FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, AMENDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2241-22T5

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction, Superior Court of New Jersey, Law Division, Cumberland County.
v.	:	
DAIQUAN C. BLAKE,	:	Indictment No. 17-03-0259-I
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Cristen D'Arrigo, J.S.C.
	:	
	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
25 Market Street
Trenton, NJ 07101

Scott M. Welfel
Assistant Deputy Public Defender
Scott.Welfel@opd.nj.gov
973-868-2906
Attorney ID: 084402013

Of Counsel and
On the Brief

DEFENDANT IS CONFINED

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 3

Facts Of The Offense 3

Personal Characteristics of Defendant 6

LEGAL ARGUMENT 9

POINT I

RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT: (A) FAILED TO APPROPRIATELY CONSIDER BLAKE'S POST-OFFENSE REHABILITATIVE CONDUCT THE AGE-CRIME CURVE, AND ADOLESCENT BRAIN SCIENCE; (B) MADE FINDINGS FOR AGGRAVATING FACTORS THREE AND NINE THAT WERE NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD; (C) IMPOSED CONSECUTIVE SENTENCES IN VIOLATION OF STATE V. YARBOUGH AND STATE V. TORRES; (D) CONSIDERED DEFENDANT'S DISMISSED CHARGES IN VIOLATION OF STATE V. K.S.; AND (E) IMPOSED AN ILLEGAL PAROLE DISQUALIFIER ON COUNT THREE. (Da49-52) 9

A. The Sentencing Court Erred In Failing To Appropriately Consider Blake's Post-Offense Rehabilitative Conduct, The Age-Crime Curve, And Adolescent Brain Development When Considering Aggravating Factors Three And Nine And Mitigating Factors Nine And Fourteen. 12

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

1. In failing to give weight to Blake's positive prison record and other post-offense rehabilitative conduct, the Court failed to sentence Blake as he stood on the date of sentencing and its finding of aggravating factors three and nine were not supported by competent, credible evidence in the record. 14

2. Because the Court's reasoning in finding and weighing aggravating factors three and nine and mitigating factor fourteen and in declining mitigating factor nine failed to address the extremely relevant adolescent brain science and age-crime curve, the Court's findings were not supported by competent, credible evidence in the record. 23

B. The Court's Rationales For Aggravating Factors Three And Nine Were Impermissible Because The Court Double-Counted The Fact That The Manslaughter Was Committed By A Firearm, Speculated That Individuals Who Have Fired A Gun At Another Person Are More Likely To Reoffend, And Relied Exclusively On General Deterrence Without Finding Any Need For Specific Deterrence. 30

C. The Court's Rationale For Imposing Consecutive Sentences Was Not Justified By Yarbough Or Torres. 36

1. The Court's findings that the Yarbough factors justified a consecutive sentence were unsupported by the facts or by Yarbough....37

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

2. The Court's assessment of the overall fairness of the sentences was fatally flawed for the same reasons as its assessments of aggravating factors three and nine; its assessment of the need to incapacitate and deter were not supported by competent, credible evidence in the record and it failed to consider relevant social science regarding deterrence and incapacitation. 42

D. The Court Erred In Considering Defendant's Dismissed Charges. 47

E. The Parole Disqualifier Imposed On Count Three Is Illegal. 48

F. This Case Should Be Reassigned To A Different Judge On Remand. 48

CONCLUSION 50

TABLE OF JUDGMENTS, RULINGS, & ORDERS BEING APPEALED

Judgment of Conviction Da49-52

INDEX TO APPENDIX

Cumberland County Indictment No. 17-03-00259-I Da1-2

Judgment of Conviction, Original Sentencing (2018) Da3-6

State v. Blake, No. A-1554-18 (App. Div. Feb. 17, 2022) Da8-48

Judgment of Conviction, Resentencing (2023) Da49-52

Sentencing Brief Da53-78

Letter from Curtis Schofield Da79-80

Notice of Appeal Da81-83

Order Granting Motion to File Notice of Appeal As Within Time
(Apr. 12, 2023) Da84

Order Granting Motion to Transfer Appeal from SOA to Plenary
(May 19, 2023) Da85

State v. Bundy, 2017 N.J. Super. Unpub. LEXIS 1593, 2017 WL 2797859
(App. Div. June 28, 2017) Da86-95

State v. Fontanez, 2017 N.J. Super. Unpub. LEXIS 150, 2017 WL 371471
(App. Div. Jan. 26, 2017) Da96-107

State v. Bridges, 2014 N.J. Super. Unpub. LEXIS 1573, 2014 WL 2957443
(App. Div. July 2, 2014) Da108-121

INDEX TO CONFIDENTIAL APPENDIX
(Submitted Under Separate Cover)

Daiquan Blake Department of Corrections Face Sheet Report Dca1-3

Daiquan Blake Department of Corrections Progress Notes Report Dca4-8

Daiquan Blake Certificates Da9-11

Daiquan Blake Individualized Education Program Dca12-31

Daiquan Blake Penns Grove School District
Summary of Performance Dca32-33

TABLE OF AUTHORITIES

PAGE NOS.

Cases

Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284 (App. Div. 2022) 21

In re Application of Trantino (Trantino II), 89 N.J. 347 (1982) 19

Roper v. Simmons, 543 U.S. 551 (2005) 24

State v. Bieniek, 200 N.J. 601 (2010) 13

State v. Blake, No. A-1554-18 (App. Div. Feb. 17, 2022) 2

State v. Bridges, 2014 N.J. Super. Unpub. LEXIS 1573, 2014 WL 2957443 (App. Div. July 2, 2014) 38

State v. Bundy, 2017 N.J. Super. Unpub. LEXIS 1593, 2017 WL 2797859 (App. Div. June 28, 2017) 38

State v. Carey, 168 N.J. 413 (2001) 18, 39

State v. Case, 220 N.J. 49 (2014) 13, 14, 21, 29, 34

State v. Copling, 326 N.J. Super. 417 (App. Div. 1999) 41, 42

State v. Cuff, 239 N.J. 321 (2019) 42

State v. Fontanez, 2017 N.J. Super. Unpub. LEXIS 150, 2017 WL 371471 (App. Div. Jan. 26, 2017) 38

State v. Fuentes, 217 N.J. 57 (2014) 13, 35

State v. Hooper, 459 N.J. Super. 157 (App. Div. 2019) 35

State v. Jaffe, 220 N.J. 114 (2014) 17

State v. Jarbath, 114 N.J. 394 (1989) 31

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

TABLE OF AUTHORITIES (Cont'd)

PAGE NOS.

State v. K.S., 220 N.J. 190 (2015) 11, 47

State v. Kromphold, 162 N.J. 345 (2000) 32

State v. Kruse, 105 N.J. 354 (1987) 13

State v. Liepe, 239 N.J. 359 (2019) 39

State v. Madan, 366 N.J. Super. 98 App. Div. 2004) 49

State v. Martelli, 201 N.J. Super. 378 (App. Div. 1985) 33, 35

State v. Martini, 131 N.J. 176 (1993) 33

State v. McFarlane, 224 N.J. 458 (2019) 48

State v. Melvin, 248 N.J. 321 (2021) 49

State v. Miller, 108 N.J. 112 (1987) 35, 45

State v. Molina, 168 N.J. 436 (2001) 39

State v. Moral, 366 P.3d 664 (Kan. Ct. App. 2016) 22

State v. Natale, 184 N.J. 458 (2005) 43

State v. O'Donnell, 117 N.J. 210 (1989) 18

State v. Randolph, 210 N.J. 330 (2012) 17

State v. Reed, 211 N.J. Super. 177 (App. Div. 1986) 32, 33

State v. Rice, 425 N.J. Super. 375 (App. Div. 2012) 18

State v. Rivera, 249 N.J. 285 (2021) 22, 23, 34

State v. Rivers, 252 N.J. Super. 142 (App. Div. 1991) 18

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

TABLE OF AUTHORITIES (Cont'd)

PAGE NOS.

State v. Roth, 95 N.J. 334 (1984) 13

State v. T.E., 342 N.J. Super. 14 (App. Div. 2001) 45

State v. Walker, 322 N.J. Super. 535 (App. Div. 1999) 41

State v. Yarbough, 100 N.J. 627 (1985) 10, 11, 31, 36, 37, 40, 41, 42, 43

State v. Yarbough, 195 N.J. Super. 135 (App. Div. 1984) 31

State v. Zuber, 227 N.J. 422 (2017) 36

Trantino v. New Jersey State Parole Bd. (Trantino IV), 154 N.J. 19 (1998) 20

United States v. Brockman, 604 F. Supp. 3d 612 (S.D. Tex. 2022) 22

United States v. Roland, 281 F. Supp. 3d 470 (D.N.J. 2017) 22

Statutes

N.J.S.A. 2C:1-2 .... 43, 45

N.J.S.A. 2C:11-3a(1) 1

N.J.S.A. 2C:24-4b(5)(b) 1

N.J.S.A. 2C:39-4a(1) 1

N.J.S.A. 2C:39-5b(1) 1

N.J.S.A. 2C:43-6 48

N.J.S.A. 2C:44-1 .... 17, 43

N.J.S.A. 30:4-123.53(a) 19

TABLE OF AUTHORITIES (Cont'd)

PAGE NOS.

Court Rules

R. 1:12-1 49

Rule 3:21-4(h) 13

Regulations

N.J.A.C. 10A:71-3.11 20

Other Authorities

Alexandra O. Cohen et. al., When Does A Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769 (2016) 24

Beth M. Huebner and Mark T. Berg, Examining the Sources of Variation in Risk for Recidivism, 28 Just. Q. 146, 156 (2011) 19

Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992) 24, 27

Model Jury Charges (Criminal), "Murder, Passion/Provocation and Aggravated/Reckless Manslaughter (N.J.S.A. 2C:11-3a(1) and (2); 2C:11-4a, b(1) and b(2)" (rev. June 8, 2015) 33

Model Penal Code: Sentencing (Am. Law Inst., Proposed Final Draft, 2017) .26

National Institute of Justice, From Juvenile Delinquency to Young Adult Offending, Office of Justice Programs, https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx (Mar. 11, 2014) 25

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

TABLE OF AUTHORITIES (Cont'd)

PAGE NOS.

National Institute of Justice, From Youth Justice Involvement to Young Adult Offending, https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending (Mar. 11, 2014) 25

National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014) 46

New Jersey Criminal Sentencing and Disposition Commission, 2019 Annual Report 41 (Nov. 2019) 27

Pressler and Verniero, Current N.J. Court Rules, cmt. 4 on R. 1:12-1 (2023) .49

Rolf Loeber, David P. Farrington, David Petechuk, From Juvenile Delinquency to Young Adult Offending (Study Group on the Transitions between Juvenile Delinquency and Adult Crime) (July 2013), available at https://www.ojp.gov/pdffiles1/nij/grants/242931.pdf 26

S. Jud. Comm. Statement to A. 4373 (Aug. 24, 2020) 27

PROCEDURAL HISTORY

Cumberland County Indictment No. 17-03-0259-I charged Defendant-Appellant Daiquan Blake with one count of murder in the first degree, N.J.S.A 2C:11-3a(1)(Count 1), one count of possession of a weapon for an unlawful purpose in the second degree, N.J.S.A. 2C:39-4a(1) (Count 2), one count of unlawful possession of a weapon in the second degree, N.J.S.A. 2C:39-5b(1) (Count 3), and one count of aggravated assault in the fourth degree, 2C:12-1b(4) (Count 4) (Da1-2).[1] A trial was held before the Hon. Cristen D'Arrigo, J.S.C. Blake was acquitted of first-degree murder, but the jury found him guilty of passion/provocation manslaughter, as well as the remaining offenses. (Da5-7; 6T5-11 to 6-10).

At the initial sentencing, the Court merged Count 2 (possession of a weapon for an unlawful purpose) and Count 4 (aggravated assault) into the

[1] The following abbreviations are used:
1T – Jan. 17, 2018 (Trial)
2T – Jan. 18, 2018 (Trial)
3T – Jan. 22, 2018 (Gross Hearing)
4T – Jan. 23, 2018 (Trial)
5T – Jan. 24, 2018 (Closing Argument and Jury Charge)
6T – Jan. 29, 2018 (Verdict)
7T – Mar. 23, 2018 (Initial Sentencing)
8T – Feb. 1, 2023 (Resentencing)
Da – Defendant-Appellant's Appendix
Dca – Defendant-Appellant's Confidential Appendix
PSR – 2023 Presentence Report

manslaughter count but did not merge Count 3 (unlawful possession of a weapon). (Da8; 7T 64-1 to 70-15). The judge imposed a sentence of ten years on the manslaughter conviction with an eighty-five percent parole disqualifier pursuant to the No Early Release Act (NERA), and a consecutive sentence of ten years on the weapons conviction with a five-year parole disqualifier, for an aggregate sentence of twenty years subject to a thirteen-and-a-half year parole disqualifier. (Da8).

On appeal, this Court affirmed Blake's convictions but remanded for resentencing in light of State v. Torres, 246 N.J. 246 (2021), to "conduct a fairness assessment of the 'overall sentence'" including "consideration of all the aggravating and mitigating factors at the time the court considers the 'overall sentence.'" State v. Blake, No. A-1554-18 (App. Div. Feb. 17, 2022) (slip op. at 38). (Da44)

On remand, the judge again imposed a sentence of ten years with an eighty-five-percent parole disqualifier pursuant to NERA on Count 1 (passion/provocation manslaughter). (8T 106-25 to 107-5; Da49) On Count 3 (unlawful possession of a handgun without a permit), the judge imposed a consecutive sentence of eight years with a five-year parole disqualifier. (8T 107-16 to 24; Da49) The aggregate sentence imposed was eighteen years with

a parole disqualifier of thirteen-and-a-half years with three years of post-release NERA parole. (Da49)

Defendant filed a notice of appeal with a motion to file as within time, which was granted by this Court on April 12, 2023. (Da81-84) Defendant thereafter filed a motion to transfer this appeal from the Sentencing Oral Argument Calendar to the Plenary Calendar, which was granted on May 9, 2023. (Da85)

STATEMENT OF FACTS

Facts Of The Offense

Daiquan Blake was convicted at trial of passion provocation manslaughter for firing a handgun once in the direction of Juanita Holley on September 17, 2016, tragically striking and killing her. (1T 260-22).

Around 3:00 pm on September 17, Juanita and her husband, Reggie, were hosting a baby shower for their niece, Siani Powers, at their home in Bridgeton. (1T 60-7 to 26; 4T 108-6).[2] Blake was the expectant father of Powers' twins and Powers had invited him to the. (1T 35-4 to 6, 59-6, 61-17 to 62-10, 67-22 to 23, 266-6 to 8). Shortly after Blake arrived, Reggie asked Powers to tell Blake to leave because Reggie felt disrespected. (1T 61-19 to

[2] Because they share a last name, Reggie Holley will be referred to as "Reggie" and Juanita Holley will be referred to as "Juanita."

62-13) Powers told Reggie, “Ok,” and she and Blake went to sit on the side of the road to wait for Blake’s ride to pick him up. (1T 62-14 to 15) Marvin Sharpe, the boyfriend of one of Powers’ sisters, arrived and started walking aggressively toward Blake. (1T62-24 to 64-9). Powers jumped in the middle of Sharpe and Blake; Sharpe told Powers he wanted to fight Blake and attempted to run around Powers to get Blake. (1T 64-7 to 14). Reggie told Powers to move out of the way, but Powers remained between Sharpe and Blake until Sharpe eventually gave up and left. (1T 64-14 to 17)

Blake then borrowed Powers’ phone to request a ride. (1T 65-6 to 66-22). Powers testified that Blake sent the following message from her phone to Imanni Baker, Blake’s ex-girlfriend: “This Dai, I’m good. I gotta get my gun.” (1T 74-21 to 22). Blake’s ride arrived and he left. (1T 78-3 to 5; 124-5).

Blake returned to the Holley home later that evening with his sisters Dianna Carlson and Hyshonna. (2T 154-1 to 155-10 to 157-5). Carlson testified Blake had told her “they had jumped” him and he wanted to fight one of “them” “one-on-one.” (2T 157-9 to 10) Carlson never saw Blake with a gun. (2T 170-2, 175-10 to 18). Blake’s father, Robert Iverson, drove a separate car with Blake’s brothers, Robert Blake and Isaiah Harris, as passengers. (Da10)

Around 8 P.M., Blake arrived at the Holley home and knocked on the door; Reggie answered, and Blake asked where Sharpe was. (4T 116-1 to 18)

Reggie told Blake that Sharpe was not there; Reggie also told Blake that he did not want to fight, and Blake walked off the porch. (4T 116-19 to 117-3) Blake and his brothers returned across the street and walked past Carlson's car. (2T 161-16 to 162-25) Reggie went inside to cook and called his friend, Bruce Hall, to come to the home with a gun. (4T 117-24 to 119-24).

Hall arrived about 15 minutes later and parked in the lot directly across the street from the Holley house. (4T 120-5 to 122-12). Reggie was inside his house resting; he grabbed his BB gun and exited his house when he saw Hall arrive. (4T 122-14 to 19). At that point, Reggie saw Blake "like 200 feet up the street." (4T 123-19 to 124-11). There were several men with Blake, and Reggie said he heard one of the men say, "[H]e brung in some people." (4T 124-15). Reggie testified that "the next thing I know I heard a shot." (4T 124-16). Reggie saw the shooter and identified Blake as the shooter. (4T 125-17). Reggie realized his wife had been hit and was on the ground behind him; while tending to her he heard at least four or five more shots. (4T 127-1). A machete was found on the lawn near where Juanita was shot; Reggie testified "my wife must have had it." (4T 154-23). Reggie drove Juanita to the hospital, where she later died. (4T 127-2 to 24; 128-13).

Seven bullet casings were found in the roadway near the Holley home and one bullet was found in Carlson's car, all of which matched Hall's gun.

(2T 76-14, 86-19 to 87-13, 1269-1 to 25) The bullet that killed Juanita did not match Hall's gun. (4T 9-1 to 18-10, 24-9 to 10., 60-1 to 69-10).

Personal Characteristics of Defendant

At the time of the offense, Daiquan Blake was nineteen years old. (PSR1) School records reveal that he was identified as a student with a learning disability requiring an IEP, or individualized education plan. (Dca12-14) His disability was significant enough to preclude in-class supports, instead requiring individualized special instruction. (Dca19) During the 2016-2017 school year, immediately preceding this offense, Daiquan had at least one behavioral incident at school requiring home instruction. (Dca12) His progress report from April of 2016 notes that Daiquan can excel when he "applies himself," but "when frustrated, he will shut down and refuse to work." (Dca32) Curtis Schofield, a youth development counselor who coached Blake in high school and reconnected with him after his incarceration, wrote that at the time of the offense, Daiquan "was a misguided teenager that needed true guidance from the right person." (Da79)

Prior to his conviction for manslaughter, Blake had a single adjudication of delinquency as a juvenile for resisting arrest for which he was sentenced to probation, which he successfully completed. (PSR8) As an adult, Blake had one disorderly persons conviction for failure to disperse, N.J.S.A. 2C:33-1(b),

and one petty disorderly persons conviction for disorderly conduct-improper behavior, N.J.S.A. 2C:33-2(a)(1); he received a sentence of fines only on each conviction. (PSR8-9) Blake's sentence on this offense is his only indictable conviction and prison sentence. (PSR8-9)

In the nearly five years he was incarcerated at Garden State Youth Correctional Facility between January 2018 and December 2022, Blake was not cited for a single infraction. (Dca3) Blake completed the personal protective equipment vocational program and has maintained consistent employment in sanitation, food service, and at the furniture shop. (Dca5, 9) He also completed the Successful Employment and Lawful Living Reentry Program. (8T 20-15 to 17) He is enrolled in a Pathways to College Program as well as an associate's degree program and has earned college credits. (8T 20-18; Dca2-3, 5) Blake successfully completed the Cage Your Rage program with perfect attendance as an "active participant in the group," which he said taught him to anticipate and avoid possible negative reactions, to "confront[] past traumas," and to exhibit patience and humility. (Dca2, 5, 10-11; 8T 66-15 to 21)

Curtis Schofield reports that through Blake's incarceration he has watched Blake "grow in every area and aspect of his life" as he has "become a better man, father, son, friend, brother." (Da79) Schofield wrote that he has

seen Blake "learn to control himself whenever he gets upset, express himself more," and that "he has grown, matured, and developed into a completely different person from the last time he stood in the court room." (Da79-80) Schofield believes that the deterrent and punitive aspects of incarceration have succeeded in pushing Blake to change to make sure he lives as a law-abiding citizen and never again returns to prison. (Da79)

Blake spoke at his resentencing, took responsibility for his conduct, and expressed remorse, stating that on September 17 he made the biggest mistake in his life—a mistake that could have been prevented and one that he wishes with all his might that he could take back. (8T 65-23 to 66-23) He expressed that he has tried to take advantage of every opportunity in prison to better himself and to learn from his mistakes; he is striving to earn an associate's degree and wants to become a youth mentor when he is released to help steer kids away from making the same bad decisions that he made. (8T 66-15 to 67-8)

LEGAL ARGUMENT

POINT I

RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT: (A) FAILED TO APPROPRIATELY CONSIDER BLAKE'S POST-OFFENSE REHABILITATIVE CONDUCT THE AGE-CRIME CURVE, AND ADOLESCENT BRAIN SCIENCE; (B) MADE FINDINGS FOR AGGRAVATING FACTORS THREE AND NINE THAT WERE NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE IN THE RECORD; (C) IMPOSED CONSECUTIVE SENTENCES IN VIOLATION OF STATE V. YARBOUGH AND STATE V. TORRES; (D) CONSIDERED DEFENDANT'S DISMISSED CHARGES IN VIOLATION OF STATE V. K.S.; AND (E) IMPOSED AN ILLEGAL PAROLE DISQUALIFIER ON COUNT THREE. (Da49-52)

The initial sentence imposed by the Court in 2018 was an aggregate twenty years with a parole disqualifier of thirteen-and-a-half years. (Da8) On remand, the Court imposed an aggregate sentence of eighteen years with a parole disqualifier of thirteen-and-a-half. (Da49) The Court found and gave substantial weight to aggravating factors three (the risk that the defendant will commit another offense) and nine (the need for deterring the defendant and others from violating the law). (Da51; 8T 105 14-15) The Court found and gave moderate weight to mitigating factor fourteen (defendant was under the age of 26 at the time of this offense). (Da51; 8T 105 15 to 16) The Court found

that that the aggravating factors preponderated over the mitigating factor. (8T 105-22 to 106-1) On Count 1 (passion/provocation manslaughter), the judge again imposed a sentence of ten years subject to NERA. (8T 106-25 to 107-5; Da49) On Count 3 (unlawful possession of a handgun without a permit), the judge imposed a consecutive sentence of eight years with a five-year parole disqualifier. (8T 107-16 to 24; Da49) The Court found that a consecutive sentence was justified because under State v. Yarbough, 100 N.J. 627 (1985), the crimes and their objectives were predominantly Independent of each other, the crimes were committed at different times, and there were multiple victims. (8T 90-3 to 95-12)

This Court should reverse and remand for resentencing for several reasons. First, the Sentencing Court erred in failing to appropriately consider Blake's post-offense rehabilitative conduct, the age-crime curve, and the science of adolescent brain development in its evaluation of aggravating factors three and nine and mitigating factors nine and fourteen. (Point I.A)

Second, the Court's rationales for aggravating factors three and nine were impermissible because the Court double-counted the fact that the manslaughter was committed by a firearm, presumed—unsupported by any competent credible evidence—that individuals who have fired a gun at another

person are more likely to reoffend, and relied exclusively on general deterrence without finding any need for specific deterrence. (Point I.B)

Third, the Court's reasoning for imposing a consecutive sentence ran afoul of both Yarbough and State v. Torres, 246 N.J. 246 (2021). (Point I.C). The Court's findings that a consecutive sentence was justified under Yarbough because the crimes and their objectives were predominantly independent of each other, the crimes were committed at different times, and there were multiple victims was unsupported by the facts or by Yarbough or its progeny. (Point I.C.1) Furthermore, the Court's Torres assessment of the overall fairness of the sentences was fatally flawed for the same reasons as its assessments of aggravating factors three and nine; its assessment of the need to incapacitate and deter were not supported by competent credible evidence in the record, failed to properly weigh Blake's positive prison record and other post-offense rehabilitative conduct, and failed to consider social science regarding the age-crime curve, juvenile brain science, and deterrence. (Point I.C.2)

Fourth, the Court erred in considering Blake's dismissed charges in violation of State v. K.S., 220 N.J. 190 (2015). (Point I.D) Fifth, the Court imposed an illegal parole disqualifier of greater than one-half the term on Count 3. (Point I.E)

For all these reasons, this Court should reverse and remand for resentencing before a different judge.

A. The Sentencing Court Erred In Failing To Appropriately Consider Blake's Post-Offense Rehabilitative Conduct, The Age-Crime Curve, And Adolescent Brain Development When Considering Aggravating Factors Three And Nine And Mitigating Factors Nine And Fourteen.

Defense counsel argued against aggravating factors three (risk of reoffending) and nine (need for deterrence) and in favor of mitigating factor nine (defendant unlikely to commit another offense) for two reasons: (1) in the five years since Blake was first sentenced, he demonstrated a development in his maturity and an ability to control his anger and impulses as evidenced by his infraction-free record, his institutional programming, the testament of Schofield, and Blake's own allocution at his resentencing; and (2) the age-crime curve and science of adolescent brain development the conclusion that Blake was less likely to reoffend at age twenty-five at his resentencing than he had been at age twenty during his original sentencing. (Da70-77; 8T 24-23 to 28-8) The Court rejected these arguments, rejected mitigating factor nine, found both aggravating factors three and nine and gave them the exact same weight that the Court had given them at Blake's original sentencing—substantial weight. (8T 79-24 to 80-1; 82-12 to 25; 85-8 to 23) Although the

Court found mitigating factor fourteen and gave it moderate weight, the Court rejected all arguments concerning adolescent brain science and the age-crime curve. (8T 24-2 to 28, 31-2 to 18, 34-9 to 35-9, 42-5 to 45-16, 79-15 to 18, 87-12 to 88-9)

A sentencing court may not find an aggravating factor unless it is "supported by competent, credible evidence in the record." State v. Case, 220 N.J. 49, 64 (2014) (citing State v. Roth, 95 N.J. 334, 363 (1984)). While mitigating factors must also be supported by competent, credible evidence, "where mitigating factors are amply based in the record before the sentencing judge, they must be found." State v. Dalziel, 182 N.J. 494, 504 (2005) (emphasis added). Any factors found by the Court must be "qualitatively assessed and assigned appropriate weight in a case-specific balancing process." State v. Fuentes, 217 N.J. 57, 72-73 (2014) (citing State v. Kruse, 105 N.J. 354, 363 (1987)). Rule 3:21-4(h) "require[s] that the Sentencing Court explain the reasoning behind its findings," to facilitate "meaningful appellate review"—i.e. for the reviewing court to determine whether the sentencing court's findings "'were based upon competent credible evidence in the record.'" State v. Bieniek, 200 N.J. 601, 609 (2010) (quoting Roth, 95 N.J. at 364-65). The reviewing court must assess not only whether the sentencing court's finding of the aggravating factor was based on competent, credible

evidence, but also whether the weight given to the factor was based on competent, credible evidence. Case, 220 N.J. at 66-67 (finding that "the weight given by the trial court to aggravating factor three . . . was based not on credible evidence in the record but apparently on [an] unfounded assumption").

1. In failing to give weight to Blake's positive prison record and other post-offense rehabilitative conduct, the Court failed to sentence Blake as he stood on the date of sentencing and its finding of aggravating factors three and nine were not supported by competent, credible evidence in the record.

Blake presented evidence that he had been significantly deterred by his incarceration and that he had taken great strides that reduced his risk of recidivism. He had maintained a pristine prison record—never having been cited for a single infraction during his five years of incarceration; he completed vocational programs and maintained consistent employment while incarcerated; he completed the Successful Employment and Lawful Living Reentry Program; he earned college credits toward an associate's degree; and he completed the Cage Your Rage program with perfect attendance, which helped him cope with negative emotions to avoid negative reactions. (8T 20-15 to 18, 66-15 to 21; Dca2-3, 5, 9-11) Blake's high school coach Curtis Schofield wrote that at the time of the offense, Blake "was a misguided teenager that needed true guidance from the right person, but that over the

course of Blake's five years in prison Schofield had seen Blake "learn to control himself whenever he gets upset, express himself more," and that "he has grown, matured, and developed into a completely different person from the last time he stood in the court room." (Da79-80) Blake spoke at his resentencing, taking responsibility for his conduct, expressing remorse, and stating that more than anything he wishes he could take back his actions on the day of the offense. (8T 65-23 to 66-23) Blake expressed his goal to become a youth mentor when he is released from prison to help steer kids away from making the same bad decisions that he made. (8T 66-15 to 67-8)

After hearing this evidence, the Court acknowledged that Blake was "different today than you were before," and that the Court could "see that being part of the maturation process." (8T 76-23 to 77-1) However, with respect to aggravating factor three, the Court found that this "does not mean that the risk [that he would commit another crime] is really any different" because Blake was "hemmed in" while in prison and did not "have a great deal of autonomy of action." (8T 77-2 to 6) The Court found that "the only real evidence" it had of Blake's risk of committing another offense was how he was "behaving the last time" he was at liberty "out in the world." (8T 77-11 to 78-3) The Court found that the evidence Blake presented did not "in any way mitigate[] the risk of reoffense," and that its "assessment with regard to the

risk level [] really hasn't changed"; thus, the Court placed the same weight on aggravating factor three as it had during the original sentencing—substantial weight. (8T 78-5 to 10; 79-22 to 80-1)

The Court employed the same reasoning for rejecting Blake's argument that evidence of his rehabilitation and positive conduct in prison reduced the need to deter him. The Court stated, "I don't know whether or not an increased level of maturity has lessened your particular need for deterrence, because again, you're in that controlled environment." (8T 80-15 to 19) The Court stated, "there's secondary gain here," and then seemed to suggest that it believed that rehabilitative evidence from an inmate's time in prison could never reduce a court's assessment of the need for deterrence:

> [S]econdary gain can lead to good things, but the problem with secondary gain is it's hard to assess what's permanent and what's not. And the only way we will ever know that is when your sentence is done. That's the only time we'll ever really know. And as I say to individuals at sentencing all the time, words are great, but actions are everything. And unfortunately, until a sentence is complete we don't really know what the actions really are because you're not back in society where it counts.
>
> [(8T 81-4 to 13)]

Thus, the Court also placed the same weight on aggravating factor nine as it had during the original sentencing—substantial weight. (8T 82-3 to 6)

The Court also rejected defense counsel's request for mitigating factor nine, "the character and attitude of the Defendant indicates that he or she is unlikely to commit another offense," N.J.S.A. 2C:44-1b(9), for a similar reason:

> Well, that gets back to the words not deeds and I am going to utilize what I took from your saying what you told me today not for this. Okay? I will tell you how it affects my assessment, but it doesn't change the overall character and attitude because of the secondary gain aspect and the controlled environment under which you are currently acting, okay? Hopefully, the criminal justice system has learned some things over the couple hundred years that we've been doing it so that there is a rehabilitative component to virtually every aspect and hopefully that works. Hopefully. I am very serious, Blake, I hope it works for you, but it's too soon. I mean, five years may feel like forever, but it's not.
>
> (8T 85-8 to 23)

On a remand for resentencing, a defendant is entitled to "present evidence of his post-sentencing rehabilitative efforts" and "to have it considered." State v. Randolph, 210 N.J. 330, 333 (2012). In State v. Jaffe, our Supreme Court held that, in imposing sentence, "the trial court should view a defendant as he or she stands before the court on the day of sentencing. This means evidence of post-offense conduct, rehabilitative or otherwise, must be considered in assessing the applicability of, and weight to be given to, aggravating and mitigating factors." 220 N.J. 114, 124 (2014). The Court's

failure to consider evidence of Blake's positive prison record and post-rehabilitative conduct as weighing in favor of mitigating factor nine and against aggravating factors three and nine constituted a failure to sentence Blake as he stood before the Court on the day of sentence and violated Randolph and Jaffe.

The Court also failed to sentence Blake as he stood before the Court on the date of sentencing by failing to consider his acceptance of responsibility and his remorse as weighing against aggravating factors three and nine and in favor of mitigating factor nine. Cf. State v. Carey, 168 N.J. 413, 426-27 (2001) (affirming aggravating factor three where the defendant "denied responsibility for the crash"); State v. O'Donnell, 117 N.J. 210, 216 (1989) (defendant's lack of remorse supported a finding of aggravating factor three and precluded a finding of mitigating factor nine); State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) (the sentencing judge appropriately found aggravating factors three and nine where defendant "lacked any remorse and took no responsibility for his actions"); State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991) ("Defendant's consistent denial of involvement and his lack of remorse indicate that a prison sentence is necessary to deter defendant from similar conduct in the future, and therefore, the trial court properly found aggravating factor.").

Furthermore, because it has long been established that prison infractions and misconduct, or lack thereof, are highly correlated with the risk of recidivism, the Court's refusal to consider Blake's positive prison record in support of mitigating factor nine and as weighing against aggravating factors three and nine resulted in findings that were not supported by competent, credible evidence in the record. Social science has demonstrated the link between prison infractions and recidivism. See, e.g., Beth M. Huebner and Mark T. Berg, Examining the Sources of Variation in Risk for Recidivism, 28 Just. Q. 146, 156, 158-60 (2011). Additionally, the New Jersey State Parole Board heavily weighs prison infractions and participation in prison programming in predicting the likelihood that inmates will recidivate or comply with parole rules upon release.

The State Parole Board is charged with predicting whether inmates are likely to recidivate. See In re Application of Trantino (Trantino II), 89 N.J. 347, 355 (1982) (for inmates whose offense was committed before 1997, the Board must determine whether "'there is a substantial likelihood that the inmate will commit a crime under the Laws of this State if released.'" (quoting N.J.S.A. 30:4-123.53(a) (1979)); N.J.S.A. 30:4-123.53(a) (2023) (for inmates who offense occurred after August 18, 1997, the Board must determine whether "there is a reasonable expectation that the inmate will violate

conditions of parole"). The Board has promulgated a rule setting forth the factors relevant to predicting an inmate's likelihood of committing another offense upon release; five of the first eight factors relate to inmate behavior in prison, including infractions. N.J.A.C. 10A:71-3.11(b)(1) ("Commission of an offense while incarcerated"); (b)(2) ("Commission of serious disciplinary infractions"); (b)(4) ("Adjustment to previous probation, parole and incarceration"); (b)(7) ("Pattern of less serious disciplinary infractions"); (b)(8) ("Participation in institutional programs . . . include[ing], but . . . not limited to, . . . academic or vocational education programs, work assignments that provide on-the-job training and individual or group counseling").

In addition to the Board's agency judgment that an inmate's institutional record is predictive of his likelihood of committing a new offense, both the Supreme Court and this Court have recognized that participation in institutional programming and a recent infraction-free record weigh against the need for deterrence and the likelihood of recidivism. Trantino v. New Jersey State Parole Bd. (Trantino IV), 154 N.J. 19, 32 (1998) (finding that Trantino's prison record—including his infraction history and participation in rehabilitative programs—"plainly is material in determining whether he has achieved a level of rehabilitation such that he has been sufficiently deterred and there is no likelihood of recidivism"); Berta v. New Jersey State Parole

Bd., 473 N.J. Super. 284, 314-15 (App. Div. 2022) (finding that "Berta's recent infraction-free history is more probative of the likelihood of re-offense than his temporally remote infraction history" and that "a more recent pattern of sustained infraction-free conduct suggests that an inmate will be willing and able to comply with parole rules just as he or she has learned to comply with prison rules"). Thus, Blake's spotless institutional record—never committing an offense or single infraction in prison—and his participation in therapeutic, vocational, and academic programming in prison, all supported a finding that he was unlikely to commit another offense and that there was not a great need for deterrence. The Sentencing Court's refusal to consider these facts as supporting mitigating factor nine and weighing against aggravating factors three and nine resulted in findings on those factors that were unsupported by competent, credible evidence in the record.

Finally, the Sentencing Court's unexplained, undecipherable reference to "secondary gain" as a basis for refusing to consider Blake's institutional record as weighing against the need to deter him and against finding mitigating factor nine amounted to unsubstantiated "[s]peculation and suspicion." Case, 220 N.J. at 64. To support a finding of aggravating factors three or nine, "the record must contain evidence demonstrating a likelihood of re-offense—be it expert testimony, or the defendant's criminal history, lack of remorse,

premeditation, or other competent evidence;" the sentencing court may not simply "engage[] in impermissible speculation." State v. Rivera, 249 N.J. 285, 302 (2021).

There are a few scattered references to secondary gain in the context of the criminal justice system, all of which use the term to refer to defendants who "malinger" or fabricate symptoms of mental illness either to avoid prosecution or to receive some other benefit within the penal system. See, e.g., United States v. Roland, 281 F. Supp. 3d 470, 507 n.53 (D.N.J. 2017) (noting that secondary gain describes a situation where a defendant seeks a diagnosis in order to benefit or gain in some way from the diagnosis, such as by avoiding the death penalty); United States v. Brockman, 604 F. Supp. 3d 612, 616 (S.D. Tex. 2022) (discussing the evaluation of a defendant by experts with "specific training and experience conducting forensic evaluations of criminal defendants where there is a concern regarding malingering or feigning dementia for potential secondary gain of the magnitude involved in this case—avoiding criminal prosecution and a potentially long prison term"); State v. Moral, 366 P.3d 664 (Kan. Ct. App. 2016) (noting that "in order to diagnose a patient as malingering, there must be a secondary gain present, such as a desire to escape criminal prosecution").

Through its "secondary gain" analysis, it appears the Sentencing Court was opining that because Blake could reasonably anticipate a benefit from behaving well in prison and participating in programming, it could not view his prison record and program participation as evidence that he was not likely to commit another offense or that he did not need to be deterred. Simply put, this use of the term "secondary gain" appears nowhere in any scientific or criminal justice literature. Furthermore, such an assertion flies in the face of the aforementioned recognition by the Parole Board, the Supreme Court, and this Court that participation in institutional programming and an infraction-free record support a finding that an inmate is not likely to commit another offense. Thus, the Sentencing Court's use of the term "secondary gain" was baseless, "impermissible speculation"—not "competent evidence." Rivera, 249 N.J. at 302.

2. Because the Court's reasoning in finding and weighing aggravating factors three and nine and mitigating factor fourteen and in declining mitigating factor nine failed to address the extremely relevant adolescent brain science and age-crime curve, the Court's findings were not supported by competent, credible evidence in the record.

In both his brief and at oral argument, defense counsel cited scientific articles concerning: (1) the underdeveloped prefrontal cortex prior to age twenty-five and the corresponding recklessness and impulsivity of young people in that age bracket; and (2) the age-crime curve. Defense counsel

argued that this science—coupled with the six years Blake had aged from committing the offense at nineteen to his age of twenty-five at the time of resentencing—supported his arguments that (1) the Court should either not find aggravating factors three and nine or at least give them much less weight; and (2) the Court should find mitigating factor nine and place great weight on mitigating factor fourteen. (Da70-75; 8T 25-8 to 27-17)

First, defense counsel cited Roper v. Simmons, 543 U.S. 551 (2005), which discusses Dr. Jeffrey Arnett's findings that "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" Id. at 569 (quoting Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339, 339 (1992)). (Da71) Dr. Arnett's research defined adolescence not as ending at age eighteen but rather extending "to the early 20's." Arnett, Reckless Behavior, 12 Developmental Rev. at 340. Additionally, defense counsel cited Alexandra O. Cohen et. al., When Does A Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769 (2016). (Da71) In that article, Dr. Cohen, who has a Ph.D. in Neuroscience, discussed the neuroscientific evidence demonstrating "continued regional development of the prefrontal cortex, implicated in judgment and self-control beyond the teen years and into the twenties." Id. at 783. She further wrote that the "symmetric and dynamic

changes in the structure and function of subcortical limbic and prefrontal cortical circuitry underlie the diminished capacity to exercise self-control to inhibit inappropriate actions, desires, and emotions in favor of appropriate ones" and that "[i]n social or emotionally charged situations, the limbic regions of the brain may hijack less mature prefrontal regions leading to an imbalance or overreliance on these emotional regions." Id. at 783-84. Specifically pertinent to Blake, who was nineteen at the time of the offense, Dr. Cohen wrote that young adults twenty-one years of age or younger "show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal" but were twenty-two to twenty-five-year-olds showed greater cognitive capacity for self-regulation Id. at 786.

Finally, defense counsel cited scholarship demonstrating the "age-crime curve," which shows that "[t]he prevalence of offending tends to increase from late childhood, peak in the teenage years (from 15 to 19) and then decline in the early 20s." National Institute of Justice, From Youth Justice Involvement to Young Adult Offending, https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending (Mar. 11, 2014).[3] (Da72) Counsel further

---

[3] At the time sentencing counsel cited this website, it had a different title and url: National Institute of Justice, From Juvenile Delinquency to Young Adult Offending, Office of Justice Programs, https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx (Mar. 11, 2014). (Da72) The permanent non-periodical publication from which

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

noted that, as recognized by the drafters of the Model Penal Code, "[l]ongitudinal studies show that the great majority of [young offenders] will voluntarily desist from criminal activity with or without the intervention of the legal system." Comment to § 6.11A, Model Penal Code: Sentencing (Am. Law Inst., Proposed Final Draft, 2017). (Da72)

In light of Blake's age of nineteen at the time of the offense, his age of twenty-five at the time of his resentencing, and his prison record between those ages of infraction-free desistence and active participation in his rehabilitation, the science of adolescent brain development and the age-crime curve should have supported findings that (a) Blake's offense was influenced by the recklessness and impulsivity stemming from an undeveloped prefrontal cortex characteristic of nineteen year-olds; and (b) his subsequent compliance and rehabilitative efforts in prison suggested desistence that is consistent with the peak of the age-crime curve at nineteen and decline through age twenty-five and beyond. Thus, the social science bolstered defense counsel's argument that Blake's post-offense rehabilitative efforts was evidence that (1) he was

---

this assertion was taken is linked on this website: Rolf Loeber, David P. Farrington, David Petechuk, From Juvenile Delinquency to Young Adult Offending (Study Group on the Transitions between Juvenile Delinquency and Adult Crime) 3 (July 2013), available at https://www.ojp.gov/pdffiles1/nij/grants/242931.pdf.

unlikely to commit another offense (i.e. that the Court should find mitigating factor nine and reject aggravating factor three); (2) he had been remarkably deterred and there was no further need for deterrence; and (3) mitigating factor fourteen should be given particularly strong weight. Indeed, the Legislature enacted mitigating factor fourteen at the recommendation of the Criminal Sentencing and Disposition Commission, which cited this adolescent brain science—including the aforementioned article by Dr. Arnett. S. Jud. Comm. Statement to A. 4373 (Aug. 24, 2020); New Jersey Criminal Sentencing and Disposition Commission, 2019 Annual Report 41 (Nov. 2019).

In response to counsel's arguments, the Sentencing Court expressed a belief that the science was limited to young people under the age of eighteen and that Blake's youth at the time of the offense was only relevant to mitigating factor fourteen. (8T 24-2 to 28, 34-9 to 35-9, 42-5 to 45-16) The Court seemed to believe there was an inherent tension between considering defendant's youth at the time of the crime for mitigating factor fourteen but to assess the other factors as of the day of his resentencing. (8T 21-21 to 22-21) The Court expressed doubt that the brain science should be mitigating at all beyond the legislatively mandated mitigating factor fourteen in light of the fact that people older than twenty-six commonly commit crimes. (8T 31-2 to 18, 34-9 to 21) Similarly, the Court stated,

> We're talking . . . the ability to pull the trigger on a handgun, point it at somebody. You have to be a certain kind of person to do that and it's not a function of youth. Because otherwise, all young people would be out there pointing guns at people and pulling triggers.
>
> [(8T 79-12 to 18)]

Thus, the Court rejected counsel's arguments that adolescent brain science or the age-crime curve was relevant to aggravating factors three or nine. (8T 76-19 to 82-15) With respect to mitigating factor fourteen, the Court indicated that it had observed in Blake's allocution "some changes . . . that . . . are elements of maturity" and gave the factor moderate weight; however, the Court based this weight entirely on Blake's statement, declining to even reference adolescent brain science or the age-crime curve and stating, "This is not a juvenile. This is not a waiver case. He was an adult. An adult maybe who lacked a level of maturity, which is where the mitigating factor is most applicable." (87-17 to 88-9)

The Sentencing Court failed to recognize that adolescent brain science has demonstrated that the prefrontal cortex is still underdeveloped at age nineteen and that as a result, nineteen-year-olds are more prone to engage in reckless and impulsive behavior than adults with fully developed prefrontal cortices at ages twenty-five or older just like juveniles under the age of eighteen are more prone to engage in reckless and impulsive behavior. (8T 24-

15 to 18, 31-2 to 18, 42-5 to 44-18, 79-12 to 18) The Court failed to connect the underdeveloped prefrontal cortex of a nineteen-year-old with the impulsive, reckless act of pulling the trigger, specifically rejecting any connection between that youth and that act. (8T 79-12 to 18) And the Court failed to acknowledge the connection between adolescent brain development, the age-crime curve, and the corresponding reduction in criminality between ages nineteen and twenty-five in considering the likelihood that Blake would commit another offense. (8T 79-12 to 80-1) Because the Court's reasoning in finding and weighing aggravating factors three and nine and mitigating factor fourteen and in declining mitigating factor nine failed to address the extremely relevant adolescent brain science and age-crime curve that counsel presented to the Court—failing even to give an explanation for rejecting its relevance—its findings were not "supported by competent, credible evidence in the record." Case, 220 N.J. at 64.

B. The Court's Rationales For Aggravating Factors Three And Nine Were Impermissible Because The Court Double-Counted The Fact That The Manslaughter Was Committed By A Firearm, Speculated That Individuals Who Have Fired A Gun At Another Person Are More Likely To Reoffend, And Relied Exclusively On General Deterrence Without Finding Any Need For Specific Deterrence.

The Court based its finding and decision to give substantial weight to aggravating factors three and nine in large part on the fact that Blake was convicted of pointing a gun in the direction of another person and pulling the trigger. In support of aggravating factor three, the Court reasoned:

> So when I talk about risk, I do that from the assessment of . . . the gravity of the action. And to point a gun in the direction of anybody and pull the trigger requires more than just youthful exuberance. It requires a level of something that not everybody has. I would dare to say, most people don't. . . . We're talking about everyday interaction, the ability to pull the trigger on a handgun, point it at somebody. You have to be a certain kind of person to do that and it's not a function of youth. Because otherwise, all young people would be out there pointing guns at people and pulling triggers. So it's not an indictment of you personally, it's an assessment of risk and when a person can reach that point that they can do that, they can reach that point again.
>
> [(8T 78-22 to 79-21)]

In support of aggravating factor nine, the Court reasoned:

> So when it comes to Nine, deterrence in both a specific and general sense is extremely high. How many young people are gonna shoot somebody in the street this

> year? I think we had one over the weekend[,] right? This is not an unknown event, particularly here in Cumberland County. So when you talk about deterrence, I don't know. Is there anything greater than substantial—is there any higher level of that? I don't know. But if there is, I'm opting for that.
>
> [(8T 81-23 to 82-6)]

In relying heavily on the fact that Blake was convicted of committing manslaughter with a gun and focusing on the need to deter other young people, the Sentencing Court made three errors: (1) it double-counted the weapon that was the cause of death, a necessary element of the offense of manslaughter; (2) it engaged in impermissible speculation that individuals who have pointed a gun at another person and pulled a trigger likely to reoffend without any basis in competent evidence; and (3) it relied exclusively on general deterrence without finding any need for specific deterrence.

First, the Court engaged in impermissible "double-counting." State v. Jarbath, 114 N.J. 394, 404 (1989). Aggravating factors are, by definition, factors that make a particular crime more severe than other convictions for the same offense. See State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), modified, 100 N.J. 627 (1985). Thus, it is impermissible to rely on a fact that constitutes an element of the offense in support of an aggravating factor, as this "would in effect result in this evidence being counted twice, once in determining the degree of culpability of the crime and, again, as an

aggravating factor." Jarbath, 114 N.J. at 404. If elements of the crime could be used in aggravation, "every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating factors." State v. Kromphold, 162 N.J. 345, 353 (2000). In a case where a defendant was convicted of aggravated manslaughter, this Court held that it was impermissible double-counting for the trial court to base its finding of an aggravating factor on the "reckless handling and pointing of a shotgun." State v. Reed, 211 N.J. Super. 177, 188 (App. Div. 1986).

Here, one of the Sentencing Court's principal justifications for finding aggravating factors three and nine was that Blake committed a homicide by pointing a firearm and pulling the trigger. (8T 78-22 to 79-21, 81-23 to 82-6) Because this act was the cause of Ms. Holley's death and causing the victim's death is an element of manslaughter, this constituted impermissible double-counting. Additionally, the prosecutor in summation directed the jury to listen to the Court's instructions that "pointing a firearm and discharging it in the direction of a human being, when a deadly weapon is used, an inference can be made the Defendant's purpose was to take a life," and the Court instructed the

jury accordingly.[4] (Jan24T 112-11 to 15, 156-25 to 157-17) Thus, Blake's action of pointing the firearm and pulling the trigger also constituted the element of intent, which is a separate reason to find that the Court's reliance on this fact in support of two aggravating factors was impermissible double-counting. Cf. Reed, 211 N.J. Super. at 188 (the defendant's "reckless handling and pointing of a shotgun" was "an ingredient of the offense" of "reckless manslaughter"). The Court utterly failed to cite any facts about Blake's specific act of pointing a firearm and pulling the trigger to distinguish it from any other homicide caused by a firearm, and thus failed to ground its rationale for aggravating factors three and nine on any facts "that differentiate the case at hand from other cases of the same crime or this offender from others." State v. Martelli, 201 N.J. Super. 378, 386 (App. Div. 1985).

Second, the Court's reasoning suggested it believed that aggravating factors three and nine should be found for every crime where the defendant pointed a firearm at a person and pulled the trigger. (8T 78-22 to 79-21, 81-23 to 82-6) With respect to mitigating factor three in particular, the Court speculated that a person who has reached the point "to pull the trigger on a

---

[4] Accord Model Jury Charges (Criminal), "Murder, Passion/Provocation and Aggravated/Reckless Manslaughter (N.J.S.A. 2C:11-3a(1) and (2); 2C:11-4a, b(1) and b(2)" (rev. June 8, 2015) at 2-3 (citing State v. Martini, 131 N.J. 176, 269-74 (1993)).

handgun, point it at somebody," is "a certain kind of person" and "can reach that point again;" in other words, there is something specific about what it takes to point and fire a firearm which means that a person who has done that is particularly likely to reoffend. (8T 79-13 to 21) The Court gave absolutely no basis for this proposition, dogmatically asserting it as if its truth were undeniable. Thus, this assertion amounted to "an impermissible presumption" not "'supported by competent, credible evidence in the record'" because it was not grounded in "expert testimony, or the defendant's criminal history, lack of remorse, premeditation, or other competent evidence." Rivera, 249 N.J. at 302 (quoting Case, 220 N.J. at 64).

Third, the Court's rationale for finding and placing great weight on aggravating factor nine was exclusively based on general deterrence. Immediately after turning to aggravating factor nine, the Court stated, "Now this is not just specific deterrence, but general deterrence. And I ask myself, how many young people just like Blake will I see? Quite a few. That's why they're here. We're here because they've done things that shouldn't have been done under circumstances that they should not have acted the way they acted." (8T 80-9 to 15) The Court then addressed Blake but did not point to any facts about Blake or his specific offense that warranted a finding of the need for deterrence, instead speaking in general terms about why the Court did not

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

consider Blake's prison record and rehabilitative efforts as evidence weighing against the need for deterrence. (8T 80-16 to 81-22) The Court then stated that "deterrence in both a specific and general sense is extremely high," but focused entirely on general deterrence, reasoning, "How many young people are gonna shoot somebody in the street this year? I think we had one over the weekend; right? This is not an unknown event, particularly here in Cumberland County." (8T 81-23 to 82-3)

Our courts have long held that, "[i]n the absence of a finding of a need for specific deterrence, general deterrence 'has relatively insignificant penal value.'" Fuentes, 217 N.J. at 79 (quoting Jarbath, 114 N.J. at 405). Generally, to sustain a finding of aggravating factor nine, a court must explain "what special need for deterrence or non-depreciation of the offenses differentiates this case from other cases" of the same class or category. Martelli, 201 N.J. Super. at 385-86. A court cannot simply rely on the need to "send a message" to prevent other people in the community from committing the same crime. See State v. Hooper, 459 N.J. Super. 157, 185 (App. Div. 2019) (reversing because the trial court "failed to explain how its expressed desire to make defendant's sentence an extreme example so as to serve as a warning for others was consistent with a 'focus on the fairness of the overall sentence'") (quoting State v. Miller, 108 N.J. 112, 121 (1987)). Accordingly, the Court's exclusive

reliance on general deterrence to find aggravating factor nine cannot be sustained.

C. The Court's Rationale For Imposing Consecutive Sentences Was Not Justified By Yarbough Or Torres.

The decision whether to impose concurrent or consecutive sentences for multiple offenses is often the single most important decision that "drives the real-time outcome at sentencing." State v. Zuber, 227 N.J. 422, 449 (2017). In this case, the Court's finding that a consecutive sentence was justified under Yarbough because the crimes and their objectives were predominantly independent of each other, the crimes were committed at different times, and there were multiple victims was unsupported by the facts or by Yarbough or its progeny. (Point I.C.1) Furthermore, the Court's Torres assessment of the overall fairness of the sentences was fatally flawed for the same reasons as its assessments of aggravating factors three and nine; its assessment of the need to incapacitate and deter were not supported by competent, credible evidence in the record, failed to properly weigh Blake's positive prison record and other post-offense rehabilitative conduct, and failed to consider social science regarding the age-crime curve, adolescent brain development, and deterrence. (Point I.C.2) This Court should order resentencing.

1. The Court's findings that the Yarbough factors justified a consecutive sentence were unsupported by the facts or by Yarbough.

Under Yarbough, courts must consider the following factors when deciding whether to impose a consecutive sentence:

> (a) the crimes and their objectives were predominantly independent of each other;
> (b) the crimes involved separate acts of violence or threats of violence;
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> (d) any of the crimes involved multiple victims; [and]
> (e) the convictions for which sentences are to be imposed are numerous.
>
> [100 N.J. at 644.]

In this case, the Court found that a consecutive sentence was justified because the crimes and their objectives were predominantly independent of each other, the crimes were committed at different times, and there were multiple victims.[5] (8T 90-3 to 95-12)

For factor (a), the Court found that the crimes and their objectives were independent of each other because "[s]hooting at Mr. Holley was not the purpose of getting the gun. The purpose was to confront Sharpe." (8T 93-12 to

[5] It is unclear whether the court found or relied on "separate acts of violence or threats of violence." (8T 94-19)

13) The Court further stated that "getting the gun was an offensive move" "to wreak vengeance on Mr. Sharpe." (8T 93-22, 94-16 to 17) But while the evidence presented at trial supported a conclusion that Blake's purpose in returning to the Holley home was to confront Sharpe, no evidence was presented that remotely suggested that Blake intended to do anything with the gun other than to have it in case his proposed one-on-one fight with Sharpe transformed into a greater threat; he told Carlson he intended to fight Sharpe one-on-one and only fired the gun after seeing both Hall and Holley with guns. (2T 157-9 to 10; 4T 117-24 to 119-24, 122-14 to 19) This Court has often rejected trial court decisions finding that the crime of unlawful possession of a firearm and a substantive crime committed with the firearm were predominantly independent of one another.[6]

---

[6] See State v. Bundy, 2017 N.J. Super. Unpub. LEXIS 1593, *12, 2017 WL 2797859, *5 (App. Div. June 28, 2017) (where defendant was convicted of reckless manslaughter and unlawful possession of a weapon, "[t]he trial judge erred by determining 'the crimes and their objectives were predominantly independent of each other'") (Da92); State v. Fontanez, 2017 N.J. Super. Unpub. LEXIS 150, *20-22, 2017 WL 371471, *8 (App. Div. Jan. 26, 2017) (finding that even where separate victims justified consecutive sentences for aggravated assault and attempted murder, this did not justify a consecutive sentence on defendant's conviction for unlawful possession of a weapon) (Da106); State v. Bridges, 2014 N.J. Super. Unpub. LEXIS 1573, *26, 2014 WL 2957443, *11 (App. Div. July 2, 2014) (finding, where a jury found defendant guilty of attempted murder and two related counts of unlawful possession of a firearm, that "[t]he two crimes were not predominantly independent of each other, did not involve separate acts, and were not committed at different times or separate places"). (Da120)

The Court's rationale for finding multiple victims is flawed for a similar reason. The Court first stated, "[T[he real victim is Sharpe. That's who it was for. That gun was for Sharpe, he was the intended victim." (8T 94-23 to 25) Again, while there is evidence Blake sought to retrieve the gun after Sharpe initially confronted him, there was no evidence that established that his purpose in retrieving the gun was to proactively use it to assault Sharpe as opposed to having it on hand for protection if needed. (2T 157-9 to 10) Moreover, it seems the Court was suggesting that Sharpe was a victim of Blake's possession offense; however, the offense of unlawful possession of a firearm does not have a victim as an element. See N.J.S.A. 2C:39-5(b). (Da2)

The Court separately suggested that both Mr. and Mrs. Holley were victims of the offense of aggravated assault by pointing a firearm. (95-1 to 12) This offense merged into the manslaughter conviction and Blake did not receive a separate sentence for the pointing conviction. (Da49) Even if the Court's conclusion that the Holleys could both be considered victims of the single pointing offense were not erroneous, this rationale would only support running the fourth-degree pointing conviction consecutive to the manslaughter conviction—not the conviction for unlawful possession of a firearm.

Moreover this case in no way resembles cases like Carey, 168 N.J. 413, State v. Molina, 168 N.J. 436 (2001), or State v. Liepe, 239 N.J. 359 (2019), in

which our courts have held that, in "cases in which more than one victim has been killed or seriously injured, 'the multiple-victims factor' should 'ordinarily result in the imposition of at least two consecutive terms.'" Liepe, 239 N.J. at 377 (quoting Carey, 168 N.J. at 429-30). The Liepe Court explained that while this language in Carey "did not impose a presumption in favor of consecutive terms," the Court "observed that when a sentencing court compares the harm inflicted . . . in the multiple-victim setting with the harm that would have resulted from the offense were there only a single victim, it is likely to conclude that the harm in the former setting is 'distinctively worse' than that in the latter." Ibid. In this case, Blake was convicted of firing a single bullet which struck a single victim; the fact that the firearm may have been pointed in the general direction of Mr. Holley as well when it was discharged—when Mr. Holley was not struck or injured—did not render this offense "distinctively worse" than it would have been if Mr. Holley had been further away or inside the house. Thus, it was improper for the Sentencing Court to rely on the "multiple victims" factor to impose consecutive sentences.

For Yarbough factor (c), the Court reasoned that the offense of unlawful possession of the firearm "occurred the moment [Blake] left his residence with that gun in his possession," which was "somewhere around 3:00, 3:30, maybe 4:00 o'clock," whereas the shooting did not occur around 8:00 pm. (8T 90-22

to 91-17) The Court found that the fact that Blake left the Holley house to retrieve the gun from his home and the four hours that transpired between the retrieval of the gun and the shooting supported a finding that the crimes were committed at different times or separate places. (8T 95-18 to 97-1). Contrary to this finding, the fact that Blake retrieved the gun for protection in case the sought "one-on-one" fight at the Holley house got out of control compelled a finding that the possession and manslaughter charges were committed "so closely in time and place as to indicate a single period of aberrant behavior." Yarbough, 100 N.J. at 644; see State v. Walker, 322 N.J. Super. 535, 557 (App. Div. 1999) (finding that the Pollenitz murder and McClendon robbery were committed "so closely in time and place as to indicate a single period of aberrant behavior" because the defendant committed the McClendon robbery at 12:35 a.m. but killed Pollenitz during a separate attempted robbery an hour later).

In State v. Copling, 326 N.J. Super. 417, 441 (App. Div. 1999), this Court sustained consecutive sentences for defendant's convictions for murder and manslaughter because they involved separate victims, but reversed the imposition of a consecutive sentence for the unlawful possession of a handgun conviction because "the true victim of unlawful possession of a handgun is society as a whole." The Court held that because the "ultimate goal" of the

unlawful possession of a handgun statute is to "protect others from being killed by those who own weapons," and the "purpose of the murder statute is obviously to protect the public and individuals from unlawful killing;" thus, "the objective of each [statute] is similar." Ibid. Accordingly, this Court found it inappropriate to sentence the weapons offense consecutively to the homicide and ordered that "[t]he conviction for unlawful possession must be served concurrently to the conviction for murder." Id. at 441. see also State v. Cuff, 239 N.J. 321, 351 (2019) ("On remand, the court should reconsider its determination that defendant's sentence for unlawful possession of a weapon in that incident should be consecutive to his sentences for other crimes committed on the same date.").

This Court should concur with Copling and find that the circumstances of this case do not support the imposition of a consecutive sentence for the possession offense.

2. The Court's assessment of the overall fairness of the sentences was fatally flawed for the same reasons as its assessments of aggravating factors three and nine; its assessment of the need to incapacitate and deter were not supported by competent, credible evidence in the record and it failed to consider relevant social science regarding deterrence and incapacitation.

The Supreme Court in Torres made clear that an evaluation of the overall fairness of a sentence "is the necessary second part to a Yarbough

analysis." 246 N.J. at 268. A court's decisions (1) setting the length of the multiple terms and (2) deciding whether to impose those terms concurrently or consecutively do not happen in a vacuum; rather, "sentencing is a holistic endeavor" and the "aggravating and mitigating factors and Yarbough factors, as well as the stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness." Id. at 272. In particular, the fairness evaluation must "contextualize[e] the individual sentences' length, deterrent value, and incapacitation purpose and need." Id. at 271.

The goals of deterrence and incapacitation are reflected both in N.J.S.A. 2C:1-2(b)(3) as well as in aggravating factors three (incapacitation)[7] and nine (deterrence). A high risk that the defendant will reoffend and a substantial need for deterrence justify a longer sentence, which can be accomplished either by running the sentences consecutively, imposing individual terms toward the top end of the range, or a combination of both. See Torres, 246 N.J. at 271; State v. Natale, 184 N.J. 458, 488 (2005).

Here, after evaluating the Yarbough factors, the Court purported to turn to an assessment of the overall fairness of the aggregate sentence as required

[7] Aggravating factor three (risk of reoffense) is tethered to the sentencing goal of incapacitation ("the confinement of offenders when required in the interest of public protection") because a higher risk of reoffense justifies a longer sentence to protect the public by incapacitating the defendant for a longer period. N.J.S.A. 2C:1-2(b)(3); 2C:44-1(a)(3).

by Torres, but the Court's reasoning is hard to parse. The Court first reasoned, "in applying consecutive sentences here, even if it were as originally sentenced ten and ten, 20 total years, he's an individual who's 19 years old. He'll be under the age of 40 by the time he reaches his parole." (8T 101-16 to 20) The Court then returned to the same distinction between possessing a gun and firing it that it had relied upon during its evaluation of the Yarbough factors, stating that "there are two separate evils." (8T 102-3 to 104-14) The weakness in the Court's Yarbough analysis, as discussed in Point I.C.1, supra, thus infected the Court's Torres fairness assessment as well.

The Court also addressed deterrence in the context of its decision to impose consecutive sentences, reasoning that the possession offense required a consecutive sentence to achieve the goal of deterrence because "if nobody knows you have the gun, what deters you from having it; right?" (8T 92-4 to 9) The Court fell back into its earlier reliance on general deterrence, stating, "I can't tell you how many young people I see who come in here and they're on Graves charges. You know? Had one today. He just happened to be stopped by police who were looking for somebody else." (8T 92-14 to 17) The Court distinguished between a person "who's walking around with a gun all the time and something happens, they pull it out and they shoot it"—in which case the Court reasoned that the possession "should merge" (i.e. run concurrently) with

the shooting—and what happened in this case, where Blake left the shower to get a gun to confront Sharpe. (8T 93-1 to 12) This reasoning defies logic; a defendant who always carries a gun in public would seem to need or deserve more deterrence than one who procured a gun on a single occasion for a specific, limited reason.

Moreover, because this deterrence rationale—via placing substantial weight on aggravating factor nine—was used to justify a maximum-term sentence for manslaughter and a sentence at the upper end of the range for possession, the Court impermissibly double-counted this rationale. State v. T.E., 342 N.J. Super. 14, 37 (App. Div. 2001) (when running sentences consecutively the sentence court should "appl[y] reduced weight to the aggravating factors" for the second term "[t]o avoid double counting of aggravating factors."); see also Miller, 108 N.J. at 122 ("factors relied on to sentence a defendant to the maximum term for each offense should not be used again to justify imposing those sentences consecutively.").

Furthermore, the Court's evaluation of deterrence failed "[t]o advance the use of generally accepted scientific methods and knowledge in sentencing offenders." N.J.S.A. 2C:1-2(b)(7). The upshot of numerous studies on the deterrent effect of various sentencing regimes, as outlined by the heralded

National Academies of Sciences report on mass incarceration, is that the relationship between sentence length and crime rate is not linear but rather decreases in slope as the sentence length increases. National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 138-39 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014). That means that as sentences get longer, the deterrent effect of extending the sentence decreases –- for each additional month or year added to a long sentence, the marginal increased deterrent value of that additional month or year becomes less and less, approaching zero. Id. at 139. The report concluded that "increasing already long sentences has no material deterrent effect." Id. at 140. The Court here relied on a rationale of deterrence to impose consecutive sentences without confronting the social science of deterrence or explain why a ten-year NERA sentence—imposed on a person who had never been to prison—was not sufficient to deter Blake from reoffending.

The Court also failed to address whether there was any incapacitative need for a consecutive sentence. Torres, 246 N.J. at 271. Even if it can be assumed that the Court relied on its analysis of incapacitative need that it set forth during its discussion of aggravating factor three, that analysis was fatally flawed for the reasons set forth in Points I.A and B, supra. Simply put, the Court's assessment of the need to incapacitate and deter was not supported by

competent, credible evidence in the record, failed to properly weigh Blake's positive prison record and other post-offense rehabilitative conduct, and failed to consider social science regarding the age-crime curve, adolescent brain development, and deterrence. See Points I.A and B, supra. Thus, this Court should reverse and remand with instructions that the trial court properly consider Blake's positive prison record and other post-offense rehabilitative conduct, and social science regarding the age-crime curve, adolescent brain development, and deterrence.

D. The Court Erred In Considering Defendant's Dismissed Charges.

The Supreme Court has held that "prior dismissed charges may not be considered for any purpose" unless "the reason for consideration [is] supported by undisputed facts of record or facts found at a hearing." K.S., 220 N.J. at 199. Here the court considered Blake's dismissed charges as evidence that he was "dancing through the raindrops" and "had constant run ins with the criminal justice system" until "finally has one hit." (8T 72-21 to 74-25, 83-20 to 84-18, 105-8 to 11) This violated K.S.

FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

E. The Parole Disqualifier Imposed On Count Three Is Illegal.

On Count 3, Unlawful Possession of a Handgun (N.J.S.A. 2C:39-5(b)), the Court imposed a sentence of eight years with five years parole ineligibility. (8T 107-20 to 23; Da49) Under the Graves Act, the "minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater." N.J.S.A. 2C:43-6(c). Thus, on a sentence of eight years the court was required to impose a parole disqualifier of four years; the five year parole disqualifier is illegal.

F. This Case Should Be Reassigned To A Different Judge On Remand.

Reassignment to a different judge is warranted when necessary "to preserve public trust in the sentencing framework established by our Code." State v. McFarlane, 224 N.J. 458, 469 (2019). Not only did the Court commit multiple sentencing errors and disregard critical evidence of rehabilitation as set forth in Point I.A through C, but the ultimate sentence the Court arrived at was not a product of the structured sentencing procedures of the Code; the Court began with its prior twenty year sentence as the starting point and "reduc[ed] that by two years" in recognition that Mr. Blake had been "making some attempt" to better himself while trying to strike a balance between not making either the victim's family or defense counsel happy. (8T 108-1 to 15)

By starting with the aggregate sentence of two consecutive maximum terms as the default—rather than arriving at it through the relevant factors set forth in the Code—and seemingly attempting to strike a balance between the wishes of the victim's family and defense counsel, the Court "undermine[d] public confidence in our system of criminal sentencing." Ibid; see also State v. Madan, 366 N.J. Super. 98, 114 (App. Div. 2004) (while "[t]he views of the victim's family may be taken into consideration" they "cannot be controlling;" the court must arrive at the sentence via "the facts, the law, and the range of permissible sentences under the Code").

Accordingly, this Court should direct this case to be reassigned to a different judge on remand. See State v. Melvin, 248 N.J. 321, 352-53 (2021) ("Viewing the proceedings from the defendant's perspective, it might be difficult to comprehend how the same judge who has twice sentenced him [or her] could arrive at a different determination at a third sentencing."); see also R. 1:12-1(d); Pressler and Verniero, Current N.J. Court Rules, cmt. 4 on R. 1:12-1 (2023) (providing "the appellate court has the authority to direct that a different judge consider the matter on remand and in subsequent proceedings in order to preserve the appearance of a fair and unprejudiced hearing").

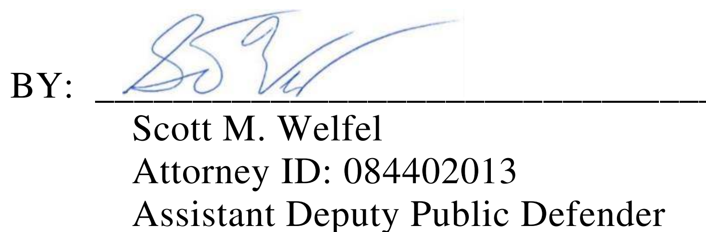
FILED, Clerk of the Appellate Division, August 10, 2023, **A-002241-22**, **AMENDED**

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for resentencing before a different judge.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant



BY: ________________________________
Scott M. Welfel
Attorney ID: 084402013
Assistant Deputy Public Defender

Date: August 7, 2023

FILED, Clerk of the Appellate Division, December 11, 2023, **A-002241-22**

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2241-22T5

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Cumberland County.
v.	:	
DAIQUAN C. BLAKE,	:	Sat Below: Hon. Cristen D'Arrigo, J.S.C.
Defendant-Appellant.	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

REGINA M .OBERHOLZER
ATTORNEY NO. 032101994
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE UNIT
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
OberholzerR@njdcj.org

OF COUNSEL AND ON THE BRIEF

December 11, 2023

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF PROCEDURAL HISTORY 1

COUNTER-STATEMENT OF FACTS 3

LEGAL ARGUMENT 11

BECAUSE THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED THE APPROPRIATE FACTORS IN RESENTENCING DEFENDANT AND EXPLAINED HIS REASONS FOR IMPOSING CONSECUTIVE SENTENCES AS REQUIRED BY THIS COURT IN ITS REMAND ORDER, DEFENDANT IS NOT ENTITLED TO ANOTHER REMAND FOR RESENTENCING. 11

A. The sentencing court heard and considered defendant's evidence of post-offense rehabilitation and remorse, the age-crime curve, and adolescent brain science. 12

B. The sentencing court relied on proper facts in finding aggravating factors three and nine. 20

C. The trial court properly imposed consecutive sentences for passion-provocation manslaughter and unlawful possession of a firearm. 25

D. The sentencing court properly considered defendant's entire record in imposing sentence. 30

E. The five-year parole disqualifier on Count Five should be amended to a four-year parole disqualifier. 35

F. If this Court remands for resentencing, the case should be remanded to Judge D'Arrigo 35

CONCLUSION 39

TABLE OF AUTHORITIES

PAGE

CASES

State v. Abdullah, 184 N.J. 497 (2005) 26

State v. Anderson, 374 N.J. Super. 419 (App. Div. 2005) 26

State v. Bulu, 234 N.J. Super. 331 (1989) 30

State v. Carey, 168 N.J. 413 (2001) 26, 27

State v. Case, 220 N.J. 49 (2014) 12

State v. Cassady, 198 N.J. 165 (2009) 27

State v. Copling, 326 N.J. Super. 417 (App. Div. 1999) 28

State v. Cuff, 239 N.J. 321 (2019) 28

State v. Green, 62 N.J. 547 (1973) 33, 34

State v. Jaffe, 220 N.J. 114 (2014) 13, 34

State v. Jarbath, 114 N.J. 394 (1989) 22

State v. K.S., 220 N.J. 190 (2015) 30, 32, 33, 34

State v. Lawless, 214 N.J. 594 (2013) 22

State v. Madan, 366 NJ Super. 98 (App Div. 2004) 37

State v. Marzolf, 79 N.J. 167 (1979) 33

State v. McFarlane, 224 N.J. 458 (2016) 36

State v. Melvin, 248 N.J. 321 (2021) 37, 38

State v. Miller, 205 N.J. 109 (2011) 27

State v. Molina, 168 N.J. 436 (2001) 26

State v. O’Donnell, 117 N.J. 210 (1989) 12

State v. Pillot, 115 N.J. 558 (1989) 22

State v. Pineda, 119 N.J. 621 (1990) 22

State v. Randolph, 210 N.J. 330 (2012) 13, 21

State v. Reed, 211 N.J. Super. 177 (App. Div. 1986) 22, 23

State v. Rivera, 249 N.J. 285 (2021) .... passim

State v. Roth, 95 N.J. 334 (1984) 12

State v. Tillery, 238 N.J. 293 (2019) 32

State v. Torres, 246 N.J. 246 (2021) .... passim

State v. Yarbough, 100 N.J. 627 (1985) 26, 27, 30, 36

STATUTES

N.J.S.A. 2C:11-3(a)(1) 1

N.J.S.A. 2C:12-1(b)(1) 1

N.J.S.A. 2C:39-4(a)(1) 1

N.J.S.A. 2C:39-5(b)(1) 1

N.J.S.A. 2C:43-6(c) 35

N.J.S.A. 2C:43-7.2 2

N.J.S.A. 2C:44-6 .... 31, 32

OTHER AUTHORITIES

Report of the Supreme Court Criminal Practice Committee 2019-2021 Term (January 14, 2021) 34

RULES

Rule 3:21-2(a) 31, 32

ADMINISTRATIVE CODES

N.J.A.C. 10A:71-3.10(b) 14

N.J.A.C. 10A:71-3.11(b) 15

TABLE OF CITATIONS

1T – Miranda hearing transcript dated August 18, 2017
2T – transcript dated August 25, 2017
3T – Miranda hearing transcript dated September 20, 2017
4T – Miranda decision transcript dated October 3, 2017
5T – transcript dated October 30, 2017
6T – severance hearing transcript dated December 11, 2017
7T – 104 hearing transcript dated January 16, 2018
8T – trial transcript dated January 17, 2018
9T – trial transcript dated January 18, 2018
10T – trial transcript dated January 19, 2018
11T – Gross hearing transcript dated January 22, 2018
12T – trial transcript dated January 23, 2018
13T – trial transcript dated January 24, 2018
14T – deliberations transcript dated January 25, 2018
15T – deliberations transcript dated January 26, 2018
16T – verdict transcript dated January 29, 2018
17T – sentencing transcript dated March 23, 2018
18T – re-sentencing transcript dated February 1, 2023
Db – defendant's brief
Da – defendant's appendix
Dca – defendant's confidential appendix
PSR – presentence report

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On March 22, 2017, a Cumberland County Grand Jury returned Indictment No. 17-03-0259-I, charging defendant, Daiquan C. Blake, with first-degree murder, in violation of N.J.S.A. 2C:11-3(a)(1) (Count One); possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a)(1) (Count Two); unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b)(1) (Count Three); and fourth-degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(1) (Count Four). (Da1-2). Defendant's father, Robert F. Iverson, and brothers, Isaiah J. Harris and Robert F. Blake, were charged in the same indictment with second-degree conspiracy to commit aggravated assault, attempting to cause serious bodily injury (Count Five). (Da2).

Defendant was tried by a jury before the Honorable Cristen D'Arrigo, J.S.C., over five days from January 17 to 24, 2018. (8T-13T). On January 29, 2018, the jury found defendant guilty of the lesser-included offense of second-degree manslaughter (Count One), possession of a weapon for an unlawful purpose (Count Two), unlawful possession of a weapon (Count Three), and fourth-degree aggravated assault (Count Four). (16T5-3 to 6-10; Da3-6).

On March 23, 2018, Judge D'Arrigo sentenced defendant on Count One, second-degree manslaughter, to ten years' imprisonment with an 85% parole

disqualifier, followed by three years of parole supervision, under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. (17T70-8 to 15; Da6). He imposed a consecutive sentence of ten years' imprisonment on Count Three, unlawful possession of a weapon. (17T70-17 to 23; Da6). The remaining counts merged into Count One. (17T70-16; 17T70-24 to 25; Da6).

Defendant filed a direct appeal. On February 17, 2022, this Court affirmed his convictions but remanded for resentencing pursuant to State v. Torres, 246 N.J. 246 (2021). (Da7-48).[1] On February 1, 2023, Judge D'Arrigo resentenced defendant on Count One, second-degree manslaughter, to ten years' imprisonment with an 85% parole disqualifier followed by three years of parole supervision, under NERA. (18T106-25 to 107-5; Da49). He imposed a consecutive sentence of eight years' imprisonment on Count Three, unlawful possession of a weapon. (18T107-16 to 24; Da8). The remaining counts merged into Count One. (18T107-6 to 12; 17T108-17 to 25; Da8).

[1] Harris pleaded guilty to third-degree conspiracy to commit aggravated assault, and was subsequently sentenced to five years of probation. Robert Blake and Iverson were tried by a jury before Judge D'Arrigo in October 2018. Both were convicted of second-degree conspiracy to commit aggravated assault, serious bodily injury. Robert Blake was sentenced to seven years' imprisonment, subject to NERA. Iverson was sentenced to an extended term of seventeen years of imprisonment, subject to NERA. Robert Blake's and Iverson's convictions and sentences were affirmed by this Court in the same consolidated opinion as defendant's.

Judge D'Arrigo also ordered defendant to pay $5,000 in restitution, imposed assessments of $150 to the Victims of Crime Compensation Board, $150 to the Safe Neighborhoods Service Fund, and $30 to the Law Enforcement Officers Training and Equipment Fund and awarded 551 days of jail credit and 1776 days of prior service credits. (18T111-1 to 10; Da50-51). Defendant was required to provide a DNA sample. (18T110-8; Da50).

Defendant filed a notice of appeal as within time on March 30, 2023, which this Court granted on April 12, 2023. (Da82-84). This Court granted defendant's motion to transfer the appeal from the sentencing oral argument calendar to the plenary calendar on May 19, 2023. (Da85).

COUNTER-STATEMENT OF FACTS

On September 17, 2016, defendant attended a baby shower for Sianni Powers, who was pregnant with his twins. (8T60-6 to 61-19). The shower was held at the home of Reggie and Juanita Holley, Sianni's aunt and uncle, at 108 Tipps Trailer Park (Tipps) in Bridgeton, New Jersey. (8T60-7 to 11; 8T61-1 to 3; 12T105-1 to 3). Marvin Sharpe, who was dating Sianni's sister, was also at the shower and got into an argument with Daiquan. (8T62-16 to 63-2; 8T64-5 to 15; 12T111-17 to 23; 12T112-21 to 25). Reggie asked both young men to leave.[2] (8T62-12 to 14; 12T113-23 to 114-13).

---

[2] Because the Holleys share a common surname, the State will refer to them

Defendant borrowed Sianni's cell phone to ask his cousin, Carlton Harrell, to pick him up. (8T64-23 to 65-13). He also sent a Facebook message from Sianni's account to his own account for his current girlfriend, Imanni, saying, "This is Dai. I'm good. I gotta get my gun." (8T67-14 to 68-12; 8T74-13 to 25; 8T100-13 to 17; 8T101-6 to 22; 103-2 to 25; 8T104-1 to 2). Harrell picked defendant up and dropped him off at home in Penns Grove at approximately 4:00 p.m. (8T269-21 to 270-1).

Daianna Carlson, a family friend, testified that she went to defendant's home when she finished work that evening. (9T154-23 to 155-2).[3] Defendant's sister, Hyshonna Blake, asked Carlson to drive her and defendant back to Bridgeton because defendant had been "jumped" and he wanted to fight "one-on-one."[4] (9T155-5 to 17; 9T157-6 to 10). Defendant's father, Robert Iverson, and his brothers, Robert Blake and Isaiah Harris, also went to Bridgeton. (9T155-18 to 22). Defendant and Hyshonna drove in Carlson's black Mitsubishi Lancer, while the other men drove in a minivan. (9T155-23

---

by their first names to avoid confusion, but intends no disrespect.

[3] Carlson refers to defendant as her brother throughout her testimony and statement, but they are not related. (9T154-to 12).

[4] Because defendant's family share a common surname, the State will refer to the Blakes by their first names or full names to avoid confusion, but intends no disrespect.

to 156-16; 11T25-7 to 18).

When they entered Tipps, Carlson parked close to the Holleys' trailer, but the minivan drove past the trailer and Carlson did not see it on the street. (9T157-1 to 158-25). Carlson, Hyshonna, and defendant got out of the car, and Harris and Robert Blake joined them, but Iverson did not. (9T159-2 to 22).

Reggie was cooking dinner when defendant and Harris approached his trailer and defendant knocked on his door. (9T159-23 to 160-7; 12T116-16 to 117-12). Defendant demanded to know, "Where he at now?" (12T116-18). Reggie, assuming defendant was looking for Sharpe, told defendant that Sharpe was not there. (12T116-18 to 20; 12T117-21 to 22). Defendant then said, "Well, it started here and it's gonna finish. . . . [W]hat about you?" (12T116-21 to 25). Reggie told him to go away and defendant walked off the porch. (12T117-1 to 3).

Shortly thereafter, Reggie received a call from a friend, Bruce Hall, who was coming over to look at a car that Hall was planning to buy. (12T118-2 to 10). Because Reggie could see shadows and thought defendant and others were still outside of his house, he warned Hall to be careful and told him to bring a gun. (12T118-25 to 119-24).

Hall arrived approximately fifteen minutes later and parked across the

street from the Holleys' trailer. (12T120-3 to 1; 122-9 to 12). When Reggie saw him pull onto the street, he retrieved a BB gun and went outside to meet Hall. (12T122-16 to 123-6). Reggie pointed out defendant, who was sitting on a car approximately 200 feet up the street, to Hall. (12T123-19 to 21; 12T124-12 to 13). Reggie heard somebody say, "He brung in some people," then he saw defendant fire a single shot. (12T124-14 to 16; 12T125-5 to 19). Hall got back into his truck and returned fire. (12T125-5).

When Reggie ducked and turned around, he saw his wife Juanita lying on the ground. (12T124-17 to 20). She had been shot once in the chest. (8T255-8 to 9). Reggie drove Juanita to the hospital, where she died. (12T127-6 to 7; 12T128-12 to 13). A single bullet was removed from near her spine during an autopsy. (8T258-18 to 20).

According to Carlson, when defendant and Harris walked away from Reggie's door, they returned to the car, where defendant and his companions waited until they noticed a car park up the street. (9T160-3 to 20; 9T162-2 to 5). At that point, Hyshonna and Carlson got back in Carlson's car, but defendant and his brothers walked past the car away from the Holleys' trailer. (9T162-7 to 21). Then Carlson heard gunshots and quickly drove away. (9T165-2 to167-9).

After Carlson and Hyshonna left the trailer park, they met up with the

van, driven by Iverson, at a nearby restaurant and defendant got out of the van and into Carlson's car. (9T168-7 to 23). Defendant told the women that someone else started shooting, so he "let one off." (9T170-15 to 19; 9T171-17 to 19; 11T36-8 to 18). Carlson drove defendant home, but Robert Blake, Harris, and Iverson stayed in the minivan and drove in a different direction, arriving back at the house sometime after the car. (4T173-22 to 174-19; 4T184-13 to 185-4).

Harold Govan, who lived down the street from the Holleys, was sitting on his porch with his wife at the time of the shooting when he heard a commotion up the street. (8T222-16 to 223-4; 8T224-21 to 225-1; 8T225-23 to 24). He saw two men in hoodies walk down the block past his trailer and meet up with a third person. (8T226-4 to 7). All three headed toward the Holleys' trailer when something startled them and they started to run. (8T226-17 to 19). But one of them said "F that, I'm not running," stepped into the street, pulled a gun out of his pants, and fired one shot towards the Holleys' house. (8T226-21 to 227-2). All three men then ran and jumped into a van that fled the trailer park, followed by a small, black car. (8T230-2 to 8; 8T231-2 to 12).

The following day, a bullet was recovered from the rear of a trailer located on Lot 60 in Tipps Trailer Park, and another was recovered from the

rear bumper of Carlson's car. (9T98-1 to 100-6; 12T17-22 to 18-3; 12T21-19 to 22). On February 21, 2017, Hall was interview by Detective-Sergeant Eric Crain and told him where his handgun could be located. (12T38-2 to 13). Detective-Sergeant Crain went to Hall's residence and recovered a P-38 semiautomatic revolver. (12T40-24 to 41-15). Ballistics examinations determined that the projectile recovered from Carlson's car and the projectile recovered from the rear of Lot 60 in Tipps Trailer Park were fired from Hall's firearm, but the projectile recovered from Juanita's body was not. (12T78-7 to 19). No firearm matching the bullet removed from Juanita's body was ever recovered. (8T216-24 to 217-1).

Defendant was interviewed twice by detectives on the night Juanita was killed, and those interviews were recorded and played for the jury. (8T104-18 to 107-6; 8T110-14 to 16; 9T12-5 to 7; 9T13-11 to 12; 9T14-8 to 15-9). During those interviews, defendant did not initially tell detectives that Reggie had asked him leave the shower because of the argument. (8T127-6 to 129-18). Rather, he claimed that he stayed until the shower ended, then went home, where he remained until police arrived to question him after the shooting. (8T131-7 to 25).

It was only after Detective John Weber informed defendant that he knew he had returned to Tipps that defendant admitted he had done so. (8T133-1 to

134-11). Defendant said his father had taken him back to the trailer park so he could take a shower gift to Sianni. (8T134-12 to 22). He said he dropped off the gift and left. (8T144-21 to 22). When Detective Weber told defendant that police had spoken to defendant's father, defendant admitted that Carlson had driven him to the trailer park, and that his brother Isaiah Harris was also with them. (8T142-4 to 143-13).

Defendant told Detective Weber that he took the gift to the Holleys' trailer, the family told him Sianni was not there, and her uncle called him crazy. (8T144-9 to 145-12). According to defendant, as he was walking away down the street, a black car pulled up and someone in the car talked to Reggie then started shooting, so defendant ran. (8T147-8 to 19).

Defendant claimed he borrowed a phone from someone on the street to call Carlson to pick him up after the shooting, but he also told Detective Weber that he did not know Carlson's phone number. (8T150-1 to 2; 8T151-5 to 9). Eventually, defendant admitted that he and Reggie argued. (8T157-22 to 25).

It was only when defendant gave a second statement to different detectives later that day that he mentioned that his sister Hyshonna and his brother Robert Blake were also at Tipps that night. (9T23-20 to 24; 9T44-23 to 45-17). But in his second statement, he did not tell the detectives that his

father or his brother Isaiah Harris were there. (9T55-18 to 56-1). In the second statement, contrary to the first, defendant said after the shooting started, Carlson drove down the block, turned around, and picked him up. (9T24-25 to 25-18).

Based on the above evidence, the jury found defendant guilty of second-degree manslaughter, possession of a weapon for an unlawful purpose, unlawful possession of a weapon, and fourth-degree aggravated assault. Defendant now appeals from the sentence imposed on remand from this Court.

LEGAL ARGUMENT

BECAUSE THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED THE APPROPRIATE FACTORS IN RESENTENCING DEFENDANT AND EXPLAINED HIS REASONS FOR IMPOSING CONSECUTIVE SENTENCES AS REQUIRED BY THIS COURT IN ITS REMAND ORDER, DEFENDANT IS NOT ENTITLED TO ANOTHER REMAND FOR RESENTENCING.

Angry about being "jumped" by Marvin Sharpe at the baby shower, defendant went home with the intention of getting a gun, and returned with that gun and his entire family in search of Sharpe. When Sharpe was not there, rather than leave, defendant challenged Reggie to a fight and laid in wait outside his home. When a car parked near the Holley trailer and the driver of that car spoke to Reggie, rather than walk away, defendant fired a shot at Reggie, killing Reggie's wife Juanita, an innocent bystander. Defendant now argues that Judge D'Arrigo abused his discretion in imposing consecutive sentences of ten years' imprisonment for passion-provocation manslaughter and eight years' imprisonment for unlawful possession of a weapon, a shorter sentence than he originally imposed. Because the judge considered the evidence presented by defendant, including his good behavior in prison, and explained his reasons for ordering that the sentences run consecutively, as required by this Court and Torres, no further remand is needed or appropriate.

When reviewing a sentencing court's decision, an appellate court must

avoid substituting its judgment for that of the trial court. State v. Roth, 95 N.J. 334, 365 (1984). An appellate court should affirm the sentencing court's findings and balancing of aggravating and mitigating factors if there is sufficient evidence in the record to support them. State v. O'Donnell, 117 N.J. 210, 215-16 (1989). As long as the court follows the sentencing guidelines, the sentence should be affirmed unless it shocks the judicial conscience. Ibid; Roth, 95 N.J. at 364-65. Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts. State v. Case, 220 N.J. 49, 65 (2014).

A. The sentencing court heard and considered defendant's evidence of post-offense rehabilitation and remorse, the age-crime curve, and adolescent brain science.

Defendant first complains that Judge D'Arrigo failed to "appropriately" consider the evidence of his post-offense rehabilitation, his acceptance of responsibility and expressed remorse, the "age-crime curve," and adolescent brain development in considering aggravating and mitigating factors. Because the sentencing judge not only considered the evidence presented by defendant, but cited it as the reason for imposing a shorter sentence than originally imposed, defendant is not entitled to further sentencing relief on this basis.

In support of his argument, defendant cites to several cases in which the sentencing judge refused to even consider evidence presented by a defendant at

sentencing. See State v. Randolph, 210 N.J. 330, 338 (2012) (sentencing court found evidence presented at resentencing beyond scope of remand order); State v. Jaffe, 220 N.J. 114, 125 (2014) (court did not consider post-offense conduct). But here, Judge D'Arrigo considered the evidence defendant presented, discussing it at length and debating the strength of the evidence with counsel for both defendant and the State before relying on much of the evidence defendant now claims he refused to consider in giving moderate weight to aggravating factor fourteen and setting the term of imprisonment on Count Three. He just did not find that evidence sufficiently persuasive to negate the findings of aggravating factors three and nine or support a finding of mitigating factor nine.

In discussing the aggravating factors, Judge D'Arrigo told defendant that he could see that he was different on the day of sentencing than he was before, and that "I can see that being part of that maturation process." (18T76-25 to 77-1). As he made clear throughout the sentencing, when Judge D'Arrigo referred to "maturation" or "maturity," he included defendant's allocation, in which he expressed his remorse and took responsibility for his actions and his behavior in prison. (19T76-25 to 77-9; 18T80-16 to 81-2; 18T87-17 to 88-9). He further told defendant that he could see that he was being compliant in prison and found that admirable. (18T77-7 to 9). Indeed, Judge D'Arrigo

said that he had been inclined to give mitigating factor fourteen only slight weight, but after hearing defendant's statement he decided to give it moderate weight because he saw some elements of maturity in defendant since trial. (18T87-23 to 88-9).

Specifically, defendant contends that the sentencing judge failed to give weight to his positive prison records and other post-offense rehabilitative conduct and should not have found aggravating factors three and nine if he properly considered this evidence. This is simply not true. To the contrary, although Judge D'Arrigo debated the motivations for defendant's good conduct in prison and expressed some doubt that defendant would continue to behave himself once he was no longer in the controlled environment of the prison setting, he expressly cited defendant's good conduct as a reason for imposing a lesser sentence for Count Three than he imposed at the initial sentencing. (18T76-23 to 77-20; 18T85-8 to 23; 18T107-25 to 108-16).

Defendant's reliance on parole board cases (Db19 to 21) is misplaced. As an initial matter, parole boards are tasked with determining whether an inmate "has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole . . . if released on parole." N.J.A.C. 10A:71-3.10(b). This task necessarily requires more of a focus on his or her behavior in prison than sentencing, where the

"severity of the crime is now the single most important factor." Torres, 246 N.J. at 262 (citation omitted). But even during parole hearings, the factors to be considered do not ignore who the inmate was prior to their incarceration, but include the nature and pattern of previous convictions; their adjustment to prior probation, parole, and incarceration; factors surrounding the offense; aggravating and mitigating circumstance surrounding the offense; history of employment, education, and military service; family and marital history; statements by the sentencing court reflecting the reasons for the sentence imposed; and statements from the prosecutor and victim. N.J.A.C. 10A:71-3.11(b). Thus, even in the context of parole decisions, an inmate's prison record is not the end of the inquiry, but merely a factor to be considered, as Judge D'Arrigo did here.

The sentencing judge found that, even with the new evidence presented by defendant, the evidence as a whole supported aggravating factors three and nine. In addressing aggravating factor three—the risk that defendant will commit another offense—Judge D'Arrigo stressed that he had listened to the evidence, including defendant's allocution, and could see that defendant had matured, but nonetheless felt that the risk of re-offense was not significantly different because defendant's compliance in prison would not necessarily translate into the outside world. (18T76-19 to 14). As a result, the sentencing

judge felt that the best indicator of how defendant was likely to behave in the future was how he behaved the last time he was in that environment, which was the night of the homicide. (18T78-1 to 25). The judge likewise was unable to find that the need for deterrence had lessened because defendant was in a controlled environment. (8T80-15 to 19). Given that defendant's prison record reflected no infractions the entire time he was incarcerated, rather than improved behavior as he matured or responded to prison programs, this was a reasonable conclusion supported by the evidence before the court.

Defendant also contends that the judge failed to consider his acceptance of responsibility and expression of remorse. Tellingly, however, defendant never actually admitted during his allocution that he fired a gun the night Juanita died. Rather, he said he was "sorry for his actions," but did not say what those actions were, and said he made the biggest mistake of his life, but did not elaborate on what that was. (18T65-1 to 67-11). Thus, his acceptance of responsibility and expression of remorse was not much greater than at his first sentencing hearing, where he said he was wrong for coming back to the house but denied shooting Juanita. (17T52-7 to 54-4). Moreover, while defendant cites to a number of cases that hold that a lack of remorse supports the finding of aggravating factor three, he does not cite to a single case that

holds the contrary (that a lack of remorse precludes finding aggravating factors three or nine), and the State is not aware of any. (Db18).

In any event, Judge D'Arrigo did consider defendant's acceptance of responsibility. In determining the weight to give to mitigating factor fourteen, the judge stated, "[a]nd that's where your statement has some effect. . . . [T]o be quite honest with you, I would not have given this [mitigating factor] greater than slight weight, but I give it moderate effect." (18T87-23 to 88-1). Thus, defendant's assertion that the sentencing court did not consider his remorse and acceptance of responsibility is not supported by the record.

Next, defendant argues that Judge D'Arrigo's reference to "secondary gain" was both "indecipherable" and improper speculation. (Db21). To the extent it is unclear what the judge meant by the term, defendant did not ask him to explain. But it is clear from context that Judge D'Arrigo was concerned that defendant may have been behaving himself in prison because it was to his benefit to do so rather than because he had changed in any real way, and thus the only true indicator of his risk of recidivism was how he behaved when he was last in the real world.

Despite claiming not to understand the reference, defendant, relying on State v. Rivera, 249 N.J. 285 (2021), argues that it was impermissibly speculative. Defendant's reliance on Rivera is misplaced. In that case, the

sentencing court speculated that Rivera had not had enough time to begin a history of criminal activity, and thus gave great weight to the risk that she would commit another offense. Id. at 302. In vacating the sentence, the Supreme Court stressed that a finding of aggravating factor three must be based on evidence in the record, whether it be the facts of the crime, "expert testimony, or the defendant's criminal history, lack of remorse, premeditation, or other competent evidence." Ibid. Here, Judge D'Arrigo based the finding of that factor, and aggravating factor nine, on defendant's behavior at the time of his crime—a permissible basis under Rivera—and rejected defendant's arguments about how his maturity and post-arrest conduct would change his future behavior as speculation.

Finally, defendant claims that the sentencing judge erred in declining to consider his evidence of adolescent brain science and the age-crime curve in finding aggravating factors three and nine and rejecting mitigating factor nine. But, as defendant acknowledges, Judge D'Arrigo considered the evidence in finding mitigating factor fourteen, which he gave moderate weight, finding that while defendant was an adult, he "lacked a level of maturity, which is where the mitigating factor is most applicable." (18T87-18 to 19). Mitigating factor fourteen was adopted by the legislature in response to a series of Supreme Court cases recognizing that youth and its characteristics should be

considered at sentencing. Rivera, 249 N.J. at 301-02. Thus, it was proper for the sentencing judge to consider defendant's evidence of characteristics of youth as it related to that sentencing factor.

Defendant nonetheless claims that Judge D'Arrigo believed that the science was limited to offenders under the age of eighteen. To the contrary, the Judge made clear that he had no issue with consideration of youth, including the brain science defendant now cites, in this case, but he did not want defense counsel to refer to his client, who was an adult when he killed Juanita Holley, as a juvenile. (18T34-15 to 35-2).

Judge D'Arrigo here found that any suggestion that defendant had matured sufficiently to no longer be a risk to commit another crime was speculative, given that the only evidence of how he would behave in the real world rather than in the controlled environment of prison was what he had done when he was last at liberty, the night of the homicide. In light of the fact that defendant did not have a single infraction in prison from the time of his arrest the night of the crime, rather than improving his behavior over time as he matured or availed himself of prison programs, this was a reasonable concern supported by the evidence. Thus, the record supported his finding of aggravating factors three and nine and rejection of mitigating factor nine.

B. The sentencing court relied on proper facts in finding aggravating factors three and nine.

Defendant next claims that, in finding aggravating factors three and nine, the sentencing court double-counted the fact that he was convicted of manslaughter by pointing a firearm at someone and pulling the trigger, improperly speculated that people who commit crimes with a gun are more likely to reoffend, and relied exclusively on general deterrence without finding a need for specific deterrence. Because Judge D'Arrigo properly found both aggravating circumstances, defendant is not entitled to a remand for another resentencing hearing.

Defendant first argues that the sentencing judge improperly engaged in double-counting when he found aggravating factors because he considered the fact that defendant pointed a gun at another person and pulled the trigger. This is a misreading of the judge's comments. Judge D'Arrigo appropriately discussed the facts of the case, including defendant's actions, in explaining why he believed defendant posed a risk of reoffending. As he correctly explained, "part of that is defined by the interactions and the description of how things happened in this case." (18T78-11 to 13). Judge D'Arrigo explained that:

> So when I talk about risk, I do so from the assessment of what I saw during trial, what I know about the interactions here and, let's face it. And the

> gravity of the action.
>
> Anyone who's ever fired a handgun has some idea of how much power that actually is. And to point a gun in the direction of anybody and pull the trigger requires more than youthful exuberance. It requires a level of something that not everybody has. I would dare to say, most people don't.
>
> * * *
>
> You have to be a certain kind of person to do that and it's not a function of youth. . . . So it's not an indictment of you personally, it's an assessment of risk and when a person can reach that point that they can do that, they can reach that point again.
>
> [(18T78-22 to 79-21).]

Judge D'Arrigo correctly considered the circumstances of the crime in assessing both the risk of re-offense and the need for specific deterrence. Randolph, 210 N.J. at 349 (recognizing that aggravating factors three and nine, among others, relate to the crime while inviting consideration of the defendant's individual qualities). Indeed, "the severity of the crime is now the single most important factor in the sentencing process." Torres, 246 N.J. at 262 (citation omitted). Defendant's willingness to pull the trigger while pointing a gun at another human being reasonably suggested to the judge that defendant was a risk to commit similar crimes in the future and needed to be deterred.

In any event, considering the fact that defendant pointed a gun at

someone and pulled the trigger would not be double-counting. "Elements of a crime, including those that establish its grade, may not be used as aggravating factors for sentencing of that particular crime." State v. Lawless, 214 N.J. 594, 608 (2013) (citations omitted). Thus, for example, the way a victim died cannot be considered an aggravating factor in sentencing in cases where death was an element of crime. State v. Pineda, 119 N.J. 621, 627–28 (1990) (death by auto); State v. Jarbath, 114 N.J. 394, 404 (1989) (manslaughter). See also State v. Pillot, 115 N.J. 558, 564 (1989) (holding that, where use of BB gun elevated robbery from second-degree to first-degree crime, use of weapon could not be considered aggravating factor for sentencing purposes).

But the use of a firearm is not an element of aggravated manslaughter. Manslaughter can be committed in many ways, including by auto, with a knife, or even with bare hands. Thus, unlike cases where the use of a weapon is an element of the crime or increases the degree of the crime, Judge D'Arrigo did not impermissibly double-count an element of the offense when he considered the fact that defendant committed the homicide with a firearm.

Defendant's reliance on State v. Reed, 211 N.J. Super. 177 (App. Div. 1986), is misplaced. In that case, Reed challenged the sentencing court's finding of aggravating factor one based on the "inexcusable and reckless handling and pointing of a shotgun at the deceased and the pulling of the

trigger," and aggravating factor two based on the death of the victim. Id. at 187-88. In vacating the sentence, this Court found that recklessness is an element of reckless manslaughter and that the death of the victim is an element of manslaughter. Id. at 188. This Court did not find, as defendant claims, that it was impermissible double counting to consider the pointing of the shotgun in sentencing Reed for manslaughter.

Nor did Judge D'Arrigo double-count an element of unlawful possession of a firearm. The judge was clear that he was concerned with the fact that defendant pointed the firearm at someone and pulled the trigger, not merely his possession of the gun. Neither of those actions are elements of the firearms offense.

Defendant also claims that the sentencing judge improperly suggested that aggravating factors three and nine should be found every time a defendant points a firearm at a person and pulls the trigger. He argues that such a presumption violates Rivera. To the contrary, the Supreme Court in Rivera expressly approved of the sentencing court's reliance on "the nature of the offense and defendant's role in planning the crime" in finding aggravating factors three because those were facts that were established in the record. 249 N.J. at 302. The Court vacated the sentence, however, because the sentencing judge speculated that Rivera did not have a criminal history because she had

not had time to begin committing crimes. Ibid. It was this latter assumption about Rivera's criminal history that the Court found impermissibly presumptuous. As Judge D'Arrigo made clear, his finding of the aggravating factors in this case was based on what actually occurred in this case. (18T78-1 to 3; 18T78-11 to 13; 18T78-22 to 25).

Defendant also inexplicable argues that Judge D'Arrigo found only general deterrence, but also quotes the judge saying, "when it come to Nine, deterrence in both a specific and generally sense is very high." (18T81-23 to 24). He then goes on to quote the judge discussing the reasons for general deterrence, but ignores the preceding passage, in which Judge D'Arrigo discusses the need for specific deterrence:

> Nine, need for deterrence. Now, this is not just specific deterrence, but general deterrence. And I ask myself, how many young people just like Mr. Blake will I see? Quite a few. That's why they're here. We're here because they've done things that shouldn't have been done under circumstances that they should not have acted the way they acted. So when you talk about deterrence, I don't know whether or not an increased level of maturity has lessened your particular need for deterrence, because again, you're in that controlled environment.
>
> And I don't mean this coldly or callously, but there's secondary gain here and that's not lost on the Court. And I don't mean that in any other way than that is an unavoidable consequence of these proceedings. There is secondary gain involved here. There are good reasons why for the Prosecutor, good reasons why. And

> I'm not trying to dissuade you from continuing to do well in your incarceration.
>
> *　　*　　*
>
> And secondary gain can lead to good things, but the problem with secondary gain is it's hard to assess what's permanent and what's not. And the only way we will ever know that is when your sentence is done. You understand? That's the only time we'll ever really know. And as I say to individuals at sentencing all the time, words are great, but actions are everything. And unfortunately, until a sentence is complete we don't really know what the actions really are because you're not back in society where it counts.
>
> And so when I say to you and the others here how difficult sentencing is, I don't have a crystal ball. I don't have the ability to tell the future. I have the experience of seeing individuals go through the system and see those who make it and those who fail and I try to make sure that I get that assessment right. And I try to do it within the boundaries that our legislature created by these aggravating and mitigating factors.
>
> [(18T80-9 to 81-22) (emphasis added).]

Thus, contrary to defendant's argument, Judge D'Arrigo considered and found both general and specific deterrence.

C. <u>The trial court properly imposed consecutive sentences for passion-provocation manslaughter and unlawful possession of a firearm.</u>

Next, defendant claims that the sentencing judge improperly imposed consecutive sentences for passion-provocation manslaughter and unlawful possession of a weapon and that the judge's explanation of his reasons for

doing so was inadequate under Torres. There is no constitutional impediment to a trial court deciding whether a defendant should serve consecutive sentences under the standards governing sentencing. State v. Abdullah, 184 N.J. 497, 512-15 (2005); State v. Anderson, 374 N.J. Super. 419, 422 (App. Div. 2005). Nor is there a presumption in favor of concurrent sentences; the maximum potential sentence authorized by the jury verdict is the aggregate of sentences for multiple convictions that do not merge. Abdullah, 184 N.J. at 513-14.

A trial court is expected to give a separate statement of reasons that clearly explains any decision to impose consecutive sentences. State v. Molina, 168 N.J. 436, 442 (2001); State v. Carey, 168 N.J. 413, 422 (2001). When making its determination, the trial court should consider whether (1) the crimes and their objectives were predominantly independent of each other; (2) the crimes involved separate acts of violence; (3) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior; (4) any of the crimes involved multiple victims; or (5) the convictions for which the sentences are to be imposed are numerous. Carey, 168 N.J. at 422-23 (citing State v. Yarbough, 100 N.J. 627, 643-44 (1985)). These factors should be applied qualitatively, not quantitatively, and therefore the trial court may

impose consecutive sentences even though a majority of the factors support concurrent sentences. Id. at 427. When the trial court properly evaluates the Yarbough factors in light of the record, the court's decision will normally not be disturbed on appeal. State v. Miller, 205 N.J. 109, 129 (2011); State v. Cassady, 198 N.J. 165, 182 (2009).

Defendant argues that Judge D'Arrigo misapplied Yarbough in finding that the gun charges and manslaughter charges were predominantly independent of each other, were committed at different times, and had different victims. Specifically, Judge D'Arrigo focused on the fact that defendant's objective in getting the gun was not to shoot Reggie, but to confront Sharpe. (18T93-8 to 16). Defendant argues that there was no evidence at trial to support that conclusion, suggesting instead that he merely had the gun in case the one-on-one fight he allegedly intended escalated into a greater threat. (Db38).

But the record does not support defendant's after-the-fact, self-serving version of events. To the contrary, when defendant left the Holley residence after his altercation with Sharpe, he stated his intention to "get [his] gun," not to engage in a fistfight. (8T74-21). Judge D'Arrigo further noted that there were multiple victims—Sharpe, against whom he intended to use the gun; Reggie, at whom he fired the gun; and Juanita, whom he accidentally shot and

killed when he missed her husband. (18T94-12 to 95-17). And finally, the judge estimated the illegal possession began when he left the curtilage of his home at 4:00 p.m., but the shooting did not occur until 8:00 p.m., so the offenses occurred at different times. (18T90-22 to 92-3; 18T95-18 to 96-11).

Defendant's reliance on State v. Copling, 326 N.J. Super. 417, 441-42 (App. Div. 1999), is misplaced. Here, unlike in Copling, the gun possession preceded the shooting by hours and defendant could have been convicted of unlawful possession even if there had been no assault. Indeed, contrary to defendant's argument, the Supreme Court expressly recognized, twenty years after Copling, that "unlawful possession of a weapon could be viewed as independent of other crimes committed with the weapon." State v. Cuff, 239 N.J. 321, 351 (2019) (remanding on other grounds and directing sentencing court to provide a more detailed explanation of its reasons for imposing consecutive sentences for unlawful possession of a weapon and kidnapping). The Supreme Court merely required that the sentencing court provide a detailed explanation of its reason for imposing a consecutive sentence, as the court here did. Ibid.[5]

---

[5] Defendant relies on several unpublished opinions, all of which, like Copling, predate the Supreme Court's opinion in Cuff. (Db38). In each of those cases, unlike here, the sentencing court did not articulate its reasons for imposing a consecutive sentence for unlawful possession of a weapon in any detail.

Defendant also claims that Judge D'Arrigo failed to properly consider the overall fairness of the sentence imposed. This is simply not true. Torres requires that courts imposing consecutive sentences give an explicit statement explaining the overall fairness of the sentence imposed. 246 N.J. at 268. That is precisely what Judge D'Arrigo did here, explaining at great length why the sentence was fair. He acknowledged that the victim's family might not think the sentence was fair, but that the question of fairness focused on the defendant, not the victim. (18T101-8 to 15). He recognized that, even if he re-imposed the original twenty-year sentence (which he did not), defendant would be under 40 years' old when he was paroled.[6] (18T101-16 to 20). Judge D'Arrigo therefore found the sentence was not unfair given the gravity of the crimes, including defendant's separate decisions to get a gun for one purpose and to point that gun and pull the trigger hours later for another reason. (18T101-25 to 104-14). While defendant may disagree with Judge D'Arrigo's assessment, to say that this statement did not comply with the dictates of Torres disregards the judge's detailed and thoughtful explanation of his reasons for imposing consecutive sentences.[7]

---

[6] In fact, defendant would have been 39 years' old when he completed his entire sentence, not just when he became eligible for parole.

[7] Defendant also claims that Judge D'Arrigo improperly relied on the need for deterrence to justify both imposing the maximum sentence for manslaughter

D. The sentencing court properly considered defendant's entire record in imposing sentence.

Defendant next claims that the sentencing court considered his prior dismissed charges in violation of State v. K.S., 220 N.J. 190 (2015). At the outset, defendant has not developed this claim beyond a single paragraph in which he cites to the transcript and to K.S. (Db47). Because he has not provided any argument in support of this claim, it is waived. State v. Bulu, 234 N.J. Super. 331, 337 n.1 (1989). It is also meritless.

When defense counsel asked Judge D'Arrigo at resentencing not to consider the eight domestic violence complaints—including against his own mother and the mother of his four children—that did not result in convictions, the judge stated that he did not do so at the first sentencing and would not do so at resentencing. (18T72-21 to 74-4; PSR at 16). He noted correctly, however, that if they had no part in the court's consideration, they would not be in the PSR. (18T74-10 to 21).[8]

---

and a lengthy sentence for unlawful possession, and imposing those sentences concurrently. (Db45). The comments he cites, however, are merely a tangent in which the judge is explaining how his previous comments on defendant's behavior in the context of the Yarbough analysis also impacted the determination of aggravating and mitigating factors. (18T92-4 to 6). Nowhere in either the Yarbough analysis or the Torres analysis did the judge indicate that deterrence was a reason for imposing consecutive sentences.

[8] While Judge D'Arrigo briefly referred to the number of times defendant had been arrested in rejecting mitigating factor seven—a finding defendant does

Both a state statute, N.J.S.A. 2C:44-6, and Rule 3:21-2(a) require that a Presentence Report ("PSR") be ordered and reviewed by the trial court, prosecutor, and defense counsel prior to sentencing. N.J.S.A. 2C:44-6 states:

> a. The court shall not impose sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation when required by the Rules of Court. . . . .
>
> b. The presentence investigation shall include an analysis of the circumstances attending the commission of the offense, **the defendant's history of delinquency or criminality**. . . and any other matters that the probation officer deems relevant or the court directs to be included.
>
> [Emphasis added.]

Likewise, Rule 3:21-2(a) requires a trial court to consider a defendant's PSR before imposing its sentence:

> Before the imposition of a sentence . . . court support staff shall make a presentence investigation in accordance with N.J.S.A. 2C:44-6 and report to the court. **The report shall contain all presentence material having any bearing whatever on the sentence** and shall be furnished to the defendant and the prosecutor.
>
> [Emphasis added.]

---

not challenge—that factor was inapplicable based on defendant's convictions for riot and disorderly conduct and his juvenile adjudication for resisting arrest, regardless of whether the court considered his eight family violence arrests that did not result in convictions. (18T83-20 to 84-18; PSR at 8).

Given that defendant was facing the imposition of a custodial sentence, both N.J.S.A. 2C:44-6 and Rule 3:21-2(a) required that a PSR containing defendant's history of convictions, arrests not resulting in convictions, and domestic-violence related arrests and court-issued restraining orders be prepared by judiciary staff.

In contrast, in K.S., the prosecutor used dismissed charges to deny a defendant's entry into Pretrial Intervention ("PTI"), where the preparation and review of a PSR were not required. 220 N.J. at 198. Thus, K.S. is not analogous to defendant's case. The Supreme Court ruled in K.S. that a prosecutor may not infer guilt in denying a defendant's PTI application from the "sole fact that a defendant was charged, where the charges were dismissed. For the prior dismissed charges to be considered properly by a prosecutor in connection" with a PTI application, the "reason for consideration must be supported by undisputed facts of record or facts found at a hearing." 220 N.J. at 199. The Supreme Court concluded, "[a]ccordingly, we hold that when no such undisputed facts exist or findings are made, prior dismissed charges may not be considered for any purpose." Ibid. According to K.S., dismissed charges thus may be considered if they are supported by undisputed facts of record or facts found at a hearing.

In State v. Tillery, 238 N.J. 293 (2019), a case outside the PTI context,

the Supreme Court ruled that the "consideration of competent evidence presented in support of charges—even if the jury does not go on to convict defendant on those charges—does not raise concerns about drawing inferences from the mere fact that charges had been brought, a practice we found improper in State v. K.S." 238 N.J. 293, 326 (2019). That holding was consistent with the Court's prior decision in State v. Green, 62 N.J. 547 (1973), which specifically authorized a trial court to consider a defendant's criminal history, including prior arrests not resulting in a conviction. In Green, the Supreme Court ruled that "many factors, including an arrest record, contribute toward the composite picture of the 'whole man' that the trial court should necessarily have to rationally sentence a defendant." Id. at 566.

Since Green was decided in 1973 to the present, the Supreme Court has mandated that sentencing courts consider the whole person standing before the court for sentencing. See Rivera, 249 N.J. at 299; State v. Marzolf, 79 N.J. 167, 180 (1979) ("[n]either the defendant nor his offense should be fictionalized for purposes of sentence. The 'whole person,' not censored versions of his personal history or selected facets of his character, is to be addressed in fashioning an appropriate sentence.")

In Rivera, decided seven years after K.S. in 2021, the Supreme Court reaffirmed its prior holding that sentencing courts "are required" to consider

the whole person standing before the court on the day of sentencing. Id. at 299. This view necessarily must include a defendant's history of prior criminal arrests not resulting in convictions as contained in a PSR, which is reviewed by the court with defense counsel making comments and amendments thereto at a sentencing hearing and any "'relevant post-offense conduct in weighing aggravating and mitigating factors.'" Ibid. (quoting Jaffe, 220 N.J. at 116).

The Supreme Court Criminal Practice Committee, in its January 14, 2021 Report for the 2019-2021 Term, recognized the tension between arrests not resulting in convictions, as discussed in Green and K.S., and the important and necessary creation of a full sentencing record for the sentencing court. Report of the Supreme Court Criminal Practice Committee 2019-2021 Term (January 14, 2021). (Pa1-61; Pa38-40). The Committee Report stated that future PSRs should contain:

> a separate new section for arrests not resulting in conviction, rather than eliminating any reference to arrests not resulting in convictions in presentence investigation reports.
>
> This approach would reinforce the sentencing court's responsibility to make reliability determinations before considering such underlying conduct in its sentencing determinations consistent with the case law. It also ensures that information is not withheld from courts that could possibly be relevant when supported by reliable evidence. This proposal can

> also be implemented without any revisions to the court rules.
>
> [Pa43-44.]

This new form was used for defendant's PSR. But the trial court only referenced defendant's prior arrests when reviewing his record as a whole, and made clear that he was not considering arrests not resulting in convictions. Thus, defendant is not entitled to relief on this meritless, undeveloped, and waived claim.

E. The five-year parole disqualifier on Count Five should be amended to a four-year parole disqualifier.

Defendant correctly notes that, under the Graves Act, the maximum permissible parole disqualifier on Count Five, unlawful possession of a handgun, is one-half the sentence imposed or 42 months, whichever is greater. N.J.S.A. 2C:43-6(c). Because defendant was sentenced to an eight-year term of imprisonment, the five year parole disqualifier must be amended to a four-year parole disqualifier. This Court can amend the Judgment of Conviction accordingly; there is no need to remand to the trial court.

F. If this Court remands for resentencing, the case should be remanded to Judge D'Arrigo

Finally, defendant asks this Court to remand his case to another judge for resentencing. If this Court determines that a remand for resentencing is required—and it is not—the case should not be reassigned to a different judge.

Defendant first argues that Judge D'Arrigo did not follow the proper sentencing procedures because he stated that he was "reducing" the sentence originally imposed. This argument, focusing on a single sentence taken out of context, elevates semantics over substance. Judge D'Arrigo spent nearly 40 pages of the transcript explaining his sentence, including the aggravating and mitigating factors that resulted in finding a new mitigating factor, lengthy Yarbough and Torres analyses, and a discussion of why he imposed a different sentence than he did initially. (8T75-13 to 113-17). His mention of the length of the first sentence does not invalidate the proper consideration of the new sentence.

The cases cited by defendant do not dictate a different result. In State v. McFarlane, the sentencing judge stated in an unrelated case that he "always" sentences defendants convicted of first-degree murder to sixty years in prison, a statement that the court understandably found would lead a reasonable person to believe the judge had predetermined an arbitrary sentence for all defendants convicted of first-degree murder. 224 N.J. 458, 469 (2016). But Judge D'Arrigo did not impose a pre-determined sentence here; rather, he considered the evidence presented and imposed a different sentence than the one previously imposed, in accordance with this Court's remand for a resentencing.

Defendant's reliance on State v. Madan, 366 NJ Super. 98 (App Div. 2004), is also misplaced. That case dealt with a court's rejection of a plea based on the opinion of the victim's family, not consideration of the feelings of the victims at sentencing after trial. Id. at 114. In any event, Judge D'Arrigo did not, as defendant claims, attempt to strike a balance between the wishes of the victim's family and defense counsel, but merely acknowledged that no one was likely to be happy with the sentence. (18T108-2 to 7).

Finally, State v. Melvin, 248 N.J. 321 (2021), is readily distinguishable. Melvin was a consolidated appeal. The Appellate Division remanded after Melvin's first sentencing (for unlawful possession of a handgun that was connected to a shooting) because the trial court found Melvin was the shooter even though the jury had deadlocked on the murder and aggravated-assault charges, which were later retried. Id. at 328. Melvin was resentenced following retrial on the deadlocked counts, at which time the same judge again found Melvin was the shooter even though he was acquitted of the murder and aggravated-assault charges. Id. at 329. In the companion case, Paden-Battle, the same judge had also considered acquitted charges in sentencing the defendant. Id. at 338. After vacating both sentences, the Supreme Court stated that it felt assignment to a new judge was "the best course of action," particularly in Melvin's case, because it would be his third sentencing and "it

might be difficult to comprehend how the same judge who has twice sentenced him could arrive at a different determination at a third sentencing." Id. at 352-53.

In this case, however, even if this Court determines that a remand is necessary, Judge D'Arrigo did not make the type of errors made by the judge in Melvin, which the Supreme Court later found were fundamentally unfair. Indeed, this case was remanded initially only because Torres was decided after defendant's trial and necessitated a more explicit statement regarding the consecutive sentences than was required at the time of the original sentences; otherwise, there was no error at all. And Judge D'Arrigo has already demonstrated that he can arrive at a different result—the sentence he imposed after remand was two years shorter than the original sentence, based on the new evidence defendant presented at the resentencing hearing. Thus, there is no reason to believe Judge D'Arrigo cannot continue to be open-minded if another sentencing remand is ordered.

CONCLUSION

For the foregoing reasons, the State urges this Court to affirm defendant's sentence, but does not oppose an amendment to the judgment of conviction to correct the parole disqualifier on Count Five.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: /s/ Regina M. Oberholzer
Regina M. Oberholzer
Deputy Attorney General
OberholzerR@njdcj.org

REGINA M. OBERHOLZER
ATTORNEY ID NO. 032101994
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE UNIT

OF COUNSEL AND ON THE BRIEF

DATED: December 11, 2023

FILED, Clerk of the Appellate Division, February 27, 2024, **A-002241-22**, **AMENDED**

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Assistant Public Defender
Appellate Deputy
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239

JENNIFER N. SELLITTI
Public Defender

February 27, 2024

SCOTT M. WELFEL
ID. No. 084402013
Ass't Deputy Public Defender
Scott.Welfel@opd.nj.gov

Of Counsel and
On the Letter-Brief

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2241-22T5

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment Of Conviction of the
v.	:	Superior Court of New Jersey, Law Division, Cumberland Vicinage
DAIQUAN C. BLAKE,	:	
		Indictment No. 17-03-0259-I
	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. Cristen D'Arrigo, J.S.C.
	:	

Your Honors:

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

LEGAL ARGUMENT

POINT I

RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT: (A) FAILED TO CONSIDER BLAKE'S POST-OFFENSE REHABILITATIVE CONDUCT THE AGE-CRIME CURVE, AND ADOLESCENT BRAIN SCIENCE AS WEIGHING AGAINST THE LIKELIHOOD OF RECIDIVISM AND THE NEED FOR DETERRENCE AND (B) CONSIDERED DEFENDANT'S DISMISSED CHARGES IN VIOLATION OF STATE V. K.S.[1]

A. Because The Court Failed To Find Blake's Post-Offense Rehabilitative Conduct, The Age-Crime Curve, And Adolescent Brain Development Weighed Against The Need For Deterrence Or Incapacitation, Its Finding Of Aggravating Factors Three And Nine, Rejection of Mitigating Factor Nine, And Its Consecutive Sentence Fairness Assessment Were Not Supported By Competent, Credible Evidence In The Record.

The crux of Blake's argument in Points I.A. and I.C.2 of his brief is that (a) post-rehabilitative conduct in prison of programming and maintaining an infraction free record, (b) the age-crime curve, and (c) the science of adolescent brain development have all been established as indicators of a lower probability of reoffending and thus weigh against the need for incapacitation (aggravating factor three) and deterrence (aggravating factor nine), weigh against a

[1] Blake is not withdrawing any arguments in his initial brief but has shortened this point heading to include only the arguments he is addressing in the reply brief.

consecutive sentence, and weigh and in favor of a finding that Blake was unlikely to reoffend (mitigating factor nine). (Db)[2] The Court rejected these arguments, rejected mitigating factor nine, found both aggravating factors three and nine and gave them the exact same weight that the Court had given them at Blake's original sentencing (substantial weight), and relied on a deterrence rationale in imposing a consecutive sentence. (8T 79-24 to 80-1; 82-12 to 25; 85-8 to 23, 92-4 to 23)

The State responds that the sentencing court committed no errors because the sentencing court did consider this evidence, "cited it as the reason for imposing a shorter sentence," but "just did not find that evidence sufficiently persuasive to negate the findings of aggravating factors three and nine or support a finding of mitigating factor nine." (Sb12-13) The State appears to take the position that so long as a sentencing court considered the evidence and arguments of defendant and explained the reasons for its sentence, this Court must defer to the trial court and affirm the sentence. (Sb11-12)

The State is mistaken in its characterization of this Court's role as so deferential that it is constrained to affirm a sentence so long as a sentencing

[2] The following abbreviations will be used:
Sb – State's Response Brief
Db – Defendant-Appellant's Initial Brief
8T – Feb. 1, 2023 (Resentencing)

court considered all relevant evidence and gave reasons for its decision. When the Supreme Court describes "[a]ppellate review of sentencing [a]s deferential" and cautions appellate courts "not to substitute their judgment for those of our sentencing courts," the Court is principally referring to the length of the sentence. State v. Case, 220 N.J. 49, 65 (2014). Indeed, the Court has specified the conditions under which an appellate court "must affirm the sentence and not second-guess the sentencing court": "[w]hen the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced." Ibid. But it is this very condition in which lies the heart of appellate review.

Appellate courts are empowered "to review findings of fact by the sentencing court in support of its findings of aggravating and mitigating circumstances," N.J.S.A. 2C:44-7, and are "expected to assess the aggravating and mitigating factors to determine whether they 'were based upon competent credible evidence in the record.'" State v. Bieniek, 200 N.J. 601, 608 (2010) (emphasis added) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). This critical role of the appellate court is precisely why a sentencing court is required to provide "[a] careful statement of reasons." State v. Fuentes, 217 N.J. 57, 74 (2014). When "the application of [an aggravating] factor . . . was not supported by competent and credible evidence in the record, [a] defendant must be

resentenced." Id. at 78 (emphasis added). An appellate court must also reverse a sentence when a sentencing court rejected a mitigating factor what was "amply based in the record," as such factors "must be found" by the sentencing court. State v. Dalziel, 182 N.J. 494, 504, (2005) (emphasis added). In sum, this Court is tasked with reviewing the evidence presented to the sentencing court and the sentencing court's corresponding reasons for finding or rejecting aggravating and mitigating factors to determine whether the court's conclusions were "fairly supported on the record before the trial court." N.J.S.A. 2C:44-7.

Here, the sentencing court completely rejected Blake's spotless prison record and programming as having any bearing on Blake's likelihood of reoffending or need for deterrence and did not discuss the age-crime curve or the science of adolescent brain development at all in its discussion of aggravating factors three and nine or mitigating factors nine and fourteen. (8T 76-19 to 82-6, 85-8 to 23, 87-12 to 88-12, 92-4 to 93-16) (discounted age-crime curve/juvenile brain science). Importantly, in rejecting Blake's arguments, the sentencing court did not point to anything specific about Blake; the Court did not, for example, find that it had evaluated Blake's character and attitude during his appearances and statements in court and on that basis determined he was likely to commit another offense and needed deterrence. Compare State v. O'Donnell, 117 N.J. 210, 216 (1989). All the court cited were that the facts of

the offense included Blake's action of purposefully going to get his gun before returning to the Holley residence and that he ultimately pulled the trigger. (8T 79-1 to 21, 92-22 to 93-16) The court even explicitly stated that its consideration of the fact that Blake "pulled the trigger" was "not an indictment of [Blake] personally, it's an assessment of risk and when a person can reach that point that they can do that, they can reach that point again." (8T79-1 to 21)

While appellate courts "should defer to trial courts' findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record," State v. Locurto, 157 N.J. 463, 474 (1999), the same deference is not owed when a court relies on assertions about, for example, what is or is not predictive of recidivism in general. The questions of whether and how specific factors—the fact that defendant retrieved a gun, the act of pulling a trigger, an infraction-free prison record, rehabilitative programming, the age-crime curve, and adolescent brain development—are related to recidivism are empirical, objective questions that this Court is able to evaluate de novo.

In his initial brief, Blake extensively explained why his infraction-free record, rehabilitative programming, the age-crime curve, and the science of adolescent brain development all supported a finding that he was unlikely to reoffend and there was no need for specific deterrence. (Db12-29) The State did

not present opposing evidence or case law suggesting these factors are not connected with a lower probability of recidivism. (Sb12-19) Nor could it, as our Supreme Court has recognized both the relevance of both the "age-crime curve" and adolescent brain development in assessing the need for deterrence and likelihood of reoffending. State v. Comer, 249 N.J. 359, 399 (2022). Rather, the State argues that the sentencing fulfilled its duty and must be affirmed merely because the sentencing court "considered" the evidence and articulated a basis for continuing to place great weight on aggravating factors three and nine and rejecting mitigating factor nine. (Sb12-19) But when certain factors have been universally accepted as weighing against a likelihood of recidivism or need for deterrence, a court must correspondingly reduce the weight given to aggravating factors three and nine unless the court provides a basis for declining to do so grounded in competent, credible evidence.

On the question of whether the evidence presented by Blake is universally accepted as weighing against the likelihood of recidivism and deterrence, the State challenges Blake's citation to parole cases in support of Blake's argument that a prison record free of infractions with rehabilitative programming is linked with a lower risk of recidivism and less need for deterrence. (Sb14-15) The State argues that the Parole Board's task is different, as the Board is charged with an inquiry broader than recidivism— whether an "inmate has failed to

cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole." N.J.S.A. 30:4-123.53 (2024). (Sb14) The quoted language is the current parole standard that took effect on August 18, 1997. L.1997, c. 213. But the parole determinations in the two cases cited by Blake—Berta and Trantino—was "governed by the version of the Parole Act of 1979 (Parole Act or Act), in effect when his crime was committed . . . . before significant revisions to the Act were adopted in 1997," which provided that an inmate "shall be released on parole at the time of parole eligibility, unless [it is shown] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime.'" Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284, 304 (App. Div. 2022) (quoting N.J.S.A. 30:4-123.53 (1979)); see also Trantino v. New Jersey State Parole Bd. (Trantino IV), 154 N.J. 19, 27 (1998).

Thus, in both Berta and Trantino the Board—and the appellate courts—were faced with the same question a trial court faces in assessing the applicability of aggravating factors three and nine—"determining whether" an inmate "has been sufficiently deterred and there is no likelihood of recidivism" Trantino IV, 154 N.J. at 32. And the appellate courts in both cases found that rehabilitative programming and a "recent infraction-free history" is "plainly material" and "probative of the likelihood of re-offense." Ibid.; Berta, 473 N.J.

Super. at 314-15. These appellate court findings are clearly applicable in the context of a sentencing court's assessment of aggravating factors three and nine. Thus, when confronted with a prison record free of infractions with rehabilitative programming, a sentencing court must consider this evidence as weighing against aggravating factors three and nine unless there is competent, credible, contrary evidence.

Neither the sentencing court nor the State cited any cases or studies supporting the sentencing court's conclusions (1) that because prison is a controlled environment, an infraction-free prison record is not correlated with a lower risk of recidivism thus lessening the need for deterrence (8T 77-7 to 11, 80-16 to 19), (2) that "secondary gain" is a valid basis for declining to find that an infraction-free record supports a lower likelihood of recidivism and less need for deterrence (8T 80-20 to 81-13), or (3) that the act of "pulling the trigger" is not a product of the underdeveloped prefrontal cortex of youth but is more predictive of future recidivism than compliance and rehabilitative programming in prison (8T 79-1 to 80-1). (Sb15-21) Thus, because these assertions by the sentencing court were not supported by "expert testimony, or the defendant's criminal history, lack of remorse, premeditation, or other competent evidence," the sentencing court in this case "engaged in impermissible speculation." State

v. Rivera, 249 N.J. 285, 302 (2021). This Court should therefore reverse and remand for resentencing.

Even if the sentencing court were justified in placing substantial weight on both aggravating factors three and nine and could justify a maximum-term sentence on the manslaughter count, the court would have then had to separately evaluate whether the need for deterrence and incapacitation justified a consecutive sentence on top of the maximum-term manslaughter sentence as part of its fairness analysis under State v. Torres, 246 N.J. 246 (2021). (Db42-47) Torres requires that the reasons for a consecutive sentence "contextualize[e] the individual sentences' length, deterrent value, and incapacitation purpose and need." Id. at 271. In other words, even if the factors under State v. Yarbough, 100 N.J. 627 (1985) permit consideration of a consecutive sentence, Torres requires the sentencing court to evaluate whether a consecutive sentence was necessary to fulfill the goals of deterrence and incapacitation. Thus, the court here was required to evaluate whether the ten-year sentence on the manslaughter count would be sufficient to achieve the goals of deterrence and incapacitation, or whether a longer sentence was required, thereby justifying running the handgun count consecutive.

The court simply never conducted the required analysis of whether a ten-year sentence was inadequate to fulfill the goals of deterrence and

incapacitation. The court's discussion of the consequences of a consecutive sentence was limited to stating that if consecutive Blake would be "under the age of 40 by the time he reaches his parole," but this is an assessment of the proportionality of a consecutive sentence, not an assessment of the "deterrent value, and incapacitation purpose and need." Torres, 246 N.J. at 271. (8T 101-16 to 20) The court discussed the need for deterring the possession of a handgun in general, but never assessed whether the ten-year manslaughter sentence would be insufficient to deter Blake from possessing a handgun in the future. (8T 92-4 to 93-7, 101-3 to 103-18)

Had the court actually evaluated the deterrent value and incapacitative need of a consecutive sentence, it would be hard to see how, given the applicable social science, deterrence or incapacitation could justify a consecutive sentence. As noted in Blake's original brief, social science research on the deterrent effect of extending the length of sentences shows that increasing the length of a substantial sentence (such a ten-years) has no material deterrent effect. (Db46) Lengthening sentences is particularly ineffectual at deterring juveniles or young adolescents, as 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. Separately, the court would have had difficulty justifying the incapacitative value of incarcerating Blake

beyond his late-twenties in light of the "age-crime curve," which demonstrates that "'that more than 90% of all juvenile offenders desist from crime by their mid-20s.'" Ibid. (quoting Laurence Steinberg, The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability, 14 Neuroscience 513, 516 (2013)); see also id. at 400 ("'[T]he rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood.'") (quoting Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psych. Rev. 674, 675 (1993)). Accordingly, this court should reverse the sentencing court's consecutive sentence determination and remand for reconsideration in light of the social science of deterrence and incapacitation.

Even if this Court affirms the sentencing court's finding and weighing of aggravating factors on Count 1 and its imposing a consecutive sentence on count three, the court erred in failing to evaluate aggravating factors three and nine separately for the handgun charge in light of the consecutive sentencing decision. (Db42-47) Even if deterrence and incapacitation justified a ten-year sentence on the manslaughter count and a consecutive sentence on the handgun count, the court would have had to assess why a five-year sentence on the handgun count (a fifteen-year aggregate sentence) would be insufficient to

accomplish the goals of deterrence and incapacitation. The sentencing court should have found aggravating factors three and nine on Count 3 only if the need for deterrence or incapacitation required a sentence on the handgun charge beyond five, six, or seven years. See State v. T.E., 342 N.J. Super. 14, 37 (App. Div. 2001) (a court imposing a consecutive sentence should "appl[y] reduced weight to the aggravating factors" for the second term "[t]o avoid double counting of aggravating factors.") The sentencing court's failure to justify applying substantial weight to aggravating factors 3 and 9 on Count 3 in light of its decision to impose a consecutive sentence on Count 3 was error.

B. The Court Erred In Considering Defendant's Dismissed Charges.

The State's recitation of the restrictions on a sentencing judge's consideration of dismissed charges, which flows from State v. K.S., 220 N.J. 190 (2015), supports rather than rebuts Blake's argument. The Report of the Supreme Court Criminal Practice Committee does not describe any tension between State v. Green, 62 N.J. 547 (1973) and K.S., but rather recognizes that after K.S., "while the mere fact of arrest may not be considered, the conduct underlying a dismissed charge may be considered if supported by reliable evidence presented at a (sentencing) hearing;" "both Green and K.S. require the sentencing court to make affirmative findings that reliable evidence supports consideration of defendant's conduct underlying a dismissed charge." Report of

the Supreme Court Criminal Practice Committee 2019-2021 Term 38-39 (January 14, 2021) (emphasis added). These statements comport with the holding in K.S. that "prior dismissed charges may not be considered for any purpose" unless "the reason for consideration [is] supported by undisputed facts of record or facts found at a hearing." K.S., 220 N.J. at 199.

In this case, the sentencing court believed that K.S. prohibits considering arrests as evidence of "prior record" but permits considering dismissed charges as evidence of "who was this underlying person:"

> [W]hat I think the Prosecutor is referring to is talking about the nature of the Defendant. She wasn't talking about those things for the purposes of relying upon them for prior record, but to demonstrate since the argument is being made is I'm a different person. But who was this underlying person and the advent of domestic violence she was pointing to as an illustration of who this person is in his more intimate relationships. . . . [I]n those instances she's pointing to as this is how prior to this, I guess, he interacted. Okay? And the question becomes as I discussed with you, who is Mr. Blake really? Okay. And that is what I interpret. I don't take that record into accounting, but I understand the argument the Prosecutor was making in regard to that.
>
> . . .
>
> [W]hen you talk about those kinds of things and you talk about say a mitigating factor, how much weight to give a mitigating factor, you look at the totality of it. How involved has the justice system been in one way, shape, or form with this individual? And of course we're talking about Mitigating Factor Seven when we're talking about that. Here's the difference between a person who has never, ever, ever gone afoul of the law

> even to the point of an accusation to a person who's dancing through the raindrops, okay, and then finally has one hit. Okay. Those are different people, okay.
>
> [(8T73-10 to 75-1)]

The court's interpretation of K.S. is incorrect. K.S. does not draw a distinction between permissible and impermissible uses of dismissed charges, but rather draws a distinction between unproven conduct and conduct that is "supported by undisputed facts of record or facts found at a hearing." K.S., 220 N.J. at 199. When there is no evidence the conduct occurred other than the mere fact that a dismissed allegation appears on the defendant's record, those "prior dismissed charges may not be considered for any purpose" Ibid.

Here, there was no evidence Blake committed any of the acts alleged in the dismissed FV complaints, yet the sentencing court assumed Blake had committed conduct underlying these complaints and factored this assumption into its sentencing decision:

> When you talk about Seven as a mitigating factor, you're differentiating between people, and I think I gave the illustration. Who's dancing through the raindrops and who is really living their life in a proper way and got themselves mixed up in something that 1 got them here. You at that point in your life were headed down a path of destruction, okay? You had constant run-ins with the criminal justice system, albeit at lower levels, but you were not living a life free of contact with the criminal justice system. So I don't see Seven as applicable. It's simply not what I would consider mitigating. Whether you were convicted or not is not really the do all or tell

> all of Mitigating Factor Seven. The question is, what kind of a life are you leading? And that's I think what the Prosecutor was talking about, but I'm talking more about -- what does it say? No history of prior delinquency, that's not true. Or criminal activity, that's not true. Or has led a law-abiding life for a substantial period of time. You were getting into trouble way too often, so I decline Seven.
>
> [(8T 83-21 to 84-18)]

The court felt it was entitled to consider Blake's dismissed FV complaints as evidence of the "kind of a life [Blake was] leading"—that he had "had constant run-ins with the criminal justice system." The court also relied on these complaints to conclude that Blake "does have a history of assaultive behavior." (8T 105-18 to 20) This consideration violated K.S.

CONCLUSION

For the foregoing reasons, Defendant respectfully moves this Court to reverse and remand for resentencing.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

By: /s/ Scott M. Welfel
SCOTT M. WELFEL
Assistant Deputy Public Defender
ID. No. 084402013

DATED: February 27, 2024