SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2359-22
INDICTMENT NO. 94-06-00667-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From A Judgment Of Conviction Entered In
v.	:	The Superior Court, Law Division, Cumberland County.
JASON BAKER,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. Cristen P. D'Arrigo, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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TRANSCRIPT KEY

"Da" – Defendant-appellant's appendix

"PSR" – Presentence Report

"1T" – March 28, 1995 (guilty plea)

"2T" – May 18, 1995 (original sentencing)

"3T" – September 4, 2018 (Zuber resentencing hearing, argument)

"4T" – January 29, 2019 (Zuber resentencing hearing, decision)

"5T" – March 31, 2023 (Comer resentencing hearing)

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PRELIMINARY STATEMENT

Jason Baker was sentenced as a 17-year-old boy to a term of life imprisonment with an aggregate 60-year parole bar. He is now 46 years old. At a re-sentencing hearing pursuant to State v. Comer, Baker presented evidence that over the past 29 years, he has established an "absolutely remarkable" prison record – earning his GED, completing dozens of behavioral programs, working in "sensitive jobs" reserved for only the most trusted incarcerated persons, and all the while avoiding any involvement with the violence, drugs, and gang life that are rampant in prison. An expert psychologist found that at the time that 17-year-old Baker committed the offense, he was suffering from developmental deficits, had the emotional maturity of a 9- to 10-year-old boy, and was uniquely prone to peer pressure. 23 years later, another psychological expert found that, over those nearly three decades, Baker had "matured psychologically and intellectually" and he was now "capable of returning to the community and complying with its laws and norms[.]" That expert even concluded that Baker's growth out of his youthful recklessness "underscored what we know about adolescent brain development" and the unique capacity of juveniles to change over time. Given his demonstrated maturity and rehabilitation, Baker was and is entitled "to obtain release" pursuant to Comer.

Despite this, the trial court did not find that Baker had matured or become rehabilitated. Instead, the court held that his "exceptional" prison record could not be considered as evidence of rehabilitation because it took place while in prison. Moreover, the court deemed the question of Baker's maturity to be largely irrelevant because of the nature of the original incident itself. And the court concluded that the Parole Board was actually better suited to decide whether Baker had matured and become rehabilitated, and that therefore the Board would ultimately make the decision as to when, and if, Baker is entitled to be released. Without a finding that Baker had been rehabilitated or matured, and with the court's belief that parole was the proper venue to rule on those key issues, the trial court reimposed a life sentence, and reduced Baker's parole ineligibility period by only one year. This finding was not only a violation of Comer's explicit instruction to specifically consider rehabilitative efforts undertaken in prison, but it also left Baker with absolutely no route to establish that he had changed his ways in the last 29 years. The only action within Baker's power – to do all that he can to reform himself while in prison – was deemed entirely irrelevant. The court thus failed to achieve the core purpose of Comer: provide Baker with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Accordingly, the matter should be remanded once again for resentencing.

PROCEDURAL HISTORY

Defendant Jason Baker, along with co-defendants Luis Beltran and William Acevedo, were charged with the killings of George and Margaret McLoughlin in Vineland, New Jersey on March 2, 1994. (Da1-5) All three boys were juveniles at the time of the incident. Baker was arrested on the murder charges on March 6, 1994, and has been continuously incarcerated since that date – a period of over 30 years. (1T34-5 to 6) Though initially charged as a juvenile because he was only 17 years old, Baker was later waived to the Law Division to be tried as an adult. All three boys were charged with the murders in Cumberland County Indictment No. 94-06-0667-I. (Da1-5) Baker was specifically charged with felony murder in the death of Margaret McLoughlin (Count Three); purposeful or knowing murder of George McLoughlin (Count Four); and nine other related offenses. (Da1-5)

On March 28, 1995, Baker pled guilty to both murder charges pursuant to a negotiated plea agreement. (Da6-9) (1T4-3 to 5-18) On May 18, 1995, the Hon. Rushton H. Ridgway, J.S.C., heard argument on sentencing, allocution testimony from Baker, and expert testimony from a psychologist and a psychiatrist on Baker's behalf. (2T) Judge Ridgway sentenced Baker to a term of life imprisonment on each count, both subject to a 30-year parole disqualifier, to run consecutively – resulting in an aggregate sentence of life imprisonment

with a sixty-year term of parole ineligibility. (2T96-13 to 21) (Da10-13) The remaining counts were dismissed. (2T96-22 to 97-1) (Da10-13)

Baker appealed his sentence, which this Court affirmed on October 27, 1997, and the Supreme Court subsequently denied certification. State v. Baker, No. A-6326-94 (App. Div. Oct. 27, 1997); State v. Baker, 153 N.J. 48 (1998).

Years later, after three unsuccessful appeals of denied PCR petitions, the Supreme Court ordered a remand for Baker to be re-sentenced in light of the then-recent decision in State v. Zuber, 227 N.J. 422 (2017). (Da96) At a joint resentencing hearing with both Baker and co-defendant Beltran on September 4, 2018, the Honorable Judge Cristen D'Arrigo, J.S.C. heard sentencing arguments, allocution testimony, and expert testimony on Baker's behalf from Dr. Timothy Foley, a psychologist. (3T) Baker argued for the court to reduce his sentence from a term of life imprisonment to a fixed term of thirty-years imprisonment, with a thirty-year period of parole ineligibility. (3T29-14 to 17) On January 29, 2019, Judge D'Arrigo sentenced Baker to a term of life imprisonment with a 30-year parole bar on each count, this time running the sentences concurrently, instead of consecutively. (4T71-1 to 14)

Baker appealed this new sentence, arguing, among other things, that the court failed to make a finding on the question of his rehabilitation, and that consideration for parole is not enough to meet Graham and Miller's promise of

a "meaningful opportunity for release based upon demonstrated maturity and rehabilitation[.]" (Da106-107) In a February 4, 2022 joint opinion for both Baker and Beltran, this Court declined to address either defendant's arguments on the merits, and instead remanded "the matter again for fresh consideration of the sentence in light of Comer." (Da109) State v. Baker, No. A-2961-18, App. Div. Feb. 4, 2022); State v. Comer, 249 N.J. 359 (2022).

On March 31, 2023 Judge D'Arrigo again presided over a joint resentencing hearing. (5T) Baker argued to reduce his sentence from a term of life imprisonment to a term of 40 years. Judge D'arrigo did not modify Baker's base sentence, and again imposed two concurrent terms of life imprisonment, but this time lowered the parole bar to 29 years, one year fewer than the 30-year bar previously imposed. (5T92-2 to 12) Baker filed a timely appeal of Judge D'Arrigo's March 31, 2023 resentence. (Da22-25) This Court initially designated the matter as a sentencing appeal to be argued on the SOA calendar before granting Baker's request to transfer the case to the plenary calendar.

STATEMENT OF FACTS

A. The Factual Basis for the Guilty Plea (1T)

Jason Baker testified that on the day of the incident he met with Luis Beltran and Willie Acevedo to plan a burglary. (1T17-12 to 24) The boys wanted to burglarize the house of George and Margaret McLoughlin because they

thought they might find money and guns. (1T13-16 to 14-2) As the boys discussed the plan, they "drank and smoked[.]" (Da48) Baker specifically consumed about 60 oz. of beer prior to the incident. (PSR4) When they arrived at the house, Baker and Beltran went into the basement, while Acevedo remained outside. (1T14-3 to 18) Beltran was carrying a gun. (1T18-6 to 8) When Mrs. McLoughlin confronted them near the back door, Beltran, who had the gun, shot her four times. (1T14-19 to 15-18; 19-9 to 20-7) After Mrs. McLoughlin fell to the floor, Beltran and Baker moved her body to the basement. (1T15-2 to 16-8)

The three boys began to search the house looking for "stuff." (1T16-9 to 15) They found money, but no guns. (1T16-16 to 19) As they were going through the house, they saw Mr. McLoughlin pull up in the driveway. (1T22-3 to 4) They "scattered through the house and...waited for him to come inside." (1T22-5 to 6) As Mr. McLoughlin approached, Beltran said that he did not want to shoot the man, so he gave the gun to Baker and told him to "do it." (1T22-7 to 17) Beltran and Baker argued briefly, but Baker ultimately took the gun, and shot Mr. McLoughlin in the front hallway. (1T22-18 to 23-3; 16-20 to 25)

Despite being shot, Mr. McLoughlin came at Baker, who ran the opposite way. (1T25-14 to 16) When Beltran yelled that the man was going out the front door, Baker went after him, caught him on the driveway, and struck him on the head with the gun. (1T26-1 to 28-6) When the man fell, Baker kicked him until

he was unconscious. (1T28-7 to 19) The boys then moved the man's body into the house and continued to search for "stuff." (1T28-20 to 29-17) At some point, Mr. McLoughlin was stabbed many times. (1T32-19) Baker did not see the stabbing, but said that, as far as he knew, Beltran had done it. (1T32-19 to 23)

B. The Original Sentencing: May 18, 1995 (2T)

At Baker's original sentencing, testimony was presented from Dr. Ryno Jackson, a psychologist, and Dr. Daniel P. Greenfield, a psychiatrist, both of whom had interviewed and conducted psychological tests on Baker. (2T7-9 to 53-3) Dr. Jackson testified that, early on, Baker fell behind in developmental markers such as crawling, walking, and talking. (2T9-23 to 10-5) Thereafter, he continued to struggle with "developmental problems" which never resolved, and which required him to receive "specialized instruction throughout his life in reading comprehension, speech, and mathematics." (2T10-5 to 12; 38-20 to 21) Baker tested at a "perfectly normal" degree of intelligence, but had "neurological deficits" resulting in his "very poor" auditory and visual memory, "very limited" vocabulary, and "poor ability to function independently in casual, informal settings or unusual social settings." (2T13-23 to 14-3) In eleventh grade, he was not able to pass the high school proficiency test. (2T10-10 to 12)

Baker also faced substantial challenges at home. One of Baker's earliest memories was of his parents' break-up, which Dr. Jackson concluded was a

"severely traumatic event[.]" (2T9-14 to 22) From that point on, Baker's family life was marked by "emotional tensions" where he experienced "considerable violence, both emotional and physical, within the household." (2T10-13 to 14) Although Baker loved his mother, he viewed her as having "emotional problems" that made her incapable of emotional support. (2T17-3 to 6) Baker's mother explained that any disagreement in their home was "conducted in very loud, violent, angry tones." (2T10-16 to 18) In one instance, Baker was hospitalized for a ruptured spleen after being assaulted by his older brother. (2T10-14 to 15) And Baker saw his father as a "dope fiend who refuse[d] to support him adequately, financially or emotionally." (2T18-5 to 6) Dr. Jackson concluded that Baker had no "viable male image to identify with" and thus "was never able to establish himself as an individuated person." (2T10-20 to 25)

As a consequence of Baker's neurological deficits and unstable household, he became inordinately immature for his age, and exceptionally prone to peer pressure. Dr. Jackson found that when he was 17 years old, Baker's emotional functioning level was "somewhere between 9 and 10 years of age." (2T15-18 to 20) His deficits "would make him impulsive, [and] would make him slow to think and react" making him incapable of "functioning independently" because he couldn't "think quickly enough." (2T14-5 to 12) Baker "would take his cues from…a stronger peer or a stronger adult[.]" (2T14-6 to 10) Without a

developed sense of self, he became susceptible to manipulation, and was "easily coerced by others who [saw] him as an easy mark." (2T19-17; 21-8 to 11) In short, Baker became "a follower, not a leader." (2T15-1 to 2)

When Baker was 14, he began to socialize with co-defendants Beltran and Acevedo, whom their school Vice Principal described as a "very negative peer group." (2T12-4 to 6; 39-3) Given his propensity to adopt the behavior of his peers, Baker began to "act out" and was suspended twice in ninth grade, and seven times in tenth grade. (2T11-13 to 12-3) Dr. Jackson noted that when Baker was charged with vandalism, his behavior should have served as a "warning flag…[which] indicates that you're dealing with a person who's extremely disturbed and needs remedial help immediately." (2T12-11 to 17) Despite this urgent need, "this [help] is not provided." (2T12-17) Dr. Greenfield testified that Baker did not have any serious psychiatric disorder under Axis I of the DSM, but he was also not "normal neurologically." (2T42-23 to 46-11; 34-8 to 9) Rather, testing concluded that Baker had a personality disorder resulting in his "difficulty getting along with people." (2T33-24 to 34-14) Baker thus "found himself influenced and coerced by others, including the two individuals who were involved in the slaying of the McLoughlins[.]" (2T44-15 to 20)

At his sentencing in 1995, the court found aggravating factors 1 (nature of crime), 3 (likelihood of reoffending), 6 (criminal record), 9 (deterrence), and

12 (elderly victim), ascribing significant weight to all but factor 6. (2T93-18 to 94-16) Because of the expert testimony, the court found mitigating factor 13 (young defendant pressured by older person) but did "not give it a great deal of weight." (2T94-17 to 95-1) The court imposed two consecutive terms of life imprisonment, each with a thirty-year parole bar, for an aggregate sentence of life imprisonment with sixty-years of parole ineligibility. (2T96-12 to 25)

C. The Resentencing in Light of State v. Zuber: September 4, 2018 Argument and January 29, 2019 Decision (3T) (4T)

In 2018, Baker's sentence was summarily remanded to the trial court for resentencing in light of State v. Zuber, 227 N.J. 422 (2017). (Da96) Judge D'Arrigo presided over a joint resentencing hearing with Baker and Beltran. (3T) (4T) Baker submitted an expert report from Dr. Timothy P. Foley, a psychologist, who evaluated Baker in 2018. (Da44 to 51) Dr. Foley found it noteworthy that from 1995 to 2018, Baker had incurred only one infraction: possession of a tattoo pen. (3T12-3 to 11) That infraction occurred one month after Baker was sentenced, when he was still 18. (Da33) Since then, Baker had zero infractions, and had not participated in any drug use, prison violence, or gang activity. (3T12-7 to 11) Instead, Baker participated extensively in employment opportunities, rehabilitation programs, and community leadership. Baker earned his GED in 1998 and went on to work as a custodian, teacher's aide, and a craftsman in the graphic arts print shop – considered a "sensitive

job" provided only to well-trusted incarcerated persons. (Da31) (3T11-24 to 12-2) He also participated in dozens of programs, including "Cage Your Rage" and "Focus on the Victim." (Da45; 54-85) Over time, Baker grew into a trusted and respected member of his community. He served as a "mediator of his wing" in prison and received letters from DOC Administrators noting that he has "maintained an exceptional institutional record[.]" (Da48; 80) Dr. Foley described this record as "absolutely remarkable." (3T11-24)

As for his maturation, Dr. Foley noticed a marked difference from Dr. Jackson's initial assessment. (3T11-14 to 21) In the 23 years since then, Baker "had matured. He had developed. Things that almost sounded like they were hardwired back in 1995 were no longer present." (3T11-18 to 23) In Dr. Foley's opinion, Baker's ability to distance himself from the drugs, violence, and gang activity that were rampant in the prison environment "really kind of underscored what we know about adolescent brain development. It wasn't hardwired. He developed it. He made those connections." (3T12-11 to 16) Foley also found that Baker had an average IQ and showed no signs of psychopathy, sociopathy, glibness or pathological lying. (3T14-18 to 15-21) (Da49) He "took complete responsibility for the crime….[offered] no alternative theories," and "blamed no one." (3T11-2 to 5) When recounting the incident, Baker "sob[bed] quietly" which Dr. Foley characterized as "credible remorse." (PSR 14) (3T16-8)

The court found aggravating factors 1 (nature of crime), 3 (likelihood of reoffending), 9 (deterrence), and 12 (elderly victim). (4T37-1 to 38-14) Though Judge Ridgway had found mitigating factor 13, Judge D'Arrigo now found that the crime was "very much a collective effort" and thus found no mitigating factors. (4T59-25 to 62-15) The judge found that Zuber "constrained the Court from issuing a sentence that would be the functional equivalent of life without parole" and thus imposed two concurrent life sentences, each with a 30-year parole bar. (4T69-18 to 25; 70-23 to 71-14)

D. The Resentencing in Light of State v. Comer: March 31, 2023 (5T)

This Court remanded in 2022 for "fresh consideration of the sentence in light of Comer." Baker, No. A-2961-18. (Da109) Judge D'Arrigo again presided over a joint resentencing. (5T) Baker relied on the previous expert testimony and noted there was no indication "that anything has changed with [Baker] psychologically" since the last sentencing. (5T16-5 to 7) Baker's counsel asked for a fixed term of 40 years rather than a life sentence. (5T16-9 to 24) The State asked for two concurrent life sentences, both with periods of thirty years parole ineligibility. (5T38-17 to 25) The court conducted an analysis of the Miller factors, as will be discussed below in Point I.B. The court applied the same aggravating factors as before (1, 3, 9, and 12). (5T88-2 to 90-2) The court now found that mitigating factor 14 applied and gave it "substantial consideration,"

but found that overall, the aggravating factors "substantially outweigh the mitigating factor." (5T90-3 to 91-3) The court imposed concurrent life sentences on both charges, each with 29 years of parole ineligibility. (5T91-13 to 92-16) The court concluded by noting that parole would take a "more in-depth look" at Baker's maturity and rehabilitation, and that the Parole Board would ultimately consider "whether or not [he] should be released." (5T85-4 to 86-21)

LEGAL ARGUMENT

POINT I

IN RE-SENTENCING DEFENDANT PURSUANT TO STATE V. COMER, THE COURT COMMITTED FOUR INDEPENDENT LEGAL ERRORS. IN SO DOING, THE COURT FAILED TO RULE ON THE BOTTOM-LINE ISSUE OF WHETHER DEFENDANT HAD MATURED AND REHABILITATED. ACCORDINGLY, THE MATTER MUST BE REMANDED AGAIN FOR RESENTENCING. (5T)

In State v. Comer, our Supreme Court held that the mandatory minimum sentence of thirty years imprisonment under N.J.S.A. 2C:11-3(b)(1) constitutes cruel and unusual punishment when applied to juvenile offenders. 249 N.J. at 369-70. Comer followed in a long line of cases from both the U.S. Supreme Court and the New Jersey Supreme Court which all recognize that juveniles are "constitutionally different" than adults, and thus "less deserving of the most severe punishments.'" Comer, 249 N.J. at 384-388 (summarizing holdings of

Roper v. Simmons, 543 U.S. 551, 570 (2005), Graham v. Florida 560 U.S. 48, 74-75 (2010), Miller v. Alabama, 567 U.S. 460, 479 (2012), and Zuber, 227 N.J. at 429, 446-47) (quotation omitted). These cases all rely upon key developments in psychology and cognitive neuroscience that have identified fundamental differences between juvenile and adult brains. Zuber, 227 N.J. at 438-39. Without a fully developed brain, juveniles have "an underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk taking." Miller, 567 U.S. at 471 (quoting Roper, 543 U.S. at 569). Juveniles "are more vulnerable...to negative influences and outside pressures"; they have "limited control over their own environment"; and their "character is not as well formed as an adult's." Ibid. (quotation omitted). Their actions are "less likely to be evidence of irretrievable deprav[ity]" because they are "more capable of change than adults." Graham, 560 U.S. at 68. Accordingly, the U.S. Supreme Court has prohibited juveniles from being sentenced to mandatory life imprisonment without parole, no matter the offense, and no matter how heinous. Graham, 560 U.S. at 74-75; Miller, 567 U.S. at 479. Instead, a juvenile with a lengthy sentence must be provided "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75.

It is against this backdrop that our Supreme Court in Comer addressed the constitutionality of the mandatory minimum sentence of 30 years without parole

ineligibility under N.J.S.A. 2C:11-3(b)(1) as applied to juveniles. 249 N.J. at 369. The Court identified two constitutional issues with that mandatory scheme: (1) it does not give sentencing courts discretion to individually assess the Miller factors for each juvenile; and (2) it does not give sentencing courts the ability to "review the original sentence later, when relevant information" concerning the juvenile's maturation which "could not [originally] be foreseen might [now] be presented." Id. at 401. To remedy these infirmities, the Court provided juveniles subject to the statute with a "later opportunity to show they have matured, to present evidence of their rehabilitation, and try to prove they are fit to reenter society." Ibid. Such juveniles have the right to "petition for a review of their sentence after having spent 20 years in jail." Id. at 403. At that hearing, "judges are to consider the Miller factors" and must focus "in particular" on a defendant's rehabilitative efforts undertaken while in prison. Ibid.

That is what the court was required to do at Baker's March 31, 2023 resentencing. Despite these requirements, the court (a) refused to consider Baker's prison conduct as evidence of rehabilitation; (b) failed to correctly apply any of the 5 Miller factors; (c) found aggravating factors without a proper basis and omitted mitigating factors supported by the record; and (d) held that relief under Comer is limited to the grant of parole eligibility. Each error independently requires a remand for resentencing. Taken together, the errors

evince the court's failure to fulfill the purpose of Comer: provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

A. The court refused to consider Defendant's exemplary conduct while incarcerated as evidence of rehabilitation.

Comer requires resentencing courts to consider a defendant's prison conduct as evidence of rehabilitation: "a defendant's behavior in prison since the time of the offense would shed light" on the defendant's maturity and rehabilitation. 249 N.J. at 403. Courts should focus "in particular" on "evidence of any rehabilitative efforts since the time a defendant was last sentenced." Ibid. Consistent with this emphasis on prison conduct, this Court's February 4, 2022 remand order also instructed that Baker is "of course entitled to present up-to-date proofs regarding [his] conduct in the state prison system[.]"Baker, No. A-2961-18 (Da 109) (emphasis added). The trial court was thus required – by the explicit instruction of this Court and our Supreme Court – to consider Baker's conduct in prison as evidence of his rehabilitation. It refused to do so.

Instead, the court found that Baker's prison record, while "not the worst," did not establish that he was rehabilitated or that he would be successful upon reentry. (5T77-20 to 78-14) In so finding, the court focused on characteristics of prison, not any of Baker's characteristics. To to the court, Baker had no opportunity to act out over the past 29 years because he was supervised by corrections officers, and because those around him were "very capable of

defending themselves." (5T63-14 to 17; 78-16 to 25) There was thus "nothing" in the record demonstrating his rehabilitation, only his "adaptation" to prison. (5T78-11 to 80-3)

This finding directly contradicted the "particular" emphasis the Supreme Court placed on prison conduct to determine fitness for reentry. Comer, 249 N.J. at 403. In fact, Dr. Foley testified that prison life poses more challenges to rehabilitation than life in the community: "there's a lot more provocation [in prison] from staff, guards, other inmates who are violent, who have attitudes, [and] want something." (3T14-1 to 3) Baker's ability to stay out of trouble in prison was, to Dr. Foley, a particularly strong indicator that he will succeed in the comparatively less strenuous environment once released. (3T13-18 to 14-17) Moreover, the court's finding must be deemed erroneous, because if it was, in fact, the correct application of Comer, then defendants seeking a reduced sentence under Comer would be left with virtually no options for proving their rehabilitation. By the nature of the proceeding, the vast majority of defendants who petition under Comer will have spent the last two decades in prison.

All Baker's actions over the past 29 years – from getting his GED to earning a sensitive job – were deemed irrelevant simply because they happened in prison. Graham requires an opportunity for release based upon demonstrated maturity and rehabilitation. 560 U.S. at 75. Yet, for the resentencing judge,

Baker's demonstration of his maturity and rehabilitation – through his 29 years of exemplary behavior – meant nothing. The court's ruling thus created the very scenario which Graham sought to eliminate: Baker was left "without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character[.]" Id. at 79. A remand for resentencing is required.

B. The court erred in its application of all five Miller factors.

When imposing a new sentence pursuant to Comer, courts must consider the Miller factors alongside traditional sentencing considerations such as the relevant aggravating and mitigating factors. Comer, 249 N.J. at 408. Sentencing courts must, as always, "explain and make a thorough record of their findings to ensure fairness and facilitate review." Id. at 404 (citing to N.J.S.A. 2C:43-2(e) (requiring a statement of reasons on the record) and R. 3:21-4(h) (same)). Courts may only rely upon "competent, credible evidence in the record" and "[s]peculation and suspicion must not infect the sentencing process[.]" State v. Case, 220 N.J. 49, 64 (2014). Courts cannot simply turn a blind eye to evidence in the record that requires mitigation. Id. at 64 ("Mitigating factors that are called to the court's attention should not be ignored, and when amply based in the record….they must be found[.]") (citation omitted).

Comer resentencing courts must also be mindful to disentangle the nature of the incident itself from the juvenile offender's current character as an adult. Comer, 249 N.J. at 403. Courts do not have to disregard the nature of the incident in its entirety, but such consideration must be limited to the appropriate statutory factors. See N.J.S.A. 2C:44-1(a)(1). Crucially, the nature of the incident cannot improperly infect the court's consideration of the juvenile's maturation. To that end, Comer warns against the "unacceptable likelihood…that the brutal nature of an offense can overpower mitigating arguments based on youth." Comer, 249 N.J. at 403 (quoting Roper, 543 U.S. at 573). Courts must therefore "consider the totality of the evidence" lest they assign undue aggravation to the offense while undervaluing the mitigation of youth. Ibid.

Courts must apply all five Miller factors, with a focus on factors 1 (immaturity) and 5 (rehabilitation) which bear heightened significance because they "could not be fully considered decades earlier[.]" Id. at 403. The remaining factors – 2 (family and environment), 3 (details of incident and peer pressure), and 4 (capacity to aid in legal defense) – must also be considered, but are "likely to [have] remain unchanged" since the original sentencing. Ibid. If the court concludes, based on its analysis of Miller, that the juvenile is fit to reenter society, then that juvenile will be entitled to "obtain release" from prison via the imposition of a "lesser sentence and a reduced parole bar." Id. at 386, 371.

Here, all five Miller factors weighed heavily towards mitigation, and thus towards a finding that Baker was an appropriate candidate for release from prison via a reduction in his sentence from life in prison to a term of fixed years. But instead of relying upon the evidence to find that each Miller factor warranted substantial mitigation, the court found that many of the factors did not apply at all, and those which did apply were entitled only slight mitigation. The court thus erred in its application of each factor by ignoring and discrediting the amply demonstrated mitigating evidence in the record, and by making findings that were not based upon any competent, credible evidence.

i. The court failed to properly apply Miller factor 1 (immaturity) by erroneously concluding that Defendant's actions as a teenager were not influenced by his immaturity, and by improperly disregarding expert psychological testimony indicating that Defendant had matured since his original sentencing.

When sentencing pursuant to Comer, there are two distinct components to consideration of maturity: (1) the presumption of the juvenile's immaturity at the time of the offense, and (2) an analysis of whether the defendant has matured in the two decades since the offense. 249 N.J. at 403. Here, the court erred in its consideration of both. As to the first consideration, Comer requires courts to presume that the hallmark qualities of youth are present in all juveniles, thus requiring mitigation: "a juvenile offender has no burden to produce evidence that his brain has not fully developed in order for the first factor to be considered

in mitigation." 249 N.J. at 407. To rebut this presumption, "[o]n rare occasions, the State might be able to present expert psychiatric evidence as proof that a particular juvenile offender possessed unusual maturity beyond his years. If unrefuted, the first factor would not weigh in the defendant's favor." Ibid.

Here, the only expert testimony in the record was offered by Baker, not by the State. Decades ago, expert psychologist Dr. Jackson testified not only that Baker had the hallmark qualities of youth in general but that he had developmental and neurological deficits which made him uniquely immature. (2T14-7 to 12) Expert psychiatrist Dr. Greenfield agreed with Dr. Jackson's conclusions. (2T46-16 to 18) In the absence of expert testimony from the State suggesting that Baker was uniquely mature for his age, and in consideration of the multiple expert accounts that found Baker was uniquely immature for his age, the State failed to overcome the presumption that the hallmark qualities of youth necessarily reduced the culpability of teenage Baker's actions. Comer, 249 N.J. at 407. The court was required to credit this presumption and assign mitigation to factor 1 accordingly.

The court did not do this. Instead, it relied upon the nature of the incident to find that Baker's actions as a teen were not influenced by immaturity at all: "You can't get away from the underlying things that happened because they tell you about the people who did it. This was not impetuousness of youth or just,

you know, not understanding." (5T77-4 to 8) The court noted that the boys had time to flee in the 45-minute period between the two shootings, and concluded: "Who does that? That's not youthful not understanding. That's something different." (5T78-1 to 10) The court ultimately held that the incident "was not motivated by outside influences nor was it the impetuousness of youth. This was just plain evil." (5T88-7 to 9) The court made no reference to the expert findings that Baker was uniquely immature. Nor did it acknowledge the presumption that youth is afforded mitigation, or find that the State overcame that presumption with the requisite expert psychological findings.

As for the second component of Miller factor 1, courts must shift their focus to the maturity of the juvenile offender now that he is an adult. Comer, 249 N.J. at 370. Courts must determine if the adult defendant still demonstrates the "hallmark qualities" of youth or whether he has grown out of them over time. Id. at 370, 381. Parties may present any "evidence relevant to sentencing," but two types of evidence are of particular importance. Id. at 370. First, "behavior in prison since the time of the offense[.]" Id. at 403. Second, evidence from a qualified expert psychological or psychiatric witness. Id. at 385 (characterizing "expert psychologists" as uniquely qualified to determine maturity).

Baker relied upon both of these categories of evidence: his exemplary prison record, and the expert psychological finding that he had "matured

psychologically and intellectually over the past 41 years." (Da50) The court, however, considered neither. The court refused to consider Baker's prison record as evidence of maturation, which was erroneous for the same reasons that its refusal to consider his record as evidence of rehabilitation was erroneous (as discussed in in Point I.A). And the court simply disregarded the expert finding of maturity. Those findings from Dr. Foley considered the precise qualities of youth as enumerated in Miller and concluded that "[t]here are strong indications that [Baker's] maturation and development will continue"; that "Mr. Baker is capable of returning to the community and complying with its laws and norms"; and that there were "no indications that he presents as an incorrigible individual requiring additional incarceration." (Da51) The court was required to either rely upon the expert testimony to find that Baker had matured – and provide mitigation weight accordingly – or provide an explanation as to why the unrebutted expert testimony failed to establish maturation, and identify relevant facts that support a finding that Baker had not matured. The court did neither.

The court made only two findings as to Dr. Foley's report. First, the court noted that Baker appeared to have a difficult childhood. (5T77-13 to 19) Second, the court explained that "I was disturbed last time and I'm disturbed again about the psychiatric report and the harming of animals, cats, I think it was, that was referenced the last time it was presented to me." (5T74-7 to 12) As an initial

matter, this latter finding was factually erroneous. In his interview with Foley, Baker recalled an incident from when he was eleven years old where he had harmed a frog. (Da47) After making this error, the court explained "Now, I didn't spend a lot of time" reviewing the report. (5T74-10 to 12) More important than the error was the court's disregard for the relevant context of the "disturbing" incident: that Baker was 11 years old; that he suffered substantial trauma and developmental deficits; and that he has since matured out of any reckless and antisocial behavior. The court thus failed to properly interpret and consider the report, failed to credit the expert psychological evidence as establishing Baker's maturity, and failed to assign mitigation accordingly.

The remainder of the court's analysis of maturity was also erroneous in that it focused on Baker's actions as a teen, instead of his maturation as an adult. See Comer, 249 N.J. at 395 (holding that courts cannot rely on a juvenile's behavior at the time of the offense to find them incapable of maturation when they are adults). The court's improper analysis of whether Baker "still fails to appreciate risks and consequences" illustrates this error. Instead of focusing on Baker's capacities as an adult, the court focused only on Baker's capacities and incapacities as a teen: "when I look at the Miller factors, both of these individuals were under the age of 18. I don't – I don't find that there was a great deal of failure to appreciate the consequences. Maybe there was some. Maybe

there was some." (5T81-1 to 6) The court made no mention of Dr. Foley's findings on this precise question – that as an adult, Baker had "reflected on the consequences" of his actions and had "established a pro-social attitude hallmarked by consistent work performance, attaining his high school diploma, and participation in a variety of prison programs over the years." (Da50)

The court also recurringly focused on the heinousness of the offense. Though the court acknowledged the Supreme Court's instruction to focus on Baker's conduct since 1995, it explained that the incident itself made Baker an exception: "However, I have not seen – I've seen few individuals who earned their way into our system in such a heinous manner as these two." (5T73-2 to 9)[1] This finding was erroneous because it drew a conclusion as to Baker's current maturation by relying upon his behavior as a teen, and because it ran counter to Comer's instruction to guard against the "unacceptable likelihood" that the "brutal nature of an offense…overpower[s] mitigating arguments based on youth." 249 N.J. at 403.

The court ultimately made no finding as to whether Baker had matured now that he was an adult beyond the mere recognition that he had gotten older:

[1] Contrary to the court's finding, all the cases contemplated by Comer involve lengthy sentences, and therefore often involve disturbing fact patterns. The juvenile in Zuber, for example, had participated in two separate gang rapes, while the juvenile in Thomas, had committed a double murder. Zuber, 227 N.J. at 430; Thomas, 470 N.J. Super. 167, 171-72 (App. Div. 2022).

"there is a natural level of maturity by simply getting older….They're 46 years old. They're not 17 years old anymore…They have grown older, that they have done. But I don't know that their approach to freedom is any different than it was before other than the fact that you're not 17 anymore." (5T70-24 to 71-24; 83-5 to 9) In sum, the court improperly disregarded expert testimony finding that Baker had matured; the court failed to explicitly rule on whether Baker had matured for purposes of Miller; and the court improperly relied upon facts of the incident itself to discount the relevance of his demonstrated maturation. Accordingly, the court failed to properly assess Miller factor 1 as required by Comer, requiring a remand for resentencing.

ii. The court failed to properly apply Miller factor 5 (rehabilitation) by disregarding expert psychological testimony indicating that Defendant has rehabilitated.

At a Comer resentencing, there is significant overlap between consideration of a juvenile's maturation and consideration of their rehabilitation. The same factors are relevant to the court's findings on both. Comer, 249 N.J. at 403 (holding that a "defendant's behavior in prison since the time of the offense would shed light" on both maturation and rehabilitation). And both findings inform the court's conclusion as to whether a juvenile offender is fit to reenter society. Comer, 249 N.J. at 386. Here, the court's refusal to consider Baker's prison conduct as evidence of rehabilitation also

rendered the court's application of Miller factor 5 improper given the factor's focus on rehabilitation. And, as was true for maturation, the court erred in disregarding Dr. Foley's expert testimony. Foley concluded that Baker's ability to stay out of trouble and remain committed to rehabilitation while in prison evinced that he had "learned to control" his impulses; that his "aggressive propensity has resolved"; and that he was "capable of returning to the community and complying with its laws and norms." (3T14-6 to 17; 22-19 to 21) (Da49) The State provided no evidence to rebut these findings.

The court, however, did not credit Dr. Foley's report as establishing rehabilitation, nor did it explain why the report failed to do so. In fact, the court did not make a finding on the question of rehabilitation at all. As discussed, the court's consideration of Dr. Foley's report was limited to an acknowledgment that Baker had a difficult youth, and an expression of concern with one detail about 11-year-old Baker's behavior. Ultimately, when ruling on rehabilitation, the court expressed only doubt: "that's the really difficult one. It's almost impossible for me to determine how they're gonna react if – when and if they would be released back into society." (5T83-1 to 4) The court's failure to rule on rehabilitation evinced its erroneous disregard for the expert psychological finding that Baker had rehabilitated, and that his conduct in prison was probative

evidence of his ability to safely reenter society – thereby requiring substantial mitigation pursuant to Miller factor 5.

iii. The court failed to properly apply Miller factor 2 (family and environment) by conducting a comparative rather than individualized analysis of Defendant's childhood environment, and by disregarding expert psychological testimony indicating that Defendant's traumatic childhood influenced his reckless behavior.

Miller factor 2 recognizes that juveniles have "limited control over their own environment and lack the ability to extricate themselves from horrific, crime producing settings." 567 U.S. at 471 (citation omitted). Courts must apply sufficient mitigation weight to Miller factor 2 if a juvenile suffered from trauma or abuse at home. Id. at 478-79. A juvenile is not required to prove that their environment was a direct, or even proximate, cause of their criminal act. Rather, a finding that the juvenile suffered significant environmental stressors is alone sufficient to warrant a reduction of culpability. Ibid. (finding a juvenile's "pathological background" contributed to his commission of the crime where he experienced physical abuse and parental neglect, moved between foster homes, and struggled with mental illness; and finding another juvenile's childhood environment to be "particularly relevant" in light of "his mother's drug abuse and his father's physical abuse").

Doctors Greenfield and Jackson provided consistent expert findings that, in his youth, Baker suffered "considerable violence, both emotional and

physical, within the household." (2T10-13 to 14) His childhood was marked by "emotional tensions"; a lack of emotional support; an absence of positive role models; exposure to parental substance use; and "severely traumatic" domestic disputes between his parents. (2T10-16 to 25; 18-5 to 9; 9-14 to 22) As a result of these environmental stressors – which were compounded by development deficits and adolescent substance abuse – Baker became highly sensitive, impulsive, immature, angry, incapable of independence, and vulnerable to coercion. In short, he became a "ticking bomb" who was "extremely disturbed and need[ed] remedial help immediately." (2T16-6 to 9; 12-11 to 17) Without a trusted support network at home, Baker "turned to what had become a negative peer group to give him the support that he needed[.]" (2T12-4 to 6) In that acute moment of vulnerability and need, Baker "found himself influenced and coerced by others, including the two individuals who were involved in the slaying of the McLoughlins[.]" (2T44-15 to 17)

In light of this unrebutted expert testimony, the court was required to attribute significant mitigation to Miller factor 2. It did not do so. Instead, the court found that although "there was some abuse…in his upbringing" it was "not the worst I've seen here while I sit here. People doing far less things having far worse childhoods than that. So who puts forth a plan like this? Because this was planned. This wasn't -- this wasn't [] just a crime of opportunity." (5T77-16 to

24) Firstly, it was improper for the court to conduct a comparative analysis by evaluating the effect of Baker's childhood to a hypothetical, alternative juvenile who suffered more extensively. One of the core purposes of Comer is to provide courts with the discretion to "assess a juvenile's individual circumstances[.]" Comer, 249 N.J. at 401 (emphasis added). The only evidence in the record specific to Baker's childhood provided the unequivocal conclusion that his childhood trauma made him prone to reckless, and ultimately criminal, behavior. The court had no evidentiary basis to conclude that Baker's trauma was not significant enough to warrant substantial mitigation, and its reliance upon non-individualized facts from outside the record was improper. Case, 220 N.J. at 64.

Secondly, the court was prohibited from letting the nature of the incident impact its consideration of the mitigating effect of Baker's youth. As to the heinous nature of the incident, courts are prohibited from letting the "brutal nature of an offense [] overpower mitigating arguments based on youth." Comer, 249 N.J. at 403. And as to the planned nature of the incident, the court ran afoul of Miller when it held that the mitigating effect of Baker's childhood was undermined by the fact that the incident was not a crime of opportunity. In Miller, the Court noted that Kuntrell Jackson, one of the juveniles sentenced to life without parole, had "learned on the way" to participating in the fatal robbery "that his friend Shields was carrying a gun[.]" 567 U.S. at 478. Despite this

knowledge, the Court concluded that Jackson's "age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point." Ibid. Accordingly, Jackson's youth reduced his "culpability for the offense" even though he was aware of the plan to commit armed robbery. Ibid.

The same is true for Baker. All of his immature characteristics – including his vulnerability to coercion that was borne of environmental trauma – were present when the boys hatched the plan. Teenage Baker lacked the capacity to understand the risk that the plan entailed, or to resist the pressure to go along with it. The court thus erred in ignoring the mitigating effect of Baker's childhood trauma just because the incident was not a crime of opportunity.

iv. The court failed to properly apply Miller factor 3 (circumstances of offense and peer pressure) by incorrectly focusing on the heinousness of the offense, and by failing to consider the expert psychological testimony indicating Defendant was uniquely susceptible to peer pressure.

Miller factor 3 requires courts to consider "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." 567 U.S. at 477. When doing so, courts must focus on the facts as they relate to maturity. Comer, 249 N.J. at 370 (holding that the Miller factors are "designed to consider the mitigating qualities of youth") (citation omitted).

Here, teenage Baker "found himself influenced and coerced by others, including the two individuals who were involved in the slaying of the McLoughlins[.]"(2T10-19 to 25; 44-15 to 17) As a teenager, Baker would do as he was told, or, if left unprompted, would act in a manner that he believed would gain the respect of his peers. (2T50-14 to 20) Accordingly, Baker's actions were always impacted by some form of external peer pressure, explicit or otherwise. In light of Baker's nature, the court should have attributed substantial mitigation to Miller factor 3, regardless of how the incident unraveled. The court thus erred by declining to apply any mitigating weight to factor 3 based on its finding – with no basis in the record – that Baker was "running the show"; that the boys were equal participants; and that the incident was heinous.

As to the specifics of the incident, Dr. Jackson concluded that Baker "did not wish to" shoot Mr. McLoughlin and that "[t]here was some coercion there in the argument" between Baker and Beltran over the gun, "meaning that [Baker] was not happy about having to do it." (2T24-8 to 19) Similarly, Dr. Greenfield concluded that Baker's characterization of the incident – that he was "scared" and was simply "following orders" – was consistent with the official report. (2T48-25 to 49-5) Based on these expert findings, the original sentencing court found that mitigating factor 13 (youthful defendant influenced by older person) applied, albeit without attributing it "a great deal of weight" (2T94-17 to 95-1)

Upon resentencing, the court rejected the expert characterization of Baker's behavior as responsive to peer pressure, reasoning that "those assertions were belied by the fact of the Defendant's own statements as to who was running the show." (4T64-19 to 24) The court found instead that "[t]hese were equal participants. This was a planned event. This was a heinous act. It was unnecessarily violent and I mean unnecessarily violent." (5T82-3 to 5) Accordingly, the court attributed no mitigation to Miller factor 3. This finding was erroneous for two reasons: (1) it was not based on any facts in the record, and (2) it relied upon the fact that the offense was planned and brutal in nature – both of which bear no relevance to the question of peer pressure.

The court found that, "if you pay close attention to Mr. Baker's statement…Mr. Beltran was not the ringleader. It was a situation where it was very much a collaborative effort. The parties preplanned it, according to Mr. Baker's own statement[.]" (4T62-11 to 16) Nothing in Baker's allocution, however, supports this finding. In 2018, Baker testified that "I stick to the original version of what happened. I'm not changing any of that stuff. But, I mean, alls [sic] I could say is, I mean, it was wrong. I know that." (3T83-14 to 17) At that same hearing, the State argued that "Mr. Beltran actually, when this case was investigated, he was described as the leader of the group. He was the one calling the shots, he was the one that had the gun, and brought it to the scene.

He was the one that shot Mrs. McLoughlin. He started the violence. He started the process. Everything escalated from there." (3T66-17 to 23) (emphasis added) And in his PSR, Baker "agreed with the details as noted in the official version [and] stated that the burglary was Beltran's idea because he wanted to get more guns and took one with him to the burglary. Baker admitted shooting George McLoughlin, at the urging of Beltran." (PSR3) At his March 2023 resentencing, Baker said, "I take full responsibility for what I did. Mr. and Mrs. McLoughlin were killed and I'm responsible for their deaths. No description of who did what or how will ever change that." (5T55-21 to 24)

None of these statements contradict the facts as established at Baker's plea. And none of these statements undermine the expert findings that Baker was generally prone to peer pressure, or that Baker was specifically urged into taking the gun during the incident. The court's finding was thus not based on a proper evidentiary basis, and it improperly rejected testimonial evidence that should have given mitigating effect to Baker's vulnerability to peer pressure.

v. The court failed to properly apply Miller factor 4 (capacity to work within legal system) by speculating that because Defendant pled guilty, he was necessarily capable of working productively within the legal system.

Miller factor 4 requires courts to consider that a juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors

(including on a plea agreement) or his incapacity to assist his own attorneys." Miller, 567 U.S. at 477-78 (emphasis added). Factor 4 is based upon the understanding that juveniles have characteristics that are "likely to impair the quality" of their representation, such as their "mistrust [of] adults and limited understandings of the criminal justice system" as well as their "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel[.]"Graham, 560 U.S. at 78. In addition to all these difficulties faced by children on the normative developmental track, Baker was also diagnosed with specific neurological and developmental deficits that would have made his experience of the criminal legal system even more difficult to navigate. As a teen, Baker failed his high school competency exam, had difficulty processing thoughts quickly, and had the emotional maturity of a 9- to 10-year-old. The court should have attributed substantial mitigation under factor 4 accordingly.

Instead, the court held that because Baker had entered into a guilty plea, those qualities of his youth had not impaired his ability to aid in his own defense. (5T82-14 to 20) That finding, and the resulting failure to attribute any mitigation under factor 4, were erroneous for two reasons. Firstly, in enumerating Miller factor 4, the U.S. Supreme Court made clear that a juvenile's inability to deal with law enforcement compromises their ability to enter a plea agreement, and

not just their ability to go to trial. Miller, 567 U.S. at 477-78. The court's finding that Baker established his competency by pleading guilty thus clearly contradicted Miller. See also, Comer, 249 N.J. at 407-08 (holding that when considering factor 4, unless the juvenile himself volunteers privileged information, courts are prohibited from relying upon "strategic decisions by counsel for both sides" which implicate privileged conversations). Secondly, there was no evidentiary basis to establish that Baker's pleading guilty was, in fact, the best legal decision for him to make. The resentencing court had not reviewed the discovery and had not spoken to any of the potential witnesses in the case. The negotiated plea provided no guarantee that his sentences would be run concurrently, and Baker ultimately ended up receiving the exact same sentence that Beltran did after being convicted at trial. (1T4-3 to 5-18) Moreover, Baker's decision to move to withdraw from his plea years later evinces, at the very least, Baker's own belief that pleading guilty was not the best legal decision to have made. (4T28-1 to 29-4)

In conclusion, the court erred in its application of all five Miller factors. This failure was particularly prejudicial to Mr. Baker because it was, in the court's own telling, central to its decision to re-impose a life sentence: "You cannot commit an act like this and not go under a life sentence…the youthfulness doesn't rise to a level that would not make this an offense punishable by life. It

just doesn't." (5T92-3 to 10) The court concluded, in other words, that the heinous nature of the crime outweighed the mitigating qualities of Baker's youth. The court had erred, however, in analyzing all five aspects of Baker's youth. The Court's reasoning – and the life sentence predicated upon that reasoning – were thus erroneous. A remand for resentencing is required.

C. The court's analysis of the statutory sentencing factors disregarded expert psychological testimony, and relied upon facts not supported by the record. Accordingly, the court erred by finding aggravating factors 3 and 9, and by declining to find mitigating factors 7, 8, and 9.

The trial court found aggravating factors 1 (nature of crime); 3 (likelihood of reoffending); 9 (deterrence); and 12 (elderly victim). (5T88-2 to 90-2) Although Baker's defense counsel requested mitigating factors 7 (law-abiding for substantial period); 8 (conduct result of circumstances unlikely to reoccur); 9 (unlikely to reoffend because of defendant's character); and 14 (youth), the court found only factor 14 and held that it was "substantially outweigh[ed]" by the aggravating factors. (5T18-19 to 25; 90-24 to 91-3) The court provided no explanation as to why it declined to find mitigating factors 7, 8, and 9. As discussed, there was substantial evidence in the record establishing that Baker had matured and rehabilitated. Conversely, there was no evidence in the record to suggest that Baker had failed to mature, or failed to become rehabilitated. Because the record clearly demonstrated Baker's maturity and rehabilitation, it

was erroneous for the court to find aggravating factors 3 and 9, and to decline to find mitigating factors 7, 8, and 9.

Beginning with Baker's likelihood of reoffending, a finding that a juvenile has matured and rehabilitated is tantamount to a finding that he is unlikely to reoffend and is thus "fit to reenter society." Comer, 249 N.J. at 371. Accordingly, the evidence that was sufficient to establish Baker's maturation and rehabilitation was also sufficient to require a finding of mitigating factor 8 (the incident was precipitated by Baker's underdeveloped brain, making it unlikely to re-occur now that he has matured), and mitigating factor 9 (Baker has matured into a rehabilitated, law-abiding person, unlikely to reoffend). The court provided no explanation as to why this clear evidence did not lead to a finding of mitigating factors 8 and 9.

Conversely, the court was prohibited from finding aggravating factor 3 (risk of re-offense) because there was no longer a risk that Baker would reoffend now that he had matured and become rehabilitated. In support of aggravating factor 3, the court reasoned, contrary to the evidence in the record, that "[t]here is nothing here…that would indicate to me that under similar circumstances outside of the control of the facility that these individuals would not [] re-offend." (5T88-11 to 21) This finding contradicted both the expert psychological testimony which concluded that Baker was not likely to reoffend, as well as the

neuroscientific research discussed in Comer. The finding was also based upon the court's erroneous reasoning that prison conduct cannot establish evidence of rehabilitation. And while the court provided no explicit justification, its denial of mitigating factor 7 (law-abiding for substantial period) implicated the same erroneous reasoning.

As for deterrence pursuant to aggravating factor 9, there was no basis to find that the re-imposition of a life sentence served either general or specific deterrence. General deterrence was not served because, as both the New Jersey Supreme Court and the U.S. Supreme Court have held, "the threat of a lengthy jail sentence is less of a deterrent for juveniles than adults" because 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 (citing Roper, 543 U.S. at 571). Specific deterrence was not served because there was no need to deter Baker now that he was mature and rehabilitated.

Had the court properly found the statutory factors that were supported in the record, then the mitigating factors (7, 8, 9, and 14) would have substantially outweighed – both quantitatively and qualitatively – the aggravating factors (1 and 12). Accordingly, the court's finding that the aggravating factors outweighed the mitigating factors, and the resulting life sentence based upon that finding, were both erroneous, requiring a remand for resentencing.

D. The court erroneously found that relief under Comer is limited to eligibility for parole, and thereby refused to even consider altering Defendant's original base sentence of life-imprisonment.

The March 31, 2023 re-sentencing hearing was Baker's "meaningful opportunity" under Comer to "obtain release based on demonstrated maturity and rehabilitation." 297 N.J. at 386. At that hearing, "[a]fter evaluating all the evidence, the trial court [had] discretion to affirm or reduce the original base sentence within the statutory range, and to reduce the parole bar to no less than 20 years." Id. at 403 (emphasis added). Baker's defense counsel asked the court to exercise its discretion and change his original sentence from a term of life imprisonment to a term of 40 years. (5T16-9 to 24) According to the court, however, parole hearings – and not resentencing hearings – are where juvenile offenders like Baker will be afforded their meaningful opportunity for release pursuant to Comer. Accordingly, the court limited the scope of its resentencing to the narrow question of determining the length of Baker's parole ineligibility period. By not even considering amending Baker's base sentence, and by finding that Comer was satisfied by the fact of Baker's parole eligibility alone, the trial court failed to impose a sentence consistent with the instructions of Comer.

In State v. Thomas, this Court reaffirmed the principle that resentencing hearings are the proper venue for juveniles to vindicate their rights under Comer and Graham, holding that "nothing less than an adversarial hearing in the

Criminal Part will afford defendant the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' envisioned by Graham, Comer, and Zuber[.]"470 N.J. Super. 167, 201 (App. Div. 2022) (citation omitted). Thomas also held that "parole hearings" are a "poor substitute for a procedure that would afford defendant" their meaningful opportunity pursuant to Comer. Id. at 196. This Court emphasized that: parole hearings are not adversarial; defendants at parole hearings are "not represented by counsel"; defendants "cannot present witnesses or expert testimony"; and the panel making the determination does "not consider the Miller factors." Id. at 194, 197.

This Court pointed to the details of William Thomas's denial of parole as "emblematic of the shortcomings" of parole. Id. at 198. Thomas, like Baker, was convicted of two murders when he was only seventeen. Id. at 172. When Thomas became eligible for parole, the Board denied him seven times in a row. Id. at 174. This Court found that, in so doing, the Board had "singularly focused upon the admittedly horrific details of Thomas's crimes" and had "failed to address" the numerous psychological reports in the record which found that Thomas had "'good insight' and maintained good impulse control and judgment." Id. at 198. This Court also highlighted "undisputed parole data" which found that "from January 1, 2019 to December 31, 2019 over 90 percent of the 445 inmates who were sentenced to life in prison that appeared before the Board were denied

parole." Id. at 178. That data and Thomas's anecdote supported the ruling that, in light of its shortcomings, parole cannot provide the "meaningful opportunity to obtain release" which Comer requires. Id. at 196.

Despite this ruling, the court in Baker's case held that parole hearings are a more meaningful opportunity to obtain release based on maturation than are adversarial hearings. First, the court found that the scope of its resentencing was limited to determining the length of parole ineligibility. (5T9-24 to 10-7) Per the court, this narrow scope was consistent with Comer: "I don't read Comer to say that I need to necessarily modify the ultimate sentence. The question is, giving them an opportunity to be evaluated and potentially released, i.e. parole, within a reasonable period of time." (5T38-5 to 16) (emphasis added).

During argument, the parties disagreed as to whether parole eligibility alone satisfies Comer. The State agreed with the court: "all Comer asks you to do is give them a meaningful opportunity to express [their rehabilitation] and I believe we've done that" by previously reducing their period of parole ineligibility. (5T39-20 to 24) Counsel for Baker, however, objected that parole was not sufficient, relying on this Court's language from Thomas[2] that "by any measure parole hearings are a poor substitute" for adversarial hearings in order

[2] Defense counsel mistakenly quoted the language of Thomas but attributed the quote to Zuber. See Thomas, 470 N.J. Super at 196.

to satisfy Comer. (5T54-15 to 20) The court ultimately ruled in favor of the State, finding that parole eligibility not only satisfies Comer, but is actually a better venue for considering rehabilitation: "I focused on whether or not parole is meaningful.…Parole exists for a reason. Okay? It's a more in depth look than the Court can actually give in any of this type of proceeding." (5T84-25 to 85-6) (emphasis added)

Instead of ruling on whether Baker had demonstrated maturation and rehabilitation – and was thus eligible for release – the court left those questions for the Board: "They haven't been the worst inmates, okay? They've shown some maturity. So these kinds of elements would be considered in the parole application…You got another year, wait and make your parole application…and parole will consider all these same things again and whether or not they should be released." (5T93-1 to 4; 86-17 to 21) The court thus denied Baker relief not based on any finding that he had failed to become rehabilitated, but on the belief that he will have his "meaningful opportunity to obtain release" via parole. This decision – delegating Baker's opportunity for relief to the Board instead of granting such relief itself – was improper. Thomas, 470 N.J. Super at 196.

Moreover, the court failed to provide any reasoning to support its erroneous finding that a parole hearing – which is a non-adversarial proceeding conducted by members of the executive branch where defendants are not entitled

to counsel and will likely not have the benefit of expert testimony – would be a better venue for addressing the constitutional infirmity of Baker's sentence than an adversarial hearing before a presumably neutral member of the learned judiciary. See State v. A.T.C., 239 N.J. 450, 468 (2019) ("Notwithstanding the important roles of the coordinate branches in sentencing, however, the determination of '[a] criminal sentence is always and solely committed to the discretion of the trial court to be exercised within the standards prescribed by the Code of Criminal Justice.'") (citation omitted).

In fact, only five months after being re-sentenced, Baker was denied parole at an August 7, 2023 hearing, and was given an additional 36-month future eligibility term. (Da86)[3] In an opinion from the Board, the Executive Director justified the denial by pointing to those precise procedural limitations which this Court identified as "shortcomings" of the parole process in Thomas. 470 N.J. Super at 198. (Da89-94) Baker's principal argument in his administrative appeal of the denial was that the panel had failed to consider Dr. Foley's psychological report finding him "capable of returning to the community and complying with its laws and norms." (Da89) The Director

[3] Mr. Baker has filed a separate Notice of Appeal to the Appellate Division challenging the Parole Board's denial of his parole. Baker v. NJ State Parole Bd., No. A-1521-23. As of March 18, 2024, Mr. Baker's appeal has been docketed but no briefing has been filed.

explained that this oversight was not, in fact, an error, but was rather a feature of the parole board's limited evidentiary record: "Since the 2018 psychological evaluation conducted by Dr. Timothy Foley was not part of the record established at the time of your Board panel hearing, it will not be considered in your appeal." (Da91) And as was the case in Thomas, the opinion provided cursory explanation for its finding that Baker had not matured, and recurringly discussed the facts of the incident itself, suggesting that the Board had likewise "singularly focused upon the admittedly horrific details" of Baker's incident. (Da91-94) Thomas, 470 N.J. Super. at 198.

The Board concluded by telling Baker to take two steps going forward: (1) "remain infraction free" while in prison, and (2) direct any further "concerns regarding your sentence…to the sentencing court." (Da88, 93) Baker was thus left stranded in a legal limbo: the sentencing court sent him to the Board to obtain release, and the Board sent him right back to the sentencing court. And that sentencing court continually refuses to consider the precise conduct which the Board advised Baker to take: behave well in prison. The court's reliance upon parole eligibility as sufficient to satisfy the requirements of Comer was thus not only a legal error, but it was an error that put Baker in the exact position that this Court sought to avoid in Thomas, wherein his "confinement seems to have no end[.]" 470 N.J. Super. at 200. A remand for resentencing is required.

POINT II

THE REMAND PROCEEDINGS SHOULD OCCUR BEFORE A DIFFERENT JUDGE. (Not raised below)

An appellate court will order resentencing before a different judge when a judge has shown a commitment to imposing a specific sentence. State v. Melvin, 248 N.J. 321, 352 (2021). A defendant need not "prove actual prejudice on the part of the court…the mere appearance of bias may require disqualification." State v. McCabe, 201 N.J. 34, 43 (2010) (quoting State v. Marshall, 148 N.J. 89, 279 (1997)). The need for a new resentencing judge is more urgent where, like here, the judge has already sentenced the defendant on two prior occasions. See, e.g., State v. Kosch, 458 N.J. Super. 344, 355-56 (App. Div. 2019) State v. Locane, 454 N.J. Super. 98, 130 (App. Div. 2018).

Judge D'Arrigo's comments created a clear appearance of bias and impropriety warranting recusal. First, from the very outset, the judge signaled that he found the remand to be unnecessary, even nonsensical. When defense counsel summarized the purpose of the Comer remand, the judge asked, "Counsel, how much sense does that make…how much sense does that make…. [The co-defendants] already have had the benefit of having their parole stip halved by this Court in my last ruling. So what is to be accomplished further[?]" (5T8-25 to 10-7) The judge appeared to begin with the expectation of reimposing

a substantially similar sentence before even hearing argument or allocution. See Melvin, 248 N.J. at 352 (remanding for resentencing before a different judge because "viewing the proceedings from the defendant's perspective, 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").

Second, Judge D'Arrigo failed to make the key findings as to Baker's maturation and rehabilitation on two prior occasions, despite explicit instruction from this Court to do so. Instead, the judge recurringly explained that the task was difficult for him, if not impossible:

- "[T]his is not easy. It's not easy to look at a 41 year old man and put myself back in time to when he's 16 years old, and then sentence him today as a 41 year old man[.]" (4T49-8 to 13)

- "[I]t's very hard to look at 46 year old men and say, well, I'm gonna consider your youth. It's almost incomprehensible." (5T70-11 to 15)

- "The tools are rudimentary at best. I can't see into someone's soul." (5T80-21 to 23)

- "Now the possibility of rehabilitation. That's the really difficult one. It's almost impossible for me to determine how they're gonna react [upon release]." (5T83-1 to 4)

Relatedly, the judge refused to consider Baker's prison conduct as evidence of rehabilitation on two occasions, despite explicit instruction from this Court and our Supreme Court to do so. Baker thus has good reason to doubt that, if given a third opportunity, the judge would now be capable of and willing to make a

different factual finding on these core issues of maturation, rehabilitation, and prison conduct. See P.T. v. M.S., 325 N.J. Super. 193, 220-21 (App. Div. 1999) (collecting cases in which a remand to a different judge was ordered to preserve the appearance of a fair and unprejudiced hearing in light of the original judge's potential commitment to findings).

Third, Judge D'Arrigo refused to interpret Baker's allocution as anything other than an insincere attempt at legal gamesmanship. Although the judge noted a "substantial difference in how [the co-defendants] approached the Court" during allocution, he explained, "I don't think that's maturity. That's intelligence." (5T71-22 to 24) To the judge, the fact that Baker changed how he thought and spoke about the incident showed only that he was saying whatever was necessary to get released: "[A]s we go through these processes, they change… But you cannot convince me that these individuals are substantially different people than who sat before me in 2019. Their presentations are different, but their overall approach has been mollified by what has happened previously since then." (5T72-1 to 17) This was, in effect, a credibility determination that Baker was dishonest. Viewed from Baker's perspective, he would have little reason to believe that, even if provided instruction, the judge would be capable of setting aside the credibility determination he previously reached that Baker's allocution testimony, and Baker himself, were insincere.

See Freedman v. Freedman, 474 N.J. Super. 291, 308 (App. Div. 2023) (ordering a different judge on remand "because the judge expressed comments regarding credibility" and "may have a commitment to her prior findings").[4]

Finally, as discussed above (in Point I.B.i) the judge indicated that his review of the record was limited – "[n]ow I didn't spend a lot of time [reviewing the record]"– and he made factual errors in his findings as a result. (5T74-10 to 11; 14-8 to 10) In one instance not previously discussed, the judge contradicted his own finding concerning Baker's childhood environment. The judge first held at Baker's 2019 sentencing that Baker's home environment was "perceptively better" than Beltran's home environment, and then later found the opposite in 2023 – that Baker "had a far more acrimonious childhood" than Beltran. (4T68-5 to 17) (5T81-19-22). Relatedly, despite Judge D'Arrigo's reassurances that he was not unduly influenced by the heinous nature of the incident, he recurringly considered the brutality of the facts, including when considering Baker's maturity, his prison conduct, his susceptibility to peer pressure, and his likelihood of reoffending. (5T77-4 to 6; 73-2 to 4; 82-4 to 5; 89-1 to 5) The brutal nature of the incident was not a relevant consideration for any of those factors, let alone an almost dispositive factor, as the court seemingly treated it.

[4] The judge also appeared to rely on Baker's prior collateral appeals to characterize his rehabilitative efforts as insincere. (5T75-15 to 24; 5T85-23 to 86-4)

The judge concluded by holding, in no uncertain terms, that "[y]ou cannot commit an act like this and not go under a life sentence…the youthfulness doesn't rise to a level that would not make this an offense punishable by life. It just doesn't." (5T92-4 to 10) From Baker's perspective, then, Judge D'Arrigo's recurring focus on the nature of the incident makes it "difficult to comprehend how the same judge who has twice sentenced him could arrive at a different determination at a third sentencing." Melvin, 248 N.J. at 352. And at both of those sentencings, the judge demonstrated that he is either incapable of or unwilling to follow the clear instruction from Comer – that he must avoid the "unacceptable likelihood" that "the brutal nature of an offense can overpower mitigating arguments based on youth." Comer, 249 N.J. at 403. Accordingly, the matter should be remanded to a different judge.

CONCLUSION

For the foregoing reasons, Baker's sentence must be vacated, and his case remanded for resentencing before a different judge. At that sentencing, the court must give full and proper mitigating effect to the evidence in the record establishing Baker's maturity and rehabilitation. After proper consideration of Baker's demonstrated maturity and rehabilitation, the court must provide him with the relief as defined by Comer: release from prison via a reduced sentence and a lesser parole bar.

Respectfully submitted,
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DATED: March 18, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2359-22
INDICTMENT NO. 94-06-667-I

April 19, 2024

STATE OF NEW JERSEY, Plaintiff-Respondent v. **JASON BAKER,** Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CUMBERLAND COUNTY INDICTMENT NO. 94-06-667-I CRIMINAL ACTION On appeal form a judgment of conviction of the Superior Court of New Jersey, Law Div., Cumberland County Sat Below: Hon. Cristen P. D'Arrigo, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

In early March 1994, defendant was arrested in connection with the murders of George and Margaret McLoughlin. (Pca4).[1] On June 23, 1994, the Honorable George H. Stanger, J.S.C. waived jurisdiction over defendant, then a minor, and transferred the matter to the Law Division. (Pa2). On the same day, defendant was charged in a fourteen-count indictment along with codefendants Luis Beltran and William Acevedo. (Da1-5). The counts were as follows:

(1) second-degree burglary in violation of N.J.S.A. 2C:18-2 (count 1)

(2) first-degree knowing/purposeful murder of Mrs. McLoughlin in violation of N.J.S.A. 2C:11-3(a)(1) or (2) (count 2),

(3) first-degree felony murder of Mrs. McLoughlin in violation of 2C:11-3(a)(3) (count 3)

(4) first-degree knowing/purposeful murder of Mr. McLoughlin in violation of N.J.S.A. 2C:11-3(a)(1) or (2) (count 4),

[1] "Pa" refers to the State's appendix.
"Pca" refers to the State's confidential appendix.
"Db" refers to defendant's brief.
"Da" refers to defendant's appendix.
"1T" refers to the plea transcript of March 28, 1995.
"2T" refers to the sentencing transcript of May 18, 1995.
"3T" refers to the sentencing transcript of September 4, 2018.
"4T" refers to the sentencing transcript of January 29, 2019.
"5T" refers to the sentencing transcript of March 31, 2023.

(5) first-degree felony murder of Mr. McLoughlin in violation of 2C:11-3(a)(3) (count 5),

(6) first-degree robbery upon Mrs. McLoughlin in violation of N.J.S.A. 2C:15-1 (count six),

(7) first-degree robbery upon Mr. McLoughlin in violation of N.J.S.A. 2C:15-1 (count seven),

(8) second-degree possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4(a) (count 8),

(9) third-degree possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4(d) (count 9)

(10) third-degree unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5(d) (count 10)

(11) fourth-degree unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5(d) (count 11)

(12) third-degree criminal mischief in violation of N.J.S.A. 2C:17-3a(1) (count 12);

(13) fourth-degree false incrimination in violation of N.J.S.A. 2C:28-4(a) (count 13 - Beltran only), and

(14) third-degree hindering apprehension in violation of N.J.S.A.2C:29-3(b) (count 14 – defendant only). (Da1-5).

After Beltran was found guilty by a jury, defendant pled guilty to counts 3 and 4. (2T92; Pa4; 1T; Da6-12). The parties' plea agreement provided that defendant would serve 30 years to life for each count, that the State reserved the right to argue for consecutive terms, and that the remaining counts would be dismissed. (Da6-9). The Honorable Donald A. Smith, Jr., J.S.C. accepted defendant's plea. (1T).

On May 18, 1995, the Honorable Rushton H. Ridgway sentenced defendant to two consecutive life terms with a 30-year parole bar in each term. (Da11). Defendant filed an appeal, but the appeal was dismissed on October 27, 1997, and the Supreme Court subsequently denied certification on February 2, 1998. State v. Baker, No. A-5326-94 (App. Div. Oct. 27, 1997); State v. Baker, 153 N.J. 48 (1998).

Defendant then filed a post-conviction relief (PCR) petition, which was denied by Judge Ridgway on July 28, 2000. (Pa10). The denial was affirmed by this court on October 28, 2002, and on January 30, 2003, the Supreme Court denied certification. State v. Baker, No. A-4406-00 (App. Div. Oct. 23, 2002); State v. Baker, 175 N.J. 433 (2003).

On July 1, 2010, defendant filed his second PCR petition, along with a motion to withdraw his guilty plea, and a motion for reconsideration of sentence. State v. Baker, No. A-3045-10 (App. Div. October 10, 2012) (slip op. at 2). The Honorable Benjamin C. Telsey, J.S.C. denied all applications following oral argument. Ibid.

The denial was affirmed by this court on October 10, 2012, and defendant's subsequent petition for certification was denied on June 7, 2013. Id. at 1; State v. Baker, 214 N.J. 116 (2013)

Defendant then filed a third PCR, which was denied by the Honorable Cristen P. D'Arrigo. (Pa156). Defendant appealed from the denial, and in an order filed on April 11, 2017, the Appellate Division summarily remanded the matter for resentencing pursuant to State v. Zuber, 227 N.J. 422 (2017). (Pa181).

On September 4, 2018, Judge D'Arrigo held a resentencing hearing in which he entertained both defendant's and Beltran's application. (3T). On January 29, 2019, the judge ordered that defendant's life sentences run concurrently, with a 30-year parole bar. (Da14-17). Defendant once again appealed. On February 4, 2022, the Appellate Division remanded the matter for resentencing pursuant to State v. Comer, 249 N.J. 359 (2022). State v. Baker, No. A-2961-18 (App. Div. Feb. 4, 2022) (slip op. at 12-14). On March 31, 2023, Judge D'Arrigo resentenced defendant to two concurrent life terms with a parole bar of 29 years. (Da18). This appeal follows.

COUNTERSTATEMENT OF FACTS

I. The underlying crime

According to defendant's plea allocution, on March 2, 1994, defendant went with Beltran and Acevedo to the victims' house to "rob them" of money and guns.

(1T13:1 to 14:2). The three participants had planned the crime at Acevedo's house, which was within walking distance. (1T17:12-24). "To protect [them] in case anything happened," Beltran brought along a gun. (1T18:9-22). Defendant was aware that Beltran was holding a gun, which he described as "[a] little revolver with white handles." (1T18:15 to 20:24).

When the participants reached the victims' house, Acevedo acted as a lookout while defendant and Beltran made entry. (1T14:2-18). Defendant knew that Mrs. McLoughlin was inside the house, but nonetheless "went through the back door." (1T19:5-16). Beltran, meanwhile, "went through the window." (1T19:5-16).

The back door led to two staircases: one going up, and one going down into the basement. (1T19:21-25). Defendant and Beltran went down into the basement. (1T19:21-25). At some point thereafter, Mrs. McLoughlin "came to the back door." (1T14:19 to 15:18). Defendant and Beltran came up the stairway, and Beltran shot Mrs. McLoughlin four times from three feet away. (1T14:19 to 15:18; 1T19:24 to 20:12). After she fell, defendant and Beltran dragged her down into the basement to hide her. (1T15:24 to 16:8).

Defendant then "went through the house looking for stuff" and found some money, but no gun. (1T16:11-19). Thereafter, Acevedo informed defendant and Beltran that Mr. McLoughlin had pulled into the driveway. (1T22:3-6). The

participants "scattered through the house and waited for him to come inside." (1T22:3-6). Beltran still had the gun at the time, but he "didn't want to shoot the man," and told defendant to do it. (1T22:16-17). An argument ensued, but in the end, defendant took the gun "voluntarily." (1T22:18-23). Defendant positioned himself close to the entrance, waited for Mr. McLoughlin to open the door, and shot him from a couple feet away. (1T23:4 to 25:9).

Mr. McLoughlin was struck in the face, but he "c[a]me towards [defendant]." (1T:25:9-16). Defendant ran "the other way" on "the side of one of the bedroom," but when he heard Beltran yell that Mr. McLoughlin was going out of the front door, he set out to pursue him. (1T25:15 to 26:6). He ran after him down the driveway, and when he caught up with him, he hit him with the butt of the gun. (1T26:1 to 27:25). Mr. McLoughlin fell down, and defendant began to kick him in the head and stomp him. (1T28:9-11). Once Mr. McLoughlin was unconscious, defendant, Beltran, and Acevedo dragged him back into the house and closed the door. (1T29:3-17). Defendant's purpose in attacking Mr. McLoughlin was to "make sure that he was dead" and eliminate him as a potential witness. (1T30:20 to 32:18). After bringing Mr. McLoughlin inside, defendant and his accomplices spent additional time looking through the house before finally leaving. (1T30:1 to 33:21). When he left the house, he assumed that Mr. McLoughlin was dead. (1T33:15-21).

Defendant was asked during his allocution whether Mr. McLoughlin was stabbed. (1T32:19-25). However, he denied stabbing him and stated that he believed Beltran was responsible for any stabbing. (1T32:19-25).

The official version of the crime in defendant's sentencing report, with which defendant agreed, indicates that Mrs. McLoughlin suffered four gunshot wounds in her head, face, chest, and abdomen. (Pca4-5). Mr. McLoughlin had a gunshot wound to his face and multiple stab wounds in the head, back, and right side of his body. (Pca4). He was found next to two knives. (Pca4). Both victims were 64 years old, and an examination of the scene revealed that their phone wires had been cut and their home ransacked. (Pca4)

On March 6, 1994, police received a tip that Beltran and two others were responsible for the victims' deaths. (Pca4). Upon being questioned, Beltran implicated defendant and Acevedo and provided information leading to the discovery of the gun used in the incident. (Pca4). Defendant was brought in for questioning on the same day but declined to give a statement. (Pca4). In his presentence interview defendant stated that he had consumed alcohol prior to burglarizing the victims, but that he was not drunk at the time. (Pca5).

II. First sentencing

At sentencing, defendant strenuously argued that he suffered from mental health deficits and had acted under Acevedo and Beltran's influence. To establish

this point, he called two expert witnesses: Dr. Ryno Jackson, Psy.D., and Dr. Daniel Greenfield, a psychiatrist. (2T; Pca29-44).

Dr. Jackson testified that at birth, defendant was delivered with forceps and sustained bruises on his head. (2T9:6-10). At three years old, he was traumatized by a bee sting incident, and the next event in his life was his parents' separation, which caused him further trauma. (2T9:11-22). He experienced developmental delays and required special education in school. (2T10:1-12). "There was considerable violence, both emotional and physical, within [his] household," and at one point, he "was hospitalized for a ruptured appendix as a result of having been kicked by his brother."[2] (2T10:13-18). Although he was of normal intelligence, he suffered from a neurological deficit that slowed his thinking. (1T13-14). He complained that his natural father was a "druggie," and while he loved his stepfather, he was "torn between the two images" and could not adopt either one. (2T16:09 to 17:2). Thus, he lacked a "viable male image that he could identify with." (2T10:22).

The problems in his family in conjunction his developmental deficits caused him to act out, incurring suspensions in school as well as juvenile charges. (2T11:13 to 12:17). He also fell under the influence of a negative peer group led by Beltran and including Acevedo. (2T13:2-14). At one point, Beltran and Acevedo assaulted

[2] Defendant stated in his last presentence report that this event occurred when he was twelve years old. (Pca57).

and robbed a pizza delivery man while defendant stood and watched. (2T13:15-22). After the incident, Beltran and Acevedo "called [defendant] chicken and a lot of other names." (2T13:15-22).

Dr. Jackson concluded that defendant's level of emotional maturity was somewhere between 9 and 10 years of age, that he was easily coerced, and that he had been negatively influenced by Beltran and Acevedo. (2T13-16; Pca34). He also stated that defendant's deficits were exacerbated by alcohol, that defendant saw his family as "nutsy," and that his family "wasn't very supportive to him in his perception." (2T17-20).

The prosecutor asked Dr. Jackson whether he had reviewed Beltran's statement in which Beltran indicated that defendant took the gun from him and held it to Acevedo's head when Acevedo was reluctant to go forward with the burglary. (2T22:3-8). Dr. Jackson replied that he had, that he found the allegation surprising, and that if true, the alleged act would constitute an "aggressive move" on defendant's part. (2T22:9-25). The prosecutor also asked Dr. Jackson about a letter dated August 13, 1994 from defendant to Acevedo's sister. (2T25-29). That letter, which the prosecutor read into the record, contained the following excerpt:

> I talked to Frankie Friday. We just said what's up and I told him it was fucked up what [Acevedo] is doing. . . . I am talking about testifying against me. I don't care if it's for less time or not, he's going to regret it. I'll get him, you can count on it. My boy Papo

> (phonetic) went to church Friday in here. He told me he seen [Acevedo] down there, so I'm going to break his jaw. I'm telling all of my boys to go to church too so everyone can hit him. I know he's your brother, but he's got to pay for what he did. Alex[3] . . . knows and I hope you can understand.
>
> So, what's up out there? Anything new or have all of you just been getting funktified (phonetic). In here, I've just been getting my props up. A lot of people know me in here now. I got people watching my back, so I ain't going to worry about shit. I ain't going to worry about getting Oscar no more either because one of my boys that's in here is getting out soon and he said he'll get Oscar for me.
>
> [2T26:21-27:13].

Dr. Jackson responded that despite the letter, he believed defendant to be remorseful because what defendant wrote was merely his attempt to "play the macho bit." (2T27:23 to 29:8).

Doctor Daniel Greenfield, a psychiatrist, testified that defendant's forceps delivery was traumatic for him. (2T38:4). Defendant had a poor relationship with his biological father, but after his mother remarried when he was about eight years old, his family environment "improved to some extent." (2T38:8-17). He did poorly in school, had a poor self-image, and attempted to make up for it by acting out. (2T38:16 to 2T40:13). "[I]n terms of his developmental history, up to the incident itself: a loser, a follower, a kid who never really was able to . . . assert himself very much in positive and wholesome kinds of ways." (2T41:2-5). He "found himself

[3] Alex is another brother of Acevedo's. (2T27:4-6).

influenced and coerced by others, including the two individuals who were involved in the slaying of the McLoughlins, . . . Beltran and . . . Acevedo, and . . . that was one of the dynamics that took place as a result of his involvement with those individuals." (2T:44:14-20). His "lack of confidence in himself and his acting out through influence of others, his macho kind of presentation that he enabled himself to make through others, was an important factor in his life in general and, certainly, a critical factor in the slaying in question." (2T45:1-5).

Under cross-examination, Dr. Greenfield related that based on defendant's account of the crime, he found defendant's role to be "following orders." (2T48:21 to 49:5). Defendant had told him: "We went into . . . the house, ransacked it. I said let's go. They said let's hide . . . . Beltran ran the group." (2T50:1-7). Dr. Greenfield recalled defendant mentioning that Acevedo had been reluctant to participate in the burglary, but not that he had put a gun to his head. (2T50:1-7). Dr. Greenfield described defendant's letter to Acevedo's sister as "angry, blow-off steam puffery." (2T50:1-15).

In response to counsel's argument that Acevedo had been treated more leniently than defendant, the judge stated that after the jury convicted Beltran, "[N]either Mr. Acevedo nor Mr. Baker stepped up and took culpability in the cases against them." (2T92:9-12). Therefore, the prosecutor made a strategic decision to offer a plea deal to Acevedo, whom the judge found to be the least culpable. (2T92:9-

16). Despite the experts' testimony, the judge was "satisfied that [defendant] was as much involved in this as was Mr. Beltran," and that "his blaming of others is a common reaction . . . that's why he's chosen Mr. Beltran as the target or the explanation of his own actions." (2T93:12-17). Therefore, the judge did not give mitigating factor 13 "a great deal of weight." (2T94:17 to 95:1).

The judge pointed out that the crime was planned, that defendant did not leave after the first homicide and in fact participated in the ransacking of the house "probably more than the other two," took the weapon, shot, chased after, and pistol-whipped Mr. McLoughlin. (2T9:2-19). The judge also pointed out that defendant had had previous interaction with the criminal justice system, that he had normal intelligence regardless of his deficits, and that he had shown no remorse for his crime. (2T946:20 to 96:11). After finding aggravating factors 1, 3, 6, 9, and 12, the judge imposed two consecutive life terms with a 30-year parole bar in each. (2T93:18-16; 96:12-21).

III. PCR proceedings

Following his unsuccessful appeal and first PCR, defendant retained counsel and filed another PCR in 2010. (Pa12). Counsel argued that "Beltran alone killed Mr. McLoughlin" because the gunshot wound inflicted by defendant had been non-

fatal, and Beltran stabbed Mr. McLoughlin without defendant's or Acevedo's participation. (Pa22, 29).

In support of this argument, defendant submitted a statement signed by Beltran. (Pa44-52). In this statement, Beltran claimed that he, defendant, Acevedo met at Acevedo's house on the day of the incident and planned the robbery. (Pa47¶8). Once they reached the McLoughlins' house, defendant gave Beltran a wire cutter, which Beltran used to cut what he believed were alarm wires. (Pa47¶10). Acevedo was staying behind meanwhile, and after waiting for him for some time, defendant told him "come on." (Pa47¶10-12). Acevedo responded "hold on," and defendant "grabbed the gun from Beltran and put it to [Acevedo's] head and repeated 'come on.'" (Pa47¶12). The three participants then observed Mr. McLoughlin inside the house, but they did not see anyone else. (Pa47¶12). Beltran broke a window, but the participants then waited for Mr. McLoughlin to leave before taking the next step. (Pa48¶¶13-15). Following entrance, Beltran killed Mrs. McLoughin, and defendant broke a table in the living room. (Pa50¶23). When Acevedo announced that Mr. McLoughlin had pulled into the driveway, defendant "took the gun with him, first saying he did not think he could shoot Mr. McLoughlin then said 'fuck it.'" (Pa50¶¶24-25). He then shot Mr. McLoughlin with "the remaining two bullets." (Pa50¶25). While Mr. McLoughlin was running away, Beltran grabbed a knife and stabbed him as he passed by. (Pa50-51¶26). After defendant caught up with Mr.

McLoughlin, Beltran and defendant beat him until he was unconscious and carried him into the house with Acevedo's help. (Pa51¶¶27-28).

Defendant then went "into the kitchen and punched the microwave when he noticed it was nearing 6:00 pm," his curfew time. (Pa51¶29). Shortly thereafter, defendant and Acevedo left, while Beltran was trying to flush the bullet casings down the toilet. (Pa51¶¶29-30). When Beltran came out of the bathroom, he realized he was left alone in the house. (Pa52¶37). Overwhelmed with panic, he grabbed a couple of knifes, stabbed Mr. McLoughlin's side a couple of times, dropped the knives, and ran out of the house. (Pa51-52¶32). When he caught up with defendant and Acevedo, "they just laughed." (Pa52¶33). Beltran concluded his statement by claiming that he alone caused Mr. McLoughlin's death, and that defendant and Acevedo should not be held accountable as "if they themselves stabbed Mr. McLoughlin." (Pa52¶36).

Judge Telsey denied PCR and defendant pursued an appeal pro se. Baker, No. A-3045-00 (slip op. at 3–4). In his brief to this court, which was filed in September 2012, defendant complained that he "ha[d] never been given a fair chance at being heard." (Pa99). He strenuously argued that he "did not commit or intend to commit homicide" (Pa125) and made the following statements:

> (1) Defendant made both of his co-defendants promise that no one would get hurt before he went into the house. After Beltran

> killed the female, [d]efendant was afraid, and he was then ordered to shoot the man (not kill him) by a killer still holding the smoking murder weapon . . . . the killer had threatened to kill [d]efendant if he did not shoot the male victim . . . . Beltran threatened to come after and kill [d]efendant if he didn't go get the man before he could call the cops. [Pa121].
>
> (2) [T]o this day [d]efendant certifies that he never intended to kill anyone, and that he had participated in the crime only after his co-defendants had promised nobody would be hurt. [Pa126].
>
> (3) It is clear that [d]efendant had shot the male victim one time and then ran, and that the gunshot wound was not fatal. [Pa72].
>
> (4) It's important to note that the juvenile defendants were all wearing masks, so there was no logical reason for [d]efendant to eliminate a witness who could not have identified him . . . . Beltran, the real ringleader and the only actual killer of the group, provided masks, since knives and masks were part of Beltran's modus operandi . . . . The instant crime was . . . planned out, and the plan included masks and gloves so there would be no identification and therefore no need to hurt anyone in the house. [Pa119-120].

Defendant also argued that his plea allocution did not demonstrate his intent to kill Mr. McLoughlin. [Pa119]. This is so even though the following exchange took place between him and the prosecutor:

> Q: . . . And, as [defense counsel] asked you, your purpose at that point was to eliminate [Mr. McLoughlin]; -
>
> A: Yes
>
> Q: - is that correct? And "eliminate's" a nice word, but at that point, you didn't want to leave a witness; is that fair to say?
>
> A: Yes.
>
> Q: So it was the intention at that point to make sure that he was dead before you left there?

A: Yes.

[1T32:9-18].

Having denied his intention to kill, defendant concluded that he was eligible for relief under Graham v. Florida, 560 U.S. 48 (2010). (Pa125). He also faulted plea counsel for falsely informing him that his consecutive life sentences would have been overturned on appeal, and that he would be eligible for a sentence reduction to take the overall sentence to "even lower than the 15 to 30 years" if he completed certain programs. (Pa68-69).

This court found defendant's arguments to be "without sufficient merit to warrant extended discussion. R. 2:11–3(e)(2)" and affirmed "substantially for the reasons stated by Judge Telsey in his thorough thirty-page written opinion." Baker, No. A-3045-00 (slip op. at 4). Judge Telsey noted that even if Beltran's statement were true, defendant would still be guilty under accomplice liability. Id. at 6. The court did not address defendant's Graham arguments because it anticipated that defendant would file an application under Miller v. Alabama, 567 U.S. 460 (2012). Id. at 7-8. However, the court took "no position as to the applicability of Miller. Defendant does have the possibility of parole, albeit not until the age of seventy-seven, the approximate end of his life expectancy." Ibid. Defendant filed for certification, which was denied on denied on June 7, 2013. Baker, 214 N.J. at 116.

Defendant then filed a third PCR, arguing that he did not murder Mr. McLoughlin and that he was entitled to relief under Miller. (Pa136, 175). In support of this PCR, defendant submitted numerous letters from friends and relatives, who stated that (1) defendant was a good person influenced by the "wrong crowd" (Pa144, 147, 148), (2) defendant did not cause the death of either victim (Pa150), (3) defendant was just in the wrong place and with the wrong people (Pa144), and (4) defendant was not thinking (Pa149). The PCR was denied and defendant appealed. The Appellate Division remanded the matter for sentencing pursuant to Zuber. (Pa181).

IV. Second sentencing

In support of his resentencing, defendant submitted an expert report from Dr. Timothy P. Foley, Ph.D. According to the report, defendant was raised in a "generally supportive" environment by his mother and stepfather, who joined the family when he was six or seven. (Da47-49). His mother and stepfather had a harmonious relationship devoid of domestic violence and infidelity. (Da47-49). His IQ reflects average to intellectual functioning, and in addition to his criminal history, he "divulged an incident of fire setting at five years old, as well as placing 'fire crackers in the mouths of frogs' from 11 to 12." (Da47-49). He also disclosed that he and his codefendants "stole 'five or six cars' over a five-month span for 'joy

rides.'" (Da48). As regards the index offense, he "took full responsibility for murdering his victims in 1995." (Da48). He "recalled that all three defendants participated in planning their index offense . . . . [N]o one was the leader of the group." (Da48). They decided to target the McLoughlins' house because "it set back from the street in a wooded area and they assumed the owners had gun." (Da48). Defendant stated "[w]e were all wrong and we are all responsible, no matter who did what." (Da48). He "did not attribute his behavior to drugs and did not blame his co-defendants or anyone else for his behavior." (Da48). He "acknowledged writing letters to [Acevedo's] sister that were attributed to 'just venting.'" (Da48). He also admitted "that he cared little about his crimes after his arrest and was 'blank' at the time of sentencing. (Da48).

Dr. Foley found that over time, defendant processed the gravity of his behavior and developed empathy for his victim. (Da48). Defendant "expressed credible remorse" and had learned to control his impulses. (3T14-16). However, on cross, Dr. Foley acknowledged that defendant's crime reflected "well thought out planning." (3T18:19).

Judge D'Arrigo found the following aggravating factors, to which he attributes substantial weight: 1, 3, 9, and 12. (4T59:12-24). He found no mitigating factors. (4T59:25). He addressed mitigating factor 12 in particular and stated, "I don't see any factor 12 at all" because defendant "was every bit as willing to" to go

to trial as Beltran, and it was not until after Beltran's conviction and sentence that defendant entered a plea. (4T61:5-18). Further defendant's testimony and allocution was not "included in the trial or the prosecution of this case." (4T61:14-18).

The judge found that Beltran was not the ringleader, and that defendant was "the precipitator of the action against Mr. McLoughlin." (4T66:2-3). He stated: "It's not as if [defendant] was simply there robbing the 7-11 with others and somebody else shot the clerk. It's not that case." (4T66:16-18). The judge also found that defendant also had a better home environment than Beltran. (4T67:12-16). Although his father had certain dependencies, his stepfather became a part of his life early on. (4T68:2-14). That, in conjunction with the fact that defendant engaged in "disturbing" animal abuse by putting firecrackers in frogs' mouths, indicated that "something other than just environment" was "going on with defendant." (4T67:24 to 68:14). In conclusion, the judge re-imposed two life sentences with a 30-year parole bar each, but ran them concurrently. (4T71; Da18). This was the result defendant had advocated for in his sentencing memo, where he stated "[a]ny sentence above the minimum of 30 years would put the possibility of a release into the hands of the Parole Board. The Parole Board is in a better position than the court or the Prosecutor to determine whether an inmate has been rehabilitated and should be released." (Da117).

Defendant appealed from Judge D'Arrigo's sentence. Upon review, this court commented that the judge reached his conclusion after "thoughtful consideration of the evidence," and that "the double-murder home-invasion burglary does not appear to be an example of children 'lack[ing] maturity and responsibility." Baker, No. A-2961-18, slip op. 10-12. Nonetheless, the court remanded the matter for resentencing pursuant to Comer. Id. at 12.

V. Third sentencing

At defendant's third sentencing hearing, the victims' family members stated that the crime had caused two relatives to turn to drug and alcohol, with one having never recovered. (5T26:18-25). Additionally, they could never put the crime behind them because they had been "going to court almost every year for some reason or other" related to this case. (5T31). Defendant gave a statement, claiming that he took full responsibility for the victims' deaths and that he had grown and become rehabilitated. (5T55-57).

The judge found that defendant's purported remorse was not a sign of maturity, but an "adaptation" in the way he approached the court. (5T69-72). With the benefits of transcripts from previous proceedings, defendant changed his presentation in order to obtain the desired result. (5T72-73). As regards the crime itself, the judge found that it was not a "youthful, stupid idea" that resulted in death,

but a planned attack on the victims. (5T73-78). Further, defendant waited for Mr. McLoughlin to come home and killed him, when he could have fled after Mrs. McLoughlin's death. (5T78). The judge found the same aggravating factors as the last sentencing, as well as mitigating factor 14, to which he attributed substantial weight. (Da20). He imposed two concurrent life sentences, each with a 29-year parole bar. (Da18).

LEGAL ARGUMENT

I. POINT I: STANDARD OF REVIEW AND THE COMER FRAMEWORK

Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a clear showing of abuse of discretion. State v. Bolvito, 217 N.J. 221, 228 (2014). Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not based upon competent credible evidence in the record; or (3) the application of the guidelines to the facts of the case shocks the judicial conscience. Ibid.

N.J.S.A. 2C:11-3(b)(1) mandates a 30-year parole bar for those convicted of murder. However, pursuant to New Jersey's prohibition against cruel and unusual punishment (Article I, Paragraph 12), this provision may not be applied to minors.

State v. Comer, 249 N.J. 359, 370 (2022). Where a minor is convicted of homicide, the Supreme Court has held that the minor may "petition for a review of their sentence after they have served two decades in prison." Ibid. At the hearing on the petition, trial judges are to "assess a series of factors the United States Supreme Court has set forth" in Miller v. Alabama, 567 U.S. 460, 476-78 (2012), "which are designed to consider the 'mitigating qualities of youth.'" Ibid. The Miller factors were summarized by our Supreme Court as follows:

> Mandatory life without parole for a juvenile
>
> [1] precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
>
> [2] It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.
>
> [3] It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.
>
> [4] Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.
>
> [5] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

> State v. Zuber, 227 N.J. 422, 445 (2017) (citing Miller, 567 U.S at 477-78)

Upon evaluating all the evidence, the trial court "would have discretion to affirm or reduce the original base sentence within the statutory range, and to reduce the parole bar to no less than 20 years." Comer, 249 N.J. at 370.

Not all juvenile offenders are eligible for relief. As the Supreme Court explained, the length of a sentence "is not the key constitutional issue" in and of itself. Id. at 100. Indeed, "some juvenile offenders should receive and serve very lengthy sentences because of the nature of the offense and of the offender." Ibid. In determining the new sentence, the court should consider "factors that could not be fully considered decades earlier, like whether the defendant still fails to appreciate risks and consequences, and whether he has matured or been rehabilitated." Id. at 403. A defendant's behavior in prison since the time of the offense would shed light on those questions. Ibid. Other factors, like the circumstances of the homicide offense, would likely remain unchanged. Ibid. A juvenile who played a central role in a heinous homicide and then had a history of problematic behavior in prison, and was found to be incorrigible at the time of the later hearing, would be an unlikely candidate for relief. Id. at 370-71. On the other hand, a juvenile who originally acted in response to peer pressure and did not carry out a significant role in the homicide, and who presented proof at the hearing about how he had been rehabilitated and was

now fit to reenter society after two decades, could be an appropriate candidate for a lesser sentence and a reduced parole bar. Id. at 71.

In light of the above, the sentence imposed by Judge D'Arrigo is not an abuse of discretion. The judge fully complied with all relevant requirements and his findings are supported by substantial evidence in the record.

II. POINT II: THE JUDGE APPROPRIATELY APPLIED ALL RELEVANT LAW

Defendant contends that Judge D'Arrigo improperly ignored evidence of rehabilitation, misinterpreted the Miller factors, and misapplied the aggravating and mitigating factors. As shown below, all of the judge's findings are well-supported.

a. On the alleged evidence of rehabilitation

Defendant argues that Judge D'Arrigo "refused to consider" his "exemplary conduct while incarcerated as evidence of rehabilitation." (Db16). "[T]o the [judge]," defendant states, "[defendant] had no opportunity to act out over the past 29 years because he was supervised by corrections officers, and because those around him were 'very capable of defending themselves.'" (Db16-17). Defendant points out that Comer requires courts to consider conduct in prison, and that Comer applicants have no other way to demonstrate rehabilitation if their prison conduct is not considered. (Db16-17). Therefore, defendant concludes, the judge erred in

finding that the record demonstrates defendant's "adaptation" to his environment rather than genuine progress towards a pro-social attitude. (Db17).

Judge D'Arrigo did not refuse to consider defendant's conduct in prison. He did consider it, but found that "it really doesn't tell you that much" because when he reviewed previous proceedings, he saw a "consistent . . . adaptation from these [d]efendants." (5T69-80). Defendant had changed his presentation to the court over time and his "approach ha[d] become mollified" with the benefit of prior decisions. (5T71-72). "That's an intelligent way to approach things," the judge stated, "but does it really mean that you've changed that much?" (5T80:5-7). He then concluded "[i]t doesn't definitely say that." (5T80:7).

Judge D'Arrigo's holdings in this regard are unassailable. He has been involved in this matter for ten years and had many opportunities to observe defendant's demeanor. (Pa132). His conclusion that defendant has "adapt[ed]" his approach is born out by the record. In recent times, defendant stated "I feel like shit every day" (Pca59), "Mr. and Mrs. McLoughin were killed and I'm responsible for their deaths" (5T55:22-23), and "Knowing that I took previous moments away from the McLoughlin family will forever tear at my heart" (5T56:12-13). Yet in his second PCR appeal, he stated unequivocally that he did not kill or intend to kill anyone, that Beltran had forced him "to shoot the man (not kill him)," and that Beltran was "the only actual killer." (Pa119-126). He even went so far as to disavow

his own testimony under oath, in which he admitted that his purpose was to ensure Mr. McLoughlin was dead, and that he had taken the gun from Beltran voluntarily. In his third PCR, he continued to maintain that he did not kill Mr. McLoughlin. (Pa136). He also submitted letters from friends and relatives, who claim that he was not responsible for either death, and that he a good person in the wrong place with the wrong people. (Pa139-152). It was only after these arguments failed that defendant changed his tune.

The history of this case illustrates the judge's point that defendant's good conduct is evidence of adaptation rather than rehabilitation. Defendant's conduct was equally good in 2012, when he strenuously denied a crime he had clearly committed and admitted to under oath. He was a full-fledged adult at the time and had had eighteen years to reflect upon his actions. Yet he continued to show no remorse. As remorse is an essential component of rehabilitation, the judge did not abuse his discretion by refusing to equate defendant's good conduct with a reformed character.

b. The first Miller factor

Defendant argues that the first Miller factor required the judge to presume his immaturity at the time of the crime. (Db20-21). To rebut this presumption, defendant claims, the State would have had to call an expert to testify that defendant was mature. (Db21). Because the State never called such an expert, defendant asserts that

the judge should have relied on Dr. Jackson, Dr. Greenfield, and Dr. Foley's testimony. (Db20-26). Defendant points out that Dr. Jackson and Dr. Greenfield found that he was "uniquely immature," and that Dr. Foley found that he had become mature since his offense. (Db20-23). Defendant also complains that the judge did not spend enough time on Dr. Foley's report and erroneously found his animal abuse to be disturbing. (Db23-24). Such abuse, defendant claims, occurred because "he was 11 years old" and "suffered substantial trauma and developmental deficits. (Db24).

The first Miller factor "invites consideration of the 'hallmark features' of youth – 'among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Comer, 249 N.J. at 407. As the Supreme Court explained, these features are not to be confused with whether a defendant is intelligent, and

> [o]n rare occasions, the State might be able to present expert psychiatric evidence as proof that a particular juvenile offender possessed unusual maturity beyond his years. If unrefuted, the first factor would not weigh in the defendant's favor. But a juvenile offender has no burden to produce evidence that his brain has not fully developed in order for the first factor to be considered in mitigation.
>
> [Ibid.]

Defendant claims that the above language required the judge to find that the first factor weighed in his favor because the State presented no expert testimony. Preliminarily, the language at issue states that defendants need not call an expert for

the first factor to "be considered in mitigation"; it does not say that upon consideration, the court must attribute mitigating weight. But even if defendant's interpretation were correct, Judge D'Arrigo did nothing improper because he did in fact attribute some mitigating weight to the first factor. In analyzing Miller, the judge stated:

> I don't find that there was a great deal of failure to appreciate the consequences. Maybe there was some. Maybe there was some. . . . So there is some aspect of that lack of consideration of what happens if I get caught. Okay. I can see that with both of these individuals.
>
> [5T81:3-15.]

The above statement makes clear that the judge accorded weight to defendant's age. Defendant complains that the judge found his crime not to be the result of impetuousness, but that finding is proper and supported by the record. Because the first Miller factor "invites consideration of the 'hallmark features' of youth," including "impetuousness" (Zuber, 227 N.J. at 445) the judge was required to analyze the details of the crime and determine whether impetuousness was a motivating factor. It is undeniable that the details in this case showed no impetuousness. Defendant and co-conspirators deliberately selected an isolated home in a wooded area, equipped themselves with masks, and brought along pliers to cut what they thought was alarm wires. They planned their crime before execution, and even defendant's expert conceded that the crime reflected "well thought out

planning." When this matter was reviewed by the Appellate Division following the second sentencing, the panel found that "the double-murder home-invasion burglary does not appear to be an example of children lack[ing] maturity and responsibility' . . . . Defendants intended to commit murder. The victims were not slain incidental to burglary." Baker, No. A-2961-18 (slip op. at 12). The Miller factors have not changed since this matter was last reviewed, neither have the relevant facts, and the panel's finding is therefore law of the case.

Regarding defendant's animal abuse, which he now attributes to "substantial trauma and developmental deficits," the judge was well within his discretion to find that it was "disturbing." Although defendant experienced some difficulty in childhood, the judge pointed out that it was not the worst he had seen, and that people with worse trauma committed less serious offenses. (5T77). That defendant's childhood was not the worst is indisputable. Dr. Foley, defendant's own expert, stated that defendant was raised in a "generally supportive" environment by his mother and stepfather, who had a harmonious relationship devoid of domestic violence and infidelity. (Da47-49). Further, defendant's initial presentence report notes "no serious childhood trauma." (Pca11).

The judge did not fail to give proper weight to defendant's expert testimony. It is well-established that "the weight to which an expert opinion is entitled can rise

no higher than the facts upon which the opinion is predicated." Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002). Here, defendant's various experts have been provided with different sets of facts. Dr. Jackson believed that defendant grew up with "considerable violence, both emotional and physical, in his household," that he was easily coerced, and that Beltran and Acevedo urged him to participate in the crime. (2T9-29). Dr. Greenfield similarly portrayed Beltran and Acevedo as "dominant" and believed that defendant was "following orders" in committing the crime. (Pca44; 2T48-49). However, he found that defendant's "history include[d] a supportive family environment (after about age eight)." (Pca44). Dr. Foley was offered yet another set of facts. He found that defendant was raised in a "generally supportive" environment by his mother and stepfather, who had a harmonious relationship devoid of domestic violence and infidelity, that "all three defendants participated in planning their index offense," that "no one was the leader of the group," and that defendant "did not blame his co-defendants or anyone else for his behavior." (Da46-48). The inconsistency in the data supplied to the experts calls into question their conclusions.

Moreover, the experts' conclusions do not square with the facts. Dr. Jackson believed defendant was remorseful, yet defendant confirmed to Dr. Foley that he felt no remorse at the time of his initial sentencing. (2T27:23 to 29:8; Da48). Dr. Greenfield believed that defendant was a "follower," but defendant's letter to

Acevedo's sister revealed that he was directing two separate plots: one to attack Acevedo in a house of worship, and the other to attack someone outside of prison named Oscar. Dr. Foley's opinion is inconsistent within itself. He claimed that defendant has learned to control his impulses and was ready to rejoin society, but conceded that defendant's crime constituted "well thought out planning." If the original crime did not arise from impulsiveness, why would impulse control render defendant ready to rejoin society? Considering these weaknesses in the proffered expert opinions, Judge D'Arrigo did not abuse his discretion in refusing to accord them more weight. Nor did he fail to spend adequate time on Dr. Foley's report, as defendant claims. Although he stated he did not spend much time on it, he explained that that was because he had seen it before. (5T74:10-12). His statement, therefore, does not show that he did not take his responsibility seriously.

c. The second Miller factor

Defendant contends that he suffered "considerable violence, both emotional and physical, within the household." (Db28). He "found himself influenced and coerced" by his codefendants, and his "childhood trauma made him prone to reckless, and ultimately criminal, behavior." (Db29-30). As a result of his environment and developmental deficits, he became "highly sensitive, impulsive, immature, angry, incapable of independence, and vulnerable to coercion." (Db29). Defendant claims that the judge was required to attribute significant mitigation to

factor two in light of "unrebutted" expert testimony, and that the judge improperly found his childhood not to be mitigating just because his crime was planned. (Db29-30).

The second Miller factor requires courts to "take into account the family and home environment that surrounds [the offender] – and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." Zuber, 227 N.J. at 445. Here, Dr. Greenfield and Dr. Foley described defendant's home environment as supportive. Although he suffered some difficulty with his biological father, by the time of his crime, he had lived for at least ten years with his loving stepfather. Nothing suggests any brutality from which defendant needed to extricate himself when he murdered the victims. Thus, it is not true that "unrebutted" expert testimony shows that his actions resulted from his environment.

Defendant argues that his childhood made him "impulsive" and vulnerable to coercion, but those qualities are not related to his crime. He and his codefendants were well-prepared for their planned attack upon the victims. Even his own expert accepted that his actions suggested well-thought-out planning. Regarding coercion, the experts concluded that defendant was coerced based on defendant's own representations. Defendant's exact wording to the experts is naturally unknown. However, before this court, he went so far as to claim that Beltran forced him to shoot Mr. McLoughlin with a smoking gun, that Beltran was the ringleader, and that

Beltran was the only killer. (Pa119-126). Now that defendant has retracted these statements by telling Dr. Foley that "no one was the leader of the group," the experts' conclusion can no longer be accepted. (Da48).

In any event, defendant's allegations of coercion are not supported by the record. If anything, it was defendant that coerced others. Defendant sent a letter to Acevedo's sister detailing a plan to attack Acevedo in a house of worship for agreeing to testify against him. When Acevedo was reluctant to go forward with the home invasion, defendant seized the gun from Beltran and put it to Acevedo's head. That incident is not a mere unfounded allegation, but a statement of Beltran's, which defendant adopted by submitting as part of his second PCR. (Pa47¶12).

d. The Third <u>Miller</u> factor

Defendant claims that the judge improperly disregarded Dr. Jackson and Dr. Greenfield's conclusion that defendant committed his crime under peer pressure. (Db31-34). According to defendant, "no facts in the record" supported the judge's finding that defendant's own statements belie suggestions of peer pressure. (Db33). Defendant also claims that the judge erroneously "relied upon the fact that the offense was planned and brutal in nature – both of which bear no relevance to the question of peer pressure." (Db33).

The third Miller factor invites courts to consider "the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him." Zuber, 227 N.J. at 445. Because the factor relates to "the circumstances of the homicide and the extent of defendant's participation," the judge properly discussed defendant's planned and brutal acts. That discussion does not imply that the judge believed planned and brutal acts could not result from peer pressure. The judge correctly found that allegations of peer pressure were belied by defendant's own statement. Defendant informed Dr. Foley that all three participated in planning the offense, and that no one was the leader of the group. (Da48). As already discussed, it was defendant that placed pressure on others. His inconsistent representations over the years defeat his own credibility and undermine the position of his experts.

e. The fourth Miller factor

Defendant claims that the judge should have attributed substantial weight to factor four because he was diagnosed with "specific neurological and developmental deficits that would have made his experience of the criminal legal system even more difficult to navigate." (Db35). He further claims that "there was no evidentiary basis to establish that [his] pleading guilty was, in fact, the best legal decision for him to make. The resentencing court had not reviewed the discovery and had not spoken to any of the potential witnesses in the case." (Db36). Additionally, "[t]he negotiated

plea provided no guarantee that his sentences would be run concurrently, and [he] ultimately ended up receiving the exact same sentence that Beltran did after being convicted at trial." (Db36).

The fourth Miller factor asks whether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." Zuber, 227 N.J. at 445. The relevant question, therefore, is not whether defendant made the "best legal decision," but whether a different outcome would have ensued had it not been for his youth. In this matter, nothing suggests that defendant's youth had any impact on the outcome. Although he was diagnosed with a deficit that prevented quick thinking, he was in fact of normal intelligence, and plea bargaining does not require quick thinking. Further, defendant's actions in this case reflect comprehension and planning. As the judge pointed out, he had the intelligence to wait for the outcome of Beltran's trial before deciding to plead. (5T82:16-15). He committed his crime five months before he turned eighteen and did not plead until seven months after he turned eighteen. It should also be noted that even as a minor, defendant wisely exercised his right to remain silent when he was arrested – a choice that the vast majority of adult offenders lack the insight to make. (Pca4). Under these circumstances, it is difficult to see how defendant's youth disadvantaged him.

f. The fifth Miller factor

Defendant claims that the judge should have relied on Dr. Foley's opinion on his rehabilitation. (Db27). The fifth Miller factor states that a "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." Zuber, 227 N.J. at 445. Here, the judge did not disregard the possibility of rehabilitation. He considered that possibility, but the evidence before him fell short of establishing a true change of character. For the reasons already stated, Dr. Foley's report suffers from major weaknesses and cannot be credited in full.

g. Aggravating and mitigating factors

Defendant concedes that the judge properly found aggravating factors one (nature of offense) and twelve (elderly victim). (Db39). However, he contends that the judge should not have found aggravating factor three (risk of reoffending) or aggravating factor nine (deterrence) (Db38-39). According to defendant, aggravating factor three is not applicable because Dr. Foley found that he was unlikely to reoffend and he has demonstrated good conduct in prison. (Db38-39). Aggravating factor nine is not applicable because there is no longer a need to deter him and general deterrence is also not served because "the threat of a lengthy jail sentence is less of a deterrent for juveniles than adults." (Db39).

Defendant also contends that the judge should have found mitigating factors seven (prior delinquency or criminal activity), eight (crime resulted from circumstances unlikely to occur), and nine (lack of likelihood to reoffend). He reasons that his crimes resulted from his underdeveloped brain, that he has been law-abiding for a substantial time period, and that he has matured into a rehabilitated adult. (Db38-39).

Contrary to defendant's contentions, the judge's findings on aggravating and mitigating factors are supported by competent, credible evidence.

Aggravating factor three relates to the "risk that the defendant will commit another offend." A court's findings on the risk of re-offense should "involve determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history." State v. Locane, 454 N.J. Super. 98, 125 (App. Div. 2018) (internal quotation marks omitted). "A defendant's claims about rehabilitation have to be weighed against the criminal history, and include, when possible, objective information in the record such as the offense circumstances." Ibid. Here, the judge did precisely what is prescribed by case law. He weighed defendant's claims of rehabilitation against objective information in the record, such as the circumstances of the crime. As the judge explained, "[y]ou don't commit an act like this and have all of a sudden a lesser risk of reoffending . . . . If you can do that once, what can you do? . . .

Anything." (5T89:1-5). See Locane, 454 N.J. at 125 (discussing case law where the severity of the acts committed properly supported aggravating factor three). Notably, defendant admitted to Dr. Foley that he cared little for his crime and felt "blank" at the time of the initial sentencing. (Da48). Although he reported to Dr. Foley that he came to feel remorse, Judge D'Arrigo witnessed the evolution of his representations over time and was well within his discretion to reject Dr. Foley's findings.

Aggravating factor nine relates to the "need for deterring the defendant and others from violating the law." This aggravating factor incorporates general deterrence, defined as deterrent effect on the public, and specific deterrence, defined as deterrent effect upon the defendant. State v. Fuentes, 217 N.J. 57, 79 (2014). Defendant contends that general deterrence is not applicable because "the threat of a lengthy jail sentence is less of a deterrent for juveniles than adults." But if that reasoning is accepted, general deterrence is never applicable in a case involving juvenile offenders. The magnitude of the violence in this case, as well as its preplanned and unnecessary nature, make clear that the public needs to be deterred from similar conduct. As for specific deterrence, defendant's history demonstrates a consistent failure to appreciate the harm he causes others. This is evidenced not just by the animal abuse, carjacking, or double murder he committed, but also by the fact that eighteen years after killing the McLoughlins, defendant insisted to this court

that he did not kill or intend to kill anyone. Under these circumstances, the judge is did not err in finding aggravating factor nine.

Mitigating factor seven states: "The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense." This mitigating factor is plainly inapplicable. Defendant had a tarnished criminal history and had not led a law-abiding life for a substantial period of time when he killed the McLoughlins. (Pca50).

Mitigating factor eight applies if "[t]he defendant's conduct was the result of circumstances unlikely to recur." Mitigating factor nine applies if "the character and attitude of the defendant indicate that the defendant is unlikely to commit another offense. These two mitigating factors simply do not fit the facts in this case. Throughout most of his incarceration, defendant showed no remorse. Now that he claims to feel remorse, he makes generic statements to the effect that his acts were heinous and that he regrets causing pain and taking lives, but he still mentions nothing of the physical and emotional suffering he inflicted upon the McLoughlins in the last moments of their lives. On March 4, 1994, defendant ambushed an elderly man in his own home, chased after him as he ran for his life, and beat him until he lost consciousness. Throughout that beating, he must have heard the anguished cry of his helpless victim. But he did not stop. Worse, according to Beltran statement,

which he submitted to the court, he laughed about what had happened when all was said and done. (Pa52¶33). To this day, his allocution does not address the torment that he visited upon Mr. McLoughlin, who was undoubtedly fearful for not just himself but also his wife. Under these facts, the judge did not err in refusing to find that he is unlikely to reoffend.

III. POINT III: THE JUDGE DID NOT FIND THAT RELIEF UNDER COMER IS LIMITED TO ELIGIBILITY FOR PAROLE

Defendant contends that the trial court "refused to consider amending [his] base sentence" and found that "Comer was satisfied by" parole eligibility alone. (Db40). Relying on State v. Thomas, 470 N.J. Super. 167 (App. Div. 2022), defendant argues that parole hearings are a poor substitute for a procedure that would afford defendants their meaningful opportunity under Comer. He then complains that he was denied parole on August 7, 2023 because the Board failed to consider Dr. Foley's report, which he attributed to "the parole board's limited evidentiary record." (Db45). He concludes that he's in legal limbo because the judge instructed him to obtain his release to parole, and the parole board instructed him to direct any further concerns regarding the sentence to the sentencing court. (Db45).

The judge did not refuse to consider reducing the base sentence, nor did he hold that relief under Comer was limited to parole eligibility. Rather, he stated:

> You can not commit an act like this and not go under a life sentence. It is under the circumstances here, while I'm trying to avoid the effects of what happened from overly influencing the court, for the reasons I've already expressed, the youthfulness doesn't rise to a level that would not make this an offense punishable by life. It just doesn't.
>
> [5T92:4-10.]

It is clear from the above that the judge realized that Comer authorized the reduction in the base sentence, considered defendant's allegations of youthfulness, and concluded that a life sentence remained appropriate because of "the circumstances here." As Comer explicitly states, the trial court has discretion to "affirm or reduce the original base sentence." Comer, 249 N.J. at 370. Here, the judge chose to affirm, and his decision is well-supported. Comer states that a juvenile who played a central role in a heinous homicide and then had a history of problematic behavior in prison, and was found to be incorrigible at the time of the later hearing, would be an unlikely candidate for relief. Id. at 370-71. On the other hand, a juvenile who originally acted in response to peer pressure and did not carry out a significant role in the homicide, and who presented proof at the hearing about how he had been rehabilitated and was now fit to reenter society after two decades, could be an appropriate candidate for a lesser sentence and a reduced parole bar. Id. at 371. Here, defendant fell between the two extremes. He played a central role in the homicide and failed to show remorse, but did not display problematic behavior in prison. It follows that the relief he was

entitled to is the middle of the two outcomes: a reduction in the parole bar, but no reduction in the base sentence.

Thomas has no application in this matter. In that case, the defendant, who had been sentenced to 13 years to life, was denied parole seven times, and when he petitioned for relief under Miller, the trial court refused to grant a hearing because he was already parole eligible. Thomas, 470 N.J. Super. at 171, 179. The defendant appealed and this court reversed, finding that "parole hearings fall far short of providing an adversarial hearing for defendant to demonstrate the degree of maturity and rehabilitation," because, among other weaknesses, such hearings do not afford the right to counsel, to call and cross-examine witness, or to proffer expert testimony. Id. at 194-95. This court then ordered the trial court to conduct a hearing. Id. at 201. Here, unlike Thomas, defendant was already provided with a resentencing hearing where he was allowed to call, cross-examine witnesses, and proffer expert testimony. The fact that he is dissatisfied with the outcome does not mean that the hearing was inadequate.

Defendant's criticism of the parole process is entirely meritless. The parole board did not consider Dr. Foley's report because defendant did not provide it as part of his parole hearing. (Da91). In instructing defendant to direct his arguments to the sentencing court, the parole board merely pointed out that it was acting within

the boundaries of the sentence legally imposed by the court. It was not abdicating its responsibility, and neither did the sentencing court.

IV. POINT IV: DEFENDANT IS NOT ENTITLED TO RESENTENCING OR RESENTENCING BY ANOTHER JUDGE

Defendant argues that Judge D'Arrigo created an appearance of bias because he asked Beltran's counsel why the matter was brought before the court when Beltran's parole eligible date was already approaching under the last sentence imposed. (Db46). This, according to defendant, shows that the judge expected to impose a similar sentence before hearing arguments. (Db47). Defendant also claims that the judge (1) refused to consider evidence of his rehabilitation and failed to make findings on rehabilitation, (2) found his representations to be an insincere attempt at legal gamesmanship, (3) admitted that he did not spend a lot of time reviewing the record, (4) contradicted himself by finding at the second sentencing that Beltran's home environment was worse than defendant's, then finding at the third sentencing that defendant's home environment was worse than Beltran's, and (5) improperly considered the heinous nature of the incident in determining the influence of peer pressure, maturity, and likelihood of reoffending. (Db47-50). He concludes that he is entitled to resentencing in front of another judge.

First, this matter was remanded because at the second sentencing, the judge did not have the option of reducing the parole ineligibility period. Baker, No. A-

2961-18, slip op. 10-12. The judge had already found that a life sentence was warranted in the second sentencing, where he applied the Miller factors as well as relevant aggravating and mitigating factors. (4T53:15 to 54:8). Defendant did not furnish any substantially new evidence for his third sentencing. He did not express any intention to call additional witnesses and in fact did not call additional witnesses. Yet he faults the judge for expecting the life sentence not to be altered. Regardless, the judge considered the evidence before him, conducted a new analysis, and reduced the parole ineligibility period. There is no indication that the judge did not take his responsibility seriously or that he failed to act as the law required.

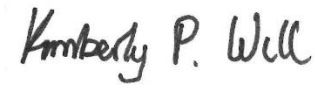
Defendant's remaining accusations are equally meritless. As already stated, the judge did not refuse to consider evidence of his rehabilitation. He simply did not find it convincing because of defendant's changing representations over the years. Given such representations, the judge cannot be faulted for finding defendant insincere. It is patently false that the judge admitted to spending little time reviewing the record. His statement that he did not spend much time related to Dr. Foley's report, which he did not spend much time reviewing because he had seen before. (5T74). To the extent that the judge contradicted himself, both defendants' names start with a "b" and they were jointly sentenced. It is understandable that the judge misspoke. In any event, defendant was not prejudiced if the judge thought his childhood was more difficult than it actually was. The heinous nature of the incident

is relevant to likelihood to reoffend pursuant to case law, and the judge's findings on maturity and peer pressure are fully supported.

CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted,

By: 

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DATED: April 29, 2024

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LETTER REPLY ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2359-22
INDICTMENT NO. 94-06-00667-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From A Judgment Of Conviction Entered In
v.	:	The Superior Court, Law Division, Cumberland County.
JASON BAKER,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. Cristen P. D'Arrigo, J.S.C.
	:	**DEFENDANT IS CONFINED**

Honorable Judges:

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

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant Jason Baker relies on the procedural history and statement of facts set forth in his opening brief.[1]

LEGAL ARGUMENT

Baker relies on his appellate briefing already submitted in this matter, as well as the following, in response to a few arguments made by the State.

POINT I

THE COURT'S FINDING THAT DEFENDANT'S EXEMPLARY PRISON CONDUCT DID NOT DEMONSTRATE REHABILITATION WAS ERRONEOUS, REQUIRING RESENTENCING.

As an initial matter, the State argues, incorrectly, that the trial court's sentence is owed deference, and must be affirmed absent a finding that the court abused its discretion. (Sb21) Our Supreme Court has made clear, however, that "the deferential standard of review applies only if the trial judge follows the Code and the basic precepts that channel sentencing discretion[.]" State v. Case, 220 N.J. 49, 65 (2014). The "deferential standard will not apply" for certain errors, ibid., such as the failure to base a sentence upon "findings of fact that are

[1] "Db" = defendant's appellant brief
"Da" = defendant's appellant appendix
"Sb" = State's respondent brief
"Pa" = State's appendix
"Pca" = State's confidential appendix

grounded in competent, reasonably credible evidence" or failure to "apply correct legal principles in exercising its discretion[.]" State v. Roth, 95 N.J. 334, 363-64 (1984). Because those errors occurred here, no deference is owed.

The purpose of the Comer resentencing hearing at issue in this appeal was to provide Mr. Baker with the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." State v. Comer, 249 N.J. 359, 386 (2022). At such hearings, courts must consider "[i]n particular…evidence of any rehabilitative efforts since the time a defendant was last sentenced." Id. at 403. The State does not dispute that Baker has "maintained an exceptional institutional record." (Da80) (Sb41) ("[Baker] did not display problematic behavior in prison."). Accordingly, the court was required to consider Baker's behavior as demonstrative of his rehabilitation. Ibid.

The court, however, did not do so. Instead, as the State concedes, the court "refus[ed] to equate defendant's good conduct with a reformed character." (Sb26) The court made the decision to categorically refuse to consider Baker's good conduct as rehabilitation simply because it had occurred in prison: "you have to consider the environment in which [Baker was] acting," and because Baker's conduct occurred in prison, which is a "much more controlled environment, [his behavior] doesn't tell me a lot[.]" (5T78-13 to 79-2) This was an error requiring resentencing. See State v. Jaffe, 220 N.J. 114, 124-25 (2014)

(remanding for resentencing where sentencing judge refused to consider defendant's post-offense efforts at rehabilitation).

On appeal, the State does not defend the court's decision to ignore Baker's conduct simply because it occurred in prison. Instead, the State argues, for the first time, that the ruling should be affirmed because of certain details from Baker's PCR petitions. (Sb25-26) Specifically, because Baker's PCR petitions alleged that the facts of his case did not meet the requisite elements of knowing and purposeful homicide, the sentencing court was permitted to find that Baker lacked remorse, and that Baker's 29 years of good prison conduct failed to demonstrate rehabilitation. (Sb25-26)

This argument is flawed for numerous reasons: (a) the court's rulings were not based upon Baker's PCR proceedings; (b) even if the court had considered Baker's PCRs, the arguments raised therein do not demonstrate a lack of remorse; (c) the court's disregard for expert findings of credible remorse was not justified; and (d) the State provides no authority to support the court's departure from established precedent characterizing good prison conduct as demonstrating rehabilitation. Firstly, the State's sole argument in support of the court's refusal to credit Baker's good conduct as rehabilitation was based upon evidence that was not part of the record. When imposing a sentence, courts may only base their decisions upon "findings of fact that are grounded in competent,

reasonably credible evidence," Roth, 95 N.J. at 364, and "[s]peculation and suspicion must not infect the sentencing process[.]" Case, 220 N.J. at 64.

In consideration of Baker's rehabilitation, numerous facts demonstrating Baker's rehabilitation were provided to the court as a formal part of the record, and are not in dispute. (Db16-18) Conversely, in support of the argument that Baker's prison conduct did not demonstrate rehabilitation, the State cites exclusively to arguments from Baker's PCR petitions. (Sb25-26) Undisputedly, no documents from those proceedings were introduced at sentencing. (3T30-15 to 31-6) By coincidence, Judge D'Arrigo had presided over Baker's PCR proceeding from 2016 – seven years prior to the sentence hearing currently on appeal. (Pa156) While Judge D'Arrigo had asked the prosecutor a question concerning that PCR during Baker's 2018 re-sentencing, the judge's memory of the PCR was limited (in that he could not remember whether he had heard Beltran or Baker's petition), and the prosecutor had not relied upon the PCR, explaining that he didn't "know anything about it." (3T30-15 to 31-6)

This discussion of Baker's PCR petition at the 2018 re-sentencing thus did not constitute a "particularized statement of reasons" in support of the sentence currently on appeal. State v. Watson, 224 N.J. Super. 354, 363 (App. Div. 1988). And Baker's 2023 re-sentencing included no discussion whatsoever of any of PCR petitions. (5T) Because Judge D'Arrigo never made a finding that

Baker's PCR petitions formed the basis for its sentence, those petitions cannot be used to justify the court's sentence on appeal. State v. Wilson, 178 N.J. 7, 14 (2003) ("[T]he State on appeal cannot rely on factual testimony or other proof that was not submitted as part of the lower court's record.").

Moreover, even if Baker's PCR petitions had been the basis for the court's holding, the arguments raised therein do not change the rehabilitative character of Baker's prison conduct. Baker has never denied that he shot Mr. McLoughlin, either in proceedings for his direct appeal or in his PCR petitions. (Db33-34) (Pa18, 23, 64, 136-137) Likewise, Baker has denied, without exception, that he stabbed Mr. McLoughlin. (Sb7) The PCR petitions raised only legal arguments as to what consequences can properly follow from these two facts, assuming that the stab wounds – and not the gunshot wound from Baker – were ultimately the injuries that proved fatal. (Pa9-155) Baker was entitled to raise these arguments without negative consequence. See State v. Poteet, 61 N.J. 493, 495-96 (1972) ("[A] sentence may not be increased because a defendant defended against the charge or insisted upon his right of appeal.") The State thus mischaracterizes Baker's PCR petitions by describing them as a form of denial that demonstrated a lack of remorse. (Sb26) To the contrary, as discussed, Baker has never denied – in PCR petitions or otherwise – that he shot Mr. McLoughlin. Instead, over his 29 years of incarceration, Baker has consistently expressed his remorse:

- At his original sentencing in 1995, Baker testified that "I'd like to say that I'm sorry to the McLoughlin family and friends for what I did. I know they may not believe me, but I am truly sorry for all the suffering and pain that they're going through." (2T91-9 to 12)

- At his re-sentencing in 2018, Baker testified that "[w]hat I did was unacceptable, it was wrong…that's not the person I am today….it wasn't right, and I'm truly, deeply sorry for it." (3T83-10 to 84-20)

- At his re-sentencing in 2023, Baker testified that "I take full responsibility for what I did" and that "I will forever carry the burden of what I did and that burden weighs heavy in my heart. Although I hope it's possible, I don't expect you to ever forgive me nor will I put more anguish on you by asking you to. I am truly and deeply sorry for the heinous act I committed and the pain I've caused you and your family." (5T55-2 to 24)

- The Parole Officer who wrote Baker's PSR report noted that when Baker's version of the events was read aloud, he "began to show extreme remorse. He could not contain his emotions. He began to tear-up and gradually began to sob quietly. With his head down he said, 'It's hard to hear and relive what happened…It eats me up inside more now than it ever did before. I feel like shit everyday…we (codefendants are all responsible, but I wish I could go back in time. I would have done things so much differently.'" (PSR14)

- Dr. Foley's expert conclusion was that Baker "took complete responsibility for the crime…[offered] no alternative theories [and] blamed no one….He expressed remorse and empathy for his victims, as well." (3T11-2 to 7)

Neither the court nor the State deny that Baker made these expressions of remorse, or that he positively changed his behavior over time. (Sb25) (5T80-1 to 3) When mitigating information is amply demonstrated in the record, as is the case here, the court cannot simply disregard it. Case, 220 N.J. at 64. ("Mitigating factors that are called to the court's attention should not be ignored, and when

amply based in the record…. they must be found[.]") (internal citation omitted). Instead of crediting this information as mitigating evidence of rehabilitation, the court found that Baker's positive "progressions over time" demonstrated only that he had "adapt[ed] [his] approach" to "get what [he] want[ed]" and not that Baker had actually "changed that much[.]" (5T79-22 to 80-8)

The court justified this ruling by pointing out that Baker's conduct occurred in prison: "[Baker's good conduct was] in a much more controlled environment, so it doesn't tell me a lot that [he has not] gotten into that much trouble." (5T78-25 to 79-2) Rather than defend that reasoning, the State now argues that Baker's PCR petitions demonstrated a lack of remorse such that the court's finding was proper. Baker's PCR petitions, however, do no such thing. Accordingly, the court's "refus[al] to equate defendant's good conduct with a reformed character," was not based upon "competent, reasonably credible evidence" in the record, requiring resentencing. Case, 220 N.J. at 64. (Sb26)

As for the court's disregard of the expert findings in this case – wherein two experts at the original sentencing found that Baker was uniquely immature and prone to peer pressure, and one expert at his 2018 re-sentencing found that he was rehabilitated – the State argues that alleged "weaknesses in the proffered expert opinions" authorized the court to "refus[e] to accord [their opinions] more weight." (Sb31) The court, however, never made any finding as to such

weaknesses in the expert testimony. Instead, the court held that the original expert findings (indicating Baker's actions were the product of coercion and peer pressure) were "belied by the fact of the Defendant's own statements as to who was running the show." (4T64-19 to 24)[2] And the court made no comment which called into question the findings from Dr. Foley, the expert from the 2018 sentencing who concluded that Baker had rehabilitated. In fact, the court cited directly to Foley's report in support of its sentence. (5T77-14 to 19)

The court's disregard of Dr. Foley's testimony was thus not based on a finding that there were inherent failings in Foley's methodology – the court simply ignored his mitigating findings without explanation. Our Supreme Court has routinely emphasized that courts should credit expert testimony, and impose sentences that comport with contemporary scientific standards. Comer, 249 N.J. at 385, 407, 400 (characterizing "expert psychologists" as uniquely qualified to determine questions of maturity and rehabilitation, and highlighting the importance of brain science in the sentencing of juvenile offenders); see also N.J.S.A. 2C:1-2(b)(7) (listing goals of statutory sentencing factors, including the advancement of "generally accepted scientific methods and knowledge in

[2] Moreover, the court never specified which statements allegedly contradicted the original experts. And as discussed in defendant's appellate briefing, Baker has never contradicted the facts as established during his guilty plea, wherein he was urged to take the gun and shoot Mr. McLoughlin. (Db33-34) (PSR3)

sentencing offenders"); State v. Jenewicz, 193 N.J. 440, 456 (2008) (holding that the trial court abused its discretion in excluding expert testimony from substance abuse counselor that was relevant to claim of self-defense); State in Int. of M.P., 476 N.J. Super. 242, 289 (App. Div. 2023) (court should have considered unrebutted expert testimony regarding juvenile's personal intellectual, educational, and cognitive limitations in determining whether his waiver of his Miranda rights was knowing and voluntary).

At sentencing, the prosecutor stipulated that Dr. Foley possessed the requisite expert qualifications under N.J.R.E. 702, and the court qualified him as an expert. (3T9-7 to 25) No dispute was raised as to Foley's lack of qualification, flawed methodology, or potential bias. In fact, Foley had served as an expert on "several hundred" prior occasions, and had been retained by defense attorneys and by "the prosecution side, the Attorney General's Office, [and] U.S. Attorney[.]" (3T10-9 to 18) Absent any evidence indicating that Foley's expert testimony should be disregarded, it was erroneous for the court to simply ignore the mitigating information from his findings. Case, 220 N.J. at 64. The State now asks this court to find that "the inconsistency in the data supplied to the experts calls into question their conclusion." (Sb30) Such a determination – if one was hypothetically made – would have been squarely within the discretion of the trial court. State v. Hubbard, 222 N.J. 249, 264

(2015) Without such a finding, this Court cannot independently render a finding on Foley's credibility on appellate review. Roth, 95 N.J. at 363-64.

POINT II

THE COURT'S FINDING THAT DEFENDANT'S YOUTH SHOULD NOT BE AFFORDED MITIGATION SIMPLY BECAUSE THE INCIDENT IN QUESTION WAS PLANNED WAS ERRONEOUS, REQUIRING RESENTENCING.

In consideration of Baker's demonstrated maturity, the State concedes that an expert witness "concluded that defendant's level of emotional maturity was somewhere between 9 and 10 years of age, that he was easily coerced, and that he had been negatively influenced by [the codefendants]." (Sb9) Despite this undisputed evidence, the trial court found that Baker's "youthfulness doesn't rise to a level that would not make this an offense punishable by life. It just doesn't." (5T92-4 to 10). As discussed in Defendant's appellant briefing, this ruling failed to afford sufficient mitigation to the culpability-reducing characteristics of Baker's youth, and failed to properly apply any of the five Miller factors. (Db18-36) In support of the court's decision, the State now relies on only two facts: that the incident was heinous, and that it was planned. (Sb26-36) Neither of these facts, however, can justify the court's refusal to credit Baker's maturation with the proper mitigation.

As to the heinous nature of the incident, our Supreme Court has warned that sentencing courts must not let the "brutal" nature of an offense overshadow the mitigating effects of youth. Comer, 249 N.J. at 403. By the very nature of the proceedings, every defendant who seeks relief under Comer or Miller will have been convicted of either murder, or a charge bearing a lengthy sentence and thus often accompanied by a disturbing set of facts. The juvenile in State v. Zuber, for example orchestrated and participated in two gang rapes, 227 N.J. 422, 430 (2017); the juvenile in Comer attacked a teenage girl and mutilated her dead body, 249 N.J. at 374-75l; and the juvenile in Roper v. Simmons kidnapped a woman, bound her hands and feet, wrapped her face in duct tape, and drowned her. 543 U.S. 551, 556-57 (2005). These cases all recognized that no matter how "bruta[l] or cold-blooded" the facts, sentencing courts must still account for the reality that a "juvenile's criminal behavior [generally] reflects unfortunate yet transient immaturity[.]" Roper, 543 U .S. at 573; Comer, 249 N.J. at 399.

Mr. Baker has never disputed the heinousness of the incident. He argues only that the sentencing court follow our Supreme Court's instruction: guard against the "unacceptable likelihood [that] the brutal nature of an offense can overpower mitigating arguments based on youth." Comer, 249 N.J. at 403.

Finally, as to the planned nature of the incident, the State cites no authority for its argument that "the details in this case showed no impetuousness" simply

because the act was planned. (Sb28) Indeed, the seminal cases on juvenile sentencing actually involve fact patterns where juveniles made a plan. In Roper, the juvenile "talked about his plan" to "commit burglary and murder" in "chilling, callous terms[.]" 543 U .S. at 566-57. Despite the planned nature of the incident, the Court held that he could not be sentenced to death because his behavior was a result of the "impetuous and ill-considered actions and decisions" that are characteristic of juvenile offenders, and that "render juveniles less culpable than adults." Id. at 569-71. Likewise in Miller, the Court noted that the juvenile had "learned on the way" to participating in the fatal robbery "that his friend Shields was carrying a gun[.]" 567 U.S. at 478. The juvenile thus did not act spontaneously, but consciously chose to participate in a planned armed robbery. Nonetheless, the Court recognized that his immaturity made him less culpable: "age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point." Ibid.

The recognition that juveniles lack the capacity to "appreciate risks and consequences" thus does not mean that juveniles are incapable of deciding to undertake certain acts in the near future (i.e. to make a plan). Comer, 249 N.J. at 270. Rather, juveniles are simply bad at planning. Miller, 567 U.S. at 472, n.5. ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse

control, planning ahead, and risk avoidance") (emphasis added). The original sentencing court's finding bears this out: "[t]he Court has taken into consideration this was a planned burglary…they went in there, obviously, to commit a burglary, but a homicide ensued and the defendant, this defendant, did not leave." (2T95-3 to 8) Judge D'Arrigo's finding – that Baker's immaturity should not be considered in mitigation because the burglary was planned – was thus erroneous in that it "contravene[d] Graham's [and] Roper'[s] foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at 474.

POINT III

THE COURT IMPOSED A SENTENCE REQUIRING A FINDING THAT DEFENDANT WAS INCORRIGIBLE, BUT NEVER FOUND DEFENDANT TO BE INCORRIGIBLE, REQUIRING RESENTENCING.

The State's argument ultimately boils down to the following: Baker allegedly "failed to show remorse," has not established "a true change of character," and is likely to reoffend. (Sb41, 36-37) If this characterization of Baker were correct – which it is not – Baker would be the "rare juvenile offender whose crime reflects irreparable corruption." Zuber, 227 N.J. at 440. The court, however, has never ruled on whether Baker is incorrigibly corrupt. In fact, the remand order from this court following Baker's 2018 sentencing noted that court previously did not find Baker "to be incorrigibly corrupt" and it was "[f]or that reason [that] we remand the matter again for fresh consideration[.]" (Da109) (emphasis added) Indeed, the court could not credibly make a finding that Baker is incorrigible because the record unquestionably established Baker's maturation, remorse, and rehabilitation. Accordingly, resentencing is required.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Mr. Baker's initial brief, Baker's sentence must be vacated and remanded for resentencing.

Respectfully submitted,

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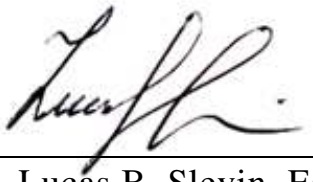
BY: 

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