STATE OF NEW JERSEY, Respondent, VS. JAMES COMER, Appellant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 084509 Criminal Action On Appeal From: Superior Court of New Jersey, Appellate Division Honorable Judges Jack M. Sabatino, Thomas W. Sumners, Jr., and Richard J. Geiger Docket No.: A-001230-18

SUPPLEMENTAL BRIEF OF APPELLANT JAMES COMER

Attorney of Record

Lawrence S. Lustberg
(Attorney ID No. 023131983)
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
llustberg@gibbonslaw.com

On the Brief

Alexander Shalom
(Attorney ID No. 021162004)
Jeanne LoCicero
(Attorney ID No. 024052000)
ACLU New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714
ashalom@aclu-nj.org

Avram D. Frey
(Attorney ID No. 188002016)
1145 Poquito Street
Austin, Texas 78702
(646) 229-4385
avidfrey@gmail.com

Counsel for Appellant James Comer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

TABLE OF JUDGMENTS

INTRODUCTION

This case concerns the constitutionality of N.J.S.A. 2C:11-3b(1) as applied to juveniles under the Eighth Amendment to the United States Constitution and Article 1, Paragraph 12 of the New Jersey Constitution. That statute imposes a mandatory minimum sentence of 30 years without the possibility of parole for murder, a harsh, non-discretionary term that fails to account for the hallmark vulnerabilities of young people and, even more significantly, their unique capacities for reform. Consistent with the recent sea change in the law of juvenile sentencing, the Court should now hold that a mandatory minimum sentence of 30 years without parole is disproportionate for juveniles, and that if a juvenile is to be sentenced to such a lengthy term without eligibility for parole, that sentence may only be imposed as a matter of discretion following an individualized sentencing determination that accounts for the defendant's youth.

Appellant's challenge to the constitutionality of N.J.S.A. 2C:11-3b(1) is properly analyzed under the well-established framework of proportionality review. This entails consideration of numerous factors, including evidence of societal norms, the culpability of the class of offenders at issue, the severity of the punishment in question, and whether traditional justifications support the punishment.

Under this framework, N.J.S.A. 2C:11-3b(1) is disproportionate as applied to juveniles. Recent jurisprudence, including this Court's landmark decision in *State v. Zuber*, 227 N.J. 422 (2017), makes manifest that juveniles are different from adults in ways that diminish their culpability and undermine the justifications for harsh sentencing. Moreover, science and social science research, of exactly the kind that courts consider in conducting proportionality review, reveals that 30 years without parole is severe punishment that might be warranted for juveniles only in limited circumstances, but certainly not in every case, as N.J.S.A. 2C:11-3b(1) compels. Thus, consideration of the relevant factors leads inescapably to the conclusion that a 30-year mandatory minimum without parole is unconstitutional for juveniles under State and Federal Law.

The Appellate Division below came to the opposite conclusion on two bases. First, it held that *State v. Pratt*, 226 N.J. Super. 307 (App. Div. 1988), which upheld a mandatory minimum 30-year sentence for juveniles over three decades ago, remained good law. And second, the Appellate Division held that deference to the Legislature was called for and that the Court should stay its hand to allow for legislative action, even years after this Court called for such action four years ago to no avail. Neither rationale is persuasive. Comer's constitutional challenge requires proportionality review in accordance with contemporary standards,

and the Judiciary may not defer on questions of constitutional rights, squarely presented. Accordingly, this Court should reverse the decision below, hold N.J.S.A. 2C:11-3b(1) unconstitutional as applied to juveniles, and reverse and remand for resentencing.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY[1]

(1) Comer's Conviction and Original Sentence

On April 17, 2000, while 17 years old, Comer participated in a string of armed robberies with co-defendants Ibn Adams and Dexter Harrison, during which Adams shot and killed one of the robbery victims, George Paul. *State v. Adams*, 194 N.J. 186, 191 (2008). Comer was tried and, on December 19, 2003, convicted of (1) second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2; (2) first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); (3) four counts of first-degree robbery, N.J.S.A. 2C:15-1; (4) six counts of third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); (5) four counts of possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and (6) third-degree theft of an automobile, N.J.S.A. 2C:20-3(a). *Adams*, 194 N.J. at 198.

At Comer's initial sentencing on March 5, 2004, the trial court noted, "[n]othing in your conduct or your background

[1]For the convenience of the Court, this brief combines its recitation of the facts and the procedural history, as those matters are here inextricably intertwined.

mitigates the crimes for which you stand before me convicted," 1T at 33:16-17,[2] and imposed a term of 75 years imprisonment, 68 years and three months of which were to be served without eligibility for parole. That sentence consisted of a 30-year term without parole eligibility for the felony-murder count pursuant to N.J.S.A. 2C:11-3b(1), and consecutive terms of 15 years for the three counts of first-degree robbery (the fourth armed robbery having merged with the felony murder conviction), 85% of which were to be served without eligibility for parole pursuant to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. In addition, Comer was sentenced to four years for each of five weapons charges and four years for the automotive theft charge, each of which was to run concurrently with all other counts of the indictment. *See Adams*, 194 N.J. at 198; *see also* 1T at 34:17 – 41:7.

On appeal, the Appellate Division affirmed Comer's conviction and sentence. *State v. Adams*, 2006 WL 3798760 (App. Div. Dec. 28, 2006). This Court affirmed on March 26, 2008. *Adams*, 194 N.J. 186.

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[2]1T is the transcript of the original sentencing on March 5, 2004
2T is Vol. 1 of the resentencing transcript of August 2, 2018
3T is Vol. 2 of the resentencing transcript of August 2, 2018
4T is the transcript of resentencing on October 5, 2018
A[number] refers to Comer's Appellate Division Appendix
CA[number] refers to Comer's Appellate Division Confidential Appendix filed under seal
[number]a refers to Comer's Appendix to the Petition for Certification

(2) Comer's Motion to Correct an Illegal Sentence

On May 23, 2013, Comer moved to correct his sentence under New Jersey Court Rule 3:21-10(b)(5). Comer alleged that his sentence was unlawful under the Eighth Amendment to the United States Constitution and Article 1, Paragraph 12 of the New Jersey Constitution, following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* held that a juvenile homicide offender may not be sentenced to life without parole absent consideration of several factors, including

- "chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences";
- "the family and home environment";
- "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";
- "inability to deal with police officers or prosecutors (including on a plea agreement) or [] incapacity to assist [the juvenile's] own attorneys"; and
- "the possibility of rehabilitation."

567 U.S. at 477-78. Comer argued that his sentence violated *Miller* because he was a juvenile at the time of the offense; because a term of 68 years and three months without parole is the functional equivalent of life without parole; and because the Court sentenced him without consideration of the *Miller* factors.

On May 11, 2015, the trial court granted Comer's motion, finding that Comer was "entitled to a re-sentencing in accordance

with the procedures mandated by *Miller*." A39 (*State v. Comer*, Indictment No. 03-01-0231I, Memorandum Opinion at 11 (Law Div. May 11, 2015)).

This Court affirmed. *See Zuber*, 227 N.J. 422.[3] First, the Court held that there is no constitutional difference between sentences formally designated "life without parole" and term-of-years sentences that are their functional equivalent:

> *Miller*'s command 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 (quoting *Miller*, 567 U.S. at 480).]

Second, emphasizing that "[t]he focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence," *Zuber* held that "judges must evaluate the *Miller* factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense" and "when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times," *i.e.* "when judges decide whether to run counts consecutively [in conjunction with the factors listed in *State v. Yarbough*, 100 N.J. 627 (1985)],

[3]Comer moved for direct certification, which this Court granted. The Court issued a consolidated opinion in Comer's case and that of Ricky Zuber, a juvenile defendant who raised related constitutional issues. *Zuber*, 227 N.J. at 434.

and when they determine the length of the aggregate sentence." *Id.* at 447. Thus, *Zuber* underscored that "judges must do an individualized assessment of the juvenile about to be sentenced — with the principles of *Graham* [*v. Florida*, 560 U.S. 48 (2010)] and *Miller* in mind" before imposing a "lengthy period of parole ineligibility." *Id.* at 450.

Third, however, *Zuber* noted that even if courts fully complied with *Miller* before imposing "lengthy sentences with substantial periods of parole ineligibility," such sentences might still prove unconstitutional because *Graham* forbids "'[s]tates from making the judgment [of a juvenile's capacity for reform] *at the outset*'" absent "any chance to *later* demonstrate . . . fit[ness] to rejoin society." *Id.* at 451 (quoting *Graham*, 560 U.S. at 75, 79) (emphasis in *Zuber*). "[R]ecogniz[ing] that it would raise serious constitutional issues about whether sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date," the Court "encourage[d] the Legislature to examine this issue." *Id.* at 452. On this point, the Court cited with approval legislation from eight States requiring that juveniles receive an opportunity for either parole or resentencing after a specified term, seven of which drew the line at between 15 and 25 years. *Id.* at 452 n.3. The Court then vacated Comer's sentence and remanded for resentencing consistent with its opinion. *Id.* at 453.

(3) Resentencing

The trial court held resentencing proceedings on August 2 and October 5, 2018. Comer argued as a threshold matter that N.J.S.A. 2C:11-3b(1), which mandates a minimum penalty of 30 years without eligibility for parole for murder, is unconstitutional as applied to juvenile offenders. As a result, Comer argued, the court could not sentence him pursuant to N.J.S.A. 2C:11-3b(1), but should instead determine an individualized, aggregate sentence for all counts of convictions based on application of the *Miller* factors, the *Yarbough* factors, and the statutory aggregating and mitigating factors listed at N.J.S.A. 2C:44-1. Comer argued that under this framework, the court should impose a sentence that would provide for his release as soon as his reentry plan could be instituted, which would translate to an aggregate term of approximately 21 years. In support, Comer provided evidence from family members and others detailing a childhood marked by abuse, neglect, and extensive exposure to drug abuse and criminality; the expert opinion of psychiatrist Dr. Richard Dudley, Jr., M.D., that Comer's offense conduct reflected childhood trauma and the developmental shortcomings of youth, and that Comer was presently rehabilitated and could achieve no further benefit from prison, CA44-76; and a Reentry Plan and supporting testimony by former Governor James McGreevey detailing precise and thorough arrangements for Comer's housing, employment, and social, psychological, logistical, and

spiritual support upon release, A77-83; 3T at 68:10 - 97:17. The State presented no witnesses to counter the evidence Comer presented.

On October 5, 2018, the court sentenced Comer to an aggregate term of 30 years without eligibility for parole. The court agreed that Comer's background mitigated his offense conduct under the *Miller* factors, that he had demonstrated reform in prison, and that consecutive sentencing was unwarranted under the *Yarbough* factors:

> This Court finds that the Defendant grew up in an environment that forced his criminal behavior. Defendant's parents and extended family had criminal histories and involvement with drugs. The reality of criminal behavior as a way of life was [] inescapable for the Defendant. And Defendant has shown an ability to be rehabilitated and has been incident free for four years while incarcerated. His involvement . . . as a mentor at the prison indicates an understanding of the consequences of his previous actions. As a juvenile, the Defendant may not have been as able to appreciate the criminality of his behavior and the impact it would have on others, especially, George Paul and his family.
>
> [4T at 79:22 – 80:11.]

Nonetheless, the court rejected Comer's constitutional challenge to N.J.S.A. 2C:11-3b(1), stating:

> The Court declines the Defense's invitation to find the sentencing structure of N.J.S.A. 2C:11-3(b)(1) unconstitutional as applied to you. The authors of our criminal code have determined that there must be a minimum period of 30 years of incarceration for murder. While it is unknown to what degree you will be, or need to be, deterred,

> it's clear that society abhors the taking of life and our citizens must know that [if] they do so, or participate in a criminal act that results in death, they are subject to a minimum of 30 years in prison.
>
> [4T at 81:1-14.[4]]

Accordingly, the court imposed a sentence of 30 years with a 30-year period of parole ineligibility for felony-murder; 15 years with 85% parole ineligibility pursuant to NERA for each of three first degree armed robbery counts; four years for each of five weapons charges; and four years for the automotive theft charge, all to run concurrently. *Id.* at 82:18 – 86:1.

(4) Appeal

Comer timely appealed, raising the single question of whether the trial court erred in sentencing him pursuant to N.J.S.A. 2C:11-3b(1) because a mandatory minimum sentence of 30 years without eligibility for parole is unconstitutional as applied to juvenile offenders under the Eighth Amendment and Article 1, Paragraph 12. In an unpublished decision issued May 6, 2020, the Appellate Division rejected Comer's constitutional challenge and affirmed

[4]The court added that it was inclined to impose a term of 30 years without eligibility for parole in any event, purportedly rendering the constitutional question moot. 4T at 81:15 – 82:4. But because the court in fact sentenced Comer pursuant to N.J.S.A. 2C:11-3b(1) – and could not have imposed a term of 30 years with a 30-year parole disqualifier otherwise — the constitutionally of that statute is squarely at issue, as the Appellate Division recognized. *See State v. Comer*, 2020 WL 2179075, at *7-11 (N.J. App. Div. May 6, 2020) (resolving constitutional question as properly presented).

his sentence. *Comer*, 2020 WL 2179075, at *7-11. The Appellate Division relied principally on its 33-year-old decision in *Pratt*, 226 N.J. Super. 307, which upheld N.J.S.A. 2C:11-3b(1) as applied to juveniles. The court reasoned that "*Pratt* is directly on point and remains good law," and that "[n]either *Miller* nor *Zuber* require reversal of *Pratt*, since both cases addressed life sentences and their equivalents." *Comer*, 2020 WL 2179075, at *8, *11. To Comer's argument that the principles underlying the decisions in *Miller* and *Zuber* are not limited to sentences of life and *de facto* life without parole — as evidenced by *State in the Interest of C.K.*, 233 N.J. 44 (2018), which cited *Miller* and *Zuber* in striking down lifetime registration requirements for juveniles under Megan's Law — the Appellate Division wrote that such extensions of constitutional doctrine should properly come from this Court. *Comer*, 2020 WL 2179075, at *9 ("[*C.K.*] supports . . . caution because the trial court and this court agreed that a change in constitutional law had to come from the Supreme Court."); *id.* at *10 ("We must be mindful that as an intermediate appellate court, our institutional role is limited."). Finally, the Appellate Division agreed with the prosecution that "[t]he debate over applying the thirty-year minimum to juvenile murderers should instead proceed in the Legislature[.]" *Id.* at *11.

On June 4, 2020, Comer timely filed a Petition for Certification, raising the single question of whether N.J.S.A. 2C:11-3b(1)'s mandatory minimum sentence of 30 years without eligibility for parole is unconstitutional as applied to juveniles under the Eighth Amendment to the U.S. Constitution and Article 1, Paragraph 12 of the New Jersey Constitution. This Court granted the Petition on March 23, 2021.

LEGAL STANDARD AND BACKGROUND

The United States and New Jersey Supreme Courts apply a well-established analytical framework to claims that a particular punishment is disproportionate for a given category of individuals. *See*, *e.g.*, *Graham*, 560 U.S. at 61 (discussing the Court's approach in "cases adopting categorical rules" under the Eighth Amendment); *see Zuber*, 227 N.J. at 438 ("'The test to determine whether a punishment is cruel and unusual . . . is generally the same' under both the Federal and State Constitutions.") (quoting *State v. Ramseur*, 106 N.J. 123, 169 (1987)).[5]

[5]Though the test is the same, this Court can and should conduct its own proportionality analysis under the New Jersey Constitution. *State v. Ramseur*, 106 N.J. 123, 169 (1987) ("[T]his Court recognizes its freedom — indeed its duty — to undertake a separate analysis under the cruel and unusual punishment clause of the New Jersey Constitution."). This is especially so because Article I, Paragraph 12 of the State Constitution "affords greater protections . . . than does the [E]ighth [A]mendment of the federal constitution." *State v. Gerald*, 113 N.J. 40, 76 (1988) (rejecting *Tison v. Arizona*, 481 U.S. 137 (1987), and requiring evidence of

Under constitutional proportionality review, first, the Court must consider "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*, 560 U.S. at 61 (citation and quotation marks omitted); *accord State v. Maldonado*, 137 N.J. 536, 557-58 (1994). Next, the Court applies its "own judgment," *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008), examining the culpability of the class of offenders at issue, *Graham*, 560 U.S. at 67-68; *Maldonado*, 137 N.J. at 558-59; the severity of the punishment, *Graham*, 560 U.S. at 69-70; *State v. Gerald*, 113 N.J. 40, 89 (1988); and whether penological justifications support the sentence at issue, *Graham*, 560 U.S. at 71; *Ramseur*, 106 N.J. at 178-80. In performing this second step, the United States and New Jersey Supreme Courts have consistently relied upon scientific and social science research and literature. *See, e.g., Miller*, 567 U.S. at 471, 472 n.5 (quoting *Roper*, 543 U.S. at 569, in citing psychiatric and neurological studies of adolescent development, and noting, "science and social science .

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intent to kill for imposition of death sentence in New Jersey); *see also State v. Martini*, 144 N.J. 603, 618 (1996) (departing from federal precedent to hold that State Constitution prohibits individuals sentenced to death from waiving the right to post-conviction relief and gives counsel standing to challenge waiver); *State v. Marshall*, 130 N.J. 109, 207-209 (1992) (repudiating *McCleskey v. Kemp*, 481 U.S. 279 (1987), and holding that, in New Jersey, a defendant complaining of racial disparities in capital sentences "surely has a right to raise a structural challenge to the constitutional fairness of the New Jersey Capital Punishment Act").

. . have become even stronger"); *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *accord Zuber*, 227 N.J. at 439; *see also Atkins v. Virginia*, 536 U.S. 304, 317-18 (2002) (citing social science literature in finding individuals with intellectual disability insufficiently culpable for the death penalty). Ultimately, the Court does not balance the "objective indicia of society's standards" against the Court's "own judgment"; rather, "[i]f the punishment fails any one of [these] tests, it is invalid." *Gerald*, 113 N.J. at 78 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Applying this analysis, the United States and New Jersey Supreme Courts have recognized expanding limitations on the constitutional punishment of juveniles. The pertinent jurisprudence began with *Roper*, 543 U.S. 551, in which the Supreme Court banned the death penalty for juveniles based on "three general differences between juveniles under 18 and adults" that render them "'categorically less culpable'" for their conduct. *Id.* at 567-69 (citation omitted). In *Graham*, the Court held that the same developmental shortcomings prohibit sentencing a juvenile convicted of a non-homicide offense to life without the possibility of parole. 560 U.S. at 71-75. Because "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient

immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,'" *id.* at 69 (quoting *Roper*, 543 U.S. at 573), *Graham* held it unconstitutional for States to make the judgment that a juvenile non-homicide offender is incorrigible, and therefore deserving of life without parole, "at the outset," *id.* at 73. Instead, *Graham* held, juveniles convicted of non-homicide offenses must receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Miller extended this jurisprudence to juveniles convicted of homicide offenses. Specifically, *Miller* held that before a juvenile convicted of homicide may be sentenced to LWOP, the sentencing court must consider the defendant's "youth and its attendant characteristics" in mitigation, 567 U.S. at 465, 477-78, and that thereafter, only the "rare juvenile offender whose crime reflects irreparable corruption" may receive a sentence of life without parole, with all others entitled to the same "meaningful opportunity to obtain release" required by *Graham*. *Id.* at 479-80 (citations and quotation marks omitted). In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Court held that *Miller* applied retroactively.

This Court extended these principles in *Zuber*, which held that under the State and Federal Constitutions, *Graham* and *Miller* apply equally to juveniles facing long sentences that fall short

of life without parole, whether for one offense or several. 227 N.J. at 429. As noted, *Zuber* recognized a further constitutional issue — whether juveniles sentenced to "lengthy periods of parole ineligibility" must receive an opportunity for parole or resentencing after a specified term of years — but referred this question to the Legislature in the first instance, as the question was not squarely presented. *Id.* at 452-53.

Most recently, in *Jones v. Mississippi*, 593 U.S. ___(2021), the Supreme Court held that *Miller* does not require a sentencing court to make a formal determination that a juvenile is permanently incorrigible before imposing a sentence of life without parole for homicide. But *Jones* reaffirmed that a *mandatory* term of life without parole is unconstitutional because it requires the imposition of that harsh penalty on juveniles who are, in fact, capable of reform:

> On the question of what *Miller* required, *Montgomery* [*v. Louisiana*, 577 U.S. 190 (2016)] was clear: "A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not."
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> [Slip Op. at 12 (quoting *Montgomery*, 577 U.S. at 210).]

In this respect, *Jones* cited with approval "the key paragraph" of *Montgomery*, which held:

> "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence

> a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."
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> [*Id.* at 7-8 n.2 (quoting *Montgomery*, 577 U. S. at 211).]

Jones rejected, however, that sentencing courts are subject to any "magic-words requirement," *id.* at 18, holding instead that sentencing courts must be trusted to employ their discretion in accordance with constitutional standards. *Id.* at 15. In this manner, *Jones* underscored that the core holding of *Miller* was its insistence on "a sentencing procedure similar to the procedure that this Court [] required for the individualized consideration of mitigating circumstances in capital cases such as *Woodson v. North Carolina*, 428 U. S. 280, 303–305 (1976)." *Jones*, Slip. Op. at 9. Such a discretionary procedure, *Jones* elaborated, "ensures that the sentencer affords individualized consideration to, among other things, the defendant's chronological age and its hallmark features." *Id.* at 9-10 (citations and quotation marks omitted). Thus, *Jones* clarified that individualized sentencing discretion – as opposed to the imposition of *mandatory* punishment – is essential to implementing the constitutional limitations on juvenile sentencing.

In light of these precedents, and under the proportionality review discussed below, Comer now urges this Court to hold that individualized sentencing is necessary for juveniles convicted of

murder, and that a mandatory minimum sentence of 30 years without parole is accordingly unlawful. As to this question, the Court's review is *de novo*. *See State v. Galicia*, 210 N.J. 364, 381 (2012) ("We consider legal and constitutional questions de novo."); *State v. Hudson*, 209 N.J. 513, 529 (2012) ("Generally, the abuse-of-discretion standard of review applies in appellate sentencing review, . . . [but] questions of law [regarding application of a sentencing statute] are reviewed de novo[.]") (citations omitted).

ARGUMENT

I. A MANDATORY SENTENCE OF AT LEAST 30 YEARS WITHOUT ELIGIBILITY FOR PAROLE, AS REQUIRED BY N.J.S.A. 2C:11-3B(1), IS UNCONSTITUTIONAL AS APPLIED TO JUVENILES. (12a-32a, 4T AT 81:1 – 82:4)

A mandatory minimum sentence of 30 years violates the prohibitions against cruel and unusual punishment contained in the Eighth Amendment to the Constitution of the United States and Article I, Paragraph 12 of the New Jersey Constitution when applied to juveniles. That is, utilizing the factors that guide the constitutional analysis in this area – objective indicia of societal standards as measured through legislative enactments and actual sentencing practices; the severity of the sentence in question; and social science research concerning the ways that juveniles are different and how those differences bear upon the traditional purposes of punishment – leads inexorably to the conclusion that a mandatory, non-individualized sentence of no

less than 30 years without parole is unjustifiable for juveniles convicted of murder.

To be clear, Comer does not here argue that it is necessarily unconstitutional to sentence a juvenile homicide offender to a term of 30 years or more without eligibility for parole, just as a sentence of life without parole is not necessarily disproportionate for a juvenile offender under *Miller*.[6] As the Supreme Court recently said in *Jones*, "[u]nder *Miller* [], an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." *Jones,* Slip. Op. at 1. Rather, Comer argues that just as a mandatory sentence of life without parole is prohibited under *Miller*, a mandatory term of no less than 30 years without parole, imposed without regard to the individual circumstances of both the defendant and the offense, is unlawful in the case of juveniles. Instead, the proportionality review mandated by the Constitutions of the United States and, especially,

[6]The upper limit on the length of "real time" a juvenile may serve before he must be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" – and if he is able to demonstrate rehabilitation, the length of time before which he must be released – has not been decided under Article I, Paragraph 12. *Zuber*, 227 N.J. at 429, 452-53 (citation and quotation marks omitted). That issue is not raised in this case, but it is in *State v. Zarate*, Dkt. No. 084516, a case for which the Court granted certification on the same day as it did so in this case.

of New Jersey, require that if a term of 30 years or more without parole is to be imposed on a juvenile offender consistent with constitutional requirements, that can only occur after an individualized determination that gives proper consideration to all relevant factors. Because that did not occur here, Comer's sentence should be vacated and he should be re-sentenced.

(a) *Objective indicia of society's standards show a consensus against mandatory terms of 30 years imprisonment without parole for juvenile homicide offenders.*

"[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (citation omitted). In this regard, courts look not to the total number of legislative enactments permitting or forbidding a particular sentence, but rather to "the consistency of the direction of change." *Id.* at 315. Here, as the Court noted with approval in *Zuber*, six State legislatures responded to the decisions in *Graham* and *Miller* by dramatically limiting the length of mandatory juvenile sentencing, requiring that juveniles receive either an opportunity for parole or the ability to petition for resentencing in less than 30 years. *See Zuber*, 227 N.J. at 452 n.4.[7] Four States and the District of

[7]Citing Cal. Penal Code § 3051(b) (2016) (maximum permissible juvenile term without parole eligibility is 25 years); Wyo. Stat. Ann. § 6-10-301(c) (2016) (same); W. Va. Code § 61-11-23(b) (2016) (15 years); Fla. Stat. § 921.1402 (2016) (juvenile offender may petition for parole or reduction of sentence after serving, at

Columbia have now passed similar laws,[8] bringing the total number of jurisdictions to 11 that effectively bar sentences of 30 years without parole eligibility for juveniles in *any* case, let alone in every case as a matter of course, as N.J.S.A. 2C:11-3b(1) mandates. Moreover, six States have recently enacted legislation limiting 30-year mandatory minimums to a limited category of juveniles, such as those convicted of multiple or particularly aggravated murders.[9] These States, too, reject the assumption underlying

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most, 25-year term); Wash. Rev. Code § 9.94A.730(1) (2016) (same, after 20 years); and Mont. Code Ann. § 46-18-222(1) (2016) (prohibiting all mandatory minimum sentences and periods of parole ineligibility in the case of juveniles).

[8]*See* Ken. Rev. Stat. 640.040 (1987) (maximum permissible juvenile term without parole eligibility is 25 years); Va. H.B. 35, Gen. Assemb. (Reg. Sess. 2020) (20 years); Or. S.B. 1008, 80th Leg. Assemb. (Reg. Sess. 2019) (15 years); D.C. B21-0683, D.C. Act 21-568 (2016) (juvenile offender may petition for parole or reduction of sentence after serving, at most, 20 years); N.D. H.B. 1195, 65th Leg. Assemb. (2017) (same).

[9]Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (sentence with 30-year parole ineligibility authorized only for juveniles convicted of capital murder – all other offenses must provide parole opportunity after no more than 25 years); Colo. S.B. 16-3820, 70th Gen. Assemb., 2d Reg. Sess. (2016) (creating a special program within the Department of Corrections for juveniles which, if completed, creates a presumption of fitness for parole if the juvenile served 25 or 30 years, depending on the offense); Mass. H. 4307, 188th Gen. Court (2014) (sentence with 30-year parole ineligibility authorized only for juveniles convicted of particularly aggravated murder); N.C. Gen. Stat. § 15A-1340.19A (2016) (only juveniles convicted of first-degree murder, exclusive of felony murder, eligible for sentence carrying parole ineligibility beyond 25 years); Nev. A.B. 267, 78th Reg. Sess. (2015) (only juveniles convicted of multiple homicides eligible for sentence with parole ineligibility beyond 20 years); Ohio S.B. 256, 133rd Gen. Assemb. (2020) (sentence with 30-year parole ineligibility authorized only for juveniles convicted of particular categories of murder).

N.J.S.A. 2C:11-3b(1) that 30 years without eligibility for parole is appropriate for every juvenile convicted of murder.

Also probative in the objective indicia analysis are "actual sentencing practices." *Graham*, 560 U.S. at 62. In the year after *Montgomery* held that *Miller* applies retroactively, approximately 1300 juvenile homicide offenders previously sentenced to life without parole were resentenced, and of that group, "the median sentence nationwide [was] 25 years before parole or release eligibility." *See* Campaign for Fair Sentencing of Youth, Report, "*Montgomery* Momentum: Two Years of Progress since *Montgomery v. Louisiana*, at 4 (2018).[10] In other words, half of all new sentences (649 total) provided a first opportunity for parole within 25 years or less — powerful evidence that society does not consider 30 years without parole appropriate for *all* juveniles convicted of homicide. Indeed, now four years removed from the decision in *Montgomery*, over 700 juveniles previously sentenced to LWOP have been released, further evidencing that society supports a rehabilitative approach to punishment even for those juveniles convicted of murder, and rejects the retributive rationale embodied by lengthy terms of parole ineligibility. *See* Campaign for Fair Sentencing of Youth, Report, "National Trends in

[10]*Available at* https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf

Sentencing Children to Life without Parole," at 2 (2021)[11]; *see also Jones*, Slip. Op. at 20 (noting that in Mississippi, where the defendant was convicted, "*Miller* has reduced life-without-parole sentences for murderers under 18 by about 75 percent") (citing Campaign for Fair Sentencing of Youth, Report, "Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children," at 7 (2018)).

Thus, both actual sentencing practices and State legislative enactments provide clear evidence: society does not consider long mandatory sentences, like one of 30 years without parole, appropriate for every juvenile convicted of murder. Instead, juveniles should be sentenced on an individual basis, with due regard for their unique vulnerabilities and capacity for reform.

(b) *Juvenile offenders are less culpable than adults.*

It is by now well-established that juveniles are categorically less culpable for their offense conduct in light of the "[t]hree general differences between juveniles under 18 and adults." *Roper*, 543 U.S. at 569; *accord Miller*, 567 U.S. at 471. First, juveniles are less mature and more irresponsible as compared to adults, "qualities that often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569 (internal citation omitted); *accord Miller*, 567 U.S. at 471; *Zuber*,

[11]*Available at* https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf

227 N.J. at 440;[12] second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *Roper*, 543 U.S. at 569; *accord Miller*, 567 U.S. at 471; *Zuber*, 227 N.J. at 440; and third, youth is a time period marked by transitory, developing identity, meaning that "'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.'" *Roper*, 543 U.S. at 570 (citation omitted); *accord Miller*, 567 U.S. at 471; *Zuber*, 227 N.J. at 440. Because these three general differences render juveniles less capable of conforming their conduct to the law, while also evidencing that juvenile offense conduct does not necessarily signal a depraved character, the Supreme Court holds juvenile offenders "categorically less culpable than the average criminal." *Roper*, 543 U.S. at 567.[13]

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[12]New Jersey courts have long recognized this fact as relevant to proportionate sentencing of juveniles. *See State v. Koskovich*, 168 N.J. 448, 554 (2001) (Zazzali, J., concurring) ("For what we find offensive about the execution of minors is not merely that they are 'young,' chronologically-speaking, but also that they tend to be immature. This Court has explained that '[i]n determining a defendant's 'relative' youth, a jury must look beyond chronological age to considerations of defendant's overall maturity.'") (quoting *State v. Bey*, 129 N.J. 557, 612 (1992)).

[13]Moreover, as the United States Supreme Court has made clear, the culpability of individuals like Comer "who did not kill or intend to kill" is "twice diminished." *Graham*, 560 U.S. at 69. Because N.J.S.A. 2C:11-3(b)(1) mandates a term of 30 years without parole for all murder convictions, including felony murder, *id.* at 2C:11-3(a)(3), it is particularly constitutionally suspect.

(c) *A term of 30 years without eligibility for parole is harsh punishment.*

A mandatory sentence of 30 years without parole, to be imposed upon every juvenile defendant convicted of murder regardless of personal circumstances or the unique facts of the offense, is a very harsh prison sentence indeed. *See Pratt*, 226 N.J. Super. at 324 (stating of 30-year term without parole, "[o]f course, we acknowledge that the sentence was harsh"); *see also* U.S.S.G. Sentencing Table (2016) (establishing 30-year term as the baseline for the most severe Guidelines range in federal sentencing). Necessarily, an individual who serves a 30-year term spends decades in a punitive, often violent institutional setting, without liberty and cut off from society. *See* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement* 11 (2006) (noting realities of "prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases[14]").

But individuals sentenced to 30 years are not merely forced to endure the deprivations and brutality of a lengthy prison sentence — they are also more vulnerable to the lasting, cumulative, physical and psychological damage that inheres in

[14]The current pandemic makes the prescience of this commentary striking: the incarcerated population in the United States has been infected by COVID-19 at a rate more than five times that of individuals in free society, with a mortality rate that is over 34% higher. *See* Equal Justice Initiative, "COVID-19's Impact on People in Prisons" (April 16, 2021), *available at* https://eji.org/news/covid-19s-impact-on-people-in-prison/

long-term incarceration. The resulting process of "accelerated aging" in people serving long sentences is well-documented: individuals subjected to extended incarceration often "develop[] [] chronic illness and disability at a younger age than the general U.S. population." Brie Williams & Rita Abraldes, "Growing Older: Challenges of Prison and Reentry for the Aging Population," in *Public Health Behind Bars* 56 (ed. Robert B. Greifinger 2007); *accord* B. Jaye Anno, *et al.*, "Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates," U.S. Dep't of Justice (2004)). Indeed, people incarcerated for long terms, on average, lead significantly shorter lives. *See* Sebastian Daza, *et al.*, "The Consequences for Mortality of Incarceration in the United States," Report, Center for Demography and Ecology, at 21 (2019) (longitudinal study documenting diminished life expectancy as correlated with extended incarceration);[15] *see also United States v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006) (noting, with respect to the federal system, "[l]ife expectancy . . . is considerably shortened").

People incarcerated for long terms are also at heightened risk of suffering the psychiatric harms of "institutionalization," *i.e.*, "the process by which inmates are shaped and transformed by

[15] *Available at* file:///C:/Users/Avidf/Downloads/Incarceration_Mortality_Sep_2019.pdf

the institutional environments in which they live." Craig Haney, "The Psychological Impact of Incarceration: Implications for Postprison Adjustment," in *Prisoners Once Removed* 38 (eds. Jeremy Travis & Michelle Waul 2004). These effects, which are "broad-based and potentially disabling," include, "dependence on institutional structure and contingencies, hypervigilance, interpersonal distrust and suspicion, emotional overcontrol, alienation, psychological distancing, social withdrawal and isolation, the incorporation of exploitative norms of prisoner culture, and a diminished sense of self-worth and personal value." *Id.* at 54. Because the process of institutionalization is "progressive or cumulative," meaning "the longer persons are incarcerated, the more significant is the nature of their institutional transformation," the effects for people serving long sentences are most severe. *Id.* at 38.

In addition, and relatedly, people sentenced to long terms face the greatest obstacles in reintegrating into society upon release. Reintegration is challenging under the best of circumstances:

> Upon release to the community, formerly incarcerated individuals face a daunting array of challenges. They often encounter major difficulties in securing housing, employment, and transportation, and they may be ineligible for public benefits. Having been incarcerated frequently results in serious damage to one's personal relationships and community and social

> supports, and the stigma of a criminal record can negatively impact one's social standing.
>
> ["Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety," Columbia Univ. Center for Justice at 62 (2015).[16]]

Accord Craig Haney, "The Psychological Impact of Incarceration," at 48 (noting, "returning prisoners face an extremely complicated transition," and specifically citing challenges related to employment, housing, social reintegration, and stigma). But people sentenced to long terms – who, under the current statutory scheme include *every* juvenile convicted of a murder, regardless of his circumstances or the facts of his case – face not only the additional obstacles of possible physical and psychiatric debilitation discussed above, but also the loss of crucial familial support over decades of incarceration. *See* Bruce Western, *et al.*, "Stress and Hardship After Prison," 120 Am. J. of Sociology 1512, 1517 (2015) ("Connections to family and friends tend to erode with lengthy terms of incarceration and histories of prolonged institutionalization[.]"). In other words, a mandatory sentence of at least 30 years without parole is particularly harsh because it jeopardizes an individual's mental and physical health and ability to fully reintegrate, thus engendering "a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69.

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[16]*Available at* http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pd

And perhaps most significantly, 30 years without parole is especially harsh with respect to juvenile offenders. *See*, *e.g.*, *Graham*, 560 U.S. at 70-71 (that "[l]ife without parole is an especially harsh punishment for a juvenile" is a "reality [that] cannot be ignored"); *see also Zuber*, 227 N.J. at 429, 442, 449 (quoting *Graham*, and noting that the *Zuber* defendants were sentenced for "longer than the time served by some adults convicted of first-degree murder" and "will likely serve more time in jail than an adult sentenced to actual life without parole"). For example, youthful offenders in adult prisons are, empirical evidence shows, more likely to be targeted for assault and sexual violence while incarcerated. *See* Equal Justice Initiative, Report, "All Children Are Children: Challenging Abusive Punishment of Juveniles," at 9 (2017) (juveniles are five times more likely to be sexually assaulted and commit suicide more frequently than adults).

Finally, a mandatory 30-year term beginning in adolescence also necessarily means incarceration during the period when one would otherwise experience the transition to adulthood and the first hallmarks of adult life, potentially including marriage,[17]

[17]According to data provided by the United States Bureau of Labor Statistics compiled through a national longitudinal study of nearly 10,000 individuals born between 1980-84 (Comer was born in 1983), the mean age of initial cohabitation with a dating partner was 25.1, and the mean age of marriage was 27.5. *See* searchable

starting a family,[18] and career development and economic independence.[19] Indeed, because juvenile offenders experience the transition to adulthood in prison, they are more vulnerable to internalizing the norms of prison and so may struggle to ever regain these opportunities:

> Because many younger inmates lack mature identities and independent judgment when they are first institutionalized, they have little internal structure to revert to or rely upon when institutional controls are removed. Consequently, they often face more serious postprison adjustment problems.
>
> [Haney, "The Psychological Impact of Incarceration," at 40.]

That is not to say that upon release in one's mid-to-late 40's, a juvenile incarcerated for 30 years cannot start a family, establish a career, and successfully reintegrate, but it is undeniably much more difficult, as empirical data demonstrates: in one study, upon release from prison, individuals 44 and older, "received less support from family, were more likely to be insecurely housed or

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database *available at* www.nlsinfo.org/content/access-data-investigator

[18]The mean age of individuals within the United States at the time a first child is born is 26.6 years old. *See* Centers for Disease Control, Nat'l Ctr. for Health Statistics, *available at* https://www.cdc.gov/nchs/fastats/births.htm

[19]According to Bureau of Labor Statistics data, the majority of the workforce in the United States is between the ages of 16 and 44, and the median weekly income rises continuously for individuals over this timespan. *See* U.S. Dept. of Labor, Bur. Labor Stats., "Economic News Release" (2017), *available at* https://www.bls.gov/news.release/wkyeng.t03.htm

outside of regular households, and were less likely to be employed." Western, *et al.*, "Stress and Hardship after Prison," 120 Am. J. of Sociology at 1538; *see also* Couloute, Lucius, "Nowhere to Go: Homelessness Among Formerly Incarcerated People," Prison Policy Initiative, at 12 (2018) (study finding that individuals 45 and older were 52% more likely to face housing insecurity than younger counterparts upon release).[20] This 44-and-over population is also the most dependent on public benefits, Western, "Stress and Hardship after Prison," 120 Am. J. of Sociology at 1529, and "shelters or transitional housing programs," *id.* at 1535. Thus, juveniles incarcerated for a mandatory minimum of 30 years face an increased probability of "[e]strangement from family, housing insecurity, and income poverty" and resulting placement "at the margins of society with little access to the mainstream social roles and opportunities that characterize full community participation," *id.* at 1515. In sum, such a sentence exacts a severe physical and psychiatric toll on a juvenile offender, one that greatly diminishes the prospects for a full and productive life upon release. For these reasons,

[20]Comer's prospective reintegration would not pose these sorts of generalized concerns because, as was evidenced at his resentencing, Comer has rehabilitated himself and put together a plan with the assistance of former Governor James McGreevey and the New Jersey Reentry Corporation that would provide for his successful reintegration upon release. *See* A77-83.

the sentence required by N.J.S.A. 2C:11-3b(1) must be considered extremely harsh punishment, particularly as applied to juveniles.

(d) ***The recognized purposes of punishment do not support a mandatory penalty of at least 30 years without parole for juveniles.***

Nor can imposing a mandatory minimum sentence of 30 years without parole on juveniles be justified by any valid penological purpose. That is because each of the four accepted rationales for punishment — retribution, deterrence, incapacitation, and rehabilitation — is incapable of justifying the sentence mandated by N.J.S.A. 2C:11-3b(1) for every case. First, with regard to retribution, as the Supreme Court recognized, the diminished culpability of juveniles means that, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 560 U.S. at 71 (citation omitted).[21] Likewise, with respect to deterrence:

[21]*Graham* analyzed the purposes of punishment in the context of a juvenile non-homicide offender sentenced to life without parole, concluding "[none of the penological rationales] provides an adequate justification." 560 U.S. at 71. "But none of what [*Graham*] said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities — is crime-specific. Those features are evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing," *Miller*, 567 U.S. at 473, exactly as occurred in Comer's case when one looks, as one can where no mandatory sentence applies, to the specific facts of a given case. And just as the mitigating features of youth undermine the purposes of punishment regardless of the charged offense, so, too, do they apply to all harsh punishments, whether life without parole in *Graham* and *Miller*, the functional equivalent of life without parole in *Zuber*, or the 30-year without parole mandatory minimum sentence at issue here. *See People v. Holman*, 91 N.E.3d 849, 861 (Ill. 2017) (in holding *Miller* applicable to discretionary life without parole sentences for

> "[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," they are less likely to take a possible punishment into consideration when making decisions.
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> [*Id.* at 571-72 (citation omitted).[22]]

As for the incapacitation rationale, this can only justify a 30-year mandatory minimum sentence for juveniles if 30 years imprisonment is generally necessary to protect the public from juveniles convicted of murder. *See Graham*, 560 U.S. at 73 (holding incapacitation rationale could justify life without parole for juvenile nonhomicide offenders only if that category of juveniles would pose a continuing risk of criminality for their natural

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juveniles, underscoring the "Supreme Court's far-reaching commentary about the diminished culpability of juvenile defendants, which is neither crime- nor sentence-specific"); *State v. Lyle*, 854 N.W.2d 378, 399 (Iowa 2014) (barring all mandatory minimum sentencing for juveniles, and noting, "the Supreme Court has emphasized that nothing it has said is 'crime-specific,' suggesting the natural concomitant that what it said is not punishment-specific either").

[22]This fact is encoded in New Jersey's juvenile criminal code at N.J.S.A. 2A:4A-44d(1)(a), (b), which makes the maximum penalty for felony-murder 10 years, while the maximum penalty for knowing/purposeful murder is 20. There is no such distinction in the adult criminal code, demonstrating that the New Jersey Legislature recognizes that juveniles have less foresight and diminished judgment, requiring a lesser sentence. This is further "objective indicia" that the 30-year mandatory sentence, without the possibility of parole, imposed on Mr. Comer, who was convicted of felony murder (and was not himself the trigger person), is not constitutionally justifiable.

lives). But to the contrary, established research demonstrates that the overwhelming majority of juvenile defendants, including those convicted of homicide, will not engage in continuing criminal conduct for anywhere near 30 years. Instead, well-established research reveals an "age-crime curve," showing that juveniles cease to pose a risk of recidivism well before 30 years from their initial offense conduct:

> [M]ost forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence (the peak age varies depending on the specific type of risky activity) and declining thereafter. Involvement in violent and nonviolent crime also follows this pattern and is referred to as the "age-crime curve."
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> [Laurence Steinberg, "The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability," 14 Neuroscience 513, 515 (2013)].

Accord Terrie E. Moffitt, "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy," 100 Psych. R. 674, 675 (1993) ("When official rates of crime are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood."); *see also* Jeffery T. Ulmer & Darrell Steffensmeier, "The Age and Crime Relationship: Social Variation, Social Explanations, The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality," at 393-94 (Kevin M. Beaver, *et al.*,

eds. 2015) ("Age is a consistent predictor of crime, both in the aggregate and for individuals. The most common finding across countries, groups, and historical periods shows that crime – especially 'ordinary' or 'street' crime – tends to be a young person's activity.") (citing numerous longitudinal and cross-sectional studies).

Indeed, research demonstrates that a sizeable portion of all offenders, including juveniles, are "immediate desisters," *i.e.* individuals whose first offense is also their last. *See* Megan C. Kurlycheck, *et al.*, "Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Felony Study," 50 Criminology 71, 98 (2012) (citing longitudinal studies showing that between approximately one quarter to one half of offenders desist after their first offense); *see also* Maynard L. Erickson, "Delinquency in a Birth Cohort: A New Direction in Criminological Research," 64 J. Crim. L. & Criminology 362, 364 (1973) (empirical study of 9,945 juvenile delinquents finding that "46 percent were classified as one-time offenders") (citing Marvin E. Wolfgang, *et al.*, *Delinquency in a Birth Cohort* (1972)). And of those juveniles who do not desist immediately, the vast majority do so within a few years of adolescence, such that by their mid-to-late 20's, only a small minority of juvenile offenders (10-15%) continue to engage in criminal behavior. *See* Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 680 (estimating

desistance by mid-to-late 20's at 85%); Steinberg, "The Influence of Neuroscience," 14 Neuroscience at 516 (estimating same at 90%). As to the minority (10-15%) who persist in criminality into and during their 30's, research shows a final wave of desistance in the early 40's, beyond which only 5-6% of former juvenile offenders remain at all likely to recidivate. *See* John H. Laub & Robert J. Sampson, "Understanding Desistance from Crime," 28 Crime & Justice 1, 17 (2001) (describing the small group of "persistent offenders" who remain criminally active, "[a]fter their early 40s, [] their termination [from criminal activity] rates are quite high") (internal citation omitted); Andrew Golub, "The Adult Termination Rate of Criminal Careers," Paper, Carnegie Mellon Sch. of Urban and Public Affairs at 6 (1990)[23] (discussing "the over 40 'burn-out' period during which offenders terminate criminal activity at an increasing rate"). Thus, ultimately only 5-6% of those who commit criminal offenses in adolescence are engaged in criminality 30 years later. Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 676 (identifying "the most persistent" offenders as between "5% or 6%" based on empirical study); Alfred Blumstein, *et al.*, "Delinquency Careers: Innocents, Desisters, and Persisters," 6 Crime & Justice 195 (1985) (finding persistent offenders constituted 5.66% of sample in empirical

[23]*Available at* https://www.ncjrs.gov/pdffiles1/Digitization/132878NCJRS.pdf

study).[24] Critically, this pattern holds equally across offense types, including in the case of violent offenders. *See* Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 680 (age-crime curve "obtains among males and females, for most types of crimes, during recent historical periods, and in numerous Western nations") (internal citation omitted); Laub & Sampson, "Understanding Desistance," 28 Crime & Justice at 52 ("What is also striking . . . is that there appear to be no major differences in the process of desistance for nonviolent and violent juvenile offenders.") (internal citations omitted).

As a result, incarcerating a juvenile offender until his mid-to-late 40's in every case – as N.J.S.A. 2C:11-3b(1) requires – cannot be justified under the incapacitation rationale. Rather, empirical evidence demonstrates that for approximately 95% percent of juvenile homicide offenders, 30 years of incarceration is unnecessary to safeguard against recidivism. *See* Moffitt,

[24]The relatively early age at which most juvenile offenders desist from crime has also been demonstrated through research into average criminal career length. From first to last offense, regardless of the type of crime, the average criminal career is between 5 and 15 years. *See* Alex R. Piquero, *et al.*, "The Criminal Career Paradigm," 30 Crime & Justice 359, 435 (2003) ("Three major studies in the 1970s estimated career lengths to be between five and fifteen years.") (internal citations omitted); Alfred Blumstein, *et al.*, *The Duration of Adult Criminal Careers* 10 (1982) ("The most methodically sophisticated attempt to estimate career lengths . . . . suggest that adult criminal careers for index offenses other than larceny follow an exponential distribution between ages 18 and 40 with a mean total length between 8 and 12 years.") (internal citations omitted).

"Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 676; Blumstein, *et al.*, "Delinquency Careers," 6 Crime & Justice 195. Rather, the extent to which the incapacitation rationale justifies a particular length of sentence must be the subject of an individualized determination.[25]

Finally, with regard to the rehabilitation rationale, as a general matter, prison does not provide inmates with the services most critical to desist from crime and succeed in society. *See, e.g.*, N.J. Reentry Corporation, Report, "Improving Upon Corrections in New Jersey to Reduce Recidivism and Promote Successful Reintegration," at 24-25 (2017) (noting importance of services in fields of "employment and training, housing, licensing, drug and addiction treatment, healthcare access, mentoring, cognitive behavior therapy, education, and legal aid," and stating, "[d]espite an urgent need for reentry services, individuals are denied access while still in custody of [the New

[25]The few juvenile offenders who will persist with criminality beyond 30 years will be identifiable through individualized consideration, including through the parole process, looking, for example, to their institutional records. Indeed, determining an offender's particular risk of recidivism, based on evidence of institutional discipline, is precisely what the parole process is designed to do. *See Trantino v. New Jersey State Parole Bd.*, 154 N.J. 19, 30 (1998) ("The test for parole fitness . . . we repeat, is whether there is a substantial likelihood the inmate will commit a crime if released on parole. Rehabilitation is relevant under that test only as it bears on the likelihood that the inmate will not again resort to crime. It need not be total or full or real rehabilitation in any sense other than there is no likelihood of criminal recidivism.").

Jersey Department of] Corrections, which often results in not receiving any aid at all").[26] Thus, there is little reason to believe that a lengthier prison sentence, let alone one of at least 30 years in every case, better promotes the rehabilitation rationale — and some reason to believe lengthy sentences may have the opposite effect. *See* Francis T. Cullen & Paul Gendreau, "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects," in *Policies, Processes, and Decisions of the Criminal Justice System*, Vol. 3, at 155 (2000) (citing meta-analyses of numerous empirical studies showing that "even when the risk level of offenders is taken into account, those sent to prison have a *higher* rate of recidivism than those given community sanctions. Indeed, it appears that longer prison sentences are associated with *greater* criminal involvement, with offenders in the 'more imprisonment' category having a recidivism rate 3 percentage points higher than those in the 'less imprisonment' category") (emphasis added); *cf. Tapia v. United States*, 564 U.S. 319, 330-32 (2011) (holding that in passing the federal Sentencing Reform Act, 98 Stat. 1987, Congress sent a clear message to the Judiciary: "Do not think about prison as a way to rehabilitate an offender," and accordingly interpreting 18 U.S.C. § 3582(a) to "preclude

[26] *Available at* http://njreentry.org/wp-content/uploads/2017/03/NJRC_CorrectionsReport.pdf

sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation").[27]

Nonetheless, as the sociological research cited above demonstrates, whatever the failings of the prison system to foster rehabilitation, all but a small minority of youthful offenders age out of criminal behavior well before 30 years in any event. In other words, for the vast majority of juveniles, rehabilitation will be achieved in significantly less time than N.J.S.A. 2C:11-3b(1) mandates. *See Lyle*, 854 N.W.2d at 400 ("As much as youthful immaturity has sharpened our understanding to use care in the imposition of punishment of juveniles, it also reveals an equal understanding that reform can come easier for juveniles without the need to impose harsh measures. Sometimes a youthful offender merely needs time to grow."); *see also* Blumstein, *et al.*, *The Duration of Adult Criminal Careers*, at 72 ("The generally short length of [criminal] careers means that . . . comparatively short periods of incarceration [are sufficient]."). Accordingly, the rehabilitative rationale, like the other recognized purposes of punishment, fails to justify a mandatory minimum sentence of 30 years without parole for juveniles, to be imposed in every case regardless of the particular facts and circumstances.

[27]As previously noted, Dr. Dudley specifically testified at Comer's resentencing hearing that Comer would not benefit from additional incarceration because he presently poses no greater risk to society than does any member of the general public. 2T at 64:9-18.

(e) ***Caselaw both within and beyond New Jersey confirms that a mandatory minimum sentence of 30 Years for juveniles is unconstitutional.***

Though the question presented here was not squarely addressed in either *Miller* or *Zuber*, both decisions support Comer's position, as do decisions from several other jurisdictions. Thus, *Miller* called the "foundational principle" of its juvenile sentencing jurisprudence "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children," 567 U.S. at 474, striking down the mandatory punishment there at issue because "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," at 477. The Court reinforced this point in *Jones*, noting, that *Miller* applied the "simple proposition" that "[y]outh matters in sentencing" by holding "that a sentencer must have discretion to consider youth before imposing a life without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence." Slip. Op. at 10. And in *Zuber*, this Court held that "judges must evaluate the *Miller* factors" — *i.e.*, conduct an individualized sentencing that accounts for, among other factors, youth and attendant circumstances — "when they sentence a juvenile to a lengthy period of parole ineligibility." 227 N.J. at 447. Because 30 years without parole is just such a "lengthy period of parole ineligibility,"

such a sentence should only be able to be imposed pursuant to an individualized, discretionary sentence, and not as a matter of mandate under N.J.S.A. 2C:11-3b(1).

Indeed, this Court has made this clear, relying on *Zuber* in holding unconstitutional N.J.S.A. 2C:7-2(g), which "impose[d] categorical lifetime registration requirements for certain sex offenses," as applied to juveniles. *C.K.*, 233 N.J. at 56. Beginning from the premise that, following *Zuber*, "juveniles do not possess immutable psychological or behavioral characteristics" but instead "are works in progress and [] age tempers the impetuosity, immaturity, and shortsightedness of youth," the Court held lifetime registration for juvenile sex offenders unconstitutional. *Id.* at 74. Specifically, the Court held that the statute at issue created an "irrebuttable presumption [that] disregards any individual assessment" in defiance of "scientific and sociological studies [and] our jurisprudence," rendering the statute devoid of any rational basis. *Id.* at 74-75. In doing so, the Court made clear that the unique deficits of juveniles, coupled with their increased capacity for reform, render mandatory sentencing provisions (even those other than life without parole and its functional equivalent) inappropriate for juveniles.

Nor was this Court alone in so holding. To the contrary, authorities from other jurisdictions have similarly banned mandatory penalties short of life without parole as applied to

juveniles. *See, e.g.*, *Lyle*, 854 N.W.2d at 402 (holding all mandatory minimum sentences for juveniles unconstitutional and stating, "*Miller* is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children. Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults"); *State v. Houston-Sconiers*, 391 P.3d 409 (Wa. 2017) (holding all mandatory minimum sentences for juveniles unconstitutional, stating, "[i]n accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system . . . . To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled"); *State v. Dull*, 351 P.3d 641, 660 (Kan. 2015) (holding "mandatory lifetime postrelease supervision [] categorically unconstitutional under *Graham* when imposed on a juvenile" convicted of particular sex offenses because "the same factors that result in a diminished culpability for juveniles . . . . all diminish the penological goals of lifetime supervision for juvenile sex offenders"); *see also Jones*, Slip. Op. at 11 ("*Miller* required a discretionary sentencing procedure . . . . [because] a mandatory life-without-parole sentence for an offender under 18 'poses too great a risk of disproportionate punishment.') (quoting *Miller*, 567 U. S. at 479).

These authorities, and the proportionality analysis discussed above, establish that the mandatory sentencing scheme set forth in N.J.S.A. 2C:11-3b(1) is unconstitutional as applied to juveniles. Because a mandatory sentence of 30 years without parole was imposed upon Comer here, his sentence should be vacated and the matter remanded for resentencing.

(f) ***Comer's case is a powerful example of why, as a matter of constitutional law, individualized, discretionary sentencing for juveniles convicted of murder is required.***

The excessiveness of a mandatory term of 30 years without parole for every juvenile convicted of murder is no mere abstract proposition: it is evident in Comer's particular case. Thus, the uncontested proof at resentencing showed that Comer was born into a traumatic environment marked by instability, abuse, and neglect, where drug use, criminality, and violence were Comer's only reality. 4T at 79:22-24 (resentencing court stated, "[t]his Court finds that the Defendant grew up in an environment that forced his criminal behavior."). These circumstances damaged Comer, compounding the usual developmental shortcomings of youth:

> [H]is life experiences were such that it made it all the more difficult for him to develop the capacity to objectively assess his situation and the problems that he was facing, and also made it all the more difficult for him to develop the capacity to come up with reasonable, hypothetical alternatives for responding to his situation or the problems he was facing. For example, as a result of his trauma-related over-reactivity and the impulsivity that was characteristic of his

> other developmental difficulties, it was all the more difficult for him to slow down and hold whatever options he might have come up with in his head long enough to weigh the pros and cons of those options. And of course, for example, as a result of those same difficulties it was also more difficult for him to identify and select the best option and then make a plan to implement that option.
>
> [CA64 (Expert Report of Dr. Richard J. Dudley, Jr.).]

But time has "demonstrate[d] the truth of *Miller*'s central intuition — that children who commit even heinous crimes are capable of change." *Montgomery*, 577 U.S. at 216. Thus, the resentencing court found that after over 18 years in prison, "Defendant has shown an ability to be rehabilitated." 4T at 80:3. This finding was well-supported, including by Comer's participation in numerous programs, among them mentorship and spiritual activities, as well as the absence of any disciplinary infractions over several years, *id.* at 74:15 - 75:12, and the uncontested testimony of his examining psychiatrist that "more time [would not] make him safer," 2T at 64:9-10. Indeed, at the time of Comer's resentencing, he had formulated a reentry plan with the assistance of former Governor James McGreevey and the New Jersey Reentry Corporation, which included provisions for training as a carpenter, immediate housing assistance, mentorship, and other means of essential support. A77-83.

Given this proof, an appropriately individualized, discretionary decision of either the trial court or the Parole Board would have provided for Comer's prompt release from prison. That is because the principles underlying modern juvenile sentencing law, coupled with the evidence before the court, made plain that Comer's continued incarceration cannot be justified by any penological rationale. Yet Comer now stands compelled to serve an additional term of 12 years by virtue of N.J.S.A. 2C:11-3b(1)'s mandatory minimum sentencing provision — a purposeless and disproportionate punishment that will serve only to delay Comer's reentry and deprive him of further time to achieve the "fulfillment outside of prison walls" of which he is so clearly capable. *Graham*, 560 U.S. at 75. In sum, Comer exemplifies the constitutional flaw of applying the mandatory sentencing provision of N.J.S.A. 2C:11-3b(1) to juveniles, and the Court should accordingly vacate and remand so that Comer may be sentenced based not upon some mandatory scheme but instead, in accord with his personal circumstances, rehabilitation, and potential for redemption.

II. THE APPELLATE DIVISION'S DECISION WAS LEGAL ERROR. (12a-32a)

The Appellate Division upheld the constitutionality of N.J.S.A. 2C:11-3b(1) on two bases: reliance on *Pratt*, 226 N.J. Super. 307, and deference to the Legislature. Both bases led the court into error. *Pratt*, which is not binding on this Court, was

decided in a vastly different era and reflects a "'just deserts' approach to juvenile crime," *id.* at 327 — an approach roundly rejected by the subsequent sea change in juvenile sentencing law. Nor was the Appellate Division correct that Comer's challenge should be resolved by the Legislature. Constitutional adjudication is, of course, the province of the Judiciary, and this Court has not shied from resolving difficult questions to protect the constitutional rights of New Jerseyans, including those convicted of the State's worst crimes. Accordingly, the Appellate Division's reasoning cannot stand and should be reversed.

(a) State v. Pratt *is neither binding nor persuasive and should be reversed.*

The Appellate Division held that "*Pratt* is directly on point and remains good law." *Comer*, 202 WL 2179075, at *8. As a preliminary matter, the decision of the Appellate Division in *Pratt* is, of course, "not binding upon this court." *New Amsterdam Cas. Co. v. Popovich*, 18 N.J. 218, 224 (1955). But neither is it persuasive.

Pratt, which upheld N.J.S.A. 2C:11-3b(1) as applied to juveniles, was decided 33 years ago. But challenges under the Eighth Amendment and Article I, Paragraph 12 must "look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 58

(internal citations and quotation marks omitted). Courts must therefore revisit and reverse prior decisions where societal consensus and scientific understanding have evolved. *See*, *e.g.*, *Roper*, 543 U.S. 551 (reversing *Stanford v. Kentucky*, 492 U.S. 361 (1989), decided 16 years earlier, in barring capital punishment for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 307, 314 (2002) (reversing *Penry v. Lynaugh*, 492 U.S. 302 (1989), decided 13 years earlier, in barring capital punishment for individuals with intellectual disability, noting, "much has changed").

In this case, "much has changed" since *Pratt*. The intervening decades have seen a transformation in the constitutional law of juvenile punishment, manifested in the Supreme Court decisions in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*, as well as this Court's decisions in *Zuber* and *C.K.* Indeed, *Pratt* itself made clear that it was writing on a completely blank slate. 226 N.J. Super. at 326 (acknowledging, "our research has disclosed no reported New Jersey decision pertaining specifically to juveniles"). But the slate is no longer blank; instead, it is filled with modern decisions rooted in recent, empirical research showing fundamental differences in the maturity, decision-making, susceptibility to peer-pressure, and capacity for change of juveniles as compared to adults. And those differences render juveniles less culpable for even the most serious offenses, undermining the conventional justifications for punishment. *See*

supra at 15-19. Further, in the wake of this jurisprudence and the underlying science, society has embraced limits on mandatory sentences imposed upon juveniles, revealing an emerging but strong consensus that there should be at least the possibility, based upon individual circumstances, of eligibility for release well before serving 30 years. *See supra* at 21-24. In short, *all* the relevant considerations under the requisite proportionality review have changed since *Pratt* was decided, making that decision obsolete.

Indeed, *Pratt* relied on law and societal norms that have since been outright rejected. For example, the *Pratt* defendant argued that N.J.S.A. 2C:11-3b(1) violated the requirement of individualized sentencing articulated in the death penalty context, citing *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). The Appellate Division held those decisions "plainly inapposite" because "'[d]eath as a punishment is unique in its severity and irrevocability.'" *Pratt*, 226 N.J. Super. at 325 (citation omitted). But *Miller* expressly disclaimed any such distinction, holding that "if 'death is different,' children are different too," and citing *Woodson* to support its requirement of individualized sentencing. *Miller*, 567 U.S. at 475, 481. As noted, the Supreme Court further adhered to that same principle in *Jones*. *See* Slip. Op. at 9 ("*Miller* . . . required a sentencing procedure similar to

the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases such as *Woodson*[.]").

Further, *Pratt* justified its holding in light of "public concern about unrehabilitated, violent youthful offenders [that] ha[d] 'stimulated a 'just deserts' approach to juvenile crime.'" 226 N.J. Super. at 326 (citations omitted). But since *Pratt*, both scientific research and objective indicia of societal values have turned away from the so-called "superpredator myth," recognizing it as not only unfounded but, worse, a product of invidious racial stereotypes. *See* Equal Justice Initiative, Report, "The Superpredator Myth, 20 Years Later" (2014)[28]; *see also* Amicus Curiae Br. of Jeffrey Fagan, *et. al* in Supp. of Pet. in *Miller v. Alabama*, 567 U.S. 460 (2012), 2012 WL 174240, at *37 (academics who first promulgated "the superpredator myth" expressed regret for advancing a theory that "threw thousands of children into an ill-suited and excessive punishment regime"). Thus, the modern revolution in juvenile sentencing reflects a movement away from the retributive approach *Pratt* endorsed, underscoring instead the primacy of rehabilitation and second chances, based upon the individual facts of a given case. *See Zuber*, 227 N.J. at 446 (calling "the essence" of the decision in *Montgomery* that juveniles

[28]*Available at* https://eji.org/news/superpredator-myth-20-years-later/

"must be given the opportunity to show their crime did not reflect irreparable corruption" so that they may be released); *Miller*, 567 U.S. at 478 (requiring individualized sentencing because "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it"); *Graham*, 560 U.S. at 79 (decrying LWOP for juvenile nonhomicide offenders because it leaves "no chance for fulfillment outside prison walls, no chance for reconciliation with society"). In sum, *Pratt* does not reflect the current state of the law, let alone contemporary standards of decency, all these years later. It should rejected. Instead, conducting its own proportionality review as informed by modern law, science, and social consensus, this Court should hold that a 30-year mandatory minimum sentence for juveniles fails to pass constitutional muster.

(b) *This Court should resolve the fundamental constitutional question presented here.*

The Appellate Division held that "the actions (and inactions) of our Legislature" support N.J.S.A. 2C:11-3b(1)'s continued application to juveniles, and that "debate over applying the thirty-year minimum to juvenile murderers should [accordingly] proceed in the Legislature." *Comer*, 2020 WL 2179075, at *10, *11. This approach fundamentally misconstrues the role of the Judiciary in our constitutional system. Both the Federal and State Constitutions limit the power of the Legislature, which limits the

Judiciary has the authority and obligation to enforce as a matter of its power of judicial review. *See State v. Buckner*, 223 N.J. 1, 52 (2015) ("In the end, this Court is the final arbiter of the Constitution. . . . That is a lesson passed on to us from the landmark case of *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), which stands for the bedrock principle of judicial review and the primacy of the Constitution over legislation."); *DePascale v. State*, 211 N.J. 40, 43 (2012) ("Because one of the core functions of the judiciary is to serve as the guardian of the fundamental rights of the people — rights enshrined in the Constitution — the judiciary, at times, must restrain legislative initiatives . . . that may threaten those rights and violate the Constitution."). That duty is no less essential in the context of determining whether a particular punishment is cruel and unusual under Article 1, Paragraph 12 or the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86, 103 (1958) (applying the Eighth Amendment to strike down a legislative enactment because, "[t]he provisions of the Constitution are not . . . hollow shibboleths. . . . They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules."); *Gerald*, 113 N.J. at 89 (striking down application of death penalty to a particular type of offense under Article 1, Paragraph 12).

That this Court in *Zuber* initially asked the Legislature to demarcate a term of years by which a juvenile would necessarily receive "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" does not diminish the Court's constitutional duty now. 227 N.J. at 452-53 (quoting *Graham*, 560 U.S. at 75). *Zuber* rightly foresaw that sentencing a juvenile to a "lengthy period of parole ineligibility" would "raise serious constitutional issues" if the juvenile could later establish that he had been rehabilitated but remained ineligible for release. *Id.* But because such a claim was not then before the Court, *Zuber* appropriately referred the matter to the Legislature "[t]o avoid a potential constitutional challenge in the future[.]" *Id.* at 452 ("We cannot address such a claim now."). The Legislature, however, has failed to act, and now the challenge that *Zuber* foresaw is squarely presented.

This Court has never hesitated to act in the face of legislative inaction where constitutional rights are implicated, even when it first provided the Legislature with the opportunity to address the issue. *See, e.g., S. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Twp.*, 92 N.J. 158, 212, 213 n.7 (1983) (*Mount Laurel II*) (Court would "exercise [its] traditional constitutional duty" though the issue was "especially appropriate for legislative resolution" because "enforcement of constitutional rights cannot await a supporting political consensus."); *see Robinson v. Cahill*,

69 N.J. 133, 147 (1975) ("'[J]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence.'") (quoting *Marbury*, 1 Cranch at 163); *see also Abbott v. Burke*, 100 N.J. 269, 282 (1985) ("[W]hen legislative inaction threatens to abridge a fundamental right . . . , the judiciary must afford an appropriate remedy").

Nor should the Court hesitate to act now. Where, as here, Comer squarely presents a claim that his mandatory sentence is unconstitutional, deference is improper, and the Court should instead afford a remedy consistent with its constitutional obligation. Applying the requisite proportionality review in the manner described above, the Court should accordingly hold the mandatory sentencing provision of N.J.S.A. 2C:11-3b(1) disproportionate in the case of juveniles.

CONCLUSION

For the foregoing reasons, this Court should hold N.J.S.A. 2C:11-3b(1) unconstitutional as applied to juveniles, vacate Comer's sentence, and remand for resentencing consistent with the Court's decision.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Attorney ID No. 023131983
GIBBONS P.C.

Alexander Shalom, Esq.
Attorney ID No. 021162004
Jeanne LoCicero, Esq.
Attorney ID No. 024052000
American Civil Liberties Union of New Jersey

Avram D. Frey, Esq.
Attorney ID No. 188002016

Counsel for Petitioner James Comer

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