence enhancing provisions that are based solely on recidivism. For example, a defendant is subject to mandatory sentence enhancements

where he has a prior felony conviction (“second felony offender”), New York Penal Law §70.06; a prior violent felony conviction (“second violent felony offender”), New York Penal Law §70.04; or two prior violent felony convictions (“persistent violent felony offender”), New York Penal Law §70.08. Under each of those recidivist sentencing provisions, the process which culminates in the imposition of an enhanced penalty is initiated by the People, who must file a “statement” setting forth the prior convictions which they contend establish the predicate felony, and the court's required findings are limited to determining the existence and constitutionality of the prior felony convictions. *See* New York Criminal Procedure Law §§400.15, 400.16, 400.21.

By contrast, it is *the court*, and not the People, who initiate a persistent felony offender proceeding by filing the pleading that commences the process. New York Criminal Procedure Law §400.20(3). As such, the court acts as the charging authority *and* trier of fact with respect to whether an enhanced sentence is “[a]uthorized.” New York Penal Law §70.10(2). That section permits the court to impose the enhanced sentence “in lieu of” the lesser sentence only when it has “found . . . that a person is a persistent felony offender *and* when it is the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public

interest[.]” *Id.* (Emphasis added). Further, “[s]uch sentence may not be imposed” unless and until the court makes both of those findings. New York Criminal Procedure Law §400.20(1).

The court's initial pleading is in the form of an “order directing a hearing to determine whether the defendant should be sentenced as a persistent felony offender [.]” New York Criminal Procedure Law §400.20(3). In addition, the statute directs that

the court must annex to and file with the order a statement setting forth the following

(a) The dates and places of the previous convictions which render the defendant a persistent violent felony offender as defined in subdivision one of section 70.10 of the penal law; and

(b) The factors in the defendant's background and prior criminal conduct which the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender.

Id. Those “factors in the defendant's background and prior criminal conduct” are enumerated as the “history and character of the defendant” and “the nature and circumstances of his criminal conduct.” New York Criminal Procedure Law §400.20(1), New York Penal Law §70.10 (same).

New York Courts have repeatedly stated that “the procedure for determining

whether or not a defendant may be subjected to increased punishment as a persistent felony offender mandates a 'two-pronged analysis'" requiring judicial determinations of both the prior-conviction element *and* the history/character/nature/circumstances element. *See People v. Murdaugh*, 38 A.D.3d 918, 833 N.Y.S.2d 557, 558 (2d Dept. 2007), *quoting People v. Gaines*, 136 A.D.2d 731, 733, 524 N.Y.S.2d 70 (2d Dept. 1988); *see also, People v. Montes*, 118 A.D.2d 812, 500 N.Y.S.2d 308 (2d Dept. 1986)(same); *People v. Oliver*, 96 A.D.2d 1104, 467 N.Y.S.2d 76 (2d Dept. 1983), *affirmed*, 63 N.Y.2d 973, 483 N.Y.S.2d 992 (1984) (same).

Moreover, with regard to the history/character/nature/circumstances element, caselaw leaves no doubt that a court is required to make a "finding" or "determination." *People v. Blackwell*, 32 A.D.2d 732, 302 N.Y.S.2d 78 (4th Dept. 1969)("[t]he findings are clearly insufficient to warrant such a determination. . . . in essence, the life sentence was imposed upon proof only of three felony convictions[.]"); *People v. Whitehead*, 142 A.D.2d 745, 531 N.Y.S.2d 48 (3d Dept. 1988)("court failed to particularize the ground or reasons for its finding with sufficient clarity"); *People v. James*, 251 A.D.2d 813, 674 N.Y.S.2d 809 (3d Dept. 1998)(characterizing second prong as "finding"); *People v. Brown*, 268 A.D.2d 593, 704 N.Y.S.2d 83 (2d Dept. 2000), *appeal denied*, 94 N.Y.2d 945, 710 N.Y.S.2d 2 (2000) (vacating sentence where it was "impossible to ascertain what conduct or

circumstances the court relied upon in determining that the second prong . . . was satisfied”); *People v. Saracina*, 298 A.D.2d 953, 954, 748 N.Y.S.2d 109, 110 (4th Dept. 2002), *appeal denied*, 99 N.Y.2d 564, 754 N.Y.S.2d 216 (2002)(after an “extensive hearing, the court properly set forth its findings supporting its determination that persistent felony status was warranted”); *Murdaugh*, 38 A.D.3d at 920, 833 N.Y.S.2d at 559 (vacating sentence due to sentencing court's failure to state “what conduct or circumstances [it] relied upon in determining that the second prong of the required persistent felony offender analysis was satisfied.”)

Finally, while the prior convictions in the first prong must be proven “beyond a reasonable doubt,” the history/character/nature/circumstances element of the second prong need only be established “by any relevant evidence . . . regardless of the admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.” New York Criminal Procedure Law §400.20(5).

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

... that the uncontroverted allegations with respect to the defendant's background and nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender[.]” New York Criminal Procedure Law §400.20(8) (addressing when a court may dispense with further hearing). The verb “satisfy” is one commonly employed by courts in instructing jurors on their decision making role.

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

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

In the past, the persistent felony offender sentencing scheme has been challenged on equal-protection grounds. *See e.g., People v. Valez*, 163 Misc.2d 571, 620 N.Y.S.2d 931 (S.Ct. N.Y.Cty. 1995), *affirmed*, 241 A.D.2d 331, 659 N.Y.S.2d 32 (1st Dept. 1997), *appeal denied*, 91 N.Y.2d 882, 668 N.Y.S.2d 581 (1997); *People v. Mason*, 277 A.D.2d 170, 717 N.Y.S.2d 130 (1st Dept. 2000), *appeal denied*, 96

N.Y.2d 785, N.Y.S.2d 650 (2001). That argument was premised on the theory that a defendant with a record of prior non-violent felonies could receive a higher penalty as a persistent felon than a similarly situated defendant facing sentencing under New York State's persistent *violent* felony sentencing scheme, set forth in New York Penal Law § 70.08. In holding that no constitutional issue existed, one court opined that

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

Mason, 277 A.D.2d 170, 717 N.Y.S.2d at 131 (emphasis added), *citing* New York Penal Law § 70.10(1); New York Criminal Procedure Law §400.20; *see also People v. Ortiz*, 180 Misc.2d 783, 691 N.Y.S.2d 683 (S.Ct. Bronx Cty. 1998) (“[U]nlike section 70.08 which mandates a persistent felony sentence upon the third violent felony conviction, under section 70.10, three felony convictions, by themselves, is not dispositive. The court must also find that: 'the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.’”)

The statute has also been challenged on Sixth Amendment grounds as well. In

People v. Rosen, 96 N.Y.2d 329, 728 N.Y.S.2d 407 (2001), the New York State Court of Appeals held that “it [is] a defendant’s prior felony convictions – an explicitly noted exception to the general rule in *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] – that initially subjected the defendant to enhanced sentencing,” *Rosen*, 96 N.Y.2d at 334. In support of that conclusion, the Court of Appeals explained that

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

Rosen, 96 N.Y.2d at 334-335, quoting New York Criminal Procedure Law §400.20(5).

More recently, in *People v. Rivera*, 5 N.Y.3d 61, 800 N.Y.S.2d 51 (2005), in a strongly divided decision, the New York State Court of Appeals again held the discretionary persistent felony provisions constitutional, relying on the same rationale set forth in *Rosen* – that “defendants are eligible for persistent felony offender sentencing based *solely* on whether they had two prior felony convictions. *Rivera*, 5 N.Y.3d at 67 (emphasis in original). However, in dissent, Chief Judge Kaye

pointed out the logical failings of the majority opinion.

In her dissent, Chief Judge Kaye first noted her agreement with the majority that *Rosen* was a reasonable application of the *Apprendi* doctrine at the time it was decided. *Rivera*, 5. N.Y.3d at 70 (Kaye, C.J., *dissenting*). Next, Chief Judge Kaye explained that the statutory scheme described by the majority was constitutional, but that it was not the one before the court in that case. In fact, and as recognized by Chief Judge Kaye, the statute described in the majority opinion is more akin to New York Penal Law § 70.08 (persistent violent felony offender), which requires a court to impose the increased penalty upon a finding that a defendant has “previously been subjected to two or more predicate violent felony convictions[.]” *Id.* That statute stands in “stark contrast” to the discretionary persistent felony statute, which specifies that “an enhanced sentence is available only for those who additionally are found to be of such history and character, and to have committed their criminal conduct under such circumstances, that extended incarceration and lifetime supervision will best serve the public interest.” *Rivera*, 5. N.Y.3d at 73 (Kaye, C.J., *dissenting*), *citing* New York Penal Law § 70.10(2); *see also Rosen*, 96 N.Y.2d at 335 (after finding the requisite prior felonies “the court must consider other enumerated factors to determine whether it is of the opinion that a persistent felony offender sentence is warranted”), *quoting* New York Criminal Procedure Law §400.20(9).

Moreover, that distinction makes clear that the Legislature understood how to structure a statute that authorized the enhanced punishment solely upon the finding of prior convictions, as opposed to the dual-prong analysis mandated in the persistent felony offender sentencing scheme. Thus, it is telling that the Legislature chose to require the additional fact-finding specified in the persistent felony offender statute by providing that the enhanced punishment “may not be imposed” unless the sentencing court finds the prior convictions element *and* the history/character/nature/circumstances element. New York Criminal Procedure Law §400.20(1). Judge Ciparick recognized as much in his dissent in *Rivera*, explaining that

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

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

However, inasmuch as the discretionary persistent-felon sentencing statutes authorize an increase in the maximum sentence based on judicial fact-finding by only a preponderance of the evidence, it is now clearer than ever that the decisions in *Rosen* and *Rivera* are contrary to and/or unreasonable applications of *Apprendi* and its progeny.

C. *Prior Challenges in this Court*

This Court has previously been called upon to examine the constitutionality of the persistent felony offender statute, and has twice declined to find that it runs afoul of the Sixth Amendment. However, in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005) (“*Brown I*”), this Court noted that it could not consider the decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), both of which had been decided after the state court opinions at issue, and was thus able only to opine whether the state courts had unreasonably applied the holding in *Apprendi*. See *Brown I*, 409 F.3d at 533, n. 3. Similarly, in *Brown v. Miller*, 451 F.3d 54 (2d Cir. 2006) (“*Brown II*”), this Court again was constrained to rule only on the state court's interpretation of *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002). See *Brown II*, 451 F.3d at 57, n. 1.

As such, and as set forth below, it is respectfully submitted that an examination

of all of the relevant Supreme Court holdings makes clear that New York's discretionary persistent felony offender statute runs afoul of the Sixth Amendment, as interpreted in *Apprendi* and its progeny.

D. The Application of Apprendi to Other State Sentencing Schemes

As is no-doubt well known to this Court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court invalidated a New Jersey “hate crime” statute that authorized an extended term of imprisonment where a judge found, by a preponderance of the evidence, that a defendant had “acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” *Id.* at 468-469. In doing so, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt.” *Id.* at 490. Further, the Court stated that in determining whether a finding is an “element” of the offense or a “sentencing factor,” the inquiry “is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict.” *Id.* at 494.

Later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court extended the reach of *Apprendi* and stuck down Arizona’s capital sentencing scheme, which set death as

the statutory maximum penalty for first-degree murder, but authorized a sentence of death only after a judge found one or more specified “aggravating circumstances” at a sentencing hearing. *Id.* at 609. The Court held that “[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that the be found by a jury.” *Id.*, quoting *Apprendi*, 530 U.S. at 494 n. 19.

The Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2000), striking down a statute that permitted a sentencing judge to consider the level of “cruelty” involved in the crime for enhancing a sentence, clearly sounded the death knell for New York’s discretionary persistent felon statute. In *Blakely*, the Court held unconstitutional Washington State’s sentencing scheme that provided for a certain sentencing range based solely on the jury’s verdict, and an increased range if the judge found “substantial and compelling reasons justifying an exception sentence.” *Id.* at 299, 305. As the *Blakely* court explained, “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment’ . . . and the judge exceeds his proper authority.” *Blakely*, 542 U.S. at 304. Further, and fatal to holdings of *Rosen* and *Rivera*, whether those judicially found facts make imposition of the enhanced sentence mandatory or permissive is of no import because “[w]hether the judicially

determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.” *Blakely*, 542 U.S. at 305 n. 8 (emphasis in original).

Most recently, in *Cunningham v. California*, ___ U.S. ___, 127 S.Ct. 856 (2007), the Supreme Court *again* struck down the type of judicial fact-finding at issue in New York State's discretionary persistent felon statute. In *Cunningham*, the Court noted that under California's determinate sentencing law (“DSL”), an increased penalty may only be imposed when a judge found “circumstances of aggravation,” which were based on “facts found discretely and solely by the judge.” *Id.* at 868. As such, California's DSL “violate[d] *Apprendi's* bright-line rule: Except for a prior felony conviction, ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’” *Id.*, quoting *Apprendi*, 430 U.S. at 490.

In addition, the draconian results of the judge's findings illustrate the Constitutional dimension of the problem with the discretionary persistent felony sentencing provisions. Once a judge makes the mandated findings, the court is authorized to impose upon the lowest-level felons the same sentence which is authorized for one convicted of second-degree murder. *See e.g., People v. Tuzzio*, 261 A.D.2d 644, 688 N.Y.S.2d 913 (2d Dept. 1999), *appeal denied*, 94 N.Y.2d 830, 702 N.Y.S.2d 601 (1999) (enhanced penalty imposed following conviction for

aggravated unlicensed operation of a motor vehicle); *People v. Medina*, 249 A.D.2d 166, 672 N.Y.S.2d 53 (1st Dept. 1998), *appeal denied*, 92 N.Y.2d 901, 680 N.Y.S.2d 66 (1998) (“low-level \$15 street sale” of drugs); *People v. Williams*, 239 A.D.2d 269, 658 N.Y.S.2d 254 (1st Dept. 1997) (drug addict who went to trial and otherwise faced a maximum of two to four years for Class E felony theft crimes sentenced to 15 years to life).

As the Supreme Court noted in *Blakely* – where the disputed judicial fact-finding led to a prison sentence three-years longer than authorized solely by the crime to which the defendant confessed – “[t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusations to ‘the unanimous suffrage of twelve of his equals and neighbors,’ rather than a lone employee of the State.” *Blakely*, 542 U.S. at 313-314, *quoting* 4 W Blackstone, Commentaries on the Laws of England 343 (1769). As such, there is no doubt that the Framers would be even more troubled by New York's statutes, which have the potential to increase a sentence far in excess of three-years above that authorized by the crime of conviction.

The Supreme Court's admonitions could not be clearer – sentencing schemes which allow sentences greater than those authorized by the facts admitted to by the

defendant or found by a jury beyond a reasonable doubt, based instead on facts found by a judge by a preponderance of the evidence, will not pass constitutional muster. Despite the New York Court of Appeals's wishes to the contrary, there is simply no way to reconcile New York's persistent felony offender sentencing scheme with the protections guaranteed by the Sixth Amendment.

E. The Practical Effect of The Persistent-Felon Scheme

The very features of New York's persistent felony offender sentencing scheme that run afoul of the Sixth Amendment also make it an extremely poor vehicle for the administration of justice. Unlike the Federal criminal justice system, where judges are barred from participating in plea discussions; *see* Fed. R. Crim. P. 11(e), New York judges can *and do* play an active role in that process. Both on and off the record, New York judges actively participate in an administrative climate that values their skills at disposing of cases.

As such, in practice the statute serves as a plea-bargaining tool and it is not unusual for a judge to warn a defendant of a possible enhanced penalty if that defendant asserts his right to proceed to trial and put the government to their burden of proof. While the court is not authorized to impose the enhanced punishment unless and until it makes the findings of fact which raise the Constitutional concerns addressed in this brief, such warnings can still be coercive enough to a defendant to

induce a plea of guilty. *See People v. Andrews*, 274 A.D.2d 670, 711 N.Y.S.2d 797 (3d Dept. 2000), *appeal denied*, 95 N.Y.2d 960, 722 N.Y.S.2d 477 (2000); *People v. Moore*, 240 A.D.2d 214, 68 N.Y.S.2d 590 (1st Dept. 1997) (defendant pleaded guilty as second felony offender after being warned that he was in “peril” of receiving enhanced sentence but court “could not say whether it would find defendant a persistent felony offender if he were convicted”); *People v. Chesshier*, 184 A.D.2d 570, 584 N.Y.S.2d 327 (2d Dept. 1992) (defendant accepted sentence and waived appeal after being promised that persistent-felon treatment would not be pursued); *People v. Fulmore*, 189 A.D.2d 823, 592 N.Y.S.2d 449 (2d Dept. 1993). On the record, such warnings may be couched in softer terms, but off the record a defendant can be made to believe that an enhanced penalty is an inevitability.

One concern with such warnings is that if a defendant chooses to go to trial and is subsequently convicted, the court's decision to impose an enhanced sentence could be tainted by those prior warnings. A judge may be wary of appearing weak or making empty threats, and could be led – consciously or unconsciously – to lean towards making the findings required to impose the enhanced penalty. *See e.g. People v. Williams*, 211 A.D.2d 596, 621 N.Y.S.2d 875 (1st Dept. 1995), *appeal denied*, 85 N.Y.2d 981, 629 N.Y.S.2d 741 (1995), *appeal after remand*, 239 A.D.2d 269, 658 N.Y.S.2d 254 (1st Dept. 1997) (15-to-life sentence imposed after trial

vacated on first appeal, reimposed by trial court on remand and then reduced to 2 to 4 years on subsequent appeal).

Further, from a defendant's standpoint, a statute that can leave a low-level non-violent felon exposed to a sentence equal to that of a person convicted of murder – based on findings made by a preponderance of the evidence, at a hearing that a judge may or may not choose to initiate after conviction – is not conducive to the voluntary and intelligent exercise of constitutional rights and impairs the ability of defense lawyers to counsel their clients. These problems arise precisely because the facts of a defendant's prior convictions, which can be ascertained at the commencement of a case, are not the determinative factor in the analysis. Rather, it is the additional factual findings made by the sentencing court regarding aggravating factors, not identified to a defendant until after conviction, that trigger the enhanced punishment. *See People v. Rivera*, 290 A.D. 730, 736 N.Y.S.2d 751 (3d Dept. 2002) (defendant induced to plead guilty despite lawyer's belief that case had “some merit to it” after defendant warned by counsel that he was “a possible persistent felony offender”). Thus, a defendant who has a triable case and may wish to put the government to its burden of proof may be caused to waive that right due to the ever-looming possibility that a judge may use his discretionary power to impose a life term without findings from a jury or decide that the defendant's decision to proceed to trial is a factor

tending to indicate that a life sentence is appropriate. Such considerations would play no part in a jury's determination.

CONCLUSION

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

Dated: New York, New York
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Respectfully submitted,

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

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

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STATEMENT PURSUANT TO FRAP RULES 32 AND 29

The undersigned hereby certifies that this Brief, exclusive of the table of contents and table of authorities, uses a proportional typeface and is 4,438 words.

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MARSHALL A. MINTZ, ESQ.

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Respondent/Appellant.

Marshall A. Mintz, Esq., an attorney duly admitted to practice law before the Courts of the State of New York, located at Mintz & Oppenheim LLP, 260 Madison Avenue - 18th Floor, New York, New York, affirms as follows:

On this day I served true and accurate copies of the accompanying Brief by First Class United States mail to the parties listed below:

Joshua M. Levine
Appellate Advocates
2 Rector Street
New York, New York 10006

ADA Ann Bordley
Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201

Dated: October 11, 2007
 New York, New York

MARSHALL A. MINTZ, ESQ.

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The undersigned hereby certifies that the PDF copy of the Brief filed with the Court was scanned for viruses using Symantec AntiVirus, version 9.0.0.338.

Dated: October 11, 2007
 New York, New York

MARSHALL A. MINTZ, ESQ.