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APPROVAL OF THE APPELLATE DIVISION**

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0538-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD L. CAIN,

Defendant-Appellant.

Argued April 26, 2023 – Decided July 7, 2023

Before Judges Accurso, Vernoia, and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Accusation Number 91-08-2277.

Peter T. Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Peter T. Blum, of counsel and on the briefs).

Steven A. Yomtov, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Daniel Finkelstein, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplement brief.

PER CURIAM

Defendant Richard L. Cain, now fifty-one years old, appeals from a May 10, 2021 order denying his motion to correct an illegal sentence. He urges us to remand this matter for resentencing pursuant to State v. Comer, 249 N.J. 359 (2022), because he was eighteen years old when he committed first-degree felony murder in 1991. Defendant contends our Supreme Court's holding in Comer—that juveniles convicted of murder are constitutionally entitled to reconsideration of their sentence after twenty years—should apply to him. Defendant also argues that a remand is warranted for the court to conduct an evidentiary hearing on the science underlying his claim. We disagree and affirm. Defendant's constitutional arguments have been rejected by our Supreme Court and lack sufficient merit to warrant extensive discussion. See R. 2:11-3(e)(2).

I.

Defendant struck John J. Thomas in the head with a hammer and then drowned him in a mud puddle. He pled open to one count of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3). On November 22, 1991, the court sentenced defendant to life imprisonment with a thirty-year period of parole ineligibility.

The court found aggravating factors one and nine, N.J.S.A. 2C:44-1(a)(1) and (9), applied "because of the nature of the beating that occurred with a hammer and the pushing of the victim's head down in the water." The court also found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), applied based on defendant's lack of a prior criminal history and noted "defendant was simply only eighteen years of age at the time this offense occurred and turned nineteen three days afterwards." The court found the aggravating factors substantially outweighed the mitigating factors.

We affirmed the conviction and sentence. State v. Cain No. A-2527-91 (App. Div. Dec. 15, 1994). The Supreme Court denied certification. State v. Cain, 139 N.J. 442 (1995). According to defendant, he filed a habeas corpus petition and a previous motion to correct an illegal sentence on the basis that the sentenced imposed was not authorized under the Code of Criminal Justice. Both applications were denied. Defendant has been incarcerated for thirty-two years for the homicide.¹

On October 5, 2020, defendant filed a pro se motion to correct an illegal sentence pursuant to Rule 3:21-10(b)(5). Defendant argued that because he was

¹ The State represents in its merits brief that defendant is eligible for parole in August 2023.

eighteen years old when he committed the offense, he is entitled to reconsideration of his sentence based on the reasoning established in Miller v. Alabama, 567 U.S. 460 (2012), and amplified by our Supreme Court in State v. Zuber, 227 N.J. 422 (2017), applicable to juveniles. Defendant argued the sentencing court failed to consider his "incomplete transient brain development" at the time he committed the offense and that the Legislature's 2020 enactment of mitigating factor fourteen, which permits a sentencing court to consider "defendant was under [twenty-six] years of age at the time of the commission of the offense," N.J.S.A. 2C:44-1(b)(14); L. 2020 c. 110 § 1, supports his contention his sentence is illegal. Counsel was assigned to represent defendant.

On March 16, 2021, the court conducted argument on defendant's motion and reserved decision. In its May 10, 2021 order and memorandum of decision, the court denied defendant's motion for resentencing. The court found defendant's sentence was not illegal and that he was not entitled to a "Miller/Zuber" hearing. The court reasoned that Zuber was inapplicable to defendant because he was "not a juvenile as defined by the statute" at the time of the homicide, and there was no "legal avenue" available to allow his resentencing "as a juvenile or based on his youth status at the time of the crime."

The court acknowledged the Legislature added mitigating factor fourteen after defendant was sentenced but concluded this was an insufficient basis to resentence him. In addition, the court highlighted that the sentencing court did, in fact, consider defendant's age at the time of the offense. The court noted defendant received the "lowest possible period of parole ineligibility" at the time of sentencing and failed to show his sentence was "disproportionate." This appeal followed.

II.

In his counseled brief, defendant raises the following sole point:

A RESENTENCING SHOULD OCCUR BECAUSE THE LANDMARK COMER DECISION—WHICH ENTITLES JUVENILE OFFENDERS TO A RESENTENCING AFTER TWENTY YEARS—SHOULD EXTEND TO EIGHTEEN-YEAR-OLD OFFENDERS LIKE DEFENDANT . . . WHO SHARE THE SAME CHARACTERISTICS AS JUVENILES. U.S. CONST. AMEND. VIII, XIV; N.J. CONST. ART. I, ¶ 12.

In his supplemental pro se brief, defendant raises the following additional points:

POINT ONE (A)

THE COURT BELOW ABUSED ITS DISCRETION BY REFUSING TO CHOOSE TO APPLY LAW OF THE FIRST PRONG OF TROP V. DULLES, 356 U.S. 86 (1958), TO THE POINT ONE CLAIM BELOW,

BUT INSTEAD CHOSE TO APPLY N.J.S.A. 2C:44-1(b)(14) OR [ZUBER] AS THE LAW OF OBJECTIVE INDICIA OF NATIONAL CONSENSUS. U.S. CONST. AMEND. VIII, XIV; N.J. CONST. ART. I ¶ 12, ART. I, ¶ 1. (Raised below)

1st Marriage, Mortgages And Voting Of 18 [To] 21/25 Year Olds Are Irrelevant To Legal Judgments Demarcating Adult Culpability.

2nd Marriage, Mortgages And Voting Of 18 [To] 21/25 Year Olds Are Highly Regulated Activities And So Do Not Aid In Making Legal Judgments Demarcating Adult Culpability.

3rd Marriage, Mortgages And Voting Of 18 [To] 21/25 Year Olds Are Immaterial To Making Legal Judgments Demarcating Adult Culpability.

4th Marriage, Mortgages And Voting Of 18 [To] 21/25 Year Olds Are Inconsequential To Making Legal Judgments Demarcating Adult Culpability.

Marriage Is Inconsequential To Adult Culpability.

Mortgage Is Inconsequential To Adult Culpability.

Voting Is Inconsequential To Adult Culpability.

5th Marriage, Mortgages And Voting Of 18 [To] 21/25 Year Olds Are Trounced In Comparison To The Corroborated Brain Science Cited In The Record Supporting A Legal Judgment Demarcating Culpability By Brain Condition, Not By Age Under 18.

6th The Premise Of The Contentions On Marriage, Mortgages And Voting Is Faulty And So Does Not Support A Legal Judgment Demarcating Culpability.

POINT ONE (B)

THE COURT BELOW ABUSED ITS DISCRETION BY REFUSING TO CHOOSE TO APPLY LAW OF THE SECOND PRONG OF TROP . . . TO THE POINT ONE BELOW, THE COURT'S INDEPENDENT JUDGMENT INTERPRETING THE EIGHTH AMENDMENT, BUT INSTEAD CHOSE TO APPLY STATE V. TORMASI, 466 N.J. SUPER. 51 (2021) AS AN INDEPENDENT JUDGMENT. U.S. CONST. AMEND. VIII, XIV; N.J. CONST. ART I ¶ 12, ART I, ¶ 1. (Raised below)

(i) The Court Below Abused Its Discretion Since The Tormasi Claims Are Unrelated To [Defendant's] Claims. (Raised below)

(ii) The Court Below Abused Its Discretion By Not Applying The Second Prong Of Trop To Determine Whether Sentencing 18 [To] 21 Year Olds The Same As Fully Developed Brain Adults Is Disproportionate Punishment. (Raised below)

(iii) The Court Below Abused Its Discretion By Not Applying The Second Prong Of Trop To Determine Whether There Is Now Any Penological Justification For Age 18 To Demarcate Culpability When Undisputed Science Shows Brains Under 22 Or 26 Are Incomplete Yet Transiently Underdeveloped, Making People Who Commit Criminal Acts With Them Less Culpable. (Raised below)

(iv) Not Applying The Second Prong Of Trop To Determine Whether The Lack Of Consideration By The Parole Board Of Attributes Of Youth Caused By Incomplete Yet Transient Brain Development For 18 [To] 21 Year Old Offenders Constitutes A Secondary Violation Of Proportionality Pursuant To Trop. (Raised below)

POINT TWO (A)

THE COURT BELOW ABUSED ITS DISCRETION BY REFUSING TO CHOOSE TO APPLY THE RULE OF SKINNER V. OKLAHOMA, 316 U.S. 535, 541-42 (1942), REQUIRING REVIEW BY STRICT SCRUTINY OF AN AGE CLASSIFICATION THAT INFRINGES ON FUNDAMENTAL RIGHTS CAUSED BY CONTINUING TO USE THE SCIENTIFICALLY UNRELIABLE CLASSIFICATION OF AGE OF UNDER 18 AS THE SOLE DETERMINANT OF ADULT CULPABILITY. U.S. CONST. AMEND. V, XIV. (Raised below)

(1) The Court Below Ignored That The Fundamental Rights To Present A Defense And Against Disproportionate Sentence Are Now Denied By The Under 18 Classification.

(2) The Court Below Speculated That All Brains Are Fully Developed At Age 18 Contrary To Brain Science Fact, Laws, And The Record, So The Finding Of Brain Incompleteness As A Matter Of Fact For Some 18+ Defendants Is Now Negated By A Mistaken View Of The Law.

(3) The Court Below Speculated That Deterrence Is Promoted By Sentencing Some Incompletely Brained Persons As If Their Brains Were Complete.

(4) The Court Below Ignored That Compelling Penological Justifications Are Promoted By Ending The Ancient Classification.

(5) The Court Below Ignored That The Classification Is Now Arbitrary As Brain Science Facts Show It Is No Longer Narrowly Tailored And So Serves No Compelling State Interest.

POINT TWO (B)

THE COURT BELOW ERRED SINCE "[18] IS THE LEGAL AGE OF MATURITY ACROSS THE ENTIRE LEGAL SPECTRUM" IS NOT A VALID INTEREST OR DOES NOT PROVIDE A RATIONAL BASIS TO UNEQUALLY TREAT THOSE AGED 18 [TO] 21/25 WHO ARE SIMILARLY SITUATED TO THOSE AGED UNDER 18 WITH INCOMPLETE YET TRANSIENT BRAIN DEVELOPMENT. U.S. CONST. V, XIV. (Raised below)

- 1st The Court Below Erred By Finding A Clear Rational Basis.
- 2nd The Court Below Properly Rejected The 14 Year Old Line.
- 3rd The Court Below Erred Since Repose Is Of No Weight When The 1991 Sentencing Decision Lacked Reasons For The Crime.
- 4th The Court Below Erred By Finding Repose Is A Rational Basis For Continued Unequal Treatment Despite Knowledge Of The Similarly Situated Brain Condition.
- 5th The Court Below Erred By Not Finding That The Sentencing Court's Imposing The Maximum

Sentence When It Did Not Know The Why Of The Crime Was Arbitrary Since It Is Known Now.

POINT TWO (C)

THE COURT BELOW ERRED IN APPLYING STATE EQUAL PROTECTION LAW TO POINT TWO (C) BELOW. N.J. CONST. ART. I, ¶ 1. (Raised below)

- 1st The Court Erred In Its View Of The Nature Of The Fundamental Rights At Stake.
- 2nd The Court Below Erred By Not Finding The Rights Are Absolutely Restrained By Law.
- 3rd The Court Below Erred By Not Finding There Is Now A Public Need For The Classification.

POINT THREE

THE COURT BELOW ABUSED ITS DISCRETION BY NOT CHOOSING TO APPLY DUE PROCESS LAW TO THE PROCEDURAL DUE PROCESS CLAIM RAISED BELOW. U.S. CONST. AMEND. V, XIV; N.J. CONST. ART I, ¶ 1. (Raised below)

- 1st The Court Below Erred In Its View Of Sentencing Law.
- 2nd The Court Below Erred Since The Plea Deal Had Insufficient Consideration And Was Not Favorable To [Defendant].
- 3rd The Court Below Erred In Assessing [Defendant's] Unsupported Life Sentence And Transient Brain Incompleteness Condition.

4th The Court Below Erred By Missing The
Compound Prejudice By The Sentencing Court
And Parole Board Making The Same Error.

Regarding Point I of defendant's counseled brief, under Rule 3:21-10(b)(5), "an order may be entered at any time . . . correcting a sentence not authorized by law including the Code of Criminal Justice." See State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) ("[A] truly 'illegal' sentence can be corrected 'at any time'" (quoting R. 3:21-10(b)(5); R. 3:22-12). "[A]n illegal sentence is one that 'exceeds the maximum penalty . . . for a particular offense' or a sentence 'not imposed in accordance with law.'" Id. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). "That includes a sentence 'imposed without regard to some constitutional safeguard.'" Zuber, 227 N.J. at 437 (quoting State v. Tavares, 286 N.J. Super. 610, 618 (App. Div. 1996)). "Whether [a] defendant's sentence is unconstitutional is . . . an issue of law subject to de novo review." State v. Drake, 444 N.J. Super. 265, 271 (App. Div. 2016) (citing State v. Pomianek, 221 N.J. 66, 80 (2015)).

In Miller, a case involving fourteen-year-old defendants, the United States Supreme Court recognized that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." 567 U.S. at 465, 472. Thus,

the Court continued, "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." Id. at 473. That led the Court to prohibit sentencing schemes that "mandate[] life in prison without the possibility of parole for juvenile offenders," while leaving open the possibility that sentencing courts could impose such a sentence in homicide cases if the mitigating effect of the defendant's age is properly taken into account. Id. at 479-80.

In Zuber, a case involving seventeen-year-old defendants, our Court expanded the protections for juveniles outlined in Miller. 227 N.J. at 428-30. The Court held Miller's requirement "that a sentencing judge 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison' applies with equal strength to a sentence that is the practical equivalent of life without parole." Id. at 446-47 (citation omitted). Further, our Court found "that the force and logic of Miller's concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases." Id. at 448.

In State v Ryan, the defendant argued his sentence of life without parole under New Jersey's "Three Strikes Law," N.J.S.A. 2C:43-7.1(a), was illegal. 249 N.J. 581, 586 (2022). He based his argument, in part, on the sentencing judge not applying the Miller factors to his "first strike" conviction, which was for an offense he committed when he was sixteen. Id. at 590. In rejecting defendant's appeal, the Court emphasized that "[b]ecause defendant committed his third offense and received an enhanced sentence of life without parole as an adult, we hold that this appeal does not implicate Miller or Zuber." Id. at 586-87.

In plain terms, the Court reviewed its decision in Zuber and unequivocally held that it "did not . . . extend Miller's protections to defendants sentenced for crimes committed when those defendants were over the age of eighteen." Ibid.; see also Comer, 249 N.J. at 384 (quoting Miller for the proposition that "children are constitutionally different from adults for purposes of sentencing").

We note that in Comer, our Court held that juvenile offenders waived to the adult Criminal Part, convicted under the homicide statute, N.J.S.A. 2C:11-3(b)(1), and sentenced to a term exceeding twenty years, may petition for review of the sentence after they have served twenty years in prison. 249 N.J. at 402-

03. Significantly, our Court did not extend that right to sentence review to offenders who were eighteen years of age or older at the time of their crimes.

Here, defendant was eighteen years old at the time he killed Thomas. Defendant may have been a young adult, but he was an adult, nonetheless. See N.J.S.A. 2A:4A-22(a) (defining a juvenile as an individual under the age of eighteen). In light of the severity of the crime committed at the age of majority—and three days shy of his nineteenth birthday—defendant cannot show the life imprisonment term with a thirty-year period of parole ineligibility is cruel and unusual punishment.

III.

We likewise reject defendant's contention that the holding in Comer should be extended to individuals who commit crimes after becoming adults at the age eighteen and through age twenty and defendant should have a Comer resentencing hearing. We discern no basis for a remand for a hearing to consider expert testimony on the "age-crime" curve, developmental science, or neuroscience. The Comer Court did not extend lookback periods to adults, including eighteen-year-old adults, and neither do we. Defendant's sentence was authorized by the New Jersey Code of Criminal Justice and did not exceed the

maximum term of imprisonment and parole ineligibility that could be imposed on his conviction. It remains a legal sentence.

Finally, defendant is not entitled to the benefit of the new mitigating factor regarding youthful offenders, N.J.S.A. 2C:44-1(b)(14).² Mitigating factor fourteen became effective on October 19, 2020, L. 2020, c. 110, § 1, and in State v. Lane, our Court made clear this sentencing provision is to be given prospective application only. 251 N.J. 84, 96-97 (2022) ("In short, nothing in N.J.S.A. 2C:44-1(b)(14)'s statutory text warrants a determination that the presumption of prospective application is overcome.").

Unlike in State v. Rivera, 249 N.J. 285, 302-04 (2021), where there was an independent basis to remand for resentencing, i.e., the mistaken treatment of the defendant's youth as an aggravating factor, here there is no independent basis to review defendant's sentence. Ibid. Defendant exhausted his avenues of appeal several years before N.J.S.A. 2C:44-1(b)(14) was enacted, and we find no independent basis to remand for resentencing.

² N.J.S.A. 2C:44-1(b)(14), which became effective on October 19, 2020, defines a mitigating circumstance when "[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense." L. 2020, c. 110, § 1.

To the extent we have not addressed them, any remaining arguments raised by defendant, including the arguments advanced in his supplemental pro se brief, lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION