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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3140-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NASIR SALAAM, a/k/a  
NASIR JAMEEL SALAAM,

Defendant-Appellant.

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Submitted March 16, 2022 – Decided April 14, 2022

Before Judges Accurso, Rose, and Enright.

On appeal from the Superior Court of New Jersey, Law  
Division, Atlantic County, Indictment No. 08-02-0310.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Michele E. Friedman, Assistant Deputy  
Public Defender, of counsel and on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney  
for respondent (Jennifer E. Kmiecik, Deputy Attorney  
General, of counsel and on the brief).

PER CURIAM

Defendant Nasir Salaam appeals from a February 13, 2020 order, denying his motion to correct an illegal sentence. He also urges us to remand this matter for resentencing pursuant to the Legislature's amendment of N.J.S.A. 2C:44-1(b) to include youth as a mitigating factor. We affirm.

I.

Because we outlined the underlying facts at length in the decision resulting from defendant's direct appeal, State v. Salaam, A-2288-10 (App. Div. Aug. 2, 2013) (slip op. at 3-5) (Salaam I), we provide only a summary of the facts pertinent to this appeal. When defendant was seventeen years old, he was involved in a robbery at a gas station that led to the death of one of the gas station's employees. Following a jury trial, defendant was found guilty of two counts of first-degree armed robbery, N.J.S.A. 2C:15-1; a lesser included third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree unlawful possession of two revolvers, N.J.S.A. 2C:58-4 and N.J.S.A. 2C:39-5(b); third-degree hindering prosecution, N.J.S.A. 2C:29-3(b)(1); and third-degree conspiracy to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and (b)(3), and N.J.S.A. 2C:5-2. The jury was unable to reach a unanimous verdict on three other counts in the indictment and the trial judge declared a mistrial on these counts.

In August 2010, pursuant to a negotiated plea agreement, defendant entered a conditional guilty plea<sup>1</sup> to felony murder, N.J.S.A. 2C:11-3(a)(3). In exchange for his guilty plea, the State recommended a prison term of thirty years with a thirty-year parole ineligibility period and dismissal of the two remaining charges.

Defendant was sentenced two months later on the convictions flowing from the trial and plea bargain. After ordering the appropriate mergers, and dismissing the charges contemplated under the plea agreement, the judge imposed a thirty-year prison term, subject to thirty years of parole ineligibility for defendant's felony murder conviction. Overall, defendant received an aggregate sentence of forty years with a thirty-year period of parole ineligibility.

On direct appeal, we affirmed defendant's convictions and aggregate sentence but remanded for correction of the judgment of conviction to accurately reflect defendant's jail credits. Salaam I, (slip op. at 22). The Supreme Court denied certification. 217 N.J. 292 (2014).

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<sup>1</sup> Defendant reserved the right to appeal the denial of his pre-trial motions to suppress his statements and for a new trial.

In 2019, following his unsuccessful bids to secure post-conviction relief,<sup>2</sup> defendant filed a motion to correct an illegal sentence under Rule 3:21-10(b)(5). On February 13, 2020, the motion judge, who was the sentencing judge, issued a written opinion, denying defendant's application. The judge found "[d]efendant received a legal sentence," because "the mandatory minimum of thirty years" with a thirty-year parole bar was imposed at sentencing for defendant's felony murder conviction. Further, the judge observed "other issues with [defendant's] sentence were previously addressed on both direct appeal and in post-conviction relief . . . proceedings."

## II.

On appeal, defendant raises the following arguments:

### POINT I

UNDER THE LEGAL AND SCIENTIFIC PRINCIPLES EMBRACED IN MILLER V. ALABAMA, 567 U.S. 460 (2012) AND STATE V. ZUBER, 227 N.J. 422 (2017), THE MANDATORY INELIGIBILITY PROVISIONS OF N.J.S.A. 2C:11-3[(b)](1) AND N.J.S.A. 2C:43-7.2[] ARE UNCONSTITUTIONAL AS APPLIED TO JUVENILES.

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<sup>2</sup> See State v. Salaam, No. A-3989-14 (App. Div. Jan. 31, 2017) (slip op. at 1-2) (Salaam II), and State v. Salaam, No. A-2320-17 (App. Div. July 15, 2019) (slip op. at 4, 21) (Salaam III).

## POINT II

THIS COURT SHOULD APPLY THE LAW REQUIRING SENTENCING MITIGATION FOR YOUTHFUL DEFENDANTS RETROACTIVELY TO THIS CASE BECAUSE THE NEW LAW IS AMELIORATIVE IN NATURE, THE SAVINGS STATU[T]E IS INAPPLICABLE, AND FUNDAMENTAL FAIRNESS REQUIRES RETROACTIVITY.

A. The Legislature Intended Retroactive Application.

1. The Legislature Did Not Express a Clear Intent for Prospective Application Only.
2. The Other Language Contained Within the Amendment is Indicative of Retroactive Application; The Presumption of Prospective Application is Inapplicable; and the law is Clearly Ameliorative.

These arguments are unavailing.

Regarding Point I, under Rule 3:21-10(b)(5), "an order may be entered at any time . . . correcting a sentence not authorized by law including the Code of Criminal Justice." See State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) ("[A] truly 'illegal' sentence can be corrected 'at any time.'" (quoting R. 3:21-10(b)(5); R. 3:22-12). "[A]n illegal sentence is one that 'exceeds the maximum penalty . . . for a particular offense' or a sentence 'not imposed in accordance with law.'" Id.

at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). "That includes a sentence 'imposed without regard to some constitutional safeguard.'" Zuber, 227 N.J. at 437 (quoting State v. Tavares, 286 N.J. Super. 610, 618 (App. Div. 1996)). "Whether [a] defendant's sentence is unconstitutional is . . . an issue of law subject to de novo review." State v. Drake, 444 N.J. Super. 265, 271 (App. Div. 2016) (citing State v. Pomianek, 221 N.J. 66, 80 (2015)).

In the present case, defendant argues the mandatory ineligibility provisions of N.J.S.A. 2C:11-3(b)(1) and N.J.S.A. 2C:43-7.2<sup>3</sup> are unconstitutional as applied to juveniles because the mandatory parole disqualifier "violates the Cruel and Unusual Punishment Clauses of the United States and New Jersey Constitutions" and "does not recognize [the] difference in culpability" between juveniles and adults by applying the sentencing provisions "in the same manner." We are not persuaded.

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<sup>3</sup> N.J.S.A. 2C:11-3(b)(1) provides, in relevant part, that an individual convicted of first-degree murder shall be sentenced "to a term of [thirty] years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between [thirty] years and life imprisonment of which the person shall serve [thirty] years before being eligible for parole." Per the No Early Release Act, N.J.S.A. 2C:43-7.2(a), an individual convicted of a first- or second-degree offense, including murder, N.J.S.A. 2C:11-3, must serve eighty-five percent of his or her sentence before parole eligibility.

Statutes are presumed constitutional. State v. A.T.C., 239 N.J. 450, 466 (2019) (citations omitted). "A law can be declared void only if its 'repugnancy to the constitution is clear beyond a reasonable doubt.'" N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 591 (2020) (quoting State v. Buckner, 223 N.J. 1, 14 (2015)).

Here, the sentencing judge imposed a term of thirty years with a thirty-year parole bar pursuant to N.J.S.A. 2C:11-3(b)(1), not N.J.S.A. 2C:43-7.2(a). Accordingly, we limit our consideration to N.J.S.A. 2C:11-3(b)(1), as defendant's sentence was not affected by N.J.S.A. 2C:43-7.2(a).

Notably, in State v. Comer and State v. Zarate, 249 N.J. 359, 380-81 (2022), our Supreme Court declined to strike N.J.S.A. 2C:11-3(b)(1) as applied to juveniles. Instead, the Court held that to

save the statute from constitutional infirmity, we will permit juvenile offenders convicted under the law to petition for a review of their sentence after they have served two decades in prison. At that time, judges will assess a series of factors the United States Supreme Court has set forth in Miller v. Alabama, [567 U.S. [460,] 476-78 (2012),] which are designed to consider the "mitigating qualities of youth."

. . . .

At the hearing, the trial court will assess factors it could not evaluate fully decades before – namely, whether the juvenile offender still fails to appreciate

risks and consequences, and whether he [or she] has matured or been rehabilitated. The court may also consider the juvenile offender's behavior in prison since the time of the offense, among other relevant evidence.

After evaluating all the evidence, the trial court would have discretion to affirm or reduce the original base sentence within the statutory range, and to reduce the parole bar to no less than [twenty] years.

[Id. at 370.]

Given the Court's holding in Comer, defendant's argument that N.J.S.A. 2C:11-3(b)(1) is unconstitutional as applied to juveniles fails. Although we decline to find either statute unconstitutional as applied to juveniles, consistent with the principles outlined in Comer, once defendant has served twenty years of his mandatory minimum sentence, he can petition for review of his sentence. At that time, the trial court will be authorized to impose a period of parole eligibility of less than thirty years, but not less than twenty years. Comer, 249 N.J. at 406.

Regarding Point II, defendant argues he is entitled to resentencing under recently enacted mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), which allows a trial court to consider a defendant's youth as a mitigating factor if the defendant was under the age of twenty-six when the crime was committed. We are not convinced.



In State v. Bellamy, 468 N.J. Super. 29, 47-48 (App. Div. 2021), we held mitigating factor fourteen does not apply retroactively to criminal convictions that were not on direct appeal when the statute was enacted in October 2020, unless there is an independent basis to order a new sentencing hearing. See also, State v. Rivera, 249 N.J. 285 (2021). In Rivera, the Court had an independent basis to remand for resentencing, i.e., the mistaken treatment of the defendant's youth as an aggravating factor. Id. at 302-04.

Here, defendant exhausted his avenues of appeal several years before N.J.S.A. 2C:44-1(b)(14) was enacted, and we find no independent basis to remand for resentencing. We are mindful the Court has granted certification in State v. Lane, No. A-0092-20 (App. Div. Mar. 23, 2021), in which the pure legal question before the Court is whether, and if so, to what extent, N.J.S.A. 2C:44-1(b)(14) applies retroactively. 248 N.J. 534 (2021). But unless and until such time as the Court holds to the contrary in Lane, we abide by our holding in Bellamy.

In sum, we are satisfied defendant's constitutional arguments regarding the mandatory ineligibility provisions of N.J.S.A. 2C:11-3(b)(1) and N.J.S.A. 2C:43-7.2 as applied to juveniles fail, and the new statutory mitigating factor

does not retroactively apply to defendant's 2010 convictions. Thus, we decline to disturb defendant's sentence.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION