

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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STATEMENT OF INTEREST

Pursuant to an Order of this Court dated August 3, 2015, *amicus curiae*, William M. Lafferty, Esquire, files this brief supporting the position taken by Defendant Martin E. Fountain (“Defendant”) that House Bill 312, which amended 11 *Del. C.* § 3901(d) (the “Amended Sentencing Act”), permits a judge the discretion to modify a sentence entered before July 9, 2014 by imposing concurrent terms of imprisonment.

Amicus curiae has no independent interest in this case.

STATEMENT OF FACTS¹

Defendant was arrested on September 9, 2002 and charged with multiple drug-related offenses and the unauthorized use of food stamps. *Fountain v. State*, 2004 WL 1965196, at *1 (Del. Aug. 18, 2004) (TABLE). Following a two-day jury trial in Kent County Superior Court, on March 19, 2003, Defendant was found guilty on all nine counts with which he had been charged—eight drug-related offenses and a ninth count of unauthorized use of food stamps. AC3, D.I. 35. On September 10, 2003, Defendant was sentenced to 31 years of Level V incarceration. AC13-21. His sentence was reduced that same day to a total of thirty years and nine months of Level V imprisonment, which included two fifteen-year sentences for delivery of cocaine. AC22-30.²

Over the course of the next twelve years, Defendant tried unsuccessfully to have his conviction overturned or his sentence modified. AC3-12.³ On March 17, 2015, Defendant filed a motion for review of sentence and judgment. AC31-47. The Superior Court denied the motion on April 29, 2015.

¹ *Amicus curiae* includes a brief statement of facts for the Court's convenience.

² Defendant was sentenced to serve 100 years at Level V, but 69 years and three months of his sentence were suspended. AC22-30.

³ *See also Fountain*, 2004 WL 1965196; *Fountain v. State*, 2009 WL 189888 (Del. Jan. 12, 2009) (TABLE); *Fountain v. State*, 2014 WL 4102069 (Del. Aug. 19, 2014) (TABLE).

AC48. On May 12, 2015, Defendant filed a motion to arrest judgment, in which he requested that his two Level V fifteen-year sentences run concurrently rather than consecutively pursuant to the Amended Sentencing Act. AC49-68. The Superior Court refused to apply the Amended Sentencing Act retroactively and denied Defendant's motion on May 21, 2015 (the "May 21 Order"). AC69.⁴ Defendant filed his *pro se* Notice of Appeal and Opening Brief on June 19, 2015. AC70-80.

On June 23, 2015, the State of Delaware (the "State") moved to affirm the May 21 Order. AC81-203. On August 3, 2015, this Court entered an Order denying the State's motion to affirm, finding that it was not "manifest on the face of the opening brief that the appeal is without merit." AC204-05. In that same Order, the Court appointed William M. Lafferty, Esquire as *amicus curiae* "to assist the Court in resolving the question of law raised in this appeal, which has resulted in conflicting outcomes in the Superior Court." *Id.* This is *amicus curiae*'s opening brief in support of Defendant's position that the Amended Sentencing Act "permits a judge the discretion to modify a sentence entered before July 9, 2014 to reimpose concurrent terms of imprisonment." *Id.*

⁴ The handwritten reference to 11 *Del. C.* § 211(b) (the "Delaware Savings Statute") at the bottom of Judge Witham's May 21 Order appears to have been made in error. Presumably, Judge Witham intended to say that "[t]he relief requested is denied again[.] There is no retroactive application of 11 *Del. C.* § 3901(d)," *i.e.*, the Amended Sentencing Act.

SUMMARY OF THE ARGUMENT

1. The Delaware Savings Statute does not bar retroactive application of the Amended Sentencing Act. This holding is not only consistent with the plain language of the Amended Sentencing Act, but it is endorsed by cases decided under the Delaware common law in which remedial or procedural statutes have been applied retroactively. To the extent *State v. Ismaaeel* has been viewed as binding precedent to the contrary, the analysis in that case was based on the flawed premise that the Delaware Savings Statute mirrors the Federal Savings Statute and thus federal law is determinative when interpreting the Amended Sentencing Act.

2. Applying the Amended Sentencing Act retroactively to sentences entered prior to July 9, 2014 is consistent with both the specific legislative intent behind the statute and the general approach to sentencing reform that has been embraced by the Delaware Judiciary, the Delaware General Assembly (the “General Assembly”) and Delaware State officials.

ARGUMENT

I. APPLICATION OF THE AMENDED SENTENCING ACT TO SENTENCES ENTERED PRIOR TO JULY 9, 2014 IS NOT BARRED BY THE DELAWARE SAVINGS STATUTE AND IS CONSISTENT WITH DELAWARE PRECEDENT PERMITTING REMEDIAL OR PROCEDURAL STATUTES TO BE APPLIED RETROACTIVELY.

A. Question Presented.

Does either the Delaware Savings Statute or Delaware common law preclude retroactive application of the Amended Sentencing Act, or do judges have the discretion to modify sentences entered before July 9, 2014 by changing them from consecutive to concurrent terms of imprisonment?

B. Scope of Review.

The question presented is a pure question of law, which the Court reviews *de novo*. See, e.g., *Wehde v. State*, 2015 WL 5276752, at *2 (Del. Sept. 9, 2015) (TABLE); *Williams v. State*, 756 A.2d 349, 351 (Del. 2000). The Court also reviews the Superior Court's construction of the Delaware Savings Statute and the Amended Sentencing Act *de novo*. *Williams*, 756 A.2d at 351.

C. Merits of Argument.

The Delaware Savings Statute does not bar retroactive application of the Amended Sentencing Act. As explained below, the Delaware Savings Statute contains separate subsections governing statutory repeals and statutory

amendments—a critical distinction that has been recognized by both the General Assembly and Delaware Courts. The Amended Sentencing Act is plainly an amendment of an existing statute, not a repeal, and thus the only provision of the Delaware Savings Statute that could potentially apply to the Amended Sentencing Act is subsection (b). However, that subsection only applies when the statutory amendment has the effect of terminating or barring a criminal action or proceeding. *See* 11 *Del. C.* § 211(b). Because the Amended Sentencing Act does not have such an effect, the Delaware Savings Statute is facially inapplicable to the Act and does not restrict Delaware judges from applying the Act retroactively.

Retroactive application of the Amended Sentencing Act is also consistent with Delaware case law recognizing an exception to Delaware’s general rule prohibiting retroactive application of statutes like the Amended Sentencing Act that are procedural or remedial in nature. Finally, the case most often cited by the State, *State v. Ismaaeel*, improperly looked to federal law interpreting the general federal savings statute (the “Federal Savings Statute”), 1 U.S.C. § 109. Because the Delaware Savings Statute differs in content and structure from the Federal Savings Statute, federal law is inapposite in interpreting subsection (b) of the Delaware Savings Statute relating to statutory amendments.

1. The Relevant Delaware Statutory Framework: The Amended Sentencing Act and the Delaware Savings Statute.

a. The Amended Sentencing Act.

Delaware's Amended Sentencing Act, 11 *Del. C.* § 3901(d), became law on July 9, 2014 and was intended to “bring[] Delaware in line with the other 49 states and the federal government,” by “restor[ing] judicial discretion to permit the imposition of either concurrent or consecutive sentences.” Del. H.B. 312 syn., 147th Gen. Assemb. (2014) (Tab 6).⁵ In empowering judges with the discretion to impose concurrent sentences, the General Assembly employed sweeping (and mandatory) language, providing that “[t]he court *shall* 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 other sentence of confinement” 11 *Del. C.* § 3901(d) (emphasis added).⁶ The Amended Sentencing Act does not permit sentences for certain severe offenses to be served concurrently. *Id.*

During the hearing before the Delaware House of Representatives regarding House Amendment 2 to House Bill 312 (Del. H.J., 147th Gen. Assemb.

⁵ All citations to “Tab ___” refer to tabs in the Compendium of Selected Authorities submitted herewith.

⁶ Delaware's prior sentencing statute required sentences to run consecutively. *See* 11 *Del. C.* § 3901(d) (2013) (Tab 16) (“No sentence of confinement of any criminal defendant . . . shall be made to run concurrently with any other sentence of confinement”).

290-91 (June 5, 2014) (Tab 7)), Kathleen Jennings, a state prosecutor with the Delaware Department of Justice, stated that the bill was designed to improve sentencing, explaining that “[t]his [bill] gives judges the ability to fashion an appropriate sentence, but restricts judges with respect to the most serious offenses.” Audio recording: Del. H., Floor Debate, 147th Gen. Assemb. at 15:30-15:40 (June 5, 2014) (hereinafter “House Debate Audio”) (Tab 4). Additionally, Representative James Johnson, a member of Delaware’s Justice Reinvestment Oversight Group, explained that the group had “been given the responsibility to address the issue of the Justice Reinvestment Act and sentencing reform,” noting that “[t]his legislation . . . fits right into that category as sentencing reform.” *Id.* at 16:56-18:53. Representative Johnson noted that Delaware “spend[s] a huge amount of money on incarceration” and commended the bill’s sponsor for proposing legislation intended to address sentencing reform while reducing the costs of incarceration. *Id.*

b. The Delaware Savings Statute.

The Delaware Savings Statute, 11 *Del. C.* § 211, is a general savings statute. Like other general savings statutes, it abridges the traditional common-law principle that the repeal of a criminal statute presumptively and immediately ends any ongoing prosecution under the statute—a principle often referred to as

“common law abatement.” *See Garvey v. Phelps*, 840 F. Supp. 2d 782, 787-88 (D. Del. 2012). The Delaware Savings Statute functions to “save,” *i.e.*, preserve the operation of, prior versions of later-amended or repealed criminal statutes by requiring changes in the law to be given prospective (not retrospective) effect.

In the absence of a general savings statute, pending criminal prosecutions could be terminated if the underlying statute was repealed, or amended in a manner inconsistent with legislative intent to continue the criminal sanction. *See State v. McGonigal*, 189 A.2d 670, 673 (Del. Super. Ct. 1963) (“[T]he majority rule . . . is that the repeal of the punishment or penalties provision of a criminal statute, without a saving clause, does effect a repeal of the prior statute and that violations of the earlier statute, not prosecuted at the date of the amendment, may not be tried after the amendment becomes effective.”). *See also State v. Gen. Chem. Corp.*, 559 A.2d 292, 300-01 (Del. Super. Ct. 1988) (surveying exceptions to “[t]he general rule that a repeal of a statute voids all prosecutions pending under it”). Accordingly, the General Assembly adopted the Delaware Savings Statute to “ensure that legislative revision to the criminal code does not have the unintended consequence of repealing an existing law, thus ending a prosecution for conduct which occurred prior to the repeal.” 1998 Del. Laws c. 263 (H.B. 277) (Tab 2).

2. Under the Plain Language of Both Statutes, the Amended Sentencing Act Is Not Subject to the Delaware Savings Statute.

The instant appeal requires the Court to examine, interpret and apply the Amended Sentencing Act and the Delaware Savings Statute. “Where there is a dispute over the meaning or effect of a statute, a court seeks to ascertain the legislative intent.” *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 712 (Del. 1995). To determine legislative intent, a court first looks to the plain language of the statute(s) at issue. *Williams*, 756 A.2d at 351 (“Where the effect of a statute is in dispute,” the Delaware Supreme Court seeks to give effect to the General Assembly’s intent “through a textual analysis of the statutory language.”). “Statutory language, where possible, should be accorded its plain meaning.” *State v. Lillard*, 531 A.2d 613, 617 (Del. 1987). Moreover, Delaware courts attempt to “ascribe a purpose to the General Assembly’s use of statutory language, construing it against surplusage, if reasonably possible.” *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

a. The Delaware Savings Statute—
Unlike Its Federal Counterpart—
Distinguishes Between Amending a
Statute and Repealing a Statute.

The Delaware Savings Statute clearly distinguishes between repealing a statute and amending a statute by breaking the statutory language into two

distinct subsections. Subsection (a) applies to statutes that have been repealed, while subsection (b) applies to statutes that have been amended:

(a) The *repeal* of any statute creating, defining, or relating to any criminal offense set forth under the laws of this State, shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under such statute, unless the *repealing* act shall so expressly provide, and such statute shall be treated as remaining in full force and effect for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

(b) Any action, case, prosecution, trial or other legal proceeding in progress under or pursuant to any statute relating 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* by the General Assembly, irrespective of the stage of such proceeding, *unless the amending act* expressly provides to the contrary. For the purposes of such proceedings, the prior law shall remain in full force and effect.

11 *Del. C.* § 211 (emphasis added). The two subsections of the Delaware Savings Statute also have their own distinct effects: subsection (a) prevents repeals from “releasing or extinguishing any penalty, forfeiture or liability,” whereas subsection (b) prevents amendments from causing actions or other legal proceedings to become “illegal or terminated.” *Id.* This Court should therefore interpret the Delaware Savings Statute in a manner which gives purpose and effect to the different language used in both subsections. *Taylor*, 14 A.3d at 538.

In contrast, the Federal Savings Statute, 1 U.S.C. § 109, contains one paragraph focused exclusively on statutory repeals and provides, in relevant part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. Unlike the Delaware Savings Statute, the Federal Savings Statute does not contain a separate subsection applicable to statutory amendments. Indeed, the Federal Savings Statute does not reference amendments at all.

In accordance with general principles of statutory construction, this distinction between the Delaware Savings Statute and the Federal Savings Statute must have meaning. Notably, many savings statutes adopted by other states track the language of the Federal Savings Statute much more closely than Delaware,⁷ or expressly state that the effect of the savings statute is the same regardless of whether a criminal statute has been repealed or amended.⁸ The General Assembly could have easily copied the Federal Savings Statute word-for-word or added the

⁷ See, e.g., La. Stat. Ann. § 24:171; Minn. Stat. § 645.35; S.D. Codified Laws § 2-14-18.

⁸ See, e.g., Alaska Stat. Ann. § 01.10.100(a); Fla. Const. art. X, § 9; Iowa Code Ann. § 4.13; Tenn. Code Ann. § 39-11-112; Vt. Stat. Ann. tit. 1, § 214; Wyo. Stat. Ann. § 8-1-107.

phrase “or amendment” after the word “repeal” in subsection (a) if the intent was for the consequences of statutory repeals and amendments to be the same under the Delaware Savings Statute.

Instead, the General Assembly structured Delaware’s statute differently to “guard[] against an unanticipated judicial interpretation which holds that an amendment of a statute constitutes a repeal.” 1998 Del. Laws c. 263 (H.B. 277) (Tab 2). This distinction between “amendment” and “repeal” exists in Delaware’s statutory and common law. Section 109(d)(1) of the Delaware Code, entitled “Amendments to Code,” expressly distinguishes between amendments and repeals. *See 1 Del. C. § 109(d)(1)* (prescribing procedures for amendment “[w]hen it is the purpose of a bill to change the language of a code provision, as distinct from affecting an outright repeal A section should be repealed, as distinct from amended, when an outright repeal thereof is intended or when the subject matter of the proposed new law is more than a mere amendment or revision of the old section.”). In addition, this Court has previously recognized the difference between repeals and amendments. *See Williams*, 756 A.2d at 352 (“A *repeal*, absent a savings clause, suggests a legislative intent not to punish acts previously deemed to be criminal acts. Statutory *amendments*, on the other hand, are indicative of a legislative intent to continue to criminalize certain conduct.”); *Gen.*

Chem. Corp., 559 A.2d at 300 (holding, prior to enactment of the Delaware Savings Statute, that a new statute was a repeal and therefore barred further prosecution of the action).

Thus, the plain textual meaning of the Delaware Savings Statute and its distinct statutory structure (as compared to that of the Federal Savings Statute) reflect a continuation of the General Assembly's intent to treat repeals and amendments of statutes differently. As explained below, this distinction has significance because the Delaware Savings Statute "saves" pre-amendment versions of statutes only if the amendment in question will "terminate" (*i.e.*, end) or bar an action already commenced under the pre-amendment version of the statute. *See infra* pp. 14-17. Because an amendment to a sentencing statute does not "terminate" a criminal prosecution, the Delaware Savings Statute has no application to the Amended Sentencing Act.

b. Section 211(b) of the Delaware Savings Statute Does Not Apply Because the Amended Sentencing Act Does Not Have the Effect of Terminating or Barring a Criminal Action or Proceeding.

The Amended Sentencing Act amended, rather than repealed, Delaware's existing sentencing statute. From the outset, the Amended Sentencing Act was entitled "An Act to Amend Title 11 of the Delaware Code Relating to

Sentencing.” See Del. H.B. 312, 147th Gen. Assemb. (2014) (Tab 6); Del. H. Judiciary Comm. Meeting Mins. (May 7, 2014) (Tab 8). Moreover, the substantive effect of the Amended Sentencing Act is consistent with a statutory amendment, not a repeal. Because the Amended Sentencing Act does not decriminalize any acts, it reflects a legislative intent to amend the prior statute. See *Williams*, 756 A.2d at 352 (“Statutory amendments . . . are indicative of a legislative intent to continue to criminalize certain conduct.”). Conversely, the Amended Sentencing Act cannot be considered a repeal because it does not completely erase the prior statute or otherwise effect an “outright repeal.” See, e.g., *Gen. Chem. Corp.*, 559 A.2d at 300 (holding that deleting a statute in its entirety constitutes a repeal); 1 *Del. C.* § 109(d)(1) (“A section should be repealed, as distinct from amended, when an outright repeal thereof is intended or when the subject matter of the proposed new law is more than a mere amendment or revision of the old section.”).

Determining whether the Amended Sentencing Act is an amendment or a repeal is not simply a case of semantics. The classification has meaning and consequences under the Delaware Savings Statute because statutory amendments are governed exclusively by the plain language of 11 *Del. C.* § 211(b)—*not* 11 *Del. C.* § 211(a), which applies exclusively to statutory repeals.

Subsection (b) of the Delaware Savings Statute provides that, “[a]ny 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 . . .*” 11 *Del. C.* § 211(b) (emphasis added). Section 211(b) is directed at amendments to criminal statutes that decriminalize previously criminalized acts (which could conceivably end legal proceedings), as opposed to procedural amendments like the Amended Sentencing Act (which could never end or terminate legal proceedings). Indeed, the Amended Sentencing Act has nothing to do with ending or barring prosecutions that were underway prior to the statute’s enactment. Instead, it merely gives the court discretion 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 other sentence of confinement imposed on such criminal defendant.” 11 *Del. C.* § 3901(d). These types of procedural amendments do not trigger application of Section 211(b) because they are not intended to terminate or invalidate prosecutions and do not have such an effect. Sentencing statutes like the Amended Sentencing Act—which do not alter the elements of a crime or otherwise affect criminal prosecutions—simply are not the types of criminal statutes that are subject to Section 211(b) of the Delaware Savings Statute.

Moreover, the Delaware Supreme Court has interpreted Section 211(b) of the Delaware Savings Statute to forbid invalidation or termination of prosecutions when a criminal statute is amended. *Dahms v. State*, 2004 WL 1874650, at *1 (Del. 2004) (TABLE) (“Under the general savings statute of the Delaware criminal code, ***an amendment to a criminal statute does not invalidate or terminate any prosecution***, regardless of the stage of the case, unless the amendment expressly so provides.”) (emphasis added); *Garvey*, 840 F. Supp. 2d at 787-88 (“[U]nder the general savings statute of the Delaware criminal code, an amendment to, or repeal of, a criminal statute does not terminate a prosecution, regardless of the stage of the case”).

In sum, the Amended Sentencing Act does not fall within the reach of 11 *Del. C.* § 211(b), and therefore can be applied retroactively without triggering, much less violating, the Delaware Savings Statute.

3. Allowing the Amended Sentencing Act to Have Retroactive Effect Is Consistent with Delaware Common Law.

Because the Delaware Savings Statute does not govern the Amended Sentencing Act, this Court may give the Amended Sentencing Act retroactive effect, particularly because it comports with the General Assembly’s intent for the Amended Sentencing Act to operate as a sentencing reform measure. *See infra* pp.

26-34. Furthermore, giving the Amended Sentencing Act retroactive effect is both logical and consistent with Delaware common law.

Delaware common law recognizes that procedural or remedial statutes should be afforded retroactive effect. *See 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)). This is because procedural and remedial statutes operate outside Delaware’s default rule that statutes are not to be applied retroactively. *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 infra* pp. 28-34 (describing why a bar against concurrent sentencing is inconsistent with the General Assembly’s policies and intentions).

A statutory 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)); *see also A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1120 (Del. 2009) (holding that a statutory amendment was not remedial

because it affected a substantive right). The Amended Sentencing Act impacts the existing practices and procedures related to concurrent and consecutive sentencing by permitting judicial discretion to be exercised but does not create, alter, or decriminalize an offense. Nor does it change the penalty associated with a given offense. Because the Amended Sentencing Act relates to practice and procedure and does not affect any substantive rights, the statute is remedial.

The Delaware Supreme Court has likewise held that the U.S. Constitution's *ex post facto* clause does not prohibit retroactive application of a statute that is "procedural in nature." *See State v. Cohen*, 604 A.2d 846, 853 (Del. 1992) (rejecting an argument that a statute could not be applied retroactively because the "new law . . . merely alter[s] the method of determining the imposition of the death penalty."); *Brice v. State*, 815 A.2d 314, 321 (Del. 2003) ("[I]t seems that the [amended statute] actually benefits defendants by requiring a binding and unanimous verdict as to the existence of an aggravating factor.").

The Amended Sentencing Act plainly relates to procedure. *See, e.g., Bailey v. State*, 588 A.2d 1121, 1124 (Del. 1991) ("A change in the criminal law is procedural when that law does not affect either '[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish [the defendant's] guilt . . .'" (alterations in

original) (quoting *Dobbert v. Florida*, 432 U.S. 282, 294 (1977)); *Cohen*, 604 A.2d at 853 (holding that a change in “the method of determining imposition of the death penalty” was procedural in nature because the “quantum of punishment for the crime of first-degree murder . . . remain[ed] unchanged.”).⁹ The Amended Sentencing Act did not criminalize or decriminalize conduct, change any standard of proof, or alter the penalty attached to any crime. Delaware judges may still impose consecutive sentences for multiple offenses under the Amended Sentencing Act. However, the Amended Sentencing Act improved sentencing procedures by permitting judges to impose concurrent sentences, which increases transparency and is “more honest” than suspending portions of sentences to approximate concurrent sentences. *See* House Debate Audio at 15:30-16:09 (Tab 4).

The Amended Sentencing Act “simply alter[s] the methods employed in determining” how multiple sentences are determined but does not alter “the quantum of punishment” attached to a particular offense (*Dobbert*, 432 U.S. at 293-94). Retroactive application of the Amended Sentencing Act therefore comports with Delaware common law permitting procedural amendments to take effect immediately.

⁹ The General Assembly’s placement of the Amended Sentencing Act in Part II of Title 11 of the Delaware Code—entitled “Criminal Procedure Generally”—further supports the conclusion that the Amended Sentencing Act is intended to be procedural in nature.

4. To the Extent *State v. Ismaaeel* Has Been Read to Preclude Retroactive Application of the Amended Sentencing Act, It Incorrectly Relied on Federal Law Interpreting the Federal Savings Statute.

State v. Ismaaeel, 840 A.2d 644 (Del. Super. Ct. 2004), *aff'd*, 854 A.2d 1158 (Del. 2004), is the primary source of Delaware jurisprudence applying and interpreting the Delaware Savings Statute. Purporting to apply *Ismaaeel*, Delaware Courts have found that the Delaware Savings Statute applies to, and thereby bars retroactive effect of, the Amended Sentencing Act.¹⁰

The weight of Delaware authority construing the Amended Sentencing Act has found that the Delaware Savings Statute bars retroactive application of the Amended Sentencing Act under *Ismaaeel*. But *Ismaaeel* improperly relied on federal law interpreting the Federal Savings Statute to reach a result that runs counter to the Delaware Savings Statute and is inconsistent with the legislative intent behind the Amended Sentencing Act.

¹⁰ See *Lewis v. State*, 2015 WL 4606521 (Del. July 30, 2015) (TABLE); *State v. Coleman*, 2015 WL 1331671 (Del. Super. Ct. Mar. 18, 2015); *State v. Desmond*, 2014 WL 7009341 (Del. Super. Ct. Dec. 2, 2014); *State v. Priest*, 2014 WL 5003419 (Del. Super. Ct. Oct. 6, 2014); *State v. Perkins*, 2014 WL 4179882 (Del. Super. Ct. Aug. 21, 2014); *State v. Jennings*, 2014 WL 3943089 (Del. Super. Ct. Aug. 11, 2014); *State v. Coverdale*, 2014 WL 4243631 (Del. Super. Ct. Aug. 11, 2014). But see *State v. Benson*, Cr. ID 9708021684 (Del. Super. Ct. Jan. 30, 2015) (TRANSCRIPT) (Tab 1) (noting that the Amended Sentencing Act has been held to apply retroactively). *Benson* does not, however, provide substantive guidance as to why the Amended Sentencing Act applies retroactively.

a. The Court's Ruling in *Ismaaeel*.

In *Ismaaeel*, the defendant was convicted of various drug offenses, 840 A.2d at 645. Between the time he was charged and the time he was convicted, one of the laws under which he was convicted was changed to increase the weight criteria for possession of cocaine from five grams to ten grams and lessen the penalties associated with possession of over ten grams. *Id.* Because the defendant possessed 7.5 grams of cocaine at the time of his arrest, he contended that the Delaware Savings Statute should not apply to the amended law and the amended law's lesser penalties should apply. *Id.* at 646.

The Court found that the Delaware Savings Statute applied to bar retroactive application of the amended law. This holding was premised on the court's observation that the Delaware Savings Statute "is modeled in part upon federal law." *Id.* at 648. The court further noted that "[w]here legislation is structured on other laws, the Delaware courts looks to them for insight," and proceeded to delve into a detailed analysis of the Federal Savings Statute for "insight" in applying the Delaware Savings Statute. *Id.* at 649-51; *see also id.* at 650 ("[T]he holdings of federal cases interpreting comparable provisions of [the Federal Savings Statute] are persuasive.").

b. Because the Delaware Savings Statute Is Meaningfully Different from the Federal Savings Statute, *Ismaaeel*'s Reliance on Federal Law Was Improper.

The court's decision in *Ismaaeel* to look to federal law interpreting the Federal Savings Statute is based on a fundamental misapprehension of the Delaware Savings Statute. Indeed, in comparing the two statutes, the court only analyzed the subsection of the Delaware Savings Statute applicable to statutory repeals, which is modeled after the Federal Savings Statute. *See id.* at 648 (comparing the text of 1 U.S.C. § 109 with the text of 11 *Del. C.* § 211(a)); *id.* at 651 (“The General Assembly is presumed to know the well-established construction and effect given to the federal general savings statute upon which the comparable Delaware statute was constructed.”). The court neglected to mention that the Delaware Savings Statute also contains a second subsection that applies only to statutory amendments and is *not* modeled off of the Federal Savings Statute. Consequently, by focusing exclusively on the “significant connection” between the Federal Savings Statute and Section 211(a) of the Delaware Savings Statute (*id.* at 651), the court conflated the terms “repeal” and “amendment” in its analysis of the Delaware Savings Statute.

According to *Ismaaeel*, applicable federal law provides that “an amendment is considered a repeal for purposes of the general savings statute” because “[a]nalytically, a ‘new’ statute comes into play whether a law is specifically repealed or an existing statute is modified.” *Id.* at 648-49. The court then imputed knowledge of the federal “experience” to the General Assembly, concluding that “[t]he [Delaware] Legislature thereby recognized the longstanding federal experience that treated repeals and amendments alike when enacting the [Delaware Savings Statute].” *Id.* at 649.

But the Delaware Savings Statute expressly differentiates between repeals and amendments. *Compare* 11 *Del. C.* § 211(a), *with* 11 *Del. C.* § 211(b). This distinction is afforded no weight by *Ismaaeel*, and thus subsequent cases relying on it have not recognized a difference between repealing and amending a statute under the Delaware Savings Statute or otherwise differentiated between the two subsections of the statute. Further, no case since *Ismaaeel* has analyzed the differences between the Federal Savings Statute and the Delaware Savings Statute or differentiated between subsections (a) and (b) of the Delaware Savings Statute.¹¹

¹¹ *Amicus curiae* has located only ten opinions that discuss the Delaware Savings Statute. Many of those cases relate specifically to the retroactive effect of the Amended Sentencing Act. The paucity of opinions interpreting Section 211—and subsection (b) in particular—has made it less likely that a court will recognize, much less correct, the error in *Ismaaeel*.

c. The Holding in *Ismaaeel* Is Inconsistent with the Plain Language of the Amended Sentencing Act.

As explained above, the Delaware Savings Statute is quite different from the Federal Savings Statute. Although there is significant overlap between Section 211(a) and the federal law, both of which pertain to statutory repeals, the concepts reflected in Section 211(b) pertaining to statutory amendments are not captured in the Federal Savings Statute. *Ismaaeel* improperly glossed over this fundamental difference between the statutes. As a result, the court misapplied federal law to interpret a provision in the Delaware Savings Statute that was unique to Delaware. Because there is no federal law interpreting Section 211(b), Delaware Courts look to the plain language of the statute to ascertain its meaning. For the reasons previously set forth, *see supra* pp. 5-20, applying the Delaware Savings Statute to prohibit retroactive application of the Amended Sentencing Act to sentences that pre-date July 9, 2014 conflicts with the express language of the Amended Sentencing Act and thus runs counter to the legislative intent behind the act. *See Williams*, 756 A.2d at 351 (“Where the effect of a statute is in dispute, we seek to ascertain legislative intent through a textual analysis of the statutory language.”) (internal citations omitted).

II. JUDGES SHOULD BE PERMITTED TO IMPOSE CONCURRENT SENTENCES FOR APPROPRIATE OFFENSES AS THE GENERAL ASSEMBLY INTENDED.

A. Question Presented.

In enacting the Amended Sentencing Act, did the General Assembly intend to grant judges the discretion to modify certain criminal sentences entered prior to July 9, 2014 by imposing concurrent sentences, or did the General Assembly intend to preclude modification of such sentences?

B. Merits of Argument.

The United States has recognized a need for sentencing reform in order to mitigate over-incarceration. *See* U.S. S. Comm. on the Judiciary, *Senators Announce Bipartisan Sentencing Reform and Corrections Act* (Oct. 1, 2015) (Tab 14) (“A bipartisan group of senators . . . is introducing comprehensive legislation aimed at recalibrating prison sentences for certain drug offenders, targeting violent criminals, and granting judges greater discretion at sentencing for lower-level drug crimes”). *See also id.* (statement of Sen. Dick Durbin) (“The United States incarcerates more of its citizens than any other country on earth.”). The General Assembly has recognized a similar need for sentencing reform in Delaware, and has therefore enacted statutes like the Amended Sentencing Act. “In Delaware, our incarceration is higher than the national average in a country whose

incarceration rate is the highest in the world.” Governor Jack A. Markell, Testimony Submitted to the United States House of Representatives Committee on Oversight and Government Reform, at 1 (July 14, 2015) (Tab 13) (hereinafter “Gov. Markell Testimony”).

Prohibiting judges from imposing concurrent sentences for crimes committed and sentences imposed prior to July 9, 2014 would therefore directly contravene the General Assembly’s aims in enacting the Amended Sentencing Act and similar laws that contribute to Delaware’s sentencing reform effort. With the Amended Sentencing Act, the General Assembly intended to advance sentencing reform in Delaware and to reduce inefficient and disproportionate sentences for lesser crimes. By contrast, a prohibition against concurrent sentences for crimes committed and sentences entered prior to July 9, 2014 arbitrarily prevents the Amended Sentencing Act from being given its full effect as a sentencing reform measure. This Court should therefore permit Delaware Courts to operate as the General Assembly expressly intended and permit judges to “direct whether sentence[s] of confinement of any criminal defendant by any court of this State shall be made to run concurrently or consecutively with any other sentence of confinement imposed on [a] criminal defendant.” 11 *Del. C.* § 3901(d).

1. The General Assembly's Policy Goals Reflect an Intention to Permit Concurrent Sentencing for Lesser Offenses Committed Prior to July 9, 2014.

Sentencing reform has been a longstanding priority for Delaware, but the problems motivating that reform still persist. This summer, Governor Markell testified before the United States House of Representatives Committee on Oversight and Government Reform and summarized the problems that Delaware currently faces with respect to its criminal justice system. *See* Gov. Markell Testimony (Tab 13). Governor Markell outlined key facts regarding over-incarceration, noting that Delaware's prisons are beyond capacity, that Delaware's incarceration rate is higher than the national average, and that Delaware spends more than \$270 million annually on corrections, including \$36,000 for each incarcerated adult. *Id.* at 1-2. Governor Markell specifically indicated that over-penalizing non-violent offenders can be inefficient, partly because "[d]uring sentencing, we rarely consider what will happen when those sentences end, even though penalties result in long-term detention." *Id.* at 2.

To effect reform, the General Assembly has passed laws to reduce disproportionate and inefficient sentencing. The General Assembly made a comprehensive effort to do so in 2012 by enacting the Justice Reinvestment Act (*id.* at 3), which, among other things, permitted judges to order a risk and needs

assessment to be used for imposing an appropriate sentence. *See* 11 *Del. C.* § 4331(b) (permitting the Court to order a presentence report which “should include administration of an objective risk and needs assessment instrument”). The Justice Reinvestment Act was partly intended to “help[] ensure scarce resources are focused on higher-risk offenders.” Del. S.B. 226 syn., 146th Gen. Assemb. (2012) (Tab 10). *See also* Juliene James & Suzanne Agha, Vera Inst. of Justice, *Justice Reinvestment in Action: The Delaware Model*, at 2-3 (Apr. 2013) (Tab 11) (noting that the Delaware Justice Reinvestment Task Force analyzed factors behind prison overcrowding in Delaware and concluded that “long lengths of stay for the incarcerated population” contributed to the costs of incarceration in Delaware).¹²

The Amended Sentencing Act is a key part of Delaware’s sentencing reform efforts. *See* House Debate Audio at 18:07-18:16 (Tab 4) (“This legislation, although a compromise, fits right into . . . sentencing reform.”). Specifically, the General Assembly hoped that by giving the Judiciary the discretion to impose

¹² The Justice Reinvestment Act and the Amended Sentencing Act are not isolated pieces of legislation. Two other criminal justice reform statutes were signed into law at the same time the Amended Sentencing Act was enacted. *See* Del. S.B. 217 syn., 147th Gen. Assemb. (2014) (Tab 9) (“This bill repeals the provision of the Delaware code requiring the revocation of the driver’s license of any individual of a drug offense, regardless of whether the offense is related to the operation of a motor vehicle.”); Del. H.B. 264, 147th Gen. Assemb. (2014) (Tab 5) (permitting the Department of Correction to offer employment to offenders who demonstrate exceptional job skills).

concurrent rather than consecutive sentences for less severe crimes, sentences would become more proportionate and cost-efficient. *Id.* at 17:20-18:30 (“Delaware, like the rest of the country, has realized we spend a huge amount of money on incarceration [W]e spend a lot of money on incarceration when we quite easily could be spending that money on other issues”).

The Amended Sentencing Act was also designed to reduce inconsistency and opacity in sentencing. As previously discussed, the prior judicial practice was to suspend sentences to emulate the effect of concurrent sentencing, thereby ameliorating the harsh effects of mandatory consecutive sentencing. “[I]f you are looking at what the net effect of this is, quite frankly, judges nowadays do impose essentially concurrent sentences under certain circumstances. They just suspend the time And so it is an artificial way of doing it.” *Id.* at 15:44-16:07. Prior to passage of the Amended Sentencing Act, Delaware judges would sentence defendants for multiple convictions to any number of years, but suspend each sentence to a degree, effectively resulting in concurrent sentencing. Judges were thus required to engage in a piecemeal analysis of each crime to approximate concurrent sentencing where appropriate, possibly creating opportunities for human error and unconscious bias. By contrast, “[concurrent sentencing] is the more honest way of doing it.” *Id.*

The Amended Sentencing Act thus simplified the Judiciary's existing practice in order to generate more transparency and uniformity, thereby furthering the Judiciary's own goals in criminal justice reform. Chief Justice Leo E. Strine, Jr., State of the Judiciary Address, at 11 (June 4, 2014) (Tab 15) ("The goal is simple to state, but hard to achieve: to try to commit as much as possible to identifying consistent and predictable judiciary-wide approaches to tough criminal justice issues. If we can do that . . . we may be able to deploy scarce treatment resources more effectively to reduce recidivism and improve the consistency of sentences for similarly situated offenders.").

2. The Amended Sentencing Act Should Be Applied Retroactively as the General Assembly Intended.

The General Assembly's goals are best served by giving the Amended Sentencing Act retroactive effect. Requiring judges to impose consecutive sentences solely based on the date of sentencing does not comport with this State's clear purpose in enacting the Amended Sentencing Act and other sentencing reform laws. Further, prohibiting concurrent sentencing for offenses committed and sentences entered prior to July 9, 2014 would lead to results that the General Assembly could not have reasonably intended.

First, sentencing reform should address current levels of over-incarceration, rather than focus exclusively on future inefficiencies and injustices. None of the General Assembly's goals are advanced by turning a blind eye to the currently incarcerated. Indeed, the Attorney General's Office has expressly recognized that sentencing reform should not exclude those who are currently incarcerated. For example, earlier this month, the Attorney General's Office proposed legislation to extend the effect of ameliorative statutes, such as the Amended Sentencing Act, on a retrospective basis. "The AG's Office will offer legislation that would allow persons who were sentenced under a law that is subsequently modified by the legislature to ask that their sentence be reviewed. The proposed legislation will give priority to persons whose crimes did not cause direct physical harm to others." *AG Denn Offers Slate of Criminal Justice Reform Ideas*, Delaware.Gov (Oct. 15, 2015) (Tab 3). Based on the descriptions offered by the Attorney General's office to date, this contemplated legislation would almost certainly require amending the Delaware Savings Statute. But, for the reasons detailed above, *see supra* pp. 5-25, this Court does not have to wait for the Attorney General's Office to propose legislation amending the Delaware Savings Statute to begin giving effect to the General Assembly's intent.

Second, the Amended Sentencing Act allows judges to impose sentences concurrently rather than suspending individual sentences to achieve the same result. *See supra* p. 20. The Amended Sentencing Act therefore has no “retroactive effect” because Delaware judges have always been capable of imposing functionally concurrent sentences. Conversely, forbidding judges from modifying sentences in a functionally identical but more transparent manner solely based on the date a sentence was entered is an absurd result that the General Assembly did not intend. *See Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1152 (Del. 2010) (“Statutes must be construed as a whole, in a way that gives effect to all of their provisions and avoids absurd results.”).

Similarly, the General Assembly did not intend to draw an arbitrary distinction between those individuals who committed offenses or were sentenced prior to July 9, 2014, and those individuals who committed offenses or were sentenced afterwards. Such an arbitrary distinction is unfair and does not advance any of the General Assembly’s goals towards sentencing reform, as described *supra*. *See* 11 *Del. C.* § 201 (“The general purposes of this Criminal Code are: . . . (2) To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction.”). Moreover, the concerns articulated in *Ismaaeel* that individuals who committed offenses prior to July 9, 2014 would

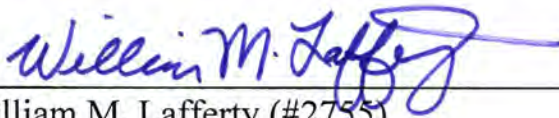
receive a “windfall” through retroactive effect of a new statute are not implicated here (*see Ismaaeel*, 840 A.2d at 654) because, unlike the statute in *Ismaaeel*, the Amended Sentencing Act merely gives *discretion* to judges to impose concurrent sentences; it does not automatically reduce sentences. In this case, equal treatment in sentencing is achieved by permitting retroactive effect.

In short, permitting the Amended Sentencing Act to be applied to sentences entered prior to its passage on July 9, 2014 would guarantee that the statute functions as intended and end the practice of “forc[ing] our judges, without exception, to impose consecutive rather than concurrent sentences for multiple offenses.” Governor Jack A. Markell, State of the State Address, at 24 (Jan. 23, 2014) (Tab 12). Mandatory consecutive sentencing “hasn’t made us any safer and contributes to overcrowding in our prisons.” *Id.* That practice should have ended on July 9, 2014.

CONCLUSION

For the foregoing reasons, *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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October 30, 2015

CERTIFICATE OF SERVICE

I, Glenn R. McGillivray, hereby certify that on October 30, 2015, the foregoing *AMICUS CURIAE'S* OPENING BRIEF IN 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* OPENING BRIEF IN 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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/s/ Glenn R. McGillivray

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