STATE OF NEW JERSEY, Respondent, VS. JAMES ZARATE, Appellant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 084516 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-2001-17T3

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY ON BEHALF OF APPELLANT JAMES ZARATE

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of New Jersey (ACLU-NJ) sought leave and was granted permission to participate in this matter before the New Jersey Superior Court, Appellate Division based upon the ACLU-NJ's long-standing commitment to protecting the rights of juveniles given their unique vulnerabilities and capacity for reform. That interest is set forth in detail in the ACLU-NJ's Motion for Leave to Participate before the Appellate Division, incorporated by reference as if fully set forth herein.

INTRODUCTION

This case presents two issues arising out of the Court's landmark decision in *State v. Zuber*, 227 N.J. 422 (2017): 1) how, under Article 1, paragraph 12 of the New Jersey Constitution, the five factors listed in *Miller v Alabama*, 567 U.S. 460, 477-78 (2012), are to be applied in sentencing juveniles; and 2) at what point, under the State Constitution, must a juvenile be afforded an opportunity to demonstrate maturity and rehabilitation so that he may be released.

In *Miller*, the United States Supreme Court held that juveniles convicted of homicide may not be sentenced to life without parole absent consideration of five factors:

> "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.]

Zuber went further, holding that under Article 1, paragraph 12, sentencing courts must consider the *Miller* factors when they consider imposing a "lengthy period of parole ineligibility" upon a juvenile, whether for one offense or several. 227 N.J. at 447.

But *Zuber* also recognized that even where a court properly applies the *Miller* factors, the sentence imposed might later prove unconstitutional if the defendant demonstrated maturity and rehabilitation years before becoming eligible for release. *Id.* at 452. Because that issue was not squarely presented, the Court asked the Legislature to provide for "later review of juvenile sentences," citing with approval enactments from other States requiring that such "later review" occur sometime between 15 and 30 years after the commencement of incarceration. *Id.* at 430, 452-53, 452 n.4. The Legislature, however, has since failed to act.

Mr. Zarate's second resentencing now requires the Court to further develop both aspects of the *Zuber* holding. That is so first because the record is clear that the resentencing court

alternatively misconstrued and refused to apply the *Miller* factors, settling on a term of 50 years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. – or 42.5 years without eligibility for parole – because the State recommended it as the likely maximum term allowable by law. *See* 4T29:22-25. But *Zuber* did not direct courts to simply discount the sentence they would otherwise impose in order to comply with some upper limit for juveniles – rather, *Zuber* holds that *Miller* sets forth certain mitigating factors that *must* be given careful consideration and appropriately weighed in determining the overall sentence. Indeed, the recent decision of the United States Supreme Court in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), reaffirms that requirement, holding that the *Miller* factors are precisely the kind of mitigating evidence that is pertinent to juveniles facing long sentences. And because *Zuber* was decided independently under New Jersey law and our Constitution, the record must reflect proper application of the *Miller* factors for purposes of appellate review, notwithstanding *Jones*' more limited interpretation of the Federal Constitution on this point. Accordingly, this Court should vacate and remand for appropriate consideration of the *Miller* factors.

Second, Zarate's sentence of 42.5 years without parole eligibility requires this Court to take up the task that the Legislature has declined to undertake in the wake of *Zuber*: to draw the constitutional line by which time a juvenile must be

afforded a chance to gain his release by demonstrating maturation and reform. In performing this task, the Court should be guided by established social science research of precisely the type upon which this Court, following the United States Supreme Court, has relied in this area. In this case, the research establishes the fact of an "age-crime curve" whereby even juveniles convicted of serious offenses overwhelmingly age out of crime within 15 years. Thus, the Court can and should draw a principled line at 15 years as the time at which juveniles must be provided a meaningful opportunity to earn their release through demonstrated maturation and reform. Because Zarate's 42.5 years of parole ineligibility well exceeds this marker, for this reason as well, the Court should vacate Zarate's sentence and remand for resentencing.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY

Amicus adopt the Statements of Procedural and Factual History in Defendant Zarate's opening brief before the Appellate Division. *See* Def. App. Div. Br. at 1-12.

ARGUMENT

I. Zarate's Sentence Should Be Vacated And The Matter Remanded For Appropriate Consideration Of The *Miller* Factors.

This Court's decision in *Zuber* mandates that sentencing courts apply the *Miller* factors to determine an appropriate overall sentence before imposing a "lengthy period of parole ineligibility" on a juvenile. 227 N.J. at 447. In the case of juveniles facing potentially long terms of imprisonment, this

Court has thus been clear that sentencing courts must consider the mitigating evidence under each *Miller* factor in determining a proportionate sentence. The Supreme Court's recent decision in *Jones* confirms this understanding of the purpose of the *Miller* factors. And to the extent that *Jones* held that consideration of the *Miller* factors need not be explicit in the record under the Federal Constitution, that holding is inapplicable here; New Jersey law requires that discretionary decisions impacting the overall sentence *must* be explained in substance on the record, and *Zuber* extended this requirement to application of the *Miller* factors for juveniles facing lengthy terms of incarceration under Article 1, paragraph 12 of the New Jersey Constitution – precisely as *Jones* held that states are free to do as a matter of their own law. Here, because the court below did not properly consider the *Miller* factors in determining Zarate's sentence, the Appellate Division's decision to the contrary should be reversed.

A. *Zuber* requires that courts consider and give weight to the *Miller* factors in determining the appropriate sentence.

In *Zuber*, this Court vacated and remanded with instructions that, "[a]t a new sentencing hearing, the trial court should consider the *Miller* factors when it determines the length of [defendant's] sentence and when it decides whether the counts of conviction should run consecutively," 227 N.J. at 453, "direct[ing] trial judges to exercise a heightened level of care

before imposing multiple consecutive sentences on juveniles," *id.* at 450. *See also id.* at 450 ("[J]udges 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."). In this manner, the Court made clear that the *Miller* factors are mitigating factors that must be considered and given significant weight in determining an appropriate overall sentence.

In keeping with this understanding of the purpose of the *Miller* factors, the Legislature recently enacted a new statutory mitigating factor (factor 14), requiring sentencing courts to consider whether "[t]he defendant was under 26 years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1b(14). That factor was specifically added in response to a recommendation of the New Jersey Criminal Sentencing and Disposition Commission, *see* A4369, 219th Legis. (June 29, 2020) (Statement), which expressly sought to embody the *Miller* holding in New Jersey law. *See* New Jersey Crim. Sentencing & Disposition Comm'n, Annual Report, at 26 (2019).[1] In this way, the Legislature sought to codify this Court's holding by rendering the characteristics of youth delineated in *Miller* mitigating factors which must be

[1] *Available at* https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf

considered in "determining the appropriate sentence to be imposed[.]" N.J.S.A. 2C:44-1b.

Of course, this requirement flows naturally from *Miller* itself. There, the Supreme Court struck down mandatory life without parole for juveniles precisely because such schemes deprive courts of the ability to construct an individualized, proportionate sentence in relation to a particular defendant's "chronological age and its hallmark features." 567 U.S. at 477; *id.* at 476-77 ("[T]he flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders" are that "every juvenile will receive the same sentence as every other . . . . And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults[.]"); *id.* at 489 ("*Graham*, *Roper* [*v. Simmons*, 543 U.S. 551 (2005)], and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances[.]"). Moreover, *Miller* itself made clear that evidence supporting the *Miller* factors serves an important mitigating purpose and courts must give it great weight, in significant part because the developmental shortcomings of youth apply categorically to *all* juveniles. *Id.* at 479 ("[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."); *see also*

Montgomery v. Louisiana, 577 U.S. 190, ("[*Miller*] established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'") (citation omitted).

In *Jones*, the Supreme Court reaffirmed this understanding of *Miller*. To be sure, *Jones* held that, before sentencing a juvenile to life without parole, a court need neither "make a separate factual finding that the defendant is permanently incorrigible" nor "provide an on-the-record sentencing explanation with [such] 'an implicit finding[.]'" 141 S.Ct. at 1311. But that is so, *Jones* held, because the *Miller* factors are "sentencing factor[s] akin to [] mitigating circumstance[s]," not an "eligibility criterion" for a juvenile sentence of life without parole. *Id.* at 1315; *see also id.* at 1316 ("*Miller* . . . required that a sentencer consider youth as a mitigating factor[.]"). Thus, *Jones* stressed that the purpose of the *Miller* factors is to account for a defendant's youth in sentencing. And *Jones* reiterated that proof under the *Miller* factors is powerful mitigation, citing with approval data showing that *Miller* had "been consequential," "result[ing] in numerous sentences less than life without parole." *Id.* at 1322. In sum, *Jones* is in accord with *Zuber*, and now with the Legislature, in viewing the *Miller* factors as mitigators. Accordingly, courts must consider and give weight to evidence under the *Miller* factors in determining an appropriate sentence for a juvenile facing a

potentially "lengthy period of parole ineligibility." *Zuber*, 227 N.J. at 447.

B. Sentencing courts in New Jersey must make their findings under the *Miller* factors on the record, notwithstanding the United States Supreme Court decision in *Jones*.

Sentencing courts in New Jersey must make consideration of the *Miller* factors explicit on the record. That is, under State law, any exercise of sentencing discretion must be explained and preserved. *See State v. Torres*, 2021 WL 1883923, at *15 (N.J. May 11, 2021) ("[E]xplanation for the overall fairness of a sentence . . . is required . . . in [] discretionary sentencing settings[.]"); *State v. Pillot, 115* N.J. 558, 565 (1989) ("[A] fundamental aspect of the sentencing process is the requirement that judges clearly articulate their reasons for imposing a sentence."); *see also* N.J.S.A. 2C:43-2(e) ("The court shall state on the record the reasons for imposing the sentence . . . ."); *R.* 3:21-4(g)("At the time sentence is imposed the judge shall state reasons for imposing such sentence . . . .").

Moreover, the court's explanation must be substantive, as "[m]erely enumerating factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis." *State v. Kruse*, 105 N.J. 354, 363 (1987); *see also State v. Fuentes*, 217 N.J. 57, 70 (2014) ("When the trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court

may remand for resentencing."). Such qualitative analysis on the record is "a necessary prerequisite for adequate appellate review." *State v. Miller*, 108 N.J. 112, 122 (1987); *see also Fuentes*, 217 N.J. at 74 ("A clear and detailed statement of reasons is [] a crucial component of the process conducted by the sentencing court, and a prerequisite to effective appellate review."); *Kruse*, 105 N.J. at 360 ("[T]he court must describe the balancing process leading to the sentence. . . . [or else] appellate review becomes difficult, if not futile."). Review on appeal, of course, is essential to ensuring compliance with the "critical sentencing policies of the Code," *i.e.* uniformity, predictability, proportionality, and fairness. *Torres*, 2021 WL 1883923, at *13-15.

Under *Zuber*, as noted, application of the *Miller* factors is a constitutionally mandated exercise of discretion with significant impact on the ultimate sentence. As a result, under New Jersey law, sentencing courts must explain, substantively and in detail, the consideration and weight given to each factor, and that "heightened level of care" must be preserved to ensure compliance with the sentencing Code and Article 1, paragraph 12, through appellate review. *Zuber*, 227 N.J. at 450.

In this regard, New Jersey law, under our Constitution, parts company with the United States Supreme Court's decision in *Jones*. *Jones* held that under the Federal Constitution, "an on-the-record

sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth" because "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth." 141 S.Ct. at 1319. But that *ipse dixit* interpretation of the Eighth Amendment has no effect on *Zuber*, which was explicitly grounded in Article I, paragraph 12 of the New Jersey Constitution, as well.[2] As this Court wrote:

> To satisfy the Eighth Amendment *and* Article I, Paragraph 12 of the State Constitution, which both prohibit cruel and unusual punishment, we direct that defendants be resentenced and that the *Miller* factors be addressed at that time.
>
> [227 N.J. at 429 (emphasis added).]

Indeed, the Court was careful to note that "the State Constitution can offer greater protection in this area," citing *State v. Gerald*, 113 N.J. 40, 76 (1988), further making clear that its holding rested independently on Article 1, paragraph 12. *Zuber*, 227 N.J. at 438. And, as discussed above, such "greater protection" includes New Jersey's unique emphasis on the importance of sentencing courts providing a thorough analysis of discretionary sentencing

[2]Indeed, the *Jones* Court specifically approved of States affording additional constitutional protections to juvenile defendants, noting, "[i]mportantly, . . . our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18," including "requir[ing] sentencers to make extra factual findings" or "direct[ing] sentencers to formally explain on the record" the sentence imposed. 141 S.Ct. at 1323.

decisions on the record – not only because statutes and Rules of Court require it, but also because the development of a record serves as a critical guarantee of fairness and proportionality, in accordance with the New Jersey Constitution. *See*, *e.g.*, *Torres*, 2021 WL 1883923, at *14 ("[W]e require an explicit explanation for the overall fairness of a sentence, in the interest of promoting proportionality for the individual who will serve the punishment.").[3] In sum, irrespective of *Jones*, sentencing courts in this State must make detailed, qualitative application of the *Miller* factors a matter of record.

C. The resentencing court did not properly apply the *Miller* factors.

The court below did not apply the *Miller* factors to determine an appropriate sentence, as *Zuber* requires. 227 N.J. at 450, 453. Instead, the court cited irrelevant considerations and ignored pertinent evidence, ultimately giving no weight to any factor associated with youth even though Zarate was only 14 at the time of offense.

Initially, the court inappropriately discounted the first *Miller* factor, Zarate's "chronological age," "immaturity," and

[3]Indeed, *Jones* supported its conclusion by adding that "many States traditionally have not legally required (and some States still do not legally require) on-the-record explanations by the sentencer[.]" *Id.* at 1321. But that is not so in New Jersey, which certainly does. *See* N.J.S.A. 2C:43-2(e); *R.* 3:21-4(g); *Miller*, 108 N.J. at 122 (1987); *Fuentes*, 217 N.J. at 74; *Kruse*, 105 N.J. at 360.

"impetuosity," *Miller*, 567 U.S. at 477, because Zarate's defense strategy suggested intelligence. 4T55:22 – 56:4 (describing Zarate, based on a trial stipulation, as "[c]unning," and contending that, "it shows once again that he's bright which . . . doesn't negate *Miller* factor one but reduces some of its forcefulness"); *id.* at 65:13-19 ("Zarate . . . was familiar with the current proceedings as to juvenile sentencing as well as other issues . . . . Once again, he's bright. That[] relates to . . . *Miller* factor[] one[.]"); *id.* at 75:9-11 ("[T]he defendant's intelligent cunning, mitigates against the circumstances set forth in the first *Miller* factor."). But, even assuming that the actions at issue were as crafty as the court believed, such technical aspects of Zarate's defense cannot fairly be attributed to Zarate himself for purposes of the *Miller* inquiry. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Rodriguez v. Rosenblatt*, 58 N.J. 281, 295 (1971) ("[T]he untrained defendant is in no position to defend himself . . . even where there are no complexities[.]"). Moreover, the pertinent social science teaches that even if Zarate was a bright 14-year-old, this says nothing about his immaturity or impetuosity. *See* Lawrence D. Cohn & P. Michiel Westenberg, "Intelligence and Maturity: Meta-Analytic Evidence for the Incremental and Discriminant Validity of Loevinger's Measure of Ego Development,"

86 J. of Personality & Social Psych. 760, 767 (2004) (meta-analysis of 42 studies involving over 5600 participants concluded "unequivocally" that "intelligence" and "impulse control, perspective taking, [and] self-reflection," are "conceptually and functionally distinct concepts.").

Meanwhile, the court disregarded the most relevant proof – that Zarate was only 14 – because the defense presented no expert to confirm that the "hallmark features" of youth applied to Zarate. *See* 4T62:14-18 (examining psychiatrist provided "no evidence of . . . any indicia of what I am to consider under *Miller* factor one[.]"); *id.* at 66:9-14 ("There was nothing specific by way of testing or otherwise that was provided about the defendant's lack of brain development[.]"). But this holding ignores the *legal significance*, under the precedents of the Supreme Court and now of this Court, of the fact that Zarate was only 14 years old. That is, individualized proof that youth affected Zarate's actions is not necessary for purposes of the first *Miller* factor, especially in the case of a 14-year-old. Rather, the modern revolution in juvenile sentencing is premised on "[t]hree *general* differences," well-established in the literature, that are common to all adolescents. *Roper*, 543 U.S. at 569 (citing "scientific and sociological studies") (emphasis added); *accord Miller*, 567 U.S. at 472 n.5 ("'[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen

the Court's conclusions' [in *Roper* regarding the ways in which all juveniles are different].") (citation omitted). Accordingly, the trial court should have accorded significant weight to the first *Miller* factor. *See State v. Roby*, 897 N.W.2d 127, 145 (Iowa 2017) ("The [first *Miller*] factor draws upon the features expected to be exhibited by youthful offenders that support mitigation" and is "the basis for the core constitutional protection extended to juvenile offenders").

The court's application of the other *Miller* factors followed the same pattern. Considering the second factor, the "family and home environment," *Miller*, 567 U.S. at 477, the court assigned no weight because, *inter alia*, Zarate's family "rall[ied] in support of the defendant," 4T at 66:23, including by writing letters at resentencing, *id.* at 54:14-17; the court thus treated the family's provision of relevant evidence as undermining this factor, making it essentially unprovable. Nor does the family's "support" at sentencing have any bearing on whether a "pathological background might have contributed to a 14-year-old's commission of a crime." *Miller*, 567 U.S. at 479-80. More pertinent was proof concerning "the trauma of [Zarate's] mother's seventh-month miscarriage and the separation of his parents," but the court treated presentation of this history only as more evidence of cunning, which again, the court held against Zarate. 4T at 52:21-24 (responding to Zarate's description of familial trauma, "[t]he point is that this was and

is a bright and intelligent individual."). Astoundingly, the court even found the second mitigating factor undermined by an inference that Zarate's family assisted in covering up the murder. *Id.* at 57:14-25 ("[W]hat about the clean up of the blood, which it's acknowledged existed? . . . . And what about the odor from the bleach . . . and other materials that were used to clean up? Are we to believe that they would go unnoticed by his family, especially the odor? That plays into *Miller* factor two."). Certainly such an inference suggests a "dysfunctional" home environment, not a secure one. *Miller*, 567 U.S. at 477.

As for the third *Miller* factor, the defendant's role in the offense and the extent of "familial and peer pressures," *Miller*, 567 U.S. at 477, the incontrovertible proof was that Zarate committed the offense with an older brother whom "he had looked up to" and who "cared for him like a father after the [parents'] divorce." *State v. Zarate*, 2020 WL 2179126, at *13 (App. Div. May 6, 2020). The court found this factor foreclosed, however, because Zarate's defense at trial – that he was not a party to the murder but only the cover-up – had failed. 4T at 68:18-19 ("[T]he jury has already decided that for me."). Yet the jury's verdict says nothing about the role of sibling pressure in Zarate's participation in the murder. On this latter point, the court said only that, "[Zarate] requested his attorney to file certain motions and . . . make certain objections," concluding, "[t]his defendant's

not a follower." *Id.* at 54:19-24.[4] But this statement demonstrates a complete failure to consider how Zarate's relationship to his brother impacted his offense conduct.

Regarding the fourth *Miller* factor, the ways that youth handicaps a defendant in the criminal system, *Miller*, 567 U.S. at 477, the court also assigned no weight, again improperly, and without basis, attributing the actions of defense counsel to Zarate personally. 4T at 55:22-25 ("Cunning. You get your statement in evidence with no opportunity for anyone to cross-examine you on the statement. Certainly that bears upon *Miller* factor four."); *Id.* at 56:11-14 ("He got that version in evidence with the State's consent without testifying. Bright. Cunning. Relates to *Miller* factor four, capacity to assist his own attorneys.").

Finally, regarding the fifth *Miller* factor, the possibility of rehabilitation, *Miller*, 567 U.S. at 478, the court stated, "I'll make it clear, permanent incorrigibility is not my finding." 4T at 44:24-25. Yet the court then went on to ignore the impact of this

[4]The court also noted its "observations with respect to the defendant's brother during his case," from which the court "assess[ed] some maturity," in contrast with Zarate. 4T at 48:17-20. To the extent the court considered this out-of-court evidence in Zarate's case, this was error. *See Bruton v. United States,* 391 U.S. 123 (1968) (admission of evidence from non-testifying co-defendant, not independently admissible in defendant's case, violates Confrontation Clause). In any event, the observation that Zarate's brother was more mature than Zarate is exactly the point, and should weigh in Zarate's favor, rather than (somehow) against him, under the third factor.

very finding, stating "rehabilitation is difficult for me to assess . . . . [b]ecause according to the defendant, he didn't do anything related to the slaying[.]" *Id.* at 73:3-6. Whether Zarate is *yet* sufficiently mature to concede a role in the slaying and show remorse, however, is distinct from whether he is capable of such rehabilitation in the future. Indeed, "[l]ack of demonstrated remorse is yet another feature of a child's immaturity." *People v. Eliason*, 833 N.W.2d 357, 384 n.6 (Mich. Ct. App. 2013) (Gleicher, P.J., concurring in part and dissenting in part). Because, having itself found that Zarate is not incorrigible, the failure to assign any mitigating weight to factor five – the possibility of rehabilitation – is inconsistent and nonsensical. Taken alone or with the sentencing court's treatment of the other factors at issue, it requires reversal.

Ultimately then, the court selected a term of 50 years subject to NERA without giving meaningful consideration or weight to any *Miller* factor. Instead, the record reflects, the court selected 50 years as the maximum allowable under law. Thus, at resentencing, the State lamented that the court was legally prohibited from reimposing a life sentence,[5] given the prior finding that Zarate is amenable to reform:

[5]The court had made clear that, but for constitutional limitations, it would have imposed a life sentence, however impermissible: at initial sentencing, the court imposed a sentence of life (subject to NERA) plus 13 years, and at the first resentencing, purportedly

> The problem we have in this case . . . is that . . . a sentence of life . . . is estopped based upon the problem of and a reality of a court of competent jurisdiction has said that the defendant had shown some potential for rehabilitation. So therefore *Miller* and *Montgomery* truncate the finish line of this race in the State's position.
>
> [4T at 24:12-22.]

See id. at 16:10-13 ("[T]he constraints of *Zuber* . . . estop[] the State from requesting Your Honor to impose a life sentence once again."); *id.* at 18:12-15 ("[W]hether he individually deserves it, which clearly the State would submit he does not . . . [,] [*Zarate* is] entitled to a reduction based upon how a sentence has to now be imposed."). The State proposed instead "that a fifty-year sentence with the No Early Release Act would satisfy any constitutional concerns . . . with the recognition that none of us likes it." *Id.* at 30:4-9.

The court agreed with and adopted this approach. Immediately before imposing sentence, the court stated:

> I note from the *Zuber* case that although the court didn't say you can't go fifty-five, because from everything I said they can -- said you can go more than fifty-five years. But I don't know if the Supreme Court was saying fifty-five years is not appropriate under *Miller*.
>
> [*Id.* at 83:14-20.][6]

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applying *Miller*, the court reimposed the life sentence. *Zarate*, 2020 WL 2179126, at *3-4.

[6]The court's observations regarding a term of 55 years were in apparent reference to the lesser period of parole ineligibility as between the two *Zuber* defendants, which was 55 years. *Zuber*, 227 N.J. at 428.

Having thus opined that a term of 55 years was constitutionally suspect, the court simply accepted the State's suggestion and imposed a 50-year term, 42.5 years of which are parole-ineligible. In doing so, the record is clear, the court worked backwards in attempt to circumvent *Zuber* rather than determining an appropriate sentence under the *Miller* factors, as *Zuber* requires.

D. The Appellate Division erred in upholding the trial court's application of the *Miller* factors.

The Appellate Division agreed that "the judge's discussion of the *Miller* factors may not have been as precise or thorough as it could be," *Zarate*, 2020 WL 2179126, at *18, adding that "arguments by appellant and the ACLU [that the court's application of *Miller* was improper] have some probative force," *id.* at *17. Nonetheless, the Appellate Division upheld the trial court's application of the *Miller* factors because "the judge [] scale[d] back even further the sentence he had previously imposed," and because the reviewing court felt compelled to apply a "prism of substantial deference." *Id.* at *17-18. Neither rationale supports affirmance.

First, that Zarate's second resentencing resulted in a lower term of years does not mean that the trial court properly applied the *Miller* factors in computing the sentence — a distinct requirement under *Zuber*. Indeed, the Appellate Division's discussion of the way in which the sentencing court applied the *Miller* factors differs little, if at all, from the description

above, revealing the same reliance on irrelevant considerations and failure to consider compelling evidence. *See*, *e.g.*, *Zarate*, 2020 WL 2179126, at 15 (court assigned no weight under first factor in light of "Zarate's intelligence, lack of psychological disorder or illness"); *id.* (under factor four, "[t]he court attributed to Zarate [legal] decisions" and "found [they] showed Zarate was 'bright' and 'cunning'"); *id.* (court "offset [fifth factor] to an extent [citing] Zarate's failure to admit his participation in the murder and [] his lack of remorse"). By nonetheless affirming, the Appellate Division effectively held, in obvious circumvention of *Zuber*, that courts need not apply the *Miller* factors so long as they discount the sentence they would otherwise apply.

Second, "the deferential standard of review applies only if the trial judge follows the Code and the basic precepts that channel sentencing discretion." *State v. Case*, 220 N.J. 49, 65 (2014). Thus, this Court has "always require[d] that the factfinder apply correct legal principles in exercising its discretion," *State v Roth*, 95 N.J. 334, 363 (1984); no deference is due where the trial court instead misinterprets the law. *See State v. Bolvito*, 217 N.J. 221, 228 (2014) ("We apply a deferential standard of review to the sentencing court's determination, but not to the interpretation of a law."); *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 are

reviewed *de novo*.") (citations omitted); *State v. Galicia*, 210 N.J. 364, 381 (2012) ("We consider legal and constitutional questions *de novo*."). Accordingly, the trial court's misinterpretation of *Zuber* – working backwards by discounting the sentence previously imposed, rather than applying the *Miller* factors to determine a fair and proportionate sentence – was legal error to which no deference was appropriate.

But even under an abuse-of-discretion standard, the Appellate Division was overly deferential to the trial court's sentencing decision. Review for abuse of discretion requires a determination of "whether there is substantial evidence in the record to support the findings of fact," *Roth*, 95 N.J. at 387, and "appellate courts are expected to exercise a vigorous and close review for abuses of discretion by the trial courts," *State v. Jarbath*, 14 N.J. 394, 400-01 (1989). Here, the Appellate Division's own discussion made plain that there was *not* substantial evidence in the record to support the trial court's findings under the *Miller* factors - rather, the record evidence contradicted those findings, as previously discussed. The Appellate Division's exercise of deference was thus a failure to conduct the requisite "vigorous and close review." For these reasons, the Appellate Division erred by upholding the trial court's application of the *Miller* factors in its sentencing, and this Court should reverse, vacate, and

remand for an appropriate resentencing that gives meaningful consideration and weight to the *Miller* factors.

II. This Court Should Hold Under Article 1, Paragraph 12 That Every Juvenile Must Receive An Opportunity to Demonstrate Maturity and Rehabilitation After 15 Years Of Incarceration.

In *Zuber*, after holding that the constitutional proscriptions against life without parole apply, as well, to lengthy sentences, including ones that are "the practical equivalent of life without parole," 227 N.J. at 429, and 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," *id.* at 447, the Court deferred to the Legislature the enactment of "a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility" in order "[t]o avoid a potential constitutional challenge in the future," *id.* at 452. The Legislature has failed to respond to that request by enacting applicable legislation, and Zarate now presents the "constitutional challenge" that *Zuber* foresaw. As a result, it now falls to the Court to determine if and when juveniles sentenced to lengthy periods of parole ineligibility are entitled to the review of their sentences as a matter of New Jersey constitutional law.

In resolving this issue, *amicus* proposes that the Court should first hold, consistent with the principles undergirding *Zuber* and

the United States Supreme Court jurisprudence from which it derived, that juveniles sentenced to lengthy periods of parole ineligibility are entitled to later review of their sentences in order to assess "whether [they] still fail[] to appreciate risks and consequences, or whether [they] may be, or ha[ve] been, rehabilitated." *Zuber*, 227 N.J. at 452. Then, employing constitutional proportionality analysis to determine the point by which juveniles must receive that opportunity, the Court should be guided by an extensive body of empirical research establishing an "age-crime" curve. This statistical data and analysis establishes that most juvenile offenders age out of criminal activity within 15 years, and that the few who are likely to pose a continuing danger can likely be identified at that time by their persistent antisocial behavior. In this manner, established social science – of exactly the kind that has given rise to the juvenile sentencing jurisprudence at the heart of this case – provides a sound and principled basis on which to draw a constitutional line: the Court should accordingly require that all juveniles receive an opportunity to demonstrate maturity and rehabilitation after no more than 15 years.[7]

[7]Though this issue was squarely presented below, the Appellate Division engaged in no analysis of it whatsoever, "declin[ing] to foreclose, as the Court suggested in *Zuber*, the possibility that Zarate may in the future be able to 'return to court' and demonstrate that he has sufficiently reformed himself," while also "not decid[ing] what would be an appropriate amount of time in

A. Juveniles sentenced to lengthy periods of parole ineligibility must be afforded later review of their sentences.

Zuber recognized that even when a sentencing court properly applies the *Miller* factors, a sentence carrying a "lengthy period of parole ineligibility" might later prove unconstitutional if the juvenile is able to demonstrate rehabilitation years before any opportunity for release. 227 N.J. at 451-52 (stating that hypothetical juvenile who served years in prison and yet remained ineligible for parole or release and "ask[ed] the court to review factors that could not be fully assessed when he was originally sentenced—like whether he still fails to appreciate risks and consequences, or whether he may be, or has been, rehabilitated" would "raise serious constitutional issues"). That issue is now squarely raised, and given the opportunity presented by this case, the Court should hold that under Article 1, paragraph 12 of the New Jersey Constitution, "sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date." *Id.* at 452.

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prison to elapse to justify such motions," neither "endors[ing] [n]or reject[ing]" the arguments of the parties and *amici*. *Zarate*, 2020 WL 2179126, at *19. Accordingly, there is no pertinent decision on this issue for this Court to review, and thus no discussion of the decision of the Appellate Division in what follows.

This conclusion follows from three well-established premises: first, that a sentence of life without parole is constitutional only for juvenile homicide offenders who are incorrigible; second, that a sentence of life without parole is constitutionally indistinguishable from one carrying a lengthy period of parole ineligibility; and third, that whether a juvenile is incorrigible cannot be determined at initial sentencing but only later, when the defendant has been through adolescence and had the opportunity to mature. Thus, later review of a juvenile's sentence is necessary to determine whether he is, in fact, incorrigible such that a lengthy period of parole ineligibility is truly justified.

First, the law is absolutely clear that only those juvenile homicide offenders who are incorrigible may be sentenced to life imprisonment without parole. That is because the signature qualities of youth undermine the penological justifications – including retribution and deterrence – for so harsh a punishment. "'[T]he case for retribution is not as strong with a minor as with an adult'" because juveniles' immaturity and impetuosity make them less culpable for their crimes, and "'personal culpability'" is at "'[t]he heart of the retribution rationale.'" *Graham*, 560 U.S. at 71 (citations omitted). And the "'same characteristics'" make juveniles "'less susceptible to deterrence,'" as their propensity for "'impetuous and ill-considered actions and decisions'" means that "they are less likely to take a possible punishment into

consideration when making decisions." *Id.* at 72 (citations omitted).

This leaves only the incapacitation and rehabilitation rationales. But incapacitation can "justify life without parole . . . [only if] the juvenile offender forever will be a danger to society," *i.e.*, only if "the sentencer [] make[s] a judgment that the juvenile is incorrigible." *Id.* at 72. And because life without parole "forswears altogether the rehabilitative ideal," that penalty is, likewise, compatible with the rehabilitation rationale only for a juvenile who is incorrigible. *Id.* at 74. Thus, life without parole is proportional only for incorrigible juveniles convicted of homicide. *See Zuber*, 227 N.J. at 451 (noting "it is only the 'rare juvenile offender whose crime reflects irreparable corruption'" who may be sentenced to life without parole for homicide) (citation omitted); *see also Montgomery*, 577 U.S. at 208 ("[*Miller*] rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth.").[8] All other juveniles are entitled

[8] *Jones* endorsed this limitation, quoting the "key paragraph from *Montgomery*" with approval:

> "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."

to "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75).

Second, in *Zuber*, this Court made clear that the constitutional limits on sentencing juveniles to life without parole apply equally to juveniles sentenced to "lengthy periods of parole ineligibility." 227 N.J. at 450. Specifically, *Zuber* held that "it does not matter for purposes of the Federal or State Constitution" whether a juvenile is sentenced to life without parole or its functional equivalent, or even to a term with "a lengthy period of parole ineligibility," because the consequences to the juvenile are sufficiently similar to "implicate[] the principles of *Graham* and *Miller*." *Id.* at 446-48 (noting, "we decline to elevate form over substance."). Thus, because life without parole is justifiable only for incorrigible juveniles

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> [141 S.Ct. at 1315 n.2 (quoting *Montgomery*, 577 U.S. at 211).]

See also id. at 1317-18 ("*Miller* required . . . '[a] hearing . . . to separate those juveniles who may be sentenced to life without parole from those who may not.'") (quoting *Montgomery*, 577 U.S. at 210). Indeed, *Jones* was explicit that, "[t]oday's decision does not overrule *Miller* or *Montgomery*." *Id.* at 1321. *Jones* simply held that, under the Federal Constitution, there is no "magic-words requirement," and therefore that a determination of incorrigibility need be neither explicit nor implicit in the record. *Id.* As noted, however, New Jersey law diverges in this respect, requiring a detailed explanation on the record of all discretionary decisions impacting the sentence imposed.

convicted of homicide, so too are sentences carrying lengthy periods of parole ineligibility.

Third, incorrigibility cannot be determined at the time of a juvenile's initial sentencing. As the Supreme Court has repeatedly noted, at the time of sentencing, "it '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.'" *Jones*, 141 S.Ct. at 1315 (quoting *Roper*, 543 U.S. at 573). Indeed, *Graham* prohibited life without parole for juveniles convicted of non-homicide specifically on this basis. 560 U.S. at 75 ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset."). And while *Miller* did not prohibit that determination in the case of juvenile homicide offenders,[9] on this point, *Zuber* – interpreting the New Jersey Constitution – adopted the reasoning of *Graham*, not *Miller*. Thus, *Zuber* cited *Graham* for

[9]*Miller* did not, however, contradict the logic of *Graham* that "[t]he characteristics of juveniles make [] judgment[s] [of incorrigibility] questionable." *Graham*, 560 U.S. at 73. To the contrary, *Miller* emphasized the "great difficulty" of making such determinations at the time of sentencing. 567 U.S. at 479 (pointing up this difficult as a further reason why sentences of life without parole for juveniles convicted of homicide should be "uncommon"). *Miller* simply left the door open in view of the unique gravity of homicide. *Id.* at 480.

the proposition that States are prohibited "'from making the judgment *at the outset* that [a juvenile] never will be fit to reenter society.'" *Zuber*, 227 N.J. at 451 (citing *Graham*, 560 U.S. at 75) (emphasis and modifications in *Zuber*). And, as noted, *Zuber* made clear that, regardless of the offense, it "would raise serious constitutional issues" if a juvenile sentenced to a lengthy term could not later seek review of "factors that could not be fully assessed when he was originally sentenced — like whether he still fails to appreciate risks and consequences, or whether he may be, or has been, rehabilitated." *Id.* at 452. In sum, in New Jersey, a juvenile may not be determined to be incorrigible at initial sentencing consistent with Article 1, paragraph 12.

Zuber's holding on this point is, of course, amply supported by the scientific literature. Thus, extensive research shows that several of the core diagnostic items for psychopathy – those that are most often used to predict future dangerousness – overlap with inherent and transitory features of youth. *See* Daniel Seagrave & Thomas Grisso, "Adolescent Development and the Measurement of Juvenile Psychopathy," 26 L. & Human Behavior 219, 224 (2002) (citing "many ways in which operational definitions of psychopathy have parallels in characteristics of children and adolescents"); John F. Edens, *et al.*, "Assessment of 'Juvenile Psychopathy' and Its Association with Violence: A Critical Review," 19 Behavioral Sci. & L. 53, 58 (2001) (psychopathy diagnostics of "need for

stimulation/proneness to boredom, impulsivity, and poor behavioral controls" are problematic in assessing juveniles because "sensation and thrill seeking . . . increase from mid to late adolescence . . . , and then decline over the course of adulthood"). Consequently, empirical data confirms, such assessments confuse normal features of adolescent development with a probability of future dangerousness, resulting in many more false positives than accurate predictions. *See* Elizabeth Cauffman, *et al.*, "Comparing the Stability of Psychopathy Scores in Adolescents Versus Adults: How Often Is "Fledgling Psychopathy" Misdiagnosed?," 22 Psych., Public Pol'y, & L. 77, 84 (2016) (diagnoses of psychopathy in adolescence are not stable over even short periods of time); Richard Rogers, *et al.*, "Predictors of adolescent psychopathy: Oppositional and conduct-disordered symptoms," 25 J. Am. Acad. Psych. & L. 261, 269 (1997) (empirical study finding weak correlation between diagnosis of psychopathy in adolescence and later physical aggression); *see also* John F. Edens, *et al.*, "Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures," 31 L. & Human Behavior 53, 59 (2006) (meta-analysis with sample size of nearly 3,000 individuals finding weak correlation between youth psychopathy diagnosis and violent recidivism); *see also* John F. Edens & Justin S. Campbell, "Identifying Youths at Risk for Institutional Misconduct: A Meta-Analytic Investigation of the

Psychopathy Checklist Measures," 4 Psychological Servs. 13, 23 (2007) (empirical study examining behavior of juveniles diagnosed with psychopathy in institutional settings "revealed that physical violence occurred too infrequently to examine"). In short, *Graham* and *Zuber* were correct in holding that it is not possible to determine "'*at the outset*'" whether a juvenile will forever pose a danger to society. *Zuber*, 227 N.J. at 451 (quoting *Graham*, 560 U.S. at 75).

Taken together, these three premises – that only an incorrigible juvenile convicted of homicide may be sentenced to a term of life without the possibility of parole; that imposition of a "lengthy period of parole ineligibility" on a juvenile is subject to the same constitutional constraints as a sentence of life without parole under Article 1, paragraph 12 of the New Jersey Constitution; and that Article 1, paragraph 12 forbids sentencing courts from making a determination of incorrigibility in the case of a juvenile at the time of initial sentencing – compel the conclusion that juveniles sentenced to lengthy periods of parole ineligibility must be provided an opportunity for later review of their sentences. Under *Zuber*, such sentences are justifiable only for individuals who are incapable of reform, and that determination cannot be made at initial sentencing when a juvenile will not yet have outgrown the hallmark features of youth. As a result, to ensure that a juvenile sentence carrying a lengthy period of parole

ineligibility complies with the constitutional mandate of Article 1, paragraph 12, those who receive such sentences must have a subsequent opportunity to demonstrate that they are not incorrigible, but rather capable of reform.

B. Juveniles should receive an opportunity to demonstrate maturation and reform after no more than 15 years.

Identifying when after initial sentencing a juvenile must be provided a chance to prove that he has been rehabilitated is a matter that implicates constitutional proportionality review. Under this paradigm, the most pertinent question is the pragmatic one of when, during a juvenile's incarceration, it is possible to distinguish the juvenile who is capable of reform from the one who is not. Research regarding the age-crime curve provides an answer to this question: within 15 years, almost all juveniles will desist from criminal activity, and the few who are likely to persist in criminality can be readily identified at that time. Accordingly, and in the absence of legislative action, the time has now come for the Court to recognize a constitutional requirement that all juveniles receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" after 15 years. *Graham*, 560 U.S. at 75.

To begin, the analytical tool for determining whether a sentence is disproportionate for a category of offenders is well-established: both this Court and the United States Supreme Court

employ constitutional proportionality review. *See Graham*, 560 U.S. at 61-75 (explaining and applying proportionality review); *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.") (citation omitted).[10] This analysis entails two parts – review of "objective indicia of society's standards, as expressed in legislative enactments and state practice," *Roper*, 543 U.S. at 572, and "exercise of [the Court's] own independent judgment," relying on scientific and social science research concerning the culpability of the class of offenders, the severity of the punishment, and the extent to which the traditional penological rationales support the punishment for the offenders in question, *Graham*, 560 U.S. at 61, 67-68. These two components are distinct; "[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)).

Under the first part, which addresses objective indicia of societal values, as *Zuber* recognized, 227 N.J. at 452 n.4, State legislative enactments show a clear trend in favor of providing all juveniles an opportunity to demonstrate maturity and rehabilitation after some determinate term of years. *See Atkins v.*

[10]As previously discussed, the Court can and has recognized broader protection under Article 1, paragraph 12 than the Eighth Amendment. *See Zuber*, 227 N.J. at 438 (citing *Gerald*, 113 N.J. at 76).

Virginia, 536 U.S. 304, 312, 315 (2002) (noting "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" particularly "the consistency of the direction of change.") (citation omitted). But while State legislative enactments generally concur that this opportunity must be afforded within 30 years,[11] there is no apparent consensus as to where to draw the line precisely – of the 11 States

[11]Eleven (11) States draw the line somewhere within 30 years. *See* Cal. Penal Code § 3051(b) (2016) (maximum permissible juvenile term without parole eligibility is 25 years); Ken. Rev. Stat. 640.040 (1987) (same); Wyo. Stat. Ann. § 6-10-301(c) (2016) (same); Va. H.B. 35, Gen. Assemb. (Reg. Sess. 2020) (20 years); Or. S.B. 1008, 80th Leg. Assemb. (Reg. Sess. 2019) (15 years); W. Va. Code § 61-11-23(b) (2016) (same); Fla. Stat. § 921.1402 (2016) (juvenile offender may petition for parole or reduction of sentence after serving, at most, 25-year term); D.C. B21-0683, D.C. Act 21-568 (2016) (same, after 20 years); N.D. H.B. 1195, 65th Leg. Assemb. (2017) (same); Wash. Rev. Code § 9.94A.730(1) (2016) (same); *see also* Mont. Code Ann. § 46-18-222(1) (2016) (prohibiting all mandatory minimum sentences and periods of parole ineligibility in the case of juveniles).

Five (5) more States draw the line at 30 years. *See* Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (maximum period of parole ineligibility is 30 years, reserved for juveniles convicted of capital murder); Conn. S.B. 796, Jan. Sess. (2015) (all juveniles eligible for parole after maximum of 30 years); Del. S.B. 9, 147th Gen. Assemb., Reg. Sess. (2013) (juveniles may petition for sentence modification after, at most, 30 years); Mass. H. 4307, 188th Gen. Court (2014) (maximum period of parole ineligibility set at 30 years for juveniles convicted of particularly aggravated homicides); OH S.B. 256, 133rd Gen. Assemb. (2020) (same).

Two (2) states draw the line at 40 years. *See* Colo. S.B. 16-181,70th Gen. Assemb., 2d Reg. Sess. (2016) (maximum period of parole ineligibility for juveniles convicted of aggravated murders is 40 years); Tex. S.B. 2, 83rd Leg. Special Sess. (2013) (same).

that draw the line within 30 years, four set the mark at 25 years, four at 20, and two at 15, while Montana forbids all mandatory minimums and periods of parole ineligibility for juveniles. *See supra* n.10. Thus, objective indicia show that society favors giving juveniles a chance to earn their release within 30 years but offers no more specific guidance.

As a result, the Court must exercise its own judgment, examining the nature of the offenders, the punishment, and the applicability of established penological rationales – much of which is already settled law. That is, as previously discussed, *see supra* at 13, the recent juvenile sentencing jurisprudence establishes that juveniles are categorically different from adults in ways that diminish their culpability. *See Roper*, 543 U.S. at 569-70. The Supreme Court's precedents also make clear that these differences alter the traditional penological calculus, rendering the retribution and deterrence rationales insufficient to justify sentences that frustrate a "chance for fulfillment outside prison walls" or "reconciliation with society." *Graham*, 560 U.S. at 71-72, 79.

As a result, the seminal question for purposes of proportionality review in this context is what length of sentence can be justified under the incapacitation and rehabilitation rationales for the juvenile who is, as the Defendant has been found to be here, capable of reform. And necessarily, the answer to that

question is: only so long as is necessary for the juvenile to achieve and demonstrate his rehabilitation. In other words, the law is now clear that once a juvenile can demonstrate rehabilitation, neither of the predominant penological rationales justify further punishment, making continued incarceration disproportionate. *Zuber* recognized as much in stating that it would raise "serious constitutional issues" if a juvenile were incarcerated beyond the time necessary for him to prove that he "may be, or has been, rehabilitated." 227 N.J. at 452; *see also id.* at 446 (summarizing "the essence" of *Montgomery* to be that "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored").

Here, research establishing the age-crime curve provides a more specific answer to the "how long" inquiry.[12] Thus, researchers

[12]The United States and New Jersey Supreme Courts have consistently relied upon just this kind of social science research and literature in performing proportionality review. *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 . . . 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); *see also State v. Ramseur*, 106 N.J. 123, 180 n.14 (1987) (citing social science research in determining that "the

studying the breakdown of criminal activity by age — specifically, by plotting age on the x-axis against the aggregate number of offenses on the y-axis — consistently observe an inverted U-shaped "age-crime curve," revealing that:

> [V]ery large percentages of young people commit offenses; rates peak in the mid-teenage years for property offenses and the late teenage years for violent offenses followed by rapid declines. For most offenders, a process of natural desistance results in cessation of criminal activities in the late teens and early 20s.
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> [Michael Tonry, "Sentencing in America: 1975-2025," 42 Crime & Justice 141, 182 (2013).]

And this pattern has been observed in countless empirical studies as documented by numerous sources. *See*, *e.g.*, 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.");[13] *accord* U.S. Dep't of Justice, Nat'l Inst. of Justice, Report, "From Juvenile

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Legislature could reasonably find that the death penalty deters murder").

[13]Citing, among others, Alfred Blumstein & Jacqueline Cohen, "Characterizing Criminal Careers," 237 Science 985, 986 (1987) (examining data set from over 40 years of Uniform Crime Reports, an annual publication of "monthly reports submitted to the [Federal Bureau of Investigation] by individual police departments of the numbers of crimes reported to the police and the numbers of arrests[.]").

Delinquency to Young Adult Offending" (2014);[14] *accord* Alfred Blumstein & Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," 47 Criminology 327, 331 (2009).[15]

Significantly, this pattern holds for "[i]nvolvement in violent and nonviolent crime.'" Laurence Steinberg, "The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability," 14 Neuroscience 513, 515 (2013). Thus, a United States Department of Justice study found that between 1990 and 2010, arrest rates for murder, rape, robbery, and aggravated assault all revealed an age-crime curve with participation in violent conduct peaking in late adolescence (age 19 for murder, rape, and robbery) and declining precipitously thereafter. Howard N. Snyder, "Arrest in the United States, 1990-2010," Report, U.S. Dep't of Justice, Bureau of Justice Statistics 3-6 (2012).[16] Indeed, for offenses of all types, all the major studies of the

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[14]*Available at* http://www.nij.gov/topics/crime/Pages/delinquency-to-adultoffending.aspx#noteReferrer2 (citing, among others, David P. Farrington, "Age and Crime," 7 Crime & Justice 189 (1986) (longitudinal study of over 400 males utilizing research and public records); Alex R. Piquero, *et al.*, *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development* (2007) (analyzing same data set)).

[15]Citing, among others, Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* (1993) (examining data compiled through the "Gluecks' Study," a longitudinal study, based on interviews and public records, of 500 delinquent boys matched with 500 nondelinquents across numerous metrics).

[16]*Available at* https://bjs.gov/content/pub/pdf/aus9010.pdf.

last century have replicated the same U-shaped-curve finding. *See* Alex R. Piquero, *et al.*, "The Criminal Career Paradigm," 30 Crime & Justice 359, 365-77 (2003).[17]

The age-crime curve thus establishes that crime "tends to be a young person's activity." 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). Indeed, "[a]ctual rates of illegal behavior soar so high during adolescence that participation in delinquency appears to be a normal part of teen life." Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 PSYCH. R. at 675 (internal citation omitted). But this research also shows that individuals overwhelmingly outgrow criminal

[17]This meta-analyses discusses, in addition to the studies previously noted: the Cambridge-Somerville Project (experiment with 650 subjects grouped in pairs to test effects of early intervention on delinquency, with longitudinal follow-up); the Philadelphia Birth Cohort Study (utilizing public records to follow the criminal careers of individuals drawn from a sample of 9,945 boys born in Philadelphia aged 10-17); the National Youth Survey (longitudinal interview project of 1,725 male youths of starting ages between 11 and 17); the Montreal Sample of Adjudicated Youths (longitudinal interview project for 470 male youths recruited from juvenile court proceedings); the Causes and Correlates Studies (United States Department of Justice study coordinating longitudinal research of 1,517 high-risk boys in Pittsburgh, Pennsylvania, 1,000 youths in Rochester, New York, and 1,527 youths in Denver, Colorado); and the Project on Human Development in Chicago Neighborhoods (longitudinal study of 6,500 children and adolescents).

behavior as they mature.[18] And critically, the literature reveals as a statistical matter, using extensive data across places, eras, and cultures, *when* juveniles age out of crime.

In particular, 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

[18]The empirical findings on this point are in accord with the neuroscience and psychiatric research, showing that most juveniles leave behind criminality when their brains and social/emotional development reach maturity in the mid-to-late 20's. *See*, *e.g.*, Laurence Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," 28 Development Rev. 78, 97 (2008) (discussing neuroscience evidencing that regions of the brain responsible for executive function and emotional regulation are in the process of development through the mid-20's and beyond); Laurence Steinberg & Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," 58 Am. Psych. 1009, 1012 (2003) (discussing behavioral studies showing that impulse control develops continuously up through the mid 20's).

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 a result, within 15 years – *i.e.*, for a juvenile who (like the defendant here) might have been 14 at the time of the offense at youngest, by the late 20's – even juveniles convicted of serious offenses overwhelmingly age out of crime.[19]

Conversely, the evidence suggests that the minority who persist in criminal activity up to the 15-year-marker may continue to do so indefinitely:

> A substantial body of longitudinal research consistently points to a very small group of males who display high rates of antisocial behavior across time and in diverse situations. The

[19]The same conclusion is evident from related research into average criminal career lengths. 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). (internal citations omitted) ("Three major studies in the 1970s estimated career lengths to be between five and fifteen years."); *see also* 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).

> professional nomenclature may change, but the faces remain the same as they drift through successive systems aimed at curbing their deviance: schools, juvenile-justice programs, psychiatric treatment centers, and prisons.
>
> [Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 678.]

In other words, the juveniles who are incapable of rehabilitation will show themselves through a continuing pattern of misconduct up to and beyond the point at which their peers have desisted. Practically speaking, this means that the key evidence that a juvenile's offense conduct was *not* a product of transient immaturity will be reflected in institutional records, showing disciplinary infractions "across time and in diverse situations," regardless of the individual's age or developmental maturity. *Id.* Accordingly, the age-crime curve research suggests a demarcation at 15 years as the point by which it will be possible to separate the majority of juveniles, who are capable of reform, from the small minority who most likely are not.

It must be noted, of course, that while 15 years is an evidence-backed signpost for juveniles as a class, the research does not suggest that it will always be certain, in individual cases, that a particular juvenile can be safely released at the 15-year-marker. For example, a juvenile's institutional history might show a pattern of early prison infractions followed by a short term of years without incident, suggesting that the juvenile

is on the path to reform but not yet ready for release. Alternatively, an individual might present a steady pattern of antisocial conduct up to the 15-year-marker yet ultimately prove capable of rehabilitation.[20] Thus, in reassessing the sentence of a juvenile after 15 years, the fact-finder must have discretion to tailor the result to the particular circumstances. And the fact-finder should exercise caution to ensure both that the public remains safe and that the juvenile is not punished disproportionately – in many instances, this may counsel further reassessment after a relatively short period of time.

Ultimately, however, a term of 15 years represents a statistically appropriate period of time at which to first assess whether a juvenile has been rehabilitated. Since between 85-90% of juveniles will have aged out of criminality by that time, the further incarceration of juveniles without opportunity to demonstrate maturity and reform cannot be justified under either the incapacitation or rehabilitation rationale. As a result, to

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[20]Research shows a final wave of desistance in the early 40's, meaning that those juveniles who persist in criminality up to the 15-year-marker are not necessarily incapable of reform. *See* John H. Laub & Robert J. Sampson, "Understanding Desistance from Crime," 28 Crime & Justice 1, 17 (2001) (of the small group of "persistent offenders" who remain criminally active in their 30's, "[a]fter their early 40s, . . . termination 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)[20] (discussing "the over 40 'burn-out' period during which offenders terminate criminal activity at an increasing rate").

ensure the constitutional punishment of juveniles, the Court should take guidance from the age-crime curve research and require that all juveniles receive an opportunity to earn their release through demonstrated rehabilitation after 15 years.

CONCLUSION

For the foregoing reasons, the Court should vacate Zarate's sentence and remand for proper consideration of the *Miller* factors in determining sentence. The Court should further hold that under Article 1, paragraph 12, all juveniles are entitled to an opportunity to demonstrate maturity and rehabilitation to earn their release after no more than 15 years.

Respectfully submitted,

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