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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTIN E. FOUNTAIN, Appellant, v. STATE OF DELAWARE, Appellee.	)	No. 315, 2015 Court Below—Superior Court of the State of Delaware, in and for Kent County Cr. ID 0209005515

AMICUS CURIAE'S REPLY BRIEF IN FURTHER SUPPORT OF APPELLANT MARTIN E. FOUNTAIN'S POSITION IN FAVOR OF REVERSAL

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INTRODUCTION[1]

The State's Answering Brief fails to address in any meaningful way most, if not all, of the issues raised in *amicus curiae*'s Opening Brief. Indeed, the State has no answer to *amicus curiae*'s three primary arguments. First, the Delaware Savings Statute does not bar the retroactive application of the Amended Sentencing Act. Because the Amended Sentencing Act amends, rather than repeals, an existing statute, the only potentially applicable portion of the Delaware Savings Statute is subsection (b). But that subsection has no applicability here because the Amended Sentencing Act does not terminate or bar a criminal proceeding. Second, under Delaware common law, the Amended Sentencing Act *may* be applied retroactively because it is a procedural and remedial statute. Third and finally, the Amended Sentencing Act *should* be applied retroactively because such application is consistent with the State's criminal justice reform efforts, including sentencing reform.

In response to *amicus curiae*'s first argument, the State does not take on the merits of the argument and thus appears to concede that the Delaware Savings Statute does not apply to the Amended Sentencing Act. Indeed, the

[1] All capitalized terms that are not defined herein have the meanings attributed to them in the Opening Brief.

State's only real response to *amicus curiae*'s argument is that *State v. Benson*, which permitted retroactive application of the Amended Sentencing Act, is an outlier. But almost every decision that the State cites to support this notion relies on *State v. Ismaaeel*, which, as explained in *amicus curiae*'s Opening Brief, improperly looked to federal law when interpreting and applying the Delaware Savings Statute. The State does not contest *amicus curiae*'s argument calling into question the reasoning applied in *Ismaaeel*. The State's reliance on cases that mechanically invoke the rule set forth in *Ismaaeel* therefore does not advance the State's position in any meaningful way.

Instead, the State focuses on *amicus curiae*'s second argument discussing the parameters of the general common law rule against retroactive application of statutes. Missing from the State's analysis, however, is any mention of the common law exception permitting retroactive application of statutes that are procedural and remedial in nature. And, with respect to *amicus curiae*'s third, policy-based argument, the State has no answer for the argument that the General Assembly's policy goals in enacting the Amended Sentencing Act are consistent with, and would be furthered by, its retroactive application.

Rather than address *amicus curiae*'s argument head on, the State argues that retroactive application of the Amended Sentencing Act is prohibited

under the separation of powers doctrine. But that argument is a red herring. The separation of powers doctrine has no application here because the General Assembly is not giving the judiciary the power to pardon criminals or commute sentences (powers that lie exclusively within the executive branch). Rather, in enacting the Amended Sentencing Act, the General Assembly intended only to give the judiciary discretion in its sentencing decisions.

ARGUMENT

I. APPLICATION OF THE AMENDED SENTENCING ACT TO SENTENCES ENTERED PRIOR TO JULY 9, 2014 IS NOT BARRED BY THE DELAWARE SAVINGS STATUTE OR THE COMMON LAW PRESUMPTION AGAINST RETROACTIVE APPLICATION OF STATUTES.

Neither the Delaware Savings Statute nor Delaware common law bars the Court from applying the Amended Sentencing Act retroactively. The Delaware Savings Statute does not apply to the Amended Sentencing Act because the Amended Sentencing Act amended (not repealed) an existing statute and does not terminate a criminal prosecution. Further, the general common law rule against retroactive application of statutes does not apply to the Amended Sentencing Act because the Amended Sentencing Act is procedural and remedial in nature.

A. The Amended Sentencing Act Is Not Subject to the Delaware Savings Statute.

In its Opening Brief, *amicus curiae* explained in detail why the Delaware Savings Statute does not apply to the Amended Sentencing Act. *See* OB at 10-17. In its Answering Brief, the State did not respond to this argument. Indeed, the State appears to concede the point by relying exclusively on common law, not the Delaware Savings Statute. *See* AB at 12-13 ("[W]hether or not 11 Del. C. § 211(b) has any application to Fountain's resentencing request based upon [the Amended Sentencing Act], long standing Delaware case law is that where

'There are no words in the Act expressly declaring it to be retroactive, . . . the presumption is to the contrary.'" (quoting *State v. Nixon*, 46 A.2d 874, 875 (Del. Gen. Sess. 1946)).

The Delaware Savings Statute contains two distinct subsections—subsection (a) applies to statutory repeals, while subsection (b) applies to statutory amendments. 11 *Del. C.* § 211. Subsection (a) prevents ***repeals*** from "releasing or extinguishing any penalty, forfeiture or liability," and subsection (b) prevents ***amendments*** from causing actions or other legal proceedings to become "illegal or terminated." *Id.* The State does not dispute that the Amended Sentencing Act is an *amendment*, and that subsection (b) of the Delaware Savings Statute would apply to this amendment. *See* AB at 12 ("Since [the Amended Sentencing Act] in 2014 is an amendment, only 11 *Del. C.* § 211(b) might have application.").

The language of subsection (b) of the Delaware Savings Statute makes clear that it is directed at amendments to criminal statutes that decriminalize previously criminalized conduct. 11 *Del. C.* § 211(b) ("Any action . . . under or pursuant to any criminal offense set forth under the laws of this State shall be preserved and ***shall not become illegal or terminated*** in the event that such statute is later amended . . . .") (emphasis added). The Amended Sentencing Act, however, does not bar or terminate a criminal proceeding; it is procedural in

nature, in that it merely empowers judges with the discretion to impose concurrent or consecutive sentences. 11 *Del. C.* § 3901(d) (Tab 1). Thus, the Delaware Savings Statute—and subsection (b), in particular—does not preclude retroactive application of the Amended Sentencing Act.

B. Because the Amended Sentencing Act Is Procedural and Remedial in Nature, It Is Not Subject to the Common Law Presumption Against Retroactive Application of Statutes.

The State's argument is predicated almost exclusively on the so-called "bright line Delaware rule" that a Court will not apply a statute retroactively unless it contains "an express contrary declaration." *See* AB at 11; *see, e.g.*, *Nixon*, 46 A.2d at 875. *Amicus curiae* does not dispute that a law generally will not be construed to apply retroactively unless the statute clearly indicates that the legislature intended a retroactive application. But, as is often the case, there are exceptions to this general rule. The Amended Sentencing Act is subject to a well-recognized exception, applicable to statutes that are procedural and remedial in nature. *See State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 529 (Del. Ch. 2005) ("The problem with the State's approach is that it seeks to apply a very general rule about retroactivity in a context to which it does not logically apply . . . . The presumption in those common contexts operates as a bulwark against unfairness."). *See also Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354

(Del. 1993) ("As a general rule statutes relating to remedies and procedure are given a retrospective construction[.]") (quoting 82 C.J.S. *Statutes* § 421 (1953)). An amendment is remedial "when it relates to practice, procedure or remedies but does not affect substantive or vested rights." *Hubbard*, 633 A.2d at 354 (quoting 2 Norman J. Singer, Sutherland Stat. Const. § 41.09, at 399 (5th ed. 1993)). Here, the Amended Sentencing Act changes the practices and procedures relating to sentencing by giving judges the discretion to impose concurrent or consecutive sentences. It does not, however, change the penalty associated with any particular offense. The Amended Sentencing Act relates to practice and procedure and does not affect any substantive rights.

The State completely ignores the exception for procedural or remedial statutes. For the reasons explained here and set forth in *amicus curiae*'s Opening Brief (*see* OB at 17-20), the Amended Sentencing Act may be applied retroactively without running afoul of the general rule against retroactivity.

C. Whether *Benson* Is an Outlier Is Irrelevant.

The State argues repeatedly that the Superior Court's decision in *Benson* is an "outlier." OB at 6-10. This fact is irrelevant to whether the Amended Sentencing Act should be applied retroactively because the *Benson* opinion did not provide any substantive guidance on that issue. *See id.* at 21 n.10. Moreover,

almost all of the cases that the State relies upon cite to *Ismaaeel*. Although *amicus curiae*'s Opening Brief highlighted the flawed reasoning in *Ismaaeel* and explained why federal law interpreting the Federal Savings Statute should not be superimposed on the Delaware Savings Statute, the State has offered no counterargument in its Answering Brief. Instead, the State simply cites to cases that rely upon *Ismaaeel*, without any explanation or analysis. Reflexively citing to a case whose reasoning has been challenged, without more, is not persuasive.[2]

[2] The State also highlights this Court's decision in *Lewis v. State*, in which the Delaware Supreme Court held that the Superior Court did not commit plain error by sentencing the defendant under the prior version of the Amended Sentencing Act in effect at the time the offense was committed. 2015 WL 4606521, at *2 (Del. July 30, 2015) (TABLE). *Lewis* was decided based on the flawed reasoning in *Ismaaeel*. Further, the Court in *Lewis* applied a plain error standard of review concerning the defendant's claim relating to the Amended Sentencing Act because the defendant never raised that claim below. *See Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) ("Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."). Here, the issue has been properly preserved and this Court is reviewing the Superior Court's decision *de novo*, which is a vastly different standard than plain error. *See Williams v. State*, 756 A.2d 349, 351 (Del. 2000). Thus, the Court's decision in *Lewis* provides very little guidance here.

The State also cites the United States Supreme Court's decision in *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974), for the proposition that the Federal Savings Statute barred application of an ameliorative sentencing law. *Marrero*, however, is inapposite because *amicus curiae* is not arguing that the Amended Sentencing Act is ameliorative.

II. APPLICATION OF THE AMENDED SENTENCING ACT TO SENTENCES ENTERED PRIOR TO JULY 9, 2014 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

According to the State, the General Assembly failed to include express language in the Amended Sentencing Act because it recognized that retroactive application of the statute would constitute an unconstitutional legislative pardon in violation of Delaware's separation of powers doctrine. *See* AB at 15-19. The State's proffered explanation is not persuasive. As explained below, the Amended Sentencing Act does not run afoul of the separation of powers doctrine for defendants (like Fountain) who are seeking reconsideration of their sentence under the Superior Court Rules of Criminal Procedure.[3] *See* Super. Ct. Crim. R. 35 ("Correcting or Reducing a Sentence"); Super. Ct. Crim. R. 61 ("Postconviction Remedy"). The separation of powers doctrine only forbids direct legislative interference with a final judicial determination. *See, e.g.*, *Evans v. State*, 872 A.2d 539, 549 (Del. 2005) ("[The General Assembly] cannot annul, set

[3] Even disregarding the merits of the State's separation of powers argument, the State's hypothesis that the separation of powers doctrine was at the forefront of the General Assembly's thinking when it drafted the Amended Sentencing Act is generally not credible because the separation of powers doctrine is not implicated for defendants who (1) committed a crime before the enactment of the Amended Sentencing Act on July 9, 2014, and (2) had not yet been sentenced. Such defendants are obvious beneficiaries of the Amended Sentencing Act, and concurrent sentencing for those defendants would plainly not "encroach[] upon the executive branch's exclusive authority to commute sentences or grant pardons." AB at 17.

aside, vacate, reverse, modify, or impair the judgment of a competent court. It cannot compel the courts to grant new trials, order the discharge of offenders, or direct what particular steps shall be taken . . . ."). The Amended Sentencing Act does not annul, impair or otherwise legislatively subvert a judgment of the Delaware Superior Court. Indeed, the Amended Sentencing Act does not require or compel Delaware judges to take any affirmative action that would interfere with existing judgments or sentences. Rather, in enacting the Amended Sentencing Act, the General Assembly merely expanded judicial discretion in sentencing matters by allowing judges to consider whether to impose consecutive or concurrent sentences.

The State broadly suggests that any reduction in sentence caused by a legislative act may not be applied retroactively without violating the separation of powers doctrine. *See* AB at 17-19.[4] But the State's position is untenable because

[4] No case cited by the State supports this general proposition. For example, in *Robinson v. State*, 584 A.2d 1203, 1205 (Del. 1990), this Court declined to apply the Truth in Sentencing Act retroactively on the basis of an express savings clause contained in the statute. Similarly, in *Seeney v. State*, 2004 WL 2297394 (Del. Oct. 7, 2004) and *Dahms v. State*, 2004 WL 1874650 (Del. Aug. 17, 2004), this Court relied upon *Ismaaeel* and the Federal Savings Statute to bar retroactive application of a statute, not the separation of powers doctrine. Moreover, the cases cited by the State for general separation of powers principles are also inapposite to the present case. *See, e.g.*, *State v. Sturgis*, 947 A.2d 1087, 1090-91 (Del. 2008) (holding that enacting mandatory minimum sentencing does not violate the separation of powers doctrine); *Evans*, 872 A.2d at 547-48 (noting that "the power to annul a final judgment was 'an assumption of judicial power'"). The State cites no authority to suggest that applying the Amended Sentencing Act to an individual (Continued . . .)

the Delaware Supreme Court has reviewed Superior Court Criminal Rule 35 and has implicitly determined that reducing a sentence pursuant to Rule 35 does not infringe upon the pardon power, even after the sentence has been served. *Compare State v. Lewis*, 797 A.2d 1198, 1202 (Del. 2002) ("[I]f a lawful sentence was lawfully imposed in the first instance, then the function of Rule 35 is simply to allow the . . . court to decide if, on further reflection, the original sentence now seems unduly harsh. The motion is directed to the court's discretion and is essentially a 'plea for leniency.'") (quoting *United States v. Maynard*, 485 F.2d 247, 247-48 (9th Cir. 1973) (citations omitted)), *with id.* at 1205 ("While the majority may correctly describe a Rule 35(b) motion as a plea for leniency, after 90 days, that plea for leniency falls squarely within the discretion of the executive branch . . . .") (Steele, J., dissenting). If the Court were to determine that the Amended Sentencing Act could not apply retroactively because reductions in sentence are exclusively the purview of the executive branch, at least some

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(. . . continued)

who had already been sentenced would amount to an unconstitutional pardon merely because it theoretically would have the effect of reducing a penalty if the judge reconsidering the sentence were to grant the motion and reduce the sentence. Indeed, as set forth *supra* at 6-7 and in *amicus curiae*'s Opening Brief (at 19-20), the Amended Sentencing Act is procedural and remedial in nature, and thus may be given retroactive effect under Delaware common law.

portions of Superior Court Criminal Rule 35 would likely be unconstitutional and *State v. Lewis* wrongly decided.

Fortunately, the separation of powers doctrine does not mandate this result. A motion to reconsider judgment under Superior Court Criminal Rule 35 is a phase of the Superior Court's sentencing process, and the legislative branch is permitted to modify the extent of judicial discretion in sentencing, as it did through the Amended Sentencing Act. *See Ex Parte United States*, 242 U.S. 27, 42 (1916) ("[It is indisputable] that the authority to define and fix the punishment for crime is legislative, and includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would otherwise be beyond the scope of judicial authority . . . ."); *State v. Sturgis*, 947 A.2d 1087, 1092-93 (Del. 2008) (citing *Ex Parte United States* and implying that the legislature may impose a law concerning the reduction of sentences). Therefore, no separation of powers problem exists, where, as here, a defendant who committed a crime before July 9, 2014 is sentenced and seeks reconsideration of his or her sentence under the Superior Court Rules of Criminal Procedure.

It is highly unlikely, as the State suggests, that the General Assembly envisioned the separation of powers doctrine as a bar to retroactive application of the Amended Sentencing Act. Such thinking would have been at odds with the

General Assembly and judiciary's existing practice under laws and Court rules that already delimit the procedures for and scope of post-conviction modification of sentences. *See, e.g.*, Super. Ct. Crim. R. 35 ("Correcting or Reducing a Sentence"); Super. Ct. Crim. R. 61 ("Postconviction Remedy"); 11 *Del. C.* § 4364 ("Effect of pardon; restoration of civil rights"). The separation of powers doctrine thus poses no obstacle to applying the Amended Sentencing Act retroactively. Under the plain language of the statute, Delaware courts are free to "direct whether the sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently or consecutively with any sentence of confinement," at all stages of sentencing, regardless of whether the crime was committed before or after July 9, 2014. 11 *Del. C.* § 3901(d).

III. RETROACTIVE APPLICATION OF THE AMENDED SENTENCING ACT IS A KEY PIECE OF DELAWARE'S OVERALL SENTENCING REFORM EFFORTS.

In its Answering Brief, the State does not respond to the many policy-based arguments in favor of retroactive application of the Amended Sentencing Act. Those arguments are set forth in detail in *amicus curiae*'s Opening Brief and, to avoid redundancy, will not be repeated here. *See* OB at 26-34.

Delaware's efforts to implement sentencing reform are no secret; they have been widely publicized in recent months. *See, e.g.*, Governor Jack A.

Markell, Testimony Submitted to the United States House of Representatives Committee on Oversight and Government Reform, at 1-2, 24 (July 14, 2015) (Tab 5); Chief Justice Leo E. Strine, Jr., State of the Judiciary Address, at 11 (June 4, 2014) (Tab 3); *AG Denn Offers Slate of Criminal Justice Reform Ideas*, Delaware.Gov (Oct. 15, 2015) (Tab 2).

Since the filing of *amicus curiae*'s Opening Brief, there has been a steady stream of articles and reports in the local media discussing Delaware's criminal justice reform efforts. *See, e.g.*, Tom McParland, *Denn Outlines Sweeping Reforms to Delaware's Criminal Justice System*, Del. L. Weekly, at 2 (Oct. 21, 2015) (Tab 9) ("Denn will also advocate legislation allowing criminals serving time under sentencing laws that were later changed to petition the courts for modified sentences. Inmates serving time for drug and property offenses would have priority in that process, he said."); James Dawson, *New Criminal Justice Reform Task Force Underway*, Del. Pub. Media, at 2 (Nov. 18, 2015) (Tab 6) (noting that "[o]fficials from the state's executive, judicial and legislative branches formed a new task force to try and overhaul Delaware's criminal codes and sentencing guidelines"); Gov. Jack Markell, *The State of the State – Expecting More*, at 11 (Jan. 21, 2016) (Tab 4) ("I look forward to working with Senator Peterson and Attorney General Denn on reforming sentencing laws and ensuring

that those impacted by the current law can have their sentences reviewed."); Matt Bittle, *Strine Seeks to Revamp Delaware Criminal Justice System*, Del. St. News, at 1-2 (Mar. 26, 2016) (Tab 8) (characterizing Delaware's criminal justice reform efforts as "part of a larger movement in Delaware and other states toward greater leniency" and noting growing support from public officials and lawmakers to "giv[e] judges more discretion").

Even without additional legislation, Delaware already has one tool in place that can be used to alleviate some of the key problems driving sentencing reform, such as overcrowding in prisons, over-penalizing for lesser crimes, and inconsistency in sentencing. *See* OB at 28-34. That tool is the Amended Sentencing Act. Permitting judges to apply the Amended Sentencing Act to sentences entered prior to July 9, 2014 would best serve the goals identified by the General Assembly in enacting the statute. As Chief Justice Strine recently noted, "The idea that we can incarcerate our way to safety or to justice – we are at the end of that experiment." Jessica Masulli Reyes, *Six in 10 Delaware Inmates Are Black*, News J., at 3 (Oct. 19, 2015) (Tab 7).

CONCLUSION

For the foregoing reasons and those provided in the Opening Brief, *amicus curiae* respectfully submits that Defendant's appeal is meritorious and that 11 *Del. C.* § 3901(d) should be given retroactive effect so that judges have the discretion to modify sentences entered before July 9, 2014 to impose concurrent terms of imprisonment.

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CERTIFICATE OF SERVICE

I, Richard Li, hereby certify that on March 31, 2016, the foregoing *AMICUS CURIAE*'S REPLY BRIEF IN FURTHER SUPPORT OF APPELLANT MARTIN E. FOUNTAIN'S POSITION IN FAVOR OF REVERSAL was served via File & Serve*Xpress* upon Appellee's counsel of record:

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The foregoing *AMICUS CURIAE*'S REPLY BRIEF IN FURTHER SUPPORT OF APPELLANT MARTIN E. FOUNTAIN'S POSITION IN FAVOR OF REVERSAL was served upon Appellant via FedEx at the following address:

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