SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002804-22T5
IND. NO. 13-01-00200-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Essex County.
MARQUISE HAWKINS,	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. Carolyn E. Wright, J.S.C.
	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 2T^{h} Floor
Newark, NJ 07101
973-877-1200

NADINE KRONIS
Assistant Deputy Public Defender
Nadya.Kronis@opd.nj.gov
Attorney ID: 404802022

Of Counsel and
On the Brief.

DEFENDANT IS CONFINED

Dated: June 30, 2024

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PRELIMINARY STATEMENT

In 2015, seventeen-year-old Marquise Hawkins participated in a robbery during which his codefendants fatally shot one of the robbery victims. At the time of his arrest, Marquise had minimal experience with the criminal justice system. He was tried separately from his codefendants and sentenced to a term of 55 years of incarceration with more than 43 years of parole ineligibility. About a month later, his adult co-defendant was sentenced to 17 years' incarceration with a 14 period of parole ineligibility after entering a plea agreement.

Pursuant to State v. Zuber, 227 N.J. 422 (2017), Marquise was granted a resentencing to assess mitigating factors associated with youth in determining whether he is among the rarest of children for whom a lifetime in prison is warranted. By the time of his resentencing, 28-year-old Marquise had demonstrated tremendous personal growth. He had accepted responsibility for his conduct, maintained a spotless prison record, and taken every educational and rehabilitative program available to him. Although the court found Marquise clearly capable of rehabilitation, it did not provide any meaningful relief, imposing an aggregate sentence of forty-five years with more than forty-one years of parole ineligibility. Because Marquise's resentencing in no way resembled what is required by Zuber, a remand for resentencing is required.

PROCEDURAL HISTORY

After being waived to Superior Court, defendant-appellant Marquise Hawkins was charged in Essex County Indictment No. 13-01-00200-I together with his codefendants, Azim Brogsdale and Haroon Perry. The indictment jointly charged seventeen-year-old Marquise and his codefendants with the following crimes: second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1 (count one); four counts of first-degree robbery, N.J.S.A. 2C:15-l (counts two through five); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count six); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3 (a)(1)-(2) (count seven); first-degree knowing or purposeful murder, N.J.S.A. 2C:11-3(a) (1)-(2) (count eight); two counts of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-(b) (counts nine and ten); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count eleven). (Da 1-12)[1]

Marquise was tried separately and prior to both of his codefendants before the Hon. Alfonse Cifelli, J.S.C. and a jury. He was convicted on all counts, other than unlawful possession of a .380 mm handgun (count nine). (1T:10-2 to 13-16) (Da 13-16)

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[1] Da: Defendant's appendix
1T: Transcript of 3/30/2015 (Trial)
2T: Transcript of 5/8/2015 (Sentencing)
3T: Transcript of 6/28/2022 (Resentencing)
4T: Transcript of 8/2/2022 (Resentencing)
5T: Transcript of 3/27/23 (Resentencing)

On May 8, 2015, Judge Cifelli sentenced Marquise to an aggregate term of fifty-five years imprisonment with a forty-six-year and nine-month period of parole ineligibility,[2] which he arrived at as follows. (2T) (Da 21-24) The court merged conspiracy to commit robbery with the robbery charges, and unlawful possession of a handgun with possession of a weapon for an unlawful purpose. It imposed 15 year terms, with an 85% parole bar pursuant to the No Early Release Act (NERA), on the robbery counts, to run concurrently with each other; 40 year terms, subject to the NERA parole bar, for felony murder and knowing or purposeful murder, to run concurrently with each other but consecutively with the robberies; and a concurrent term of eight years with a four year period of parole ineligibility for unlawful possession of a handgun. (2T:25-19 to 30-2)

Marquise appealed. On April 9, 2018, the Appellate Division, in an unpublished decision, affirmed his convictions and remanded the case to the trial court for resentencing in accordance with State v. Zuber, 227 N.J. 422 (2017). (Da 33-69) The Appellate Division also ordered the court to merge the convictions for felony murder and knowing or purposeful murder, and to remove

[2] At sentencing, the judge mistakenly stated that Hawkins would not be eligible for parole for a period of fifty-one years and three months pursuant to NERA. (2T:29-21 to 30-1) The judgment of conviction (JOC) was subsequently amended on July 22, 2015 to merge conspiracy to commit murder (count seven) with murder (count eight), and to reflect that Marquise would not be parole eligible for forty-six-year and nine-months. (Da 21-24)

aggravating factor six from the judgment of conviction because it was not found by the sentencing court. (Da 69)

Following two days of hearings, Marquise was resentenced by the Hon. Judge Carolyn E. Wright on March 27, 2023. (3T; 4T; 5T) After ordering the requisite merger of counts, including felony murder with purposeful or knowing murder, the court resentenced Marquise to a term of 30 years imprisonment with 30 years of parole ineligibility for murder, and a consecutive term of 15 years imprisonment subject to an 85% percent parole disqualifier for robbery, resulting in a new aggregate sentence of forty-five years with an approximately forty-three-year period of parole ineligibility. (5T:24-24 to 27-15)

Marquise filed a notice of appeal on May 18, 2023. (Da 70-73) On January 8, 2024, he filed a motion to transfer his case from the Sentencing Oral Argument Calendar to the Plenary Calendar, which was granted on February 12, 2024. (Da 74) He is presently incarcerated at East Jersey State Prison.

STATEMENT OF FACTS

A. The incident[3]

On February 17, 2012, seventeen-year-old Marquise Hawkins and his codefendants – twenty-year-old Haroon Perry and sixteen-year-old Azim Brogsdale – drove around Irvington for approximately six hours, looking for someone to rob.[4] (5T:14-24 to 15-5) (Da 35) After seeing a group of four teenagers walking down the street, Perry parked the car, and Brogsdale and Perry robbed the group at gunpoint. Marquise remained in the backseat of the car. (Da 35) One of the teenagers began to flee and Marquise shouted "Get the guy in the yellow jacket," who was later identified as Krishna Nesbeth. (Da 35, 56) (2T:16-18 to 25; 5T:6-12 to 13) His two codefendants started shooting – killing Khalil Williams. Cash and at least one cell phone was taken from the robbery victims. Marquise kept a cell phone. (Da 35) (2T:17-15 to 17)

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[3] The transcripts from Marquise's trial were not in evidence at the resentencing. The facts, therefore, are based on the Appellate Division's recitation of the facts in its unpublished opinion, documents presented to the resentencing court, the presentence report (PSR), and transcripts of the original sentencing and resentencing proceedings.

[4] Marquise Hawkins, Haroon Perry, and Azim Brogsdale were the only individuals indicted for the offense. However, an alleged fourth participant, referred to only as "Jaquill" is mentioned during the resentencing. (4T:21-15 to 20)

B. The original sentencing hearing

While the sentence imposed on May 8, 2015 is not at issue in this appeal, the findings of the original sentencing court are relevant because the resentencing court heavily relied upon and incorporated them into its own decision. At the sentencing hearing, defense counsel primarily relied on his sentencing memorandum, adding that the court should consider Marquise's lack of prior criminal history, that his conduct was unlikely to recur, that it was not "conduct that he contemplated," and that he was most likely influenced by older individuals. (2T:3-17 to 4-25) The State argued for a one-hundred-and-ten-year term of incarceration, quoting "The Godfather" in support of its contention that Hawkins "ordered the gunmen to do the shooting" for him. (2T:10-21 to 11-8; 14-9 to 15) The victim's mother spoke at the hearing. (2T:6-12 to 8-6) Marquise chose not to speak on his own behalf. (2T:6-7 to 10)

The court found aggravating factor one based on the nature and circumstances of the offense, as well as Marquise's role in the offense, explaining that "the shooting did not start, nor did it appear that there was any intention to shoot anyone until the order was given by Mr. Hawkins,"[5] and that Marquise received a cell phone as proceeds from the robbery. (2T:15-25 to 17-

[5] In the immediate aftermath of the incident, the robbery victims told police that the two armed individuals who exited the car told them to empty their pockets, and that "if they ran they would get shot." (PSR 3)

18) The court also found aggravating factor three, risk of reoffense, based on Marquise's decision not to speak at his sentencing and not expressing remorse or responsibility in his pre-sentence interview with probation. (2T:17-19 to 18-6) The court found aggravating factor nine based on "the need for deterring Mr. Hawkins and others from violating the law… notwithstanding the fact that Mr. Hawkins has a limited criminal record." (2T:18-12 to 19)

The court found no mitigating factors. (2T:18-20 to 20-18) While the court acknowledged that Marquise's prior juvenile and criminal history consisted of a single dismissed deferred disposition for shoplifting,[6] it nonetheless rejected mitigating factor seven ("defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time"). The judge noted only that the factor "really does not apply," but that the court would "take into consideration Mr. Hawkins's age, as well as the fact that Mr. Hawkins does not have a substantial criminal and/or juvenile history." (2T:18-20 to 19-9) The court rejected mitigating factor thirteen, "conduct of youthful defendant substantially influenced by more mature codefendant," because "Hawkins gave the command to shoot and to get the guy in the yellow jacket," concluding that if anything, the individuals who shot at the victims, including

[6] The deferred disposition had been dismissed by the time of the sentencing. (5T:24-12 to 18; 2T:14-17 to 24)

Marquise's adult co-defendant, "were influenced by Mr. Hawkins." (2T:19-10 to 21)

While the court imposed concurrent sentences for the four robbery convictions because they were committed "so close in time and place as to indicate a single act or crime," it ran the robbery convictions consecutive to the homicide convictions, "notwithstanding the fact that they occurred at the same place, in a relatively short span of time," because they involved "separate acts of violence" and "predominantly independent objectives." (2T:23-7 to 24-24) The court imposed an aggregate sentence of 55 years, and the JOC was later amended to include the correct parole ineligibility term of 46 years and 9 months pursuant to NERA. (Da 21-24)

On June 25, 2015, Marquise's twenty-year-old co-defendant, Haroon Perry, pled guilty to an amended charge of aggravated manslaughter. He was sentenced to seventeen years with an approximately fourteen-year period of parole ineligibility subject to NERA. (Da 75-78, 211)

C. Appellate Division remand for Zuber resentencing.

Between Marquise's sentencing and his appeal, our Supreme Court decided Zuber and our legislature amended the homicide statute to implement "the constitutional policies underlying Graham, Miller, and Zuber." (Da 68-69) (citing Graham v. Florida, 560 U.S. 48, 82 (2010); Miller v. Alabama, 567 U.S.

460, 473 (2012); Zuber, 227 N.J. 422; L. 2017, c. 150; Senate Budget and Appropriations Comm. Statement to A. 373 (June 1, 2017)).[7] Accordingly, this Court found that Marquise's sentence amounted to the practical equivalent of life without parole and remanded for resentencing pursuant to Zuber. (Da 67-69) This Court instructed the resentencing court to take the Miller factors into account in revisiting Marquise's aggregate sentence and his consecutive sentences, specifically emphasizing the importance of considering the "real-world" effect of Marquise's consecutive sentences on remand. (Da 67)

D. The resentencing hearing

Marquise's resentencing took place over the course of three days. During the first two days, the court heard testimony from Dr. Megan Perrin, an expert in neuropsychology who evaluated Marquise in prison on October 2, 2020 and reviewed the transcripts from his trial, his prison records, and other documents. (3T; 4T; Da 79-81) The court also heard from several members of Marquise's family, the victim's family, and Marquise himself. (4T:72-5 to 92-15)

Marquise and his six maternal sisters were raised by their single mother, Stefanee Hawkins. (Da 100) Marquise's mother often struggled to keep food on the table and the lights on, and he was exposed to significant neighborhood

[7] The 2017 amendment to the homicide statute requires juveniles convicted of murder to be sentenced to a thirty-year period of parole ineligibility pursuant to subsection b(1). See N.J.S.A. 2C:11-3b(1)

violence as a child – witnessing several shootings and his mother getting jumped and beaten outside their building. (3T:22-20 to 25-20) (Da 84, 111-12, 117) Marquise's biological father was "a very well-respected drug dealer in the community" who was incarcerated for most of his childhood and would often disappear and then reappear in his life without warning. (3T:30-31; Da 111) When Marquise's father reappeared, Marquise would sometimes spend time with him while he sold drugs, recalling that his father would tell him to quickly walk away when a customer was coming. (Da 111) Marquise sought his father's company and attention whenever he could get it, despite being hurt and disappointed when his father would invariably disappear again. (Da 111) Marquise had a complicated relationship with his mother's boyfriend, Kevin Brown, who was the biological father of five of his sisters, but lived with his "other family," including his wife and children from that marriage. (Da 83, 113)

When Marquise was sixteen, he began hanging out on one of the streets his father was known to frequent – deciding, in the words of his sister Marquia, that "if he wanted to be near [his father], he had to be out there." (Da 121) That was where he met Haroon Perry, or "60 Cal," who became his co-defendant soon after. Marquise looked up to twenty-year-old Perry – who in his eyes "had status… girls, money, a car" and "people listened to [him] because he had already been to prison." (3T:30-31, 57-3 to 25) (Da 121) Marquise saw twenty-

year-old Perry as someone who "commanded authority" and was respected in the community. (3T:57-3 to 25)

While Marquise had generally done well in school, his grades dropped in high school and he was transferred to an alternative high school after coming to class smelling like marijuana during his junior year. (3T:22-7 to 19; Da 84, 121) He was arrested for the offense that is the subject of the present appeal several weeks later. (Da 84) Prior to the incident, Marquise's interaction with the criminal legal system was limited to a single juvenile deferred disposition for shoplifting that had been dismissed. (5T:24-12 to 15)

Marquise earned his high school diploma within a year of being incarcerated at the juvenile detention center (ECJDC), and his grades improved dramatically. (4T:106-23 to 107-13) (Da 97, 219-21) Despite struggling with depression when he was first transferred to adult jail, he went on to acclimate to his new environment and complete college preparatory courses upon his transfer to state prison. (4T:101-20 to 102-13) He has been eager to enroll in college classes, which New Jersey State Prison (NJSP), where he was subsequently transferred, does not offer. (Da 85) Marquise's prison records reflect that he has continuously maintained a job in prison. (4T:106-3 to 22) (Da 163-164, 226-27) At Garden State Youth Correctional Facility (GYCF), he was selected to work in the cafeteria for the correctional officers. (4T:106-17 to 22) Throughout the

coronavirus pandemic, Marquise worked as a porter for NJSP's COVID-19 quarantine unit. (Da 164, 227) At the time of his resentencing, he was working as a porter "attending to the needs of inmates with significant adjustment difficulties and suicidal ideation." (Da 97)

Furthermore, Marquise had no disciplinary infractions since entering adulthood and the state prison system. (Da 130, 225) He has also taken every rehabilitative program available to him in state prison, including therapeutic programs, vocational programs, enrichment programs, and substance abuse programs – in addition to being very involved in faith-based programming. (Da 129, 234-47)

Marquise expressed remorse for the devastating impact that his actions have had on others, particularly on the family of Khalil Williams, both in and out of the courtroom. (4T:60-17 to 61-14, 88-4 to 90-15) (Da 97-98) During the resentencing hearing, Marquise took "full responsibility for his actions" during the robbery, acknowledging that his act of shouting from the car made him "just as responsible" for Williams's death as if he had shot him. (4T:88-25 to 89-1) He addressed the victim's family directly, apologizing for his actions and telling them "[n]ot a day goes by that I don't think about your son." (4T:89-9 to 16) After Marquise spoke, Williams's mother gave emotional testimony at the

hearing, addressing Marquise directly to say that she appreciated and "accept[ed] [his] apology through God." (4T:91-16 to 19)

E. Arguments of counsel

At the resentencing hearing, defense counsel requested that Marquise be resentenced to a term of 30 years with a 30-year period of parole ineligibility, incorporating her arguments regarding the applicability of mitigating factors seven, nine, thirteen, and fourteen from the sentencing memorandum. (4T:93-19 to 25) (Da 186-87) Counsel argued that the Yarbough factors strongly weigh in favor of running the robbery and homicide sentences concurrent, particularly given new guidance regarding concurrent and consecutive sentencing from our Supreme Court in State v. Zuber and State v. Torres – both of which were decided after Marquise's original sentencing. (Da 183, 188-93); See Zuber, 227 N.J. at 447; State v. Torres, 246 N.J. 246, 268 (2021). Marquise's 46 year and nine-month period of parole ineligibility – the result of consecutive sentences – meant that he would first become eligible for release at the age of 63, denying him a meaningful opportunity for release.

Despite acknowledging that Miller factor five "could" apply based on Marquise's spotless disciplinary record and expression of remorse, the State argued that the resentencing court should nonetheless give him the same sentence, reasoning that "we don't all get a pat on the back for … doing what we

have to." (4T:129-2 to 130-6) However, the State conceded that if the Court did find Miller factor five, it "would simply ask that it consider not doing consecutive sentences" for the robbery and the homicide and keep the original 40-year sentence for the homicide. (4T:130-12 to 22)

F. The resentencing court's ruling

After being presented with all the mitigation evidence, the court rejected the first four Miller factors, finding that only the fifth factor, concerning the possibility of rehabilitation, applied. The court then reduced Marquise's aggregate sentence but resentenced him to a period of parole ineligibility that was nearly identical to that of his original sentence – despite recognizing that the proper focus of a resentencing hearing is "the amount of real time a juvenile will spend in jail." (5T:5-14 to 23, 8-18 to 20) The court reasoned that the Appellate Division remanded the case solely to address the Miller factors, determining "that the trial judge made findings of facts concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record," and incorporating both the original sentencing court's aggravating and mitigating factor analysis and its Yarbough analysis by reference. (5T:6-13 to 17, 13-11 to 18, 23-22 to 24-3 to 11, 25-7 to 15); See State v. Yarbough, 100 N.J. 627 (1985).

In rejecting Miller factor one, the juvenile's chronological age and its hallmark features, the court found that Dr. Perrin's testimony regarding adolescent brain

development was of general applicability, and not "specifically based on the facts and circumstances of Marquise Hawkins's development." (5T:18-3 to 25) The court further rejected Dr. Perrin's finding that Marquise's act of shouting to his codefendants was an impulsive act, instead accepting the State's argument that Marquise "ordered or commanded" his codefendants "to stop the fleeing victim" in a calculated manner to avoid apprehension. (5T:16-8 to 11, 19-1 to 20-1)

The court found that while Marquise "was poor and grew up in a difficult and often violent environment where he was exposed to crime" and his "biological father was uninvolved and provided a negative role model," Miller factor two – concerning the juvenile's family and home environment – did not apply. (5T:21-6 to 15) The court also found that despite Marquise's father's absence, his stepfather, or mother's boyfriend, "has been involved in [his life]." (5T:20-15 to 21-15) The court rejected Miller factor three – concerning the circumstances of the offense and the effect of familial and peer pressure – based on its acceptance of the State's theory that Marquise had ordered the shooting and its finding that "the youngest [co]defendant arguably succumbed to the pressure exerted by this defendant to stop the fleeing victim". (5T:21-16 to 22-6) The court also rejected Miller factor four – concerning a juvenile's ability to deal with the police and justice system – finding simply that Marquise's "failure to comprehend the process and/or trust his attorney is not unique or necessarily based upon his age." (5T:22-7 to 14)

Finally, the court found that "Miller factor five is clearly supported by the record made by the defense" and that "it is abundantly clear that the defendant is capable of rehabilitation" based on his lack of disciplinary infractions in prison and his participation in all of the rehabilitative programs available to him. (5T:23-14 to 21) However, concerning Marquise's statement of remorse, the court found that "the defendant does not truly appreciate his full culpability," noting that "he never mentioned the victim's name in his statement of remorse" and that Marquise never acknowledged "that the order caused the gunshot that caused the death." (5T:22-15 to 23-4)

The court only reduced Marquise's aggregate sentence for the homicide, resentencing him to a term of 30 years with a 30-year period of parole ineligibility, subject to a five-year period of NERA parole supervision. It kept his aggregate sentence for the robbery the same – 15 years with an 85% parole disqualifier. (5T:24-24 to 25-6) In determining the length of the aggregate sentence, the court found "that the sentencing court appropriately found aggravating factors one, three, and nine," and expressly incorporated those findings in its own sentencing decision. (5T:23-22 to 24-3 to 11) The court noted only that these aggravating factors were "fully supported by the underlying record and … by the Appellate Division." (5T:24-12 to 18) The court did not address any of the mitigating factors argued by defense counsel

apart from mitigating factor fourteen, that Marquise was under the age of twenty-six at the time of the offense. (5T:24-19 to 23)

The court ran the robbery counts concurrent to one another but consecutive to the homicide counts based on the original sentencing court's Yarbough analysis. As a result, the court reduced Marquise's aggregate sentence to 45 years, while keeping his period of parole ineligibility effectively the same – reducing it from 46 years and nine months to 43 years and nine months. (5T:25-7 to 24)

LEGAL ARGUMENT

POINT I

THE RESENTENCING COURT'S FAILURE TO PROPERLY CONSIDER THE MILLER FACTORS DENIED MARQUISE HAWKINS DUE PROCESS AND RESULTED IN THE IMPOSITION OF AN AGGREGATE SENTENCE THAT WAS FIVE YEARS LONGER THAN THE ONE RECOMMENDED BY THE STATE. ACCORDINGLY, HE IS ENTITLED TO A NEW RESENTENCING. (3T; 4T)

Pursuant to our state's jurisprudence, juveniles who were sentenced to lengthy terms of imprisonment are entitled to a resentencing where their character and conduct are evaluated with the recognition that children are constitutionally different from adults. State v. Comer, 249 N.J. 359, 368-70, (2022); Zuber, 227 N.J. at 451. This analysis requires consideration of specific factors, identified by the United States Supreme Court, at each sentencing

determination, and an assessment about whether the juvenile is incapable of rehabilitation and deserving of a lifetime of incarceration.

Despite finding Marquise clearly capable of rehabilitation and applying Miller factor five, the court resentenced Marquise to an aggregate sentence of 45 years with a parole ineligibility period of 43 years and nine months – reducing his period of parole ineligibility by just three years and making him first eligible for release at the age of 60. The resentencing court failed to properly find and weigh the Miller factors, and it improperly adopted the original sentencing court's imposition of consecutive sentences without considering the Miller factors, the effect of consecutive sentences on Marquise's parole eligibility, or the overall fairness of the sentence. While the court reduced Marquise's aggregate sentence for the homicide count based on its finding of Miller factor five, it gave no explanation for why this mitigating factor was inapplicable to the robbery count. (5T:23:24-24 to 25-15) The court also failed to sentence Marquise as he stood before it. Instead of considering the aggravating and mitigating factors in light of the Miller factors, the court erroneously adopted the original sentencing court's findings from 2015 without considering the mitigating factors argued by defense counsel, which were amply supported by the record at resentencing.

Had the court properly evaluated the Miller factors, the aggravating and mitigating factors, and considerations relevant to the imposition of consecutive

sentences, it would have found that they all weigh strongly against the imposition of a sentence amounting to the practical equivalent of life without parole. Thus, the court should have imposed concurrent sentences on the robbery and homicide counts and sentenced Marquise to an aggregate term of 30 years with a 30-year period of parole ineligibility, as requested by defense counsel.

A. The Miller factors weigh strongly against the imposition of a lengthy sentence.

Under a series of landmark decisions, beginning with Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court held that the Eighth Amendment's prohibition on cruel and unusual punishment requires that children be treated differently than adults at sentencing. Most recently, the Court held that children may not receive a sentence of life without parole except in the rarest of cases where the juvenile offender is found to be incorrigible. Miller, 567 U.S. 460. This decision was made retroactive, requiring a resentencing for any juvenile offender serving a mandatory life-without-parole sentence for homicide. Montgomery v. Louisiana, 577 U.S. 190 (2016). In Zuber, our Supreme Court extended these protections under our state constitution, applying the requirements of Miller and Montgomery to lengthy, discretionary sentences imposed on a juvenile.

These cases were also founded on developments in psychology and cognitive neuroscience demonstrating fundamental differences between juvenile

and adult brains that led to the conclusion that "children are constitutionally different from adults for purposes of sentencing," and "less deserving of the most severe punishments." Miller, 567 U.S. at 471. As noted by our Supreme Court in Comer,

> "the law recognizes what we all know from life experience – that children are different from adults. Children lack maturity, can be impetuous, are more susceptible to pressure from others, and often fail to appreciate the long-term consequences of their actions … They are also more capable of change than adults."
>
> [Comer, 249 N.J. at 368 (citing Miller, 567 U.S. at 477; Graham, 560 U.S. at 68)].

These traits make juveniles' misconduct less morally reprehensible than that of adults. Roper, 543 U.S. at 570. Juveniles also have less ability to escape negative environments and are more susceptible to the negative influences of their surroundings. Id. at 569, 570. Additionally, "even a heinous crime" is rarely a sign that a juvenile has an "irretrievably depraved character." Id. at 570. Instead, the recklessness and impetuousness of youth tends to subside as an individual matures: "Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." Ibid.

Consequently, when a juvenile is "facing a very lengthy term of imprisonment" the sentencing judge must "take into account how children are different, and how those differences counsel against" imposing a severe

sentence. Zuber, 227 N.J. at 451 (internal quotations and citation omitted). Specifically, sentencing courts are now required to consider what are referred to as the "Miller factors":

> (1) the juvenile's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences";
>
> (2) the juvenile's "family and home environment";
>
> (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";
>
> (4) "the incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and
>
> (4) whether the circumstances suggest "a possibility of rehabilitation."
>
> [Miller, 567 U.S. at 477-78.]

These factors must be part of the court's decision-making process at multiple stages of the sentencing, including when determining the length of the sentence and whether to run sentences consecutively. Id. at 477. A proper assessment of the Miller factors reveals that Marquise epitomizes the juvenile offender envisioned by Miller, Zuber, and Comer, and that he is entitled to a new resentencing hearing and significant relief. U.S. Const. amend VIII, XIV; N.J. Const. art. I, ¶ 12.

i. The court failed to consider the impact of Marquise's youth on his participation in the offense, as required under Miller factor one.

Miller factor one clearly points to juveniles' inability to appreciate risks and consequences as a fully developed adult would. The factor requires courts to consider the "hallmark features" of youth – "among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Comer, 249 N.J. at 407 (citing Miller, 567 U.S. at 477). It "reflects the fact that teenagers – even intelligent ones – are not yet as mature, or as fully developed in their way of thinking, as adults." Ibid. Our Supreme Court has recognized that "a juvenile offender has no burden to produce evidence that his brain has not fully developed in order for the first factor to be considered in mitigation," noting that "[o]n rare occasions, the State might be able to present expert psychiatric evidence as proof that a particular juvenile offender possessed unusual maturity beyond his years." Ibid.

Here, the court did not contend that Marquise was any different from other juveniles in this respect, yet it simply refused to find this factor militated in favor of sentencing relief. Such a finding is not only illogical, but it is in contravention of the very case law upon which the remand order in this case was premised. At the resentencing hearing, Dr. Perrin testified that in adolescence, there is a "developmental mismatch" between the highly developed area of the brain responsible for emotional processing and the less developed area

responsible for cognitive control, and thus adolescents are more likely to react impulsively in emotionally heightened situations. (3T:35-6 to 20) Dr. Perrin noted that this mismatch peaks in late adolescence, around the age of seventeen, and corresponds to a greater likelihood of criminal behavior in that period. (3T: 36-19 to 37-16)

In its decision, the resentencing court acknowledged Dr. Perrin's opinion that at the time of the incident, Marquise was like other seventeen-year-olds in this respect. (3T:45-6 to 46-16, 59-1 to 60-3; 5T:18-3 to 16) While the court "accepted the validity of the psychology and psychiatric factors," it found that "Dr. Perrin's ultimate conclusion" regarding the applicability of Miller factor one "is based upon her general application of … this science to any young person frankly under the age of 30 and is not specifically based on the facts and circumstances of Marquise Hawkins' development." (5T:18-3 to 25) However, Marquise had no burden to produce evidence that his brain had not fully developed for the court to consider Miller factor one in mitigation, and the State did not produce the expert evidence of unusual maturity necessary to rebut the presumption that Marquise's brain development was comparable to that of other seventeen-year-olds. Thus, the court's refusal to consider Miller factor one in mitigation on the basis that Marquise did not present evidence of his individual brain development constituted an abuse of its discretion.

The court also rejected Miller factor one based on its finding that Marquise's role in the incident – shouting "get the one in the yellow jacket" from the car to his codefendants – was not characterized by the kind of impulsivity or impetuousness typical of adolescents. (5T:19-1 to 20-1) The court accepted the State's theory that "this was a conscious, thought-out decision, that it was not an impetuous act, but was calculated to make certain that … Hawkins was not apprehended for the robberies." (5T:15-6 to 9, 16-8 to 11) The court found that Marquise "appreciated the consequences of being apprehended and so to avoid same … order[ed] the co-defendants to stop the fleeing victim," and that he understood the "significant risk that death could or would result from his actions." (5T:19-23 to 20-1) In support of this conclusion, the court noted that Marquise told his codefendants to stop the victim from fleeing "after the robberies were completed." (5T:19-11 to 22) (emphasis own) However, both the court's finding that Marquise only shouted to his codefendants *after* the robberies were completed and its conclusion that this was a calculated act rather than an impulsive one are unsupported by the record.

It is evident from the record that both the flight of the victim wearing the yellow jacket and the subsequent shooting occurred during the robberies – not after they were completed. In the immediate aftermath of the crime, the robbery victims told police that two armed individuals got out of a car and told them to

empty their pockets. Two of the victims – White and Arrington – emptied their pockets.[8] (PSR 3) Marquise shouted to his codefendants from the parked car to "get the guy in the yellow jacket" as Nesbeth, who was wearing the yellow jacket, tried to get away. (5T:10-16 to 19) The shooting that resulted in Williams's death occurred during the robberies.

Furthermore, there is no evidence in the record to support the court's finding that Marquise's act of shouting out to his codefendants was a considered or premeditated decision rather than an impulsive one. Dr. Perrin testified that while Marquise's decision to participate in the robbery was not impulsive, his act of shouting to his codefendants from the car probably was because it occurred during precisely the type of emotionally heightened situation in which teenagers are most likely to behave impulsively and least likely to consider the consequences of their actions. (3T:45-17 to 46-16, 58-14 to 24) Dr. Perrin further noted that Marquise's behavior was most likely impulsive based on his lack of any prior history of antisocial behavior or indicators of antisocial personality disorder. (3T:59-1 to 60-3) There is no credible evidence on the record that Marquise's act of shouting to his codefendants was more than a split-second

[8] The summary of the police report in the PSR refers to robbery victims Davon Arrington and Naeem White by their initials. (PSR 3) (Da 13, 14)

reaction to a sudden event – Nesbeth trying to flee – that occurred during an emotionally heightened situation and in the presence of peers.

Not only was the court's rejection of Miller factor one unsupported by the evidence on the record, but it also reflected its fundamental failure to account for the ways in which our Courts have held that "children are different." See Comer, 249 N.J. at 384-385 (holding teenagers "are less mature and responsible than adults…The disparity, often result[s] in impetuous and ill-considered actions and decisions.") Despite necessarily agreeing that Marquise was not mature and suffered from the developmental incapacities of youth, the court discounted all of what the science and the high Courts have told us about this aspect of youth based on its determination that Marquise intentionally shouted out to his codefendants, knowing that doing so was potentially deadly. The court's reasoning misses the point of Miller factor one. It is not that teenagers cannot intellectually understand the nature of their actions or the risks that they carry, but that they are more likely to make risky, ill-considered, and impulsive decisions – especially in the presence of peers. (5T:37-17 to 22) A failure to understand the nature of the crime would, of course, raise the question of capacity and the ability to even be held legally culpable. What our caselaw recognizes is that while teenagers are responsible for their actions, their immaturity makes them less culpable than adults. Comer, 249 N.J. at 399; id. at 403 (warning against the "unacceptable likelihood…that the brutal nature of an

offense can overpower mitigating arguments based on youth.") (quoting Roper, 543 U.S. at 573) (internal quotations omitted). The resentencing court should have applied and given heavy weight to Miller factor one because Marquise was no different from other teenagers in this respect.

ii. The court failed to consider how Marquise's conduct was affected by peer pressure – including his adult co-defendant's participation in the offense – as required under Miller factor three.

Miller factor three requires a sentencing court to consider "[t]he circumstances of the offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him," Miller, 567 U.S. at 477. One way in which adolescents differ from adults is the outsized influence that peer pressure has on their behavior – particularly as it concerns risk taking. (Da 95) Based on developmental science research, the United States Supreme Court has repeatedly heeded that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569; accord Miller, 567 U.S. at 471; Graham, 560 U.S. at 569-70. During the resentencing hearing, Dr. Perrin testified that research demonstrates that the mere knowledge that a peer is present or watching is enough to make it more likely that an adolescent will engage in risky behaviors. (3T:51-3 to 53-18) She further noted that an

adolescent is more likely to engage in such behavior to gain acceptance from an older person they respect. (3T:56-21 to 57-2)

Here, the court failed to consider the ample evidence presented at the hearing that Marquise's participation in the incident and his conduct were influenced by peer pressures. Dr. Perrin found that Marquise's experiences with "unreliable, inconsistent parental figures left him with an exceptionally strong desire to assimilate and to be accepted." (3T:50-18 to 51-7) (Da 95) She testified that Marquise's desire for peer acceptance influenced his decision to participate in the robbery, and that the presence of those peers during the robbery made him more likely to act impulsively. (3T:58-4 to 24; 4T:54-1 to 5) She found the participation of Marquise's twenty-year-old codefendant, Haroon Perry, particularly significant. Not only was Perry older, but "he was considered to be revered by his community," "commanded authority", and had a prior criminal record – much like Marquise's absent biological father, who Marquise and his friends looked up to. (3T:56-21 to 57-25, 30-23 to 31-8) Marquise felt that Perry was "someone who would look out for [him], someone who was showing an interest in [him]." (Da 122)

In rejecting Miller factor three, the resentencing court did not discuss the copious evidence that the presence of Marquise's peers affected his participation in the offense, nor did the court mention Perry. Instead, its rejection of the factor was

based on its purely speculative finding that "it was not … until the statement, order, or command" given by Marquise, who had just turned seventeen,[9] "that the youngest defendant," Brogsdale, who was still sixteen, "arguably succumbed to the pressure exerted by this defendant to stop the fleeing victim that shots were fired." (5T:21-16 to 22-6) The fact that Miller factor three could also apply to Marquise's *codefendants* does not provide a basis for the court to conclude that the factor does not apply to Marquise, and is entirely inappropriate and irrelevant under the Miller analysis, which requires resentencing courts to consider the youth mitigating factors in relation to the juvenile being resentenced. See State v. Case, 220 N.J. 49, 64 (2014) (holding sentencing court's findings must be supported by credible evidence in the record, and speculation must not infect sentencing process.)

Furthermore, there was no basis in the record for the court's conclusions that Marquise directed or ordered the shooting, that his codefendants had no intention of shooting prior to hearing him shout from the car, or that he was in any position of authority over his codefendants. (See 5T:22-2 to 6) (adopting original sentencing court's finding that codefendants lacked intention to shoot anyone until Marquise gave "order"). When the robbery victims were

[9] Marquise was 17 years and one month old at the time of the incident. (5T:14-24 to 15-1)

interviewed at the scene of the crime, they told the police that the two armed codefendants immediately told them to empty their pockets, and that they would get shot if they ran. (PSR 3) Despite the court's acceptance of the State's frequently repeated assertion that Marquise ordered or directed the shooting, there was no substantial evidence that the shooting was solely the result of Marquise's statement. Due to the copious evidence that Marquise's participation in the offense was influenced by the presence of his codefendants, Miller factor three should have been found and weighed heavily in his favor at resentencing.

iii. The court failed to properly consider the effect of Marquise's youth on his ability to deal with police and prosecutors and to assist in his own defense, as required under Miller factor four.

The disadvantages of adolescence had clear and devastating consequences for Marquise's ability to navigate the criminal legal system – beginning with his decision to make a statement to the police and ending with his inability to assist in his own defense. Yet the resentencing court inexplicably refused to consider Miller factor four, noting only that Marquise's "failure to comprehend the process and/or trust his attorney is not unique or necessarily based upon his age." (5T:22-7 to 14) The court's failure to consider the specific ways in which Marquise's youth and attendant immaturity affected his ability to navigate the criminal justice system at every stage of the proceedings was an abuse of its

discretion – particularly where the court itself acknowledged that Marquise failed to "comprehend the process." (5T:22-7 to 14)

The United States Supreme Court has long recognized that "[t]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." Graham, 560 U.S. at 78. Miller factor four requires courts to consider whether a juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," Miller, 567 U.S. at 477-78. By virtue of their immaturity, juveniles are less likely to grasp the complexities of the legal system, less trusting of authority figures, and unable to appreciate the long-term consequences of their decisions. Graham, 560 U.S. at 78. They are also "less likely than adults to work effectively with their lawyers to aid in their defense." Ibid.; (See 3T:65-8 to 18) (Dr. Perrin's testimony that adolescents tend to trust peers more than adults, undermining their ability to work with their attorneys). At the resentencing hearing, Dr. Perrin testified that unlike adults, adolescents are more likely to be motivated by rewards than by the potential risks or long-term consequences of their actions – affecting their ability to participate in plea negotiations. (3T:62-23 to 64-15)

The resentencing court was required to consider the ways in which Marquise's immaturity and inexperience impaired his ability to deal with police and prosecutors and prevented him from assisting his attorney in his defense. Prior to the present charges, Marquise had almost no contact with the criminal justice system. It is evident from the record that at seventeen years old, he did not fully understand his Fifth Amendment rights or the risks of making a statement to the police. One week after the incident, Marquise was picked up from school by police officers, together with his mother, Stefanee, who was crying. (4T:60-1 to 16) Stefanee was present during his interrogation and encouraged him to give a statement to the police, who had already questioned his sister, Marquia. (3T:61-22 to 62-22; 4T:60-4 to 16) (See Da 273-74) (Trial attorney's affidavit noting police had approached Stefanee about possible connection between Marquia and stolen cell phone prior to interrogation). Stefanee was concerned that Marquia, who Marquise had confided in, would be implicated in the offense and "wanted him to clear his sister's name." (3T:62-11 to 22) Stefanee evidently believed that if Marquise cooperated with law enforcement by giving a statement, he would be able come home with her from the police station. (Da 269-70) Marquise, who was under the impression that he would not be charged in the homicide because he was unarmed and never left the car, subsequently confessed. (Da 88)

Marquise was unable to participate in his own defense because he did not have an accurate understanding of the plea negotiations in his case and had difficulty understanding the complicated concepts of accomplice liability and felony murder. (3T:64-16 to 65-7) (Da 273) Without understanding these concepts, Marquise could not properly assess his own sentencing exposure or fully grasp the risks of proceeding to trial. Even at the time of his resentencing many years later, Marquise's recollection was that the State had presented him with a plea offer of ten-years of incarceration, while in reality, the State did not offer him a plea bargain at all. (4T:88-23 to 25; 5T:65-1 to 7) (Da 273) In his affidavit, Marquise's trial attorney, Johnnie Mask, explained that he never made an official offer to the State because Marquise – who had difficulty understanding the charges and sentencing exposure that he faced – declined to consider cooperating with the State. (Da 272-73) Had the resentencing court properly evaluated Miller factor four, it would have considered the effect that Marquise's youth had on his ability to understand and participate in plea negotiations with the State. Indeed, Marquise's adult co-defendant who had more experience with the criminal justice system was sentenced to a term of 17 years of incarceration with a 14-year period of parole ineligibility as the result of a plea bargain amending his original murder charges to aggravated manslaughter. (Da 75-79)

Additionally, Marquise did not share much information about the incident with his attorney, and "was always conscious of what his codefendants might say, think or do." (Da 272) Dr. Perrin testified that in typical adolescent fashion, instead of turning to his attorney for legal advice, Marquise turned to his peers – the other inmates he was incarcerated with. (3T:65-8 to 24, 66-8 to 67-6) Marquise's ability to participate in his own defense was further hampered by the depression that he experienced after being transferred from his juvenile detention facility to the adult jail, where he was placed on suicide watch. (3T:65-19 to 66-7, 67-25 to 12; 4T:101-20 to 102-5) (Da 89)

In light of all the evidence presented to the resentencing court regarding the impact of Marquise's youth on his ability to navigate the criminal legal system, the court should have found and assigned considerable weight to Miller factor four.

B. The resentencing court did not conduct any analysis when imposing consecutive sentences. Had it done so, it would have imposed concurrent sentences.

Instead of independently assessing whether to run the sentences for Marquise's homicide and robbery convictions consecutively or concurrently to one another, the resentencing court simply incorporated the original sentencing court's imposition of consecutive sentences into its own findings by reference. (See 5T:25-7 to 15) (court's finding it was "satisfied that the sentencing court

properly considered and articulated the applicable Yarbough factors for the imposition of a consecutive sentence"); See Yarbough, 100 N.J. at 643-44. The court's failure to consider the Yarbough and Miller factors, as well as the overall fairness of the sentence, resulted in its reimposition of an extremely lengthy sentence with a virtually unchanged period of parole ineligibility. See ibid.; Miller, 567 U.S. at 477-78; Torres, 246 N.J. at 268. Had the resentencing court properly assessed whether to run the sentences concurrently or, it would have imposed concurrent sentences – as even the State conceded was appropriate. Instead, the court's reimposition of consecutive sentences resulted in an aggregate sentence that was five years longer than even the State's sentencing recommendation. (4T:130-12 to 131-5)

In Zuber, our Supreme Court held that "[t]he focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence," including any lengthy period of parole ineligibility resulting from the imposition of consecutive sentences. Zuber, 227 N.J. at 447. The Court held that "judges should exercise a heightened level of care" and "must consider the Miller factors along with the other traditional concerns," namely the Yarbough factors, before imposing consecutive sentences. Id. at 429-30, 447. Moreover, "the reasons for imposing either consecutive or concurrent sentences should be separately stated in the sentencing decision[.]" Yarbough, 100 N.J. at 633. "An

explicit statement, explaining the overall fairness of a sentence imposed on a defendant … is essential to a proper Yarbough sentencing assessment." Torres, 246 N.J. at 268; see id. at 274 (holding "age is a fact that can and should be in the matrix of information assessed by a sentencing court, even in the deliberation over whether consecutive sentences are a fair and appropriate punishment – proportional for the individual being sentenced.")

The resentencing court's failure to provide any reasoning regarding its imposition of consecutive sentences, let alone an explanation of the overall fairness of the sentence, requires resentencing. See Torres, 246 N.J. at 268; Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:44–5 at 1134 (2012) ("In deciding whether consecutive sentences are appropriate under the Yarbough criteria, an appellate court must consider the reasons the trial court gives; in the absence of expressed reasons a remand is ordinarily necessary.") Here, the court failed to do any Yarbough analysis in imposing consecutive sentences for the robbery and homicide convictions, and it did not explain the overall fairness of the sentence. Nor did the court consider the Miller factors as part of its decision to impose consecutive sentences, let alone "exercise a heightened level of care" in doing so. See Zuber, 227 N.J. at 429-30. Thus, the case must be remanded for resentencing.

Application of the Yarbough factors clearly indicates that the homicide and the robberies were part of a single incident, warranting the imposition of concurrent sentences. Under Yarbough, sentencing judges must consider the following factors to determine whether to impose consecutive or concurrent sentences: (a) whether the crimes and their objectives were independent of one another; (b) whether the crimes involved separate acts of violence or threats of violence; (c) whether the crimes were committed at different times or separate places, rather than being committed so closely in time as to indicate a single period of aberrant behavior; (d) whether the crimes involved multiple victims; and (e) whether the convictions for which the sentences are to be imposed are numerous. Yarbough, 100 N.J. at 643-44. Among the most important factors in determining whether sentences are to be concurrent or consecutive is whether the offenses were "predominantly independent of each other." See State v. Lester, 271 N.J. Super. 289, 293 (App. Div. 1994) (holding "[w]here separate crimes grow out of the same series of events or the same factual nexus, consecutive sentences are not imposed.")

Here, the robberies and the homicide were not "predominantly independent of each other" where the shooting that killed Williams began when Nesbeth, the individual in the yellow jacket, attempted to flee the ongoing robbery. (5T:10-16 to 19) (PSR 3) Because the homicide was committed very

close in time to the robbery and at the same location, the entire incident constituted a single period of aberrant behavior, weighing heavily in favor of concurrent sentences. Marquise's felony murder conviction indicated that the jury had found that the felony and the killing were closely connected in time, place, and causal connection, making up parts of one continuous transaction. See State v. Spencer, 319 N.J. Super. 284, 308 (App. Div. 1999).

Not only did the court fail to consider the fundamental fairness of imposing consecutive sentences on Marquise, but the overall sentence it imposed – 45 years with a 43-year period of parole ineligibility – was five years longer than the 40-year sentence recommended by the State, and carried a lengthier period of parole ineligibility. (4T:130-12 to 22; 5T:24-24 to 25-6) Had the court properly imposed concurrent sentences – as even the State conceded was appropriate – it would have resentenced Marquise to 30 years with a 30-year period of parole ineligibility. (5T:24-24 to 25-6)

C. The resentencing court improperly adopted the original aggravating factors based on the reasons provided by the 2015 sentencing court, failed to address the mitigating factors raised by Marquise altogether, and failed to order a new presentence report.

The resentencing court fundamentally misunderstood the law, as well as this Court's instructions for remand, when it found that because "[t]he Appellate Division … determined that the sentencing judge did take into consideration Hawkins' age as well as any lack of any significant previous criminal and

juvenile history," there was "no basis to second guess the court's findings with respect to the statutory aggravating and mitigating factors." (5T:13-21 to 14-3) (internal citations omitted) The resentencing court simply adopted the original sentencing court's finding and weighing of the aggravating factors without considering Marquise as he stood before the court, and it did not weigh those factors in harmony with the Miller factors. The court neglected to order a new presentence report (PSR) – though the resentencing took place nearly eight years after the original sentencing. And it failed to consider the mitigating factors argued at Marquise's resentencing entirely.

All sentencing decisions must involve a qualitative analysis, wherein the court states its reasons for finding and weighing aggravating and mitigating factors. See Case, 220 N.J. at 65. When the sentencing court "fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a qualitative analysis, or provides little insight into the sentencing decision, then the deferential standard [of review] will not apply" on appeal. Ibid. (internal quotations omitted). In State v. Randolph, 210 N.J. 330, 333 (2012), our Supreme Court "held that, upon remand for resentencing a trial court must engage in a de novo review of the aggravating and mitigating factors applicable to the defendant at the time of his resentencing." State v. Jaffe, 220 N.J. 114, 122 (2014); see id. at 124-25 (holding resentencing court must consider

defendant's post-offense efforts at rehabilitation). A resentencing court must assess the defendant as he stands before the court on that day, and provide him with "the same full review and explanation of the finding and weighing of aggravating and mitigating factors" to which he is entitled at any sentencing hearing. Randolph, 210 N.J. at 349. In order to do so, the court must order a new PSR and duly consider information therein regarding the life that a defendant has led between his original sentencing and resentencing. Id. at 346 (quoting N.J.S.A. 2C:44-6(a), (b)). Similarly, at a Zuber resentencing, "judges must do an individualized assessment of the juvenile about to be sentenced – with the principles of Graham and Miller in mind" and "apply Miller's template" when considering the "relevant aggravating and mitigating factors." 227 N.J. at 450.

Had the resentencing court properly considered Marquise as he stood before it and assessed the statutory sentencing factors in harmony with the Miller factors, it would have found that the mitigating factors far outweighed the aggravating factors.

i. Had the resentencing court properly assessed the aggravating factors in light of the evidence presented at resentencing and the Miller factors, it would have given them minimal weight at best.

Here, the resentencing court simply adopted the same aggravating factors found by the original sentencing court based on that court's reasoning, without considering the Miller factors or Marquise as he stood before the court on the

day of resentencing. Had the court properly assessed the aggravating factors, it would have assigned minimal, if any, weight to aggravating factors three, N.J.S.A. 2C:44-1a(3) (the risk of reoffense), nine, N.J.S.A. 2C:44-1a(9) (the need to deter defendant and others), or one, N.J.S.A. 2C:44-1a(1) (the nature and circumstances of the offense).

Had the resentencing court properly considered Marquise's post-offense conduct and rehabilitation, it would not have found aggravating factor three or would have given it minimal weight. The 2015 sentencing court found aggravating factor three based on Marquise's decision not allocute at his sentencing and the fact that he did not accept responsibility for his actions in his presentence interview with probation. (2T:17-19 to 25) (PSR 3) It is evident that by the time of Marquise's resentencing, he had fully accepted responsibility for his actions and expressed remorse on multiple occasions, both in and out of the courtroom. (4T:60-17 to 61-14, 88-4 to 90-15) (Da 97-98) During his resentencing, Marquise took the stand, telling the court and the victim's family that his act of shouting out to his codefendants made him "just as responsible" for the victim's death as if he had been one of the shooters, and apologizing directly to the victim's family– telling them "[n]ot a day goes by that I don't think about your son." (4T:88-22 to 89-16) When the victim's mother took the

stand, she directly addressed Marquise in turn, telling him that she appreciated and "accept[ed] [his] apology through God." (4T:91-16 to 19).

Not only did the resentencing court fail to find that Marquise's evidently genuine expression of remorse demonstrated his rehabilitation and growth since his 2015 sentencing, but it inexplicably adopted the 2015 sentencing court's finding and weighing of aggravating factor three – which was largely based on Marquise not accepting responsibility in his 2015 presentence interview. (See 5T:22-24 to 23-4) (noting "it does appear to the court the defendant does not truly acknowledge his full culpability for that death, as it was not an accident…"); (PSR 3) The court's finding that Marquise's risk of reoffense remained the same eight years after his original sentencing based on a lack of remorse was unsupported by the record at resentencing, particularly given the court's own findings that Marquise repeatedly expressed remorse for his actions and that his capacity for rehabilitation "is abundantly clear." (5T:22-15 to 20, 23-14 to 21) The resentencing court was required to sentence Marquise as he stood before it, and to that effect, it was required to order a new PSR. The court's weighing of aggravating factor three is contrary to our Supreme Court's recognition that juveniles are not fully developed and not only less morally culpable for their actions, but uniquely capable and likely to demonstrate rehabilitation. Finally, the court's assessment of the factor was not supported by Marquise's "very limited" prior

juvenile history, consisting of a single dismissed juvenile disposition for shoplifting. (5T:24-12 to 18); See State v. Shoats, 339 N.J. Super. 359, 360-62 (App. Div. 2001) (holding aggravating factor three did not apply to defendant who had one minor juvenile encounter with law); Case, 220 N.J. at 67 (where defendant does not have prior criminal record, court must base its finding of the risk factor on "competent, credible evidence in the record.")

Likewise, the court did not reconsider the weight that the 2015 sentencing court assigned to aggravating factor nine in light of the Miller factors and the evidence presented at resentencing. Our state's jurisprudence makes plain that general deterrence unrelated to specific deterrence should hold little weight in sentencing. State v. Jarbath, 114 N.J. 394 (1989). At the original sentencing, the court's basis for finding the factor was solely based on general deterrence, and the court noted it was applying the factor "notwithstanding" Marquise's "limited criminal record." (2T:18-12 to 19) As for any possible specific deterrence, we know from Roper, Miller, Zuber, and their progeny that deterrence simply is not as significant a factor in sentencing of young actors. Our Supreme Court has found that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence. They are less likely to take possible punishment into account when making impulsive, ill-considered decisions that stem from immaturity. Comer, 249 N.J. at 399 (internal citations omitted).

The resentencing court, which was required to consider the aggravating factors in light of the Miller factors, could not solely rely on the findings of the initial sentencing court concerning deterrence. That finding was made approximately eight years earlier without the direction subsequently provided by our federal and state courts about the lack of deterrent value in long sentences for young people. Furthermore, the court failed to assess the need for any further specific deterrence in light of the copious evidence of Marquise's maturation and rehabilitation presented at resentencing.

The court was also required to address what weight, if any, to give aggravating factor one in light of the Miller factors. Had the court properly weighed the nature and circumstances of the crime with regard to the attributes of youth that may have contributed to its commission, it would have assigned the factor little to no weight based on the impulsive nature of Marquise's conduct. (See Section I.A.i. for detailed discussion of Miller factor one) Instead, the resentencing court found aggravating factor one based on the original sentencing court's conclusion that "only as a result of [Marquise's] order … to his codefendants was Mr. Khalil Williams shot and killed," double-counting the elements of knowing or purposeful murder by considering the very same facts that formed the basis of Marquise's conviction – his act of shouting out to his codefendants and Williams's resulting death – in aggravation of his sentence.

(5T:17-1 to 9); See State v. Carey, 168 N.J. 413, 424 (2001) ("It is well-settled that where the death of an individual is an element of the offense, that fact cannot be used as an aggravating factor for sentencing purposes"); cf. State v. Fuentes, 217 N.J. 57, 76 (2014) (finding of aggravating factor one in aggravated manslaughter case "[m]ust be based on factors other than the death of the victim and … finding that the defendant has acted with extreme indifference to human life"). Had the court properly considered only those facts that rendered Marquise's offense more severe than other homicides of its type, and had it considered aggravating factor one in harmony with the Miller factors, it would have given it little to no weight.

Had the court properly considered Marquise as he stood on the day of resentencing and considered the Miller factors in its assessment of the aggravating factors, it would have given those factors minimal weight, if any.

ii. The resentencing court failed to address the mitigating factors requested by Marquise, which were amply supported by the record.

"Mitigating factors that are called to the court's attention should not be ignored, and when amply based in the record ... they must be found." Case, 220 N.J. at 64 (internal citations omitted). "Remand may be necessary when 'a sentencing court failed to find mitigating factors that clearly were supported by the record.'" State v. Rivera, 249 N.J. 285, 300 (2021) (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)).

Here, defense counsel argued for the application of a number of mitigating factors, both at Marquise's original sentencing and at his resentencing. (2T:3-17 to 4-25; 14-17 to 25); (Da 186-87) However, the court believed that it was only required to consider mitigating factor fourteen, which did not exist at the time of the original sentencing, and to which it assigned "great weight." (5T:24-19 to 23) This was a fundamental misunderstanding of what a Zuber resentencing requires. Had the court made the required findings regarding the mitigating factors, it would have been forced to address the evidence in the record at resentencing clearly supporting the existence of mitigating factors seven, ("The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time"), eight, 2C:44-1b(8) ("defendant's conduct was the result of circumstances unlikely to recur"), nine, 2C:44-1b(9) ("The character and attitude of the defendant indicate that he is unlikely to commit another offense"), and thirteen, 2C:44-1b(13) (conduct of youthful defendant substantially influenced by more mature co-defendant).

The resentencing court inexplicably refused to find mitigating factor seven, despite finding that Marquise's prior history was "very limited," consisting of one juvenile disposition that was first deferred, then dismissed. (5T:24-12 to 18); (Da 187); (PSR 5) The court's rejection of mitigating factor seven based on a single

dismissed juvenile charge was error. See State v. K.S., 220 N.J. 190, 199 (2015) (holding "prior dismissed charges may not be considered for any purpose.")

The court should have found mitigating factors eight and nine based on its own findings regarding Marquise's "abundantly clear" capacity for rehabilitation and our Supreme Court's recognition that juveniles are uniquely capable of rehabilitation. (5T:23-14 to 21) In Comer, our Supreme Court recognized that research on the "age-crime curve" shows that "more than 90% of all juvenile offenders desist from crime by their mid-20s." 249 N.J. at 399-400 (citing Laurence Steinberg, The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability, 14 Neuroscience 513, 516 (2013)). Together with the age-crime curve, Marquise's strong record of rehabilitation reveals that, as a now twenty-nine-year-old, his risk of recidivism has fallen precipitously – supporting the application of mitigating factor eight. Indeed, at the time of resentencing, Marquise had zero prison disciplinary infractions since entering adulthood and the state prison system. (5T:23-16 to 19) (Da 225) Likewise, the ample evidence of Marquise's rehabilitation, his acceptance of responsibility, and his expression of remorse at resentencing strongly support the application of mitigating factor nine. (Da 186)

Finally, as argued by Marquise, the resentencing court should have found mitigating factor thirteen for many of the same reasons that it should have applied Miller factor three. (Da 187) Ample evidence was presented at the resentencing

hearing that Marquise's participation in the offense was substantially influenced by his adult co-defendant, Haroon Perry. Marquise looked up to Perry, who was respected in the community and had a criminal history, similarly to Marquise's absent father. (3T:57-3 to 25) Furthermore, there was substantial evidence on the record that Perry drove Marquise and his other co-defendant to the scene of the incident and that he was one of the shooters. (Da 35, 122)

The trial court's failure to address the mitigating factors raised by Marquise – let alone to consider them in light of the Miller factors – requires resentencing.

D. Despite finding Marquise clearly capable of rehabilitation and applying Miller factor five, the court once more imposed an extremely lengthy sentence with a nearly identical period of parole ineligibility.

The purpose of Zuber resentencing hearings is to give juvenile offenders who were sentenced to the practical equivalent of life without parole "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Zuber, 227 N.J. at 452 (quoting Graham, 560 U.S. at 75). A sentencing judge does not discharge his or her duty under Miller by simply considering the youth factors. Montgomery, 577 U.S. at 734 (observing that Miller "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole"). Zuber requires sentencing courts to consider the Miller factors at every stage of sentencing, including as part of the

evaluation of the statutory sentencing factors and the decision to impose concurrent or consecutive sentences. Zuber, 227 N.J. at 447. The Miller analysis is not complete until the judge "addresse[s] the question Miller and Montgomery require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility'" such as to warrant a sentence that is the practical equivalent of life without parole. Tatum v. Arizona, 137 S.Ct. 11, 12 (2016) (Sotomayor, J., concurring) (quoting Montgomery, 136 S.Ct. at 735); See Zuber, 227 N.J. at 440 (citing Miller, 567 U.S. at 479).

As the resentencing court acknowledged, Marquise was originally sentenced to the practical equivalent of life without parole. (5T:4-25 to 5-13) The court found that "Miller factor five is clearly supported by the record made by the defense," noting Marquise's excellent prison disciplinary record and participation in "all the rehabilitative services currently available to him." (5T:23-14 to 19) The court further determined that "[i]t is abundantly clear that the defendant is capable of rehabilitation in this Court's opinion." (5T:23-19 to 21) Yet despite its unequivocal finding that Marquise is capable of rehabilitation, the court declined to meaningfully reduce his sentence. The court failed to apply Miller factor five to Marquise's sentence on the robbery count and imposed consecutive sentences for the homicide and robbery counts, resulting in a period

of parole ineligibility that was nearly identical to one imposed under Marquise's original sentence. (5T:24-24 to 25-15) The real-time impact of the resentencing was a reduction of Marquise's parole ineligibility term by three years. This superficial change in Marquise's sentence bears no relation to the question at hand, or even to the court's own findings. The court found that Marquise could not be characterized as one of the rarest of children whose crimes reflect irreparable corruption warranting decades of incarceration. Therefore, it was required to give effect to its finding that Marquise was capable of rehabilitation by imposing a new sentence that would afford him a meaningful opportunity to obtain release. See Zuber, 227 N.J. at 452 (quoting Graham, 560 U.S. at 75).

CONCLUSION

For the reasons set forth herein, Marquise Hawkins's sentence must be vacated and remanded for a new resentencing hearing.

Respectfully Submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: s/ Nadine Kronis
NADINE KRONIS
Assistant Deputy Public Defender
ID No. 404802022

Dated: June 30, 2024

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Respondent	:	
	:	DOCKET NO. A-2804-22T5
v.	:	
MARQUISE HAWKINS,	:	CRIMINAL ACTION
Defendant-Appellant.	:	On Appeal from a Judgment of Conviction (Re-Sentencing), entered in the Superior Court of New Jersey, Law Division, Essex County.
		Sat Below: Hon. Carolyn E. Wright, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

THEODORE N. STEPHENS II
ESSEX COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT
VETERANS COURTHOUSE
NEWARK, NEW JERSEY 07102
(973) 621-4700 - Appellate@njecpo.org

Frank J. Ducoat
Attorney No. 000322007
Deputy Chief Assistant Prosecutor
Appellate Section

Of Counsel and on the Brief

e-filed: October 11, 2024

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Preliminary Statement

This case returns to this Court after it remanded for reconsideration of defendant's aggregate sentence of 55 years with an almost 47-year period of parole ineligibility. This Court affirmed the sentencing court's imposition of consecutive sentences for murder and robbery, and its findings regarding aggravating and mitigating factors, but concluded that the aggregate sentence had to be revisited given recent changes in the law governing the sentencing of juvenile offenders.

On resentencing, the court held a two-day hearing at which it heard from defendant's neuropsychologist, defendant's family, defendant's counsel, and defendant himself. After considering the record before her in light of the governing case law and the new mitigating factor for juvenile offenders, the judge imposed a new sentence, one in which defendant will be parole eligible four years earlier than he was on the sentence originally imposed.

To be sure, defendant has still received a long sentence, one he is no doubt disappointed with. But this Court must remember a 16-year-old boy is dead as a direct result of defendant's order to kill him. The issues raised in defendant's brief were considered and weighed by the sentencing judge, and her decision is entitled to this Court's deference. This Court should therefore affirm.

Counterstatement of Procedural History

For purposes of this appeal, the State accepts defendant Marquise Hawkins' Statement of Procedural History, see (Db2-4),[1] with one clarification.

Defendant's original aggregate sentence was 55 years pursuant to NERA,[2] i.e., with an 85% period of parole ineligibility: 40 years for the murder of 16-year-old Khalil Williams (count 8), and a consecutive sentence of 15 years for robbery (count 2). (Da21-24; Da34). His total period of parole ineligibility for this sentence was 46 years and 9 months.

Defendant's new sentence is 45 years with a 42-year-and-9-month period of parole ineligibility based on the following calculation: 30 years with a 30-year period of parole ineligibility for the murder, and 15 years with an 85% (12.75 years) period of parole ineligibility for the robbery. (Da29-32; 5T24-24 to 28-18). Overall, defendant's new sentence is 10 years shorter, and his parole-ineligibility period has been reduced by 4 years.

[1] The State also adopts defendant's transcript references. See (Db2 n. 1).
[2] No Early Release Act. See N.J.S.A. 2C:43-7.2.

Counterstatement of Facts

Trial

Defendant has not provided all of the trial transcripts in support of his appeal of his re-sentence. See (Db2 n. 1). His attempt on appeal to present a one-sided story of this case, focusing on himself and not his victims or his co-defendants whose crimes he directed, is consistent with what the resentencing judge characterized as defendant's continued failure throughout this case to "truly acknowledge his full culpability for" the 16-year-old victim's death. (5T22-15 to 23-1).

On direct appeal, this Court summarized the facts underlying defendant's convictions in this way, which will suffice for purposes of the present appeal:

> On September 17, 2012, defendant and his co-defendants were driving through Irvington looking for someone to rob when they saw a group of boys "coming down Orange Ave[nue)." After parking their car "around the corner," [co-defendants] Brogsdale and Perry robbed the four boys at gunpoint while defendant waited in the back seat of the car. When one of the victims attempted to flee, defendant yelled to his co-defendants to "get the one in the yellow coat." Brogsdale and Perry then fired their weapons, and defendant witnessed one of the boys "fall on the ground" before they drove off. The victim was sixteen-year-old Williams, who was later pronounced dead as the result of a gunshot wound to his back.
>
> Cash and two cell phones were taken from the robbery victims. Defendant kept one of the phones, and when he returned to his Newark home he "put the phone in [his] top drawer…."

> Upon suspecting the police might be tracking the stolen phone, defendant hid it in the backyard of a nearby home.
>
> Detective Kevin Green of the Essex County Prosecutor's Office was assigned to investigate the shooting. Before interviewing defendant, Green obtained permission from defendant's mother, Stephanie Hawkins, who accompanied Green to pick defendant up from school after police first questioned his sister about the stolen phone. Defendant, his mother, and Green then proceeded to an interview room at the Essex County Prosecutor's Office. Both defendant and his mother read and signed a form waiving defendant's Miranda[3] rights before defendant was questioned by Green.
>
> In his recorded statement, defendant confessed that he and his accomplices planned to "go robbing" and rode around for approximately six hours before encountering the group of boys on Orange Avenue. Defendant remained in the car while his two accomplices, with guns, robbed the four boys. When one of the victims attempted to run, defendant stuck his head out the car and yelled: "Get the one in the yellow coat." One of defendant's accomplices then began shooting at the victim in yellow. Defendant admitted receiving a cell phone that was taken from one of the victims, and he subsequently led police to the location where it was hidden. [(Da35-36).]

A jury ultimately convicted defendant of every charged count, with the exception of one of the two counts of unlawful possession of a weapon. (Da13-16, 17-20, 34, 42).

Direct Appeal

On direct appeal, this Court affirmed defendant's convictions but vacated his aggregate 55-year NERA sentence. Importantly, however, this

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Court did not accept every argument defendant made against his sentence, and vacated the sentence for the very narrow reason that the sentencing court did not adequately consider his youth in conjunction with recent case law[4] when imposing the aggregate sentence.

First, this Court found that consecutive sentences were appropriate in this case. (Da57-60). While defendant argued that "'the homicide was inextricably intertwined with the robber[ies]' and that these crimes were committed so closely in time, and at the same location, as to 'indicate a single period of aberrant behavior[,]'" this Court disagreed, (Da57) concluding that,

> as defendant candidly concedes, the crimes involved multiple victims, [Yarbough[5]] factor (3)(c), and "separate acts of violence or threats of violence," factor 3(b), in that four victims were robbed at gunpoint, and one was fatally shot. Also, given the multiple victims of the robbery, the homicide, and the unlawful use of weapons, the convictions were necessarily "numerous," factor 3(e). Factor 3(a) is also implicated because although the crimes were committed close in place and time, the objective of the robbery, to obtain the four victims' property, was independent of the purpose behind defendant's homicide conviction, which was to wound or kill Nesbeth, who wore the yellow jacket. Accordingly, we conclude the record amply supports the imposition of consecutive sentences for murder and robbery consistent with the Yarbough guidelines. [(Da60) (footnote omitted).]

[4] Specifically: Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 577 U.S. 190 (2016); State v. Zuber, 227 N.J. 422, cert. denied, 583 U.S. 826 (2017).

[5] State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014 (1986).

After determining that consecutive sentences were supported by the record, this Court next addressed defendant's arguments as to aggravating and mitigating factors. (Da60). The Court noted that the sentencing court found aggravating factors "(1) the nature and circumstances of the offense, and the role of the actor therein, including whether it was committed in an especially heinous, cruel, or depraved manner (factor one); (2) the risk of re-offense (factor three); and (3) the need for deterrence (factor nine). The court found no mitigating factors." (Da61-62) (citations omitted). The sentencing judge then analyzed both qualitatively and quantitatively these factors and concluded that "the aggravating factors substantially outweighed the mitigating factors." (Da62). Importantly, this Court found the sentencing judge's

> findings of fact concerning aggravating and mitigating factors [] were based on competent and reasonably credible evidence in the record. The application of the factors to the law, including the imposition of consecutive sentences, do not constitute such clear error of judgment as to shock our judicial conscience. Accordingly, we discern no basis to second-guess the court's findings with respect to the statutory aggravating and mitigating factors. [(Da62) (emphasis added).]

Then, having upheld the sentencing court's decisions as to the imposition of consecutive sentences and the finding and weighing of aggravating and mitigating factors, the Court turned to defendant's final claim: that his sentence was "unconstitutional" because the sentencing judge failed to give due consideration to his youth at the time of the offenses in light of then-

recent case law from both the United States Supreme Court and the Supreme Court of New Jersey. (Da62-63). After reviewing that decisional law, (Da63-68), the Court found that in this case, defendant was 17 years old at the time of the crimes, and that his sentence, while not literally a life-without-parole sentence, "closely approaches it." (Da69). It then concluded that "the aggregate sentence must be revisited on remand for an evaluation taking into account the Miller constitutional factors of youthfulness, this time with the beneficial guidance of Montgomery, Zuber, and the new statutory amendment." (Da69) (referring to N.J.S.A. 2C:44-1b(14)); see also (Da63) (finding it was "constrained to remand for reconsideration of the aggregate sentence.").

Finally, the Court also noted that, on remand, the court should merge the felony murder conviction with the purposeful and/or knowing murder conviction and delete any reference to aggravating factor (6), which was mistakenly put on the judgment of conviction. (Da69); see (Da60 n. 5; Da62 n. 6).

Remand Proceedings

The original sentencing judge had retired, so the remand proceedings were conducted by the Honorable Carolyn E. Wright, J.S.C. Judge Wright held a two-day re-sentencing hearing on June 28 and August 2, 2022. (3T;

4T). At that hearing, the defense called Dr. Megan Perrin, an expert in forensic neuropsychology. (3T12-3 to 12). Several people then spoke on defendant's behalf (4T71-21 to 87-17); defendant himself addressed the court, (4T88-4 to 90-14); as did the victim's mother, (4T91-12 to 92-14). Counsel then gave oral argument in support of their positions. (4T93-3 to 131-10).

On March 27, 2023, Judge Wright imposed the new sentence. That decision will be discussed in more detail in Point I-C., post. Suffice it to say at this point, the judge re-sentenced defendant to a term of 30 years with a 30-year-period of parole ineligibility subject to NERA. (5T24-24 to 25-6). Judge Wright then merged the felony murder count into the purposeful and/or knowing murder count, and also found that a consecutive 15-year NERA sentence for robbery was appropriate for the same reasons given by the original sentencing judge. (5T25-7 to 28-18).

At bottom, defendant's new sentence is 10 years shorter than the one originally imposed, and he will be eligible for parole 4 years sooner. Defendant will also be eligible for a sentence "look-back" in less than 11 years, in May 2035, when he is 40 years old. See (2T; 5T9-8 to 14); State v. Comer, 249 N.J. 359, 370 (2022).

Defendant now appeals this new, shorter sentence. (Da70-73).

Legal Argument

Point I

Defendant's new, shorter sentence is not excessive. Applying the proper deference it is owed, this Court must affirm.

Defendant seeks yet another resentencing hearing in the hopes the judge will go even lower and impose the mandatory minimum for defendant's crimes—30 years with a 30-year period of parole ineligibility. (Db19). But defendant's claim—essentially one of excessive sentence—fails because his new, shorter sentence was imposed following a comprehensive, multi-day sentencing proceeding at which the judge considered all relevant sentencing criteria—the Miller factors as explained by Zuber, the Yarbough factors governing consecutive-versus-concurrent sentencing, and the statutory aggravating and mitigating factors in N.J.S.A. 2C:44-1—and came to a reasonable conclusion that finds ample support in the record and is commensurate with defendant's crimes.

Defendant's arguments to the contrary seem to be based on two major points. First, the judge erred in relying on previous findings made by the original sentencing judge as to the Yarbough factors and aggravating and mitigating factors, findings affirmed by this Court on direct appeal. And second, that the judge gave insufficient weight to certain Miller factors and so

should have arrived at a lower number, indeed the lowest number, permissible by law. Both of these arguments fail for a number of reasons.

As to the first, this was the second sentencing proceeding in this case, and the judge relied on previous findings by both the original sentencing judge and this Court on direct appeal. There was nothing wrong with her doing so. The original sentencing judge's conclusions were supported by the trial record, as this Court conclusively determined, and so there was no need to re-sentence defendant on a blank slate. Of course, the re-sentencing judge had to consider things the first judge did not—the Miller factors and new mitigating factor (14)—and she did. Defendant is just displeased with the result.

So too with the second. Distilled to its essence, defendant's entire brief on appeal is simply a request that this Court second-guess the sentencing judge's conclusion and replace it with what defendant hopes this Court's will be. In other words, while Judge Wright did consider each of the Miller factors and new mitigating factor (14), as she was required to do, and notwithstanding that she did so to the ultimate benefit of defendant in the form of a lower sentence, she should have, in defendant's estimation, gone lower. Defendant is entitled to that opinion, but again, defendant's displeasure with the result does not equate to an abuse of discretion warranting reversal. So, this Court should affirm defendant's new, shorter sentence.

A. From Graham to Comer: Principles Governing the Sentencing of Juvenile Offenders

Defendant was a juvenile when he committed his offenses, and much ink has been spilled in the last dozen or so years in this area. But from then up to today, it remains the case that juvenile murderers can still be sentenced to lengthy sentences, even ones that are the substantial equivalent of life without parole, so long as the sentencing court considers the necessary factors related to the offenses and the offender.

In Graham, the United States Supreme Court held that the Constitution categorically prohibits sentences of life without parole for juveniles convicted of non-homicide offenses. 560 U.S. at 82.[6] The Graham Court pointed out, however, that "[a] State is not required to guarantee eventual freedom to" such offenders. Id. at 74-75. Instead, the states must give those defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75. The Court did not define "meaningful opportunity[,]" leaving that decision to the states "in the first instance." Ibid.

Notably, the Court also concluded that "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." Ibid. But it

[6] Five years earlier, in Roper v. Simmons, the Court held that capital punishment for juvenile offenders violates the Eighth Amendment. 453 U.S. 551, 578 (2005).

"does prohibit states from making the judgment at the outset that those offenders never will be fit to reenter society." Ibid.

Two years later, in Miller, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. Relying on Graham and other sources, the Court observed that "children are constitutionally different from adults for purposes of sentencing" and "have diminished culpability and greater prospects for reform." Id. at 471. In other words, "[y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Id. at 473.

The Court ultimately set forth five factors a sentencing court must consider before "irrevocably sentencing [a juvenile offender] to a lifetime in prison." Id. at 480. Now known as the Miller factors, they are:

> [1]…consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
>
> [2]…the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.
>
> [3]…the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.
>
> [4]…[whether] he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for

> example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys[, and]
>
> [5]…the possibility of rehabilitation even when the circumstances most suggest it. [Id. at 477-78 (emphasis added).]

As in Graham, the Miller Court did not "foreclose" life without parole for juveniles convicted of homicide; rather, the Court required sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480.[7]

Then, in 2017, our Supreme Court held in Zuber that sentencing judges must evaluate the Miller factors when they sentence a defendant who was a juvenile at the time of the offense to a lengthy period of parole ineligibility that renders the sentence the "practical equivalent" of life without parole. 227 N.J. at 446-47. The Court also held that sentencing courts must still consider the Yarbough factors as well when deciding whether to impose consecutive sentences on a juvenile which may result in a sentence with a lengthy period of parole ineligibility that constitutes the "practical equivalent" of life without parole. 227 N.J. at 448; see Yarbough, 100 N.J. at 643-44. Distilled to its essence, Zuber held that sentencing courts may still impose lengthy sentences

[7] The Court later held that Miller announced a substantive rule of constitutional law that applies retroactively. Montgomery, 577 U.S. at 212-13.

on juvenile murderers, so long as the proper steps are followed:

> To be faithful to the concerns that Graham and Miller highlight, which our State Constitution embraces as well, a sentencing court must consider not only the factors in Yarbough but also the ones in Miller when it decides whether to impose consecutive sentences on a juvenile which may result in a lengthy period of parole ineligibility. Because of the overriding importance of that decision, we direct trial judges to exercise a heightened level of care before imposing multiple consecutive sentences on juveniles.
>
> In all of those cases, consistent with settled law, judges must do an individualized assessment of the juvenile about to be sentenced—with the principles of Graham and Miller in mind. Judges, of course, are to consider the nature of the offense, the juvenile's history, and relevant aggravating and mitigating factors. They should apply Miller's template as well when they consider a lengthy, aggregate sentence that amounts to life without parole. [227 N.J. at 448.]

Under this framework, the Court recognized that as judges begin to apply the Miller factors at sentencing, some juveniles will still "receive lengthy sentences with substantial periods of parole ineligibility, particularly in cases that involve multiple offenses on different occasions or multiple victims." Id. at 451. After all, "[n]either Graham nor Miller foreclosed life without parole for juveniles." Id. at 450. The Court therefore imposed the following instructions for sentencing hearings going forward:

> [T]he trial court should consider the Miller factors when it determines the length of his sentence and when it decides whether the counts of conviction should run consecutively. In short, the court should consider factors such as defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences"; "family and home environment"; family and peer pressures;

> "inability to deal with police officers or prosecutors" or his own attorney; and "the possibility of rehabilitation." Miller, 567 U.S. at 478. The sentencing judge should also "view defendant as he stands before the court" at resentencing and consider any rehabilitative efforts since his original sentence. State v. Randolph, 210 N.J. 330, 354 (2012). [Id. at 453.]

Jones v. Mississippi, 141 S. Ct. 1307 (2021), is the most recent in the line of United States Supreme Court cases addressing lengthy sentences imposed on juvenile offenders. There, Jones was convicted of murder and, after a thorough re-sentencing hearing in which the judge considered possible sentences other than life without parole, the judge nonetheless imposed that sentence after thorough consideration of factors relevant to Jones's culpability and the Miller considerations. Id. at 1312-13. On certiorari, Jones argued that a state sentencing court could not impose a sentence of life without parole unless it first found that the defendant was permanently incorrigible. Id. at 1313, 1315.

Rejecting that argument, the Supreme Court held under Montgomery and Miller, such a "formal factfinding requirement…is not required." Id. at 1313 (quoting Montgomery, 577 U. S. at 211). "In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." Ibid.

While of course "sentencing an offender who was under 18 at the time of

the crime raises special constitutional considerations[,]" Miller expressly permitted "life-without-parole sentences for defendants who committed homicide when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." Id. at 1314 (quoting Miller, 567 U.S. at 476). Miller didn't require any specific factual findings to impose such a lengthy sentence; it "mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." Ibid. (quoting Miller, 567 U. S. at 483).

The Jones Court explained:

> Miller repeatedly described youth as a sentencing factor akin to a mitigating circumstance. And Miller in turn required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases…. Those capital cases require sentencers to consider relevant mitigating circumstances when deciding whether to impose the death penalty. And those cases afford sentencers wide discretion in determining "the weight to be given relevant mitigating evidence." But those cases do not require the sentencer to make any particular factual finding regarding those mitigating circumstances.
>
> Repeatedly citing [those capital cases], the Miller Court stated that "a judge or jury must have the opportunity to consider" the defendant's youth and must have "discretion to impose a different punishment" than life without parole. Stated otherwise, the Miller Court mandated "only that a sentencer follow a certain process—considering an offender's youth and attendant

> characteristics—before imposing" a life-without-parole sentence. In that process, the sentencer will consider the murderer's "diminished culpability and heightened capacity for change." That sentencing procedure ensures that the sentencer affords individualized "consideration" to, among other things, the defendant's "chronological age and its hallmark features." [141 S. Ct. at 1315-16 (internal citations omitted).]

Refusing to second-guess the appropriateness of Jones's state sentence, the Court observed that

> any homicide, and particularly a homicide committed by an individual under 18, is a horrific tragedy for all involved and for all affected. Determining the proper sentence in such a case raises profound questions of morality and social policy. The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender.
>
> Under our precedents, this Court's more limited role is to safeguard the limits imposed by…the Eighth Amendment. The Court's precedents require a discretionary sentencing procedure in a case of this kind. The resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth. [Id. at 1322 (emphases added).]

The Court noted that "States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth…." Id. at 1323. New Jersey, of course, requires courts imposing sentence in any case on any offender, including those like defendant who were under 18 at the time of their crimes and are receiving

lengthy sentences, to thoroughly explain their reasoning. See, e.g., Comer, 249 N.J. at 404 ("We ask trial courts to explain and make a thorough record of their findings to ensure fairness and facilitate review."); State v. Torres, 246 N.J. 246, 272 (2021) (requiring an "explanation for the overall fairness of a sentence"); State v. Cuff, 239 N.J. 321, 347-52 (2019) (same); State v. Fuentes, 217 N.J. 57, 70-74 (2014) (calling for "a qualitative analysis of the relevant sentencing factors on the record"); N.J.S.A. 2C:43-2e (requiring a statement of reasons on the record); R. 3:21-4(h) (same).

Finally, in 2022, our Supreme Court held in Comer that a 30-year period of parole ineligibility for a murder sentence imposed on a juvenile offender is not an unconstitutional sentence so long as, after the offender has served 20 years, he or she is permitted to petition the court for a review of the sentence. 249 N.J. at 400-05. As the Court explained, "[i]n our judgment, the length of a sentence in cases like the ones on appeal is not the key constitutional issue. We recognize that some juvenile offenders should receive and serve very lengthy sentences because of the nature of the offense and of the offender. By itself, that outcome does not necessarily trigger a constitutional concern provided appropriate limits and safeguards are followed." Id. at 400.

Those "limits and safeguards"—in addition to the "thorough record of their findings to ensure fairness and facilitate [appellate] review" required in

all sentencings—must now include a single 20-year "look-back" proceeding at which the offender, having served 20 years of his or her sentence, can show a court whether "they have matured, to present evidence of their rehabilitation, and to try to prove they are fit to reenter society…." Id. at 401.

B. Standard of Review

Before turning to Judge Wright's re-sentence (Part C) or defendant's arguments against it (Part D), it is important to stress this Court's standard of review. As explained in countless cases, this Court plays an important yet limited role when reviewing sentences. See, e.g., Fuentes, 217 N.J. at 70; State v. Lawless, 214 N.J. 594, 606 (2013); State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 364-65 (1984). Reviewing courts do not substitute their judgment for the sentencing court's, but apply a "deferential standard." Fuentes, 217 N.J. at 70. Appellate review of a sentence is therefore limited to these questions: Were the correct guidelines followed? Does the record support the sentencing judge's findings? And was the sentence reasonable? Fuentes, 217 N.J. at 70; Lawless, 214 N.J. at 606. And "[o]f course, the weight to be given to [any applicable sentencing] factor is within the sentencing court's discretion." State v. Rivera, 249 N.J. 285, 290 (2021).

Also relevant here is Rule 3:22-5. That rule provides that, "[a] prior

adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings."

C. Judge Wright's Re-Sentencing Decision

Hewing to the appropriate standard of review, this Court must affirm. Judge Wright considered and applied the correct guidelines, namely the Miller factors, the Yarbough factors, and the statutory aggravating and mitigating factors. The record—including the trial evidence and the record made at both the original and re-sentencing hearings—supports her conclusions as to each. And defendant's aggregate sentence—45 years with a 42.75 years of parole ineligibility, and a sentence "look-back" in just 11 years—for a robbery and a subsequent cold-blooded murder of a teenager—is eminently reasonable.

As noted above, Judge Wright held a two-day hearing at which Dr. Perrin testified, several people spoke on behalf of defendant and the victim, defendant personally addressed the court, and counsel gave oral argument in support of their respective positions. (3T; 4T). Then, after she spent "the appropriate amount of time to go over everything that has been put so thoroughly before the Court by both the defense and the State[,]" (4T131-16 to 19), Judge Wright imposed sentence, (5T).

Reviewing the applicable law, Judge Wright recognized that she was required to reconsider defendant's sentence in light of the Miller factors and that she would be sentencing defendant as he stood before the court at that time. (5T4-4 to 9-21). She also noted that: new mitigating factor (14) would be applied; that in its opinion, this Court found the imposition of consecutive sentences for murder and robbery were appropriate; and that the felony murder count would be merged into the murder count. (5T9-22 to 10-12).

Judge Wright then reviewed the facts of the case, (5T10-13 to 16-11), including the original sentencing judge's observation following the trial "that it was Hawkins' decision which ultimately cost Williams his life, a decision which has and will continue to cause unspeakable pain to the Williams' family as well as to the family of Mr. Hawkins himself." (5T14-7 to 12).

Next, Judge Wright summarized Dr. Perrin's testimony and concluded that while the court "accepts the validity of the psychology and psychiatric factors upon which" she bases her opinion, her "ultimate conclusion that Miller factor one is present" is too generalized and not based on this particular defendant's development, but rather applies to "any young person frankly under the age of 30…." (5T16-12 to 18-25). This conclusion is amply supported by the record, a careful review of which shows that much of the doctor's testimony relates to young people in general and not this defendant in

particular. In other words, while the doctor's testimony supports why youthful offenders are different and why there are Miller factors in the first place, she said very little in terms of why those factors are entitled to great weight in this case, as defendant argues.

For example, regarding Miller factor number one, which Dr. Perrin described as "it's youth," (3T31-12), Dr. Perrin mostly testified generally about how brains develop over time, particularly in young people, (3T31-9 to 43-22). And while she did testify that she "believe[d] he was 17[,]" Dr. Perrin admitted that she was "giving generalizations" based on her experience in the field, generalizations which formed the basis of the rest of her testimony about this factor. (3T43-23 to 47-3). So, while the doctor did testify to defendant's "age," she gave the court very little in terms of his "immaturity, impetuosity, and failure to appreciate risks and consequences" as it relates to the murder and robbery defendant committed. Miller, 567 U.S. at 477.

Judge Wright instead looked to defendant's specific actions, instead of his expert's general conclusions, and found:

> that the defendant's decision to seek out and find people to rob at gunpoint over a prolonged period of time was not in touch with his conduct as Dr. Perrin conceded on cross-examination. Dr. Perrin's modified opinion that while the plan over time to commit robberies was not impetuous, [] she remained convinced that the order or command to "get the one in the yellow jacket" was impetuous and that [defendant] made that impetuous statement without comprehending the significant risk that death could or

> would result from his actions. The Court finds that factor one is not supported by the record before the court.
>
> Defendant, by his own admissions, made a plan with his co-defendants to commit armed robberies after finding the unarmed victims, and after the robberies were completed when one victim attempted to flee the scene the defendant told, ordered or commanded, whatever verbiage you wish to use, his two armed co-defendants to stop the victim from fleeing and only then did the 16 year old co-defendant fire his weapon in direct response to the defendant's encouragement. The defendant, the Court finds, appreciated the consequences of being apprehended and so to avoid same by ordering the co-defendants to stop the fleeing victim as he remained safely in the vehicle. [(5T19-1 to 20-1).]

With Miller factor two, the judge again found that the record simply did not support Dr. Perrin's conclusions. While the doctor found this factor applicable because "she believed the defendant was the victim of physical abuse[,]" defendant himself denied any such abuse. (5T20-2 to 11). "There are no documents as part of the lengthy record created by the defense in support of its petition for re-sentencing that independently supports any physical abuse of the defendant." (5T20-11 to 14). The judge also found that

> the record made by the defendant's family at the hearing… belies the contention that the defendant lacked guidance to ensure positive emotional, intellectual, and social development. The defendant did and does have a positive male role model in his stepfather who has been involved in the defendant's life in a positive and consistent manner since the defendant was five years of age. The fact that Mr. Hawkins rebuked some of that concern and support does not mean that that support did not exist for him. Mr. Kevin Brown has remained involved and continues to provide emotional support and guidance to this defendant. The testimony of defendant's other family members also made it clear that the

> defendant was an[d] is loved by his immediate family as well as his stepfather. [(5T20-15 to 21-5).]

Although defendant's biological father was an uninvolved, negative role model in defendant's life, and defendant grew up poor in a difficult and often violent environment, those facts, "without more and specific information detailing this defendant's PTSD as relied upon by Dr. Perrin," were not enough to support finding that Miller factor two applies here. (5T21-6 to 15). These findings are supported by Dr. Perrin's testimony that defendant was never abused, did not feel that he was subjected to "excessive corporal punishment[,]" and that his "need for affiliation, to be accepted by a group…" was common in all adolescents. See (3T47-4 to 51-7; 4T62-1 to 64-4).

As for the third Miller factor, the circumstances of the offense including defendant's role and whether any familial and peer pressures may have affected him, Dr. Perrin opined that defendant reacted "impulsively" to an emotionally charged situation and his peers influenced his decision-making capacity that night. (3T51-8 to 59-17). But Judge Wright correctly recognized defendant's significant role in both the robberies and the murder, concluding that the record before her was clear that "it was not until the statement, order or command was given that the youngest defendant arguably succumbed to the pressure exerted by this defendant to stop the fleeing victim that shots were fired and Khalil Williams was killed." (5T21-16 to 22-6). And Dr. Perrin

even admitted that she would have characterized defendant's behavior as "impulsive" even if he were 40 years old, (4T65-17 to 25), lending further support to the judge's conclusion that her testimony was not entitled to the heavy weight defendant suggests, (Db30).

Miller factor four, which looks to whether defendant had any incompetencies associated with youth that might have affected his charges or his ability to deal with police, prosecutors, or his own counsel, also did not apply, Judge Wright found. Dr. Perrin's opinion on this point indicated nothing "unique or necessarily based on his age" that affected how defendant interacted with the criminal justice system. (5T22-7 to 14). Rather, her "opinion was also based, at least in part, on assumptions she made about why no plea offer was made to this defendant. There was no support in the record that 'the State was never interested in resolving this case short of trial.'" (5T23-9 to 13).

This conclusion too finds ample support in the record. Dr. Perrin acknowledged on cross-examination that defendant was 20 by the time the case went to trial and by then had had a two-year relationship with his experienced counsel, Johnny Mask, Esq. (4T28-3 to 19). Mask pointed out that defendant was unwilling to cooperate with the State, (4T43-22 to 44-21), and defendant told his presentence investigator that the State "made a big mistake" and "they

have the wrong guy[,]" (4T31-10 to 32-8). Mask even indicated that defendant wanted to make a plea offer that would have resulted in only 9 or 10 years in State Prison, but because he would not cooperate with prosecutors Mask never tendered the offer to the State. (Da273). Clearly defendant was not the immature babe he now purports he was. The record supports Judge Wright's conclusion that this factor does not weigh in his favor.

Regarding this factor the judge also addressed defendant's purported show of remorse. She explained:

> The defendant has expressed remorse to Dr. Perrin, it is alleged, and to the psychologist with whom he spoke, and made a statement of remorse in court for deciding to participate in robberies, which resulted in Khalil Williams' death and the dramatic change in the trajectory of his future thereafter. I note in this[] re-sentencing hearing and in listening to Mr. Hawkins' statement of remorse that he never mentioned the victim's name in his statement of remorse, and <u>it does appear to this Court the defendant does not truly acknowledge his full culpability for that death</u>, as same was not an accident where a gun went off during a robbery under circumstances that appear to be accidental or an unintended consequence. The order caused the gunshot that caused the death. [(5T22-15 to 23-4) (emphasis added).]

This conclusion is supported by the record. Dr. Perrin testified on direct that defendant "feels badly that somebody lost their life and that, you know, his actions <u>may have</u> contributed to that." (3T72-13 to 19) (emphasis added). And on cross-examination, when discussing remorse-versus-regret, she acknowledged that defendant has never admitted that his actions were the

reason why these tragic events occurred, even conceding that defendant "regrets putting the [victim's] family through this whole situation" which to her "suggests that he is taking responsibility." (4T19-4 to 21-10) (emphasis added).

The court was not required to accept this "suggestion" reached by the expert. See E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 29 (App. Div. 2018) (noting that "[a] factfinder is not required to accept an expert's opinion" and that "a judge sitting as factfinder may accept some parts of a witness's testimony and reject other parts.") (citations omitted). And being present when defendant addressed the court, (4T88-4 to 90-4), the judge in her role as fact-finder was permitted to reject defendant's newly-minted expression of remorse, and this Court should defer to that finding. See State v. Francisco, 471 N.J. Super. 386, 426 (App. Div. 2022) ("Generally, an appellate court should defer to the sentencing court's factual findings and should not 'second-guess' them.") (quoting State v. Case, 220 N.J. 49, 65 (2014)).

Finally, Judge Wright found Miller factor five, defendant's possibility for rehabilitation, "clearly supported by the record made by the defense." (5T23-14 to 15).

Judge Wright then found aggravating factors (1), (3), and (9), adopting the analyses of both the original sentencing judge and this Court in its opinion.

(5T23-22 to 24-11). She also noted, but gave no weight to, defendant's limited juvenile history. (5T24-12 to 18). Judge Wright did, however, give "great weight" to mitigating factor (14)—that defendant was under 26 at the time he committed the offenses. (5T24-19 to 23); see N.J.S.A. 2C:44-1b(14).

Then, "draw[ing] guidance from Miller, Zuber, and Comer," she found "that the defendant's sentence for knowing and purposeful murder shall be reconsidered and the defendant re-sentenced to a term of 30 years in New Jersey State prison with a period of 30 years of parole ineligibility subject to NERA with a five-year period of parole supervision upon release." (5T24-24 to 25-6). She then merged the felony murder count into the purposeful and/or knowing murder count, and also found that a consecutive 15-year NERA sentence for robbery was appropriate for the same reasons given by the original sentencing judge. (5T25-7 to 28-18).

The judge ended by addressing defendant directly:

> Mr. Hawkins, this is a very long sentence. I think you have the ability to be rehabilitated. I think you are on that right path. I ask you, despite the Court's decision, to stay on that path. You deserved [sic] to have a future. You deserve to have your family released from their pain as well. If the Court could do justice, it would turn back the clock and this day would not occur for anyone, but I don't have the ability to create justice in that fashion. I've done the best that I could under these circumstances, I believe. I wish you good luck, young man. [(5T29-18 to 30-3).]

As noted above, defendant's new sentence is 10 years shorter than the

one originally imposed, and he will be eligible for parole 4 years sooner. Defendant will also be eligible for his 20-year look-back pursuant to Comer in less than 11 years, in May 2035, when he is 40 years old. See (2T; 5T9-8 to 14); Comer, 249 N.J. at 370.

Defendant can show no abuse of discretion in Judge Wright's new sentence or her sentencing analysis. The judge considered the Miller factors, the Yarbough factors, and the statutory aggravating and mitigating factors in light of the evidence presented by defendant at the re-sentencing hearing and the facts and circumstances of defendant's crimes established at his jury trial. She correctly identified, considered, and fairly weighed each of these factors, and came to a fair sentence that should not shock this Court's conscience. Applying the proper standard of deference, this Court must uphold defendant's sentence.

D. Defendant can show no abuse of discretion in his new, shorter sentence.

The crux of defendant's arguments in favor of reversal seems to be that the judge should have weighed some facts and circumstances more heavily than others. But, as noted above, "the weight to be given to [any applicable] factor is within the sentencing court's discretion[,]" Rivera, 249 N.J. at 290, and defendant's displeasure with the sentencing judge's ultimate result does

not render that decision an abuse of discretion warranting reversal. A few specific responses are necessary.

Regarding the Miller factors, defendant claims that factor one should have been given "heavy weight" because defendant is "no different than other teenagers…." (Db27). But no case requires that this factor be found in every case. It was correct, and not an abuse of her discretion, for Judge Wright to find that the expert's testimony on this factor was too generalized. Dr. Perrin's testimony may support why there is Miller factor one in the first place, but it doesn't support defendant's claim that it should have been found and given "heavy weight." The factor required the judge to consider defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences[,]" and the judge found that the expert's testimony was of no assistance in this regard, making finding it here inappropriate.

Defendant also claims that Judge Wright should have found Miller factor 3[8] applies because his "participation" in the incident and his conduct were the result of peer pressure. (Db28). While it is true Dr. Perrin testified about things such as defendant's desire to assimilate, his desire for peer acceptance, and that the presence of peers made him, in his words, "more likely to act impulsively[,]" (Db28), the judge was permitted to weigh this testimony

[8] Defendant does not argue the judge abused her discretion when she found Miller factor 2 did not apply.

against other evidence in the case such as defendant's leading role in the murder and that if anyone was exerting peer pressure, it was him on the younger co-defendant; as the judge concluded, "it was not until the statement, order or command was given that the youngest defendant arguably succumbed to the pressure exerted by this defendant to stop the fleeing victim that shots were fired and Khalil Williams was killed." (5T21-16 to 22-6). That it was in fact defendant who wielded pressure over a younger accomplice supports Judge Wright's conclusion that this factor has no applicability here.

So too with Miller factor four. Defendant's claim that the "disadvantages of adolescence had clear and devastating consequences for [his ability to navigate the criminal legal system" finds no support in the record. And again, mindful of this Court's standard of review, Judge Wright's decision to not find this factor because "defendant's failure to comprehend the process and/or trust his attorney is not unique or necessarily based upon his age[,]" (5T22-4 to 14), is not unsupported. As recounted above, Dr. Perrin acknowledged on cross-examination that defendant was 20 by the time the case went to trial and by then had had a two-year relationship with his experienced counsel, Johnny Mask, Esq. (4T28-3 to 19). Mask pointed out that defendant was unwilling to cooperate with the State, (4T43-22 to 44-21), and defendant told his presentence investigator that the State "made a big mistake" and "they

have the wrong guy[,]" (4T31-10 to 32-8). Mask even indicated that defendant wanted to make a plea offer that would have resulted in only 9 or 10 years in State Prison, but because he would not cooperate with prosecutors Mask never tendered the offer to the State. (Da273). So, while defendant points to some facts that may support a contrary conclusion, on appeal he can show no abuse of discretion by the judge going the other way.

That defendant's mother may have encouraged him to be cooperative and speak with police, (Db32), is within her purview as a mother and does not establish that he was incompetent and unable to assist in his own defense. See State in the Interest of A.S., 203 N.J. 131, 148 (2010) (recognizing that a parent has the right to "advise his or her child to cooperate with the police or even to confess to the crime if the parent believes that the child in fact committed the criminal act.") (citations omitted). And again, this is at most one fact that might have supported a finding of Miller factor four, not proof that Judge Wright abused her considerable discretion.

As for imposing a consecutive sentence, Judge Wright did not err in relying upon the previous findings by the first sentencing judge, which were affirmed by this Court. "[T]he Appellate Division found the imposition of a consecutive sentence [] for count eight for the knowing and purposeful murder of Khalil Williams was and is fully supported by the record created at the

sentencing on May 8th of 2015…." (5T9-22 to 10-2). This Court's affirmance of a consecutive sentence was binding on Judge Wright. R. 3:22-5. As this Court determined on direct appeal:

> [A]s defendant candidly concedes, the crimes involved multiple victims, [Yarbough] factor (3)(c), and "separate acts of violence or threats of violence," factor 3(b), in that four victims were robbed at gunpoint, and one was fatally shot. Also, given the multiple victims of the robbery, the homicide, and the unlawful use of weapons, the convictions were necessarily "numerous," factor 3(e). Factor 3(a) is also implicated because although the crimes were committed close in place and time, the objective of the robbery, to obtain the four victims' property, was independent of the purpose behind defendant's homicide conviction, which was to wound or kill Nesbeth, who wore the yellow jacket. Accordingly, we conclude the record amply supports the imposition of consecutive sentences for murder and robbery consistent with the Yarbough guidelines. [(Da60) (footnote omitted).]

Defendant can show no error in this reasoning.

Defendant also claims a remand is required because Judge Wright did not provide "an explanation of the overall fairness of the sentence" pursuant to Torres. (Db36). But Judge Wright adopted the original sentencing judge's analysis on consecutive sentences, and in that proceeding the judge specifically pointed out, as he began his Yarbough analysis, that even though his findings would "dictate a custodial sentence towards the upper end of the range[,]" he was not inclined to do so given defendant's "age, as well as the lack of any significant previous criminal and juvenile history…." (2T20-12 to 21-1). He then spent pages of the transcript meticulously explaining why he

was imposing a consecutive sentence, (2T21-2 to 24-23), an explanation this Court upheld. Even though this decision predated Torres, it surely satisfies that case's mandate that trial courts provide reviewing tribunals with sufficient reasons to facilitate meaningful appellate review, foster consistent sentences, and safeguard defendant from excessive, disproportionate, or arbitrary sentences. 246 N.J. at 272-73. No remand is required.[9]

Finally, defendant criticizes Judge Wright's findings of aggravating and mitigating factors. (Db40-48). As noted, Judge Wright agreed that the record supports the findings of aggravating factors (1), (3), and (9), and incorporated the findings of the original sentencing judge. (5T23-22 to 24-3). She also found mitigating factor (14) applied and was entitled to "great weight." (5T24-19 to 23).

In response to these findings, defendant again takes the divide-and-conquer approach, arguing every aggravating factor should have been given less or no weight, and every mitigating one should have been found and given heavy weight. But the original sentencing judge's findings were (and still are) supported by the record, and this Court has already upheld those findings on

[9] Notably, while Zuber requires courts to "exercise a heightened level of care before imposing multiple consecutive sentences on juveniles[,]" 227 N.J. at 448 (referred to at Db36), Judge Wright only imposed one consecutive sentence here. Regardless, her decision shows that she indeed exercised such a level of care in imposing sentence.

direct appeal. R. 3:22-5. At the risk of being repetitive, this Court explained in its opinion that the sentencing court analyzed both qualitatively and quantitatively these factors and concluded that "the aggravating factors substantially outweighed the mitigating factors." (Da62). Importantly, this Court found the sentencing judge's findings were "based on competent and reasonably credible evidence in the record" and their application to the law did "not constitute such clear error of judgment as to shock our judicial conscience. Accordingly, we discern no basis to second-guess the court's findings with respect to the statutory aggravating and mitigating factors." (Da62) (emphasis added).

With no criminal record, Judge Wright should have explicitly found mitigating factor (7), "no history of prior delinquency or criminal activity…." N.J.S.A. 2C:44-1b(7). The judge did note, but appeared to give no weight to, defendant's deferred disposition for a juvenile shoplifting. (5T24-12 to 15). Why she didn't then find mitigating factor (7) is unclear, but it is obvious the original sentence judge, whose findings as to aggravating and mitigating factors she adopted, took "into consideration [defendant]'s age, as well as the fact that Mr. Hawkins does not have a substantial criminal and/or juvenile history" in imposing sentence. (2T19-5 to 19) (emphasis added). Since this was implicitly found by both sentencing courts, the JOC should be amended to

so reflect. However, given the lower sentence defendant received and the adequacy of the judge's other findings, defendant fails to show how adding this factor entitles him to any relief. R. 2:10-2 (permitting appellate courts to disregard "[a]ny error" not "clearly capable of producing an unjust result").

Defendant's remaining arguments can be distilled to one: his youth and show of remorse should have caused the court to give less weight to aggravating factors (1), (3), and (9), and to find mitigating factors (8), (9), and (13). But Judge Wright rejected defendant's purported show of remorse, (5T22-15 to 23-4), and his youth was already accounted for in both mitigating factor (14) and the court's consideration of the Miller factors, making repetitive use of it inappropriate. See State v. Teat, 233 N.J. Super. 368, 372-73 (App. Div. 1989) (observing that "[d]ouble counting mitigating factors distorts the sentencing guidelines as much as double counting aggravating factors.).

Conclusion

A careful review of Judge Wright's sentencing decision, through the lens of the standard of review that governs appellate scrutiny of sentencing decisions, shows that defendant has failed to establish that Judge Wright abused her discretion in re-sentencing defendant. The judge considered the Miller factors, the Yarbough factors, and the statutory aggravating and mitigating factors in light of the evidence presented by defendant at the re-sentencing hearing and the facts and circumstances of defendant's crimes established at his jury trial. She correctly identified, considered, and fairly weighed each of these factors. Her decision comports with how judges should analyze such a confluence of sentencing factors against an extensive record, and, applying the proper standard of deference to it, this Court must uphold it.

Respectfully submitted,

THEODORE N. STEPHENS II
ESSEX COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

s/Frank J. Ducoat – No. 000322007
Deputy Chief Assistant Prosecutor
Appellate Section

Of Counsel and on the Brief

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Appellate Deputy / Assistant Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973.877.1200 · Fax 973.877.1239
Nadya.Kronis@opd.nj.gov

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

JENNIFER N. SELLITTI
Public Defender

October 29, 2024

NADINE KRONIS
ID. NO. 404802022
Assistant Deputy
Public Defender

Of Counsel and
On the Letter-Brief

REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002804-22T5
INDICTMENT NO. 13-01-00200-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Essex County.
MARQUISE HAWKINS,	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Carolyn E. Wright, J.S.C.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Marquise Hawkins relies on the Procedural History and Statement of Facts set forth in his opening brief (Db 2-17)[1]

LEGAL ARGUMENT

Marquise Hawkins relies on his opening brief, and adds the following:

POINT I

MARQUISE HAWKINS'S DE FACTO LIFE WITHOUT PAROLE SENTENCE CANNOT STAND.

Although the State concedes that State v. Zuber, 227 N.J. 422 (2017) "requires courts to 'exercise a heightened level of care before imposing multiple consecutive sentences on juveniles,'" it claims that the resentencing court met this heightened standard simply by incorporating the original sentencing court's reasoning into its own decision by reference (Sb 11, 13-14) In support of this conclusion, the State claims that 1) the resentencing court was bound by the Appellate Division's affirmance of the consecutive sentences, and 2) that the original sentencing court had already explained the fairness of the overall

[1] Da: Defendant's appendix
Db: Defendant's opening brief
Sb: State's brief
2T: Transcript of 5/8/2015 (Sentencing)
4T: Transcript of 8/2/2022 (Resentencing)

sentence, as required by State v. Torres, 246 N.J. 246, 268 (2021). (Sb 32-34) These claims reflect a misunderstanding of both the record and the law.

The State's claim that the Appellate Division's "affirmance of a consecutive sentence was binding" on the resentencing court is plainly incorrect. (Sb 33) As discussed extensively in the defendant's brief, Zuber requires a sentencing court to consider the Miller factors at every stage of sentencing – including as part of its decision to impose consecutive or concurrent sentences and as part of its finding of statutory sentencing factors. (Db 34-49) Contrary to the State's contentions, this Court recognized that Zuber requires a judge to consider the Miller factors alongside "the principles set forth in Yarbough … when imposing consecutive sentences upon juvenile offenders." (Da 67) (citing Zuber, 227 N.J. at 447, 450)) This Court specifically instructed that on remand, "the aggregate impact of consecutively-imposed sentences must be considered when applying the Miller factors," taking into account the "real-world" effect of Marquise's consecutive sentences on his parole eligibility date. (Da 67); (Db 8,9)

Furthermore, the State's claim that the resentencing court was not required to provide an explanation of the overall fairness of the sentence that it imposed on Marquise because the original sentencing court had already given such an explanation eight years earlier is mistaken on multiple levels. First, the State's

assertion that the original sentencing court had already explained the fairness of its imposition of consecutive sentences on Marquise is unsupported by the record. (See Sb 33-34) The State cites the sentencing court's justification for the length of the discrete sentences it imposed on Marquise – not for its imposition of consecutive sentences. (Sb 33); (2T:20-12 to 21-1)

Moreover, our jurisprudence requires defendants to be sentenced as they stand before the court at any full resentencing proceeding. State v. Randolph, 210 N.J. 330, 354 (2012) (holding "when reconsideration of sentence or resentencing is ordered after appeal, the trial court should view defendant as he stands before the court on that day."). In Torres, our Supreme Court specifically held that "the fairness of a sentence cannot be divorced from consideration of the person on whom it is imposed," and when conducting a "fairness assessment . . . the court sentences the defendant as the defendant appears before the court on the occasion of sentencing." Torres, 246 N.J. at 273. The resentencing court was required to consider Marquise as he stood on the day of his resentencing in order to assess the fairness of imposing consecutive sentences under Torres. The court's failure to do so requires a remand for resentencing.

At Marquise's resentencing hearing, even the State conceded that concurrent sentences would be appropriate if the resentencing court applied Miller factor five, or found Marquise capable of rehabilitation. (Db 13-14);

(4T:130-12 to 131-5). Notwithstanding this Court's instructions for remand, the State's concession at the resentencing hearing, and the resentencing court's own finding that Marquise was clearly capable of rehabilitation under Miller factor five, the court failed to explain the fairness of imposing consecutive sentences on Marquise. The real-time effect of the resentencing court's imposition of consecutive terms was to reduce Marquise's parole ineligibility from 46 years and 9 months to 42 years and 9 months – a sentence that once more amounts to effective life without parole. Thus, Marquise is entitled to a new resentencing hearing and the imposition of a sentence that affords him a meaningful opportunity for release based on the resentencing court's own finding that he is clearly capable of rehabilitation and has made tremendous strides towards it.

The State's observation that Marquise will be eligible for a Comer[2] hearing "in less than 11 years, in May 2035, when he is 40 years old," has no bearing on the fact that Marquise is entitled to be properly resentenced under Zuber. (Sb 29) As stated by defense counsel at his resentencing hearing, Marquise's effective life without parole sentence may preclude him from being eligible for additional rehabilitative programming in prison for the next eleven years. (4T:115-9 to 20) The fact that Marquise, who continues to pursue every

[2] State v. Comer, 249 N.J. 359 (2022).

rehabilitative and educational opportunity available to him in prison, will eventually have a Comer hearing cannot rectify that.

CONCLUSION

For the foregoing reasons, and the reasons stated in his opening brief, Marquise Hawkins respectfully requests that this Court vacate his sentence and remand the matter for resentencing.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: /s/ Nadine Kronis
NADINE KRONIS
Assistant Deputy Public Defender
ID No. 404802022