SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL DIVISION, ESSEX COUNTY
INDICTMENT NO. 03-01-0231

STATE OF NEW JERSEY,	)
	)
Plaintiff,	)
	)
v.	)
	)
JAMES COMER,	)
	)
Defendant-Movant.	)

BRIEF IN SUPPORT OF MOTION TO REDUCE SENTENCE PURSUANT TO NEW JERSEY COURT RULE 3:21-10

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INTRODUCTION

Petitioner James Comer ("Comer" or "Petitioner") hereby moves for a reduction of sentence pursuant to *New Jersey Court Rule* 3:21-10(b)(5). In 2003, Comer was sentenced to a term of 75 years — 68 years and three months of which are without eligibility for parole — for four robberies and a felony-murder that he committed as a juvenile. Comer will not be eligible for parole until after his 86th birthday, more than two decades past his life expectancy. In imposing that sentence, the Court gave virtually no consideration to Comer's youth. The resulting sentence, which condemns Comer to grow old and die in prison, constitutes cruel and unusual punishment under the State and Federal Constitutions.

Since Comer's sentencing, a consensus has emerged that juveniles are biologically and psychologically dissimilar from adults in ways that render them "constitutionally different . . . for purposes of sentencing." *Miller v. Alabama*, 132 *S. Ct.* 2455, 2464 (2010). Drawing on developments in neuroscience and developmental psychology, the Supreme Court of the United States has repeatedly recognized what "any parent knows:" juveniles are impulsive, irresponsible, lacking in foresight, and acutely susceptible to peer pressure. *Id.* The upshot of these attributes is that, when youths offend, they do so with diminished culpability. However, an equally notable feature of

youth is that these shortcomings are transient; thus, countless studies show that a vast majority of juvenile offenders, even those who commit truly egregious crimes, will mature into law abiding citizens. Recognizing these twin facets of youth — diminished blameworthiness and a high likelihood of rehabilitation — the Supreme Court has invalidated a series of laws that exposed juveniles to the harshest sanctions. Thus, in *Roper v. Simmons*, 543 *U.S.* 51 (2005), the Court abolished the death penalty for juvenile offenders. In *Graham v. Florida*, 560 *U.S.* 48 (2010), it banned states from imposing life without parole on juveniles who did not "kill or intend to kill," recognizing as it did so that juvenile life without parole ("JLWOP") is akin to the death penalty in terms of its severity and irrevocability. And in *Miller v. Alabama*, 132 *S. Ct.* 2455 (2010), the Court extended *Graham*'s holding by banning mandatory sentences of life without parole for juvenile homicide offenders.

Under this case law, Comer's sentence of *de facto* life without parole is plainly in violation of the Eighth Amendment of the U.S. Constitution and Article 1, Paragraph 12 of the State Constitution. First, though *Miller* stopped short of announcing a wholesale ban on JLWOP for homicide offenders, the logic animating that decision (as well as the *Roper* and *Graham* decisions) necessitates a ban on any sentence that irrevocably

condemns a juvenile to die in prison, regardless of the crime committed. Second, even if this Court declines to embrace a ban on JLWOP for all homicide offenses, Comer's sentence must be vacated because it violates *Graham*'s explicit prohibition against JLWOP for juveniles who neither "kill[] nor intend[] to kill," 560 *U.S.* at 69, for while Comer was convicted of felony-murder, the record establishes that he neither killed the victim nor acted with the requisite intent to kill.

Finally, even if this Court rejects Comer's argument that his sentence violates a categorical prohibition on JLWOP, Petitioner is still entitled to be re-sentenced. At an absolute minimum, *Miller* requires that judges conduct an individualized hearing — akin to the one conducted in a death penalty sentencing phase — in which the court considers the "wealth of characteristics and circumstances attendant to [youth]" that impact a juvenile's culpability and capacity for redemption before sentencing a youth to LWOP. *Miller*, 132 *S. Ct.* at 2467. The sentencing judge gave no such consideration to Petitioner before sentencing him to die in prison.

To be clear, neither *Graham* nor *Miller* mandate that the State eventually release Comer or any other juvenile offender. They do, however, require the State to fashion a sentence that gives the offender a "meaningful opportunity to obtain release"

based on proven rehabilitation. *Graham*, 560 *U.S.* at 75. The sentence here imposed violates that constitutional requirement.

FACTS AND PROCEDURAL HISTORY UNDERLYING CRIMINAL CASE

During the night of April 17, 2000 and into early morning of April 18, 2000, Comer and his two accomplices, Ibn Ali Adams and Dexter Harrison committed four armed robberies. During the second robbery, Adams shot and killed the intended robbery victim, George Paul. According to Harrison, who testified for the prosecution, Adams said immediately after the shooting that he shot Paul because Paul did not have any money. Dec. 11, 2003 Trial Trans. at 54. Harrison also testified that Comer did not draw a gun during the robbery of Paul. *Id.* at 52. After the shooting, Comer, Adams, and Harrison stole a car and proceeded to commit two more armed robberies. In the morning of April 18, 2000, after the stolen vehicle ran out of gas, the three pushed the car into a gas station, which prompted the gas station attendant to call the police. Comer, Adams, and Harrison were arrested shortly thereafter. Dec. 17, 2003 Trial Trans at 46. At the time of his arrest, Comer had no prior criminal convictions. Adult Presentence Report ("PSR") at 8, attached as Ex. A.

Comer was charged as an adult with (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, *N.J.S.A.* 2C:20-3(a).[1] On December 9, 2003, after a two-week jury trial, Comer was found guilty on all counts. PSR at 1.

At sentencing on March 5, 2004, Comer's counsel sought concurrent terms. Hrg. Trans. at 13:9-10, attached as Ex. B. Counsel argued for application of mitigating factor number thirteen, which provides for a lesser sentence where the "conduct of a youthful defendant was substantially influenced by another person more mature than the defendant," *N.J.S.A.* 2C:44-1(b)(13), on the grounds that the scheme was "concocted" by his older accomplice and that Comer was a mere "minion[] working for him at the time these acts were committed." Hrg. Trans. at 7:10-20. Defense counsel also highlighted the fact that all previous complaints against Comer in juvenile court – which were for minor infractions such as receipt of stolen property and

[1] Adams was charged with first-degree murder, *N.J.S.A.* 2C:11–3(a)(3), but was convicted only of first-degree felony-murder. *N.J.S.A.* 2C:11–3(a)(1)-(2). Adams's aggregate sentence was 67 years imprisonment with 61.45 years to be served without parole. Comer's third accomplice, Harrison, pleaded guilty to aggravated manslaughter, second-degree conspiracy, four counts of first-degree robbery, receipt of stolen property, and fourth-degree criminal mischief in exchange for a recommended 20-year sentence with an 85% parole disqualifier. *See Jersey New v. Adams v. Comer*, 2006 *WL* 3798760, at *196-97 (N.J. Super. A.D. Dec. 28, 2006).

possession of burglar tools – had been dismissed, and that he therefore had no criminal record. *Id.* at 8:10-23, 9:4-12.

The Court sentenced Comer to 75 years imprisonment, of which 68 years and three months were to be served without eligibility for parole.[2] That sentence consisted of a 30-year term for the felony-murder count, without parole eligibility, and 15 years for each of the three counts of first-degree robbery, 85% of which were to be served without eligibility for parole pursuant to the No Early Release Act, *N.J.S.A.* 2C:43-7.2.[3] Each of these four sentences runs consecutively. In addition, Comer was sentenced to four years for each of five weapons charges and four years for the automotive theft charge, each to run concurrently with all other counts of the indictment. In issuing its sentence, the Court dispensed with Comer's pleas for mitigation with one sentence: "[n]othing in [Comer's] conduct or [his] background mitigates the crimes for which he stands before me convicted." Hrg. Trans. at 33. At no point did the Court reference or evidence any consideration of Comer's age, nor address any mitigating factors associated with his youth.

[2] Comer, of course, received credit for the 1,417 days that he had spent in custody prior to sentencing.

[3] NERA imposes a mandatory minimum prison term of 85% of the overall sentence, and a mandatory three- to five-year period of post-release parole supervision, for any conviction of a first- or second-degree crime that is found to be violent. N.J.S.A. 2C:43-7.2(a),(c); *State v. Johnson*, 166 *N.J.* 523, 527 (2001).

Comer filed a timely appeal, arguing that the trial judge erred by (1) refusing to exclude certain eye-witness identifications; (2) permitting the prosecutor to make improper statements in summation; (3) failing to inquire about a jury member who was supposedly refusing to deliberate; (4) failing to give a limiting instruction concerning his the guilty plea of Comer's accomplice, Harrison; (5) failing to find that the age disparity between Comer and Harrison was a mitigating factor; (6) imposing consecutive sentences for the murder and robbery charges; and (7) sentencing Comer to a higher term of imprisonment than his accomplices. Comer's conviction was affirmed.[4] *State v. Adams*, 2006 *N.J. Super. Unpub. LEXIS* 2233 (App. Div. Dec. 28, 2006). The Supreme Court granted certification[5] and affirmed Comer's conviction. *State v. Adams*, 194 *N.J.* 186, 190 (2008).

On May 23, 2013, Comer filed a *pro se* Motion for an Order (1) Correcting Defendant's Illegal Sentence and (2) Assigning Counsel. With Comer's consent, undersigned counsel respectfully submit this brief in support of Comer's motion.

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[4] In upholding the sentence imposed by the trial court, the Appellate Division held that there was no evidence that Mr. Harrison had influenced his younger co-conspirators, noting that the three planned the robberies together, and that Mr. Harrison was, in fact, only a few years older than the others.

[5] Certification was granted to consider (1) whether the trial court should have excluded the eye-witness identifications; (2) whether the trial court erred in failing to instruct the jury on how to consider Harrison's guilty plea; and (3) whether the trial court violated the rule that sentences above the presumptive term based solely on judicial findings of aggravating factors other than prior criminal conviction violated the Sixth Amendment.

STANDARD FOR CORRECTING A SENTENCE

Comer seeks a reduction in sentence under *New Jersey Court Rule* 3:21-10(b), which provides that a "motion may be filed and an order may be entered at any time" to "correct[] a sentence not authorized by law . . . ." *R.* 3:21-10(b)(5); *State v. Acevedo*, 205 *N.J.* 40, 47 n.4 (2011) (an illegal sentence may be challenged "at any time"). A sentence is "illegal" where it "is inconsistent with the requirements of the controlling sentencing statute or constitutional principles." *State v. Veney*, 327 *N.J. Super.* 458, 462 (App. Div. 2000); *State v. Tavares*, 286 *N.J. Super*. 610, 618 (App. Div. 1996) ("[A] defendant can also challenge a sentence because it was imposed without regard to some constitutional safeguard or procedural requirement."); *State v. Ervin*, 241 *N.J. Super.* 458, 465 (App. Div. 1989) (vacating sentence where trial court impermissibly used a parole violation to impose a prison term greater than the presumptive sentence); *State v. Adams,* 227 *N.J. Super.* 51, 57 (App. Div. 1988) (holding that a failure to merge certain counts "implicat[ed] a defendant's substantive constitutional rights" and, thus, constituted an illegal sentence for purposes of post-conviction relief); *State v. Paladino*, 203 *N.J. Super.* 537, 549 (App. Div. 1985) (vacating illegal sentence where court violated defendant's due process rights by failing to ascertain a factual basis for a guilty plea and placing defendant on probation

without holding a hearing). Here, Mr. Comer's sentence to a term that is tantamount to life without parole is illegal because it violates the state and federal constitutional prohibition on sentencing juveniles to life without the possibility of parole.

I. Petitioner's Sentence Of *De Facto* Life Without Parole for Crimes Committed as a Juvenile Constitutes Cruel and Unusual Punishment Under the State and Federal Constitutions.

Under the Constitutions of both the United States and New Jersey, courts must make three inquiries when assessing whether a punishment constitutes cruel and unusual punishment:

> First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?
>
> [*State v. Maldonado*, 137 *N.J.* 536, 557 (1994) (quoting *State v. Ramseur*, 106 *N.J.* 123, 169 (1987).]

"If the punishment fails any one of the three tests, it is invalid." *State v. Gerald*, 113 *N.J.* 40, 78 (1988) (citing *Coker v. Georgia*, 433 *U.S.* 584, 592 (1977)). Comer's sentence to die in prison for crimes he committed as a juvenile fails at least the second and third tests.

A. Sentences That Condemn Juveniles To Die In Prison Are Grossly Disproportionate and Serve No Legitimate Penological Interest.

The Federal and State prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected

to excessive sanctions." *Roper*, 543 *U.S.* at 560. That right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Miller v. Alabama*, 132 *S. Ct.* at 2463 (quoting *Roper,* 543 *U.S.* at 560); *Graham*, 560 *U.S.* at 59 ("The concept of proportionality is central to the Eighth Amendment."). In keeping with the proportionality principle, both the U.S. and New Jersey Supreme Courts have repeatedly found that the "the severest sanctions should be reserved for actors exhibiting the most culpable mental states." *Gerald*, 113 *N.J.* at 149 (Handler, J., concurring); *Atkins v. Virginia*, 536 *U.S.* 304, 319 (2002); *Enmund v. Florida*, 458 *U.S.* 782, 800 (1982). However, thanks to advances in brain science and developmental psychology, a consensus has emerged that juvenile offenders are *categorically* less culpable than adults. On the basis of these differences, the U.S. Supreme Court has steadily curtailed the types of sanctions that may be imposed upon juveniles. A faithful application of these decisions leads inexorably to the conclusion that any sentence that irrevocably condemns an individual to die for crimes he or she committed as a minor is unconstitutional.

In *Roper v. Simmons*, *supra*, the Court banned states from executing offenders who committed murder as juveniles. In *Roper,* the Court identified three "general differences between

juveniles under 18 and adults." 543 *U.S.* at 569. First, juveniles tend to be immature, irresponsible and impulsive, which is why they are "overrepresented statistically in virtually every category of reckless behavior." *Id*. (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339, 339-40 (1992); *accord Miller*, 132 *S. Ct.* at 2468 ("immaturity, impetuosity, and failure to appreciate risks and consequences" are the "hallmark features" of youth). Second, juveniles have "less control . . . over their own environment," and often cannot "extricate" themselves from a dangerous setting; they are therefore exceptionally "vulnerable or susceptible to negative influences and outside pressures." *Roper*, 543 *U.S.* at 569. Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570 (citation omitted). Thus, while many teenagers engage in risky, antisocial, and even criminal conduct, for a vast majority these behaviors are "'fleeting'" and "'cease with maturity as individual identity becomes settled. Only a relatively small proportion [will] develop entrenched patterns of problem behavior that persist into adulthood.'" *Id.* (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence*, 58 *Am. Psychologist* 1009, 1014 (2003)). Based on these

characteristics, the *Roper* Court held that, even in the most egregious murder cases, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id*. at 569; *id.* at 570 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irredeemably depraved character."). Thus, the Court concluded, "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id*. at 573-74.

In *Graham v. Florida*, *supra*, the Court extended *Roper*'s reasoning to prohibit all JLWOP sentences for nonhomicide offenses. The *Graham* Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including the fact that "parts of the brain involved in behavior control continue to mature through late adolescence," and that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 560 *U.S.* at 68 (quoting *Roper*, 543 *U.S.* at 570) (citing scientific studies). The Court reiterated its conclusion in *Roper* that "'[f]rom a moral standpoint it would be misguided to

equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* (quoting *Roper*, 543 *U.S.* at 570).

Graham held that these features of youth undermine the penological rationales for JLWOP. *Id.* at 71-74. Thus, minors' diminished culpability undermines the retribution justification insofar as "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Id.* at 71 (quoting *Tison v. Arizona*, 481 *U.S.* 137, 149 (1987)). Deterrence does not justify JLWOP because "the same characteristics that render juveniles less culpable than adults" — *e.g.*, immaturity, impulsivity, and lack of responsibility — make it "less likely [they will] take a possible punishment into consideration when making decisions." *Id.* at 72 (internal quotation marks and citations omitted). Nor can incapacitation support JLWOP: "to justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible" - a judgment that is "inconsistent with youth" and impossible to make with any reliability. *Id.* (internal quotation marks omitted). As for rehabilitation, JLWOP not only fails to further this penological goal — it is fundamentally inimical to it: eliminating the possibility of release and forever denying

the offender the opportunity to reenter society, JLWOP "forswears altogether the rehabilitative ideal." *Id.* at 74.

Graham also recognized that life without parole for a juvenile implicates the "same concerns" as the death penalty. *Id.* at 79. With both punishments, there is "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id*. The Court thus concluded that condemning a juvenile to die behind bars — "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crime and learn from his mistakes" — violates the Eighth Amendment. *Id*. Rather, the Constitution requires the state to afford a juvenile defendant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Most recently, in *Miller v. Alabama*, *supra*, the Court declared that mandatory life without parole for juveniles for homicide offenses runs afoul of the Eighth Amendment's ban on cruel and unusual punishment. *Miller* noted that the "the science and social science supporting Roper's and Graham's conclusions" about juveniles' diminished culpability and greater capacity for change "have become even stronger." Id. at 2465, n.5. As in Graham, the Miller *Court reaffirmed its conclusion*

that none of the traditional penological justifications – retribution, deterrence, incapacitation, and rehabilitation – justified "imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 2465. The Court also reiterated that life without parole is "akin to the death penalty" and must therefore be "treated . . . similarly to that most severe punishment." 132 *S. Ct.* at 2466; *id*. (life without parole "when imposed on a teenager, as compared with an older person, is . . . 'the same . . . in name only'") (quoting *Graham*, 560 *U.S.* at 70). Drawing on a line of Eighth Amendment cases requiring that judges in capital cases conduct an individualized sentencing in which they consider all mitigating factors before imposing the death penalty, *id.* at 2467-68 (citing *Woodson v. North Carolina*, 428 *U.S.* 280 (1976) (striking down mandatory death penalty scheme)), the Court held that judges must conduct an individualized hearing in which they specifically "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. To aid the lower courts' review of such mitigating factors, the Court outlined the factors a sentencer must consider, including: (1) the youth's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the youth's "family and home environment that surrounds

him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) "the incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys;" and (5) "the possibility of rehabilitation." *Id.* at 2468.

1. *Graham* and *Miller* Require a Complete Ban On JLWOP For All Offenses.

While *Miller* reserved judgment as to whether the Eighth Amendment required a wholesale abolition of JLWOP,[6] it admonished that, "given 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." *Id*. In fact, the underlying premises of *Roper, Graham,* and *Miller* demand a categorical ban on sentencing juveniles to life without parole (or its functional equivalent) in homicide cases as well for several reasons.

[6] *See id.* at 2469 ("Because [our] holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles. . . .").

i. The "Hallmark Features of Youth" Diminish The Culpability of Juveniles Who Commit Any Crime, Including Homicide.

The mitigating characteristics of youth that compelled the Supreme Court to ban juvenile death sentences and JLWOP for nonhomicide offenses run with age, regardless of the crime the youth commits. Accordingly, they necessarily diminish the culpability of a juvenile who commits homicide. *Miller* plainly recognized as much:

> [N]one 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. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

[*Miller*, 132 *S. Ct.* at 2465.]

Roper recognized the same principle — in the context of a brutal, premeditated, thrill-killing, no less — when it stated that juvenile offenders, even those who commit the most "heinous crime" "cannot with reliability be classified among the worst offenders." 543 *U.S.* at 569, 570.

It bears repetition that the Eighth Amendment reserves the harshest penalties not merely for the most serious crimes, but also for the most culpable offenders. *See, e.g., Gerald*, 113 *N.J.* at 149. The neuroscience literature overwhelmingly shows that juveniles, as a class, cannot be placed in that category —

that they are unable to restrain their impulses, are acutely susceptible to peer pressure, and are incapable of considering the long term consequences of their actions.[7] Those temporary developmental disabilities lessen blameworthiness irrespective of the crime. Accordingly, the Eighth Amendment cannot countenance *any* juvenile being given a sanction "akin to the death penalty." *Miller*, 132 *S. Ct.* at 2466.

ii. Courts Cannot Predict Which Juvenile Homicide Offenders Will Rehabilitate.

Graham expressly rejected a case-by-case proportionality approach in favor of a categorical bar on JLWOP for nonhomicide offenders because it is impossible for courts, or even expert psychologists, to divine whether any given adolescent is one of "the few incorrigible juvenile offenders" or one of "the many that have the capacity for change." *Graham*, 560 *U.S.* at 77 (citing *Roper*, 543 *U.S.* at 573);[8] *see also* Brief of Former Juvenile Court Judges as *Amici Curiae* in Support of Petitioners at 1, *Miller v. Alabama*, 132 *S. Ct.* 2455 (2012) (No. 10-9646, 10-9617), 2012 WL 135044, at *1 ("the criminal justice system

[7] *See* Laurence Steinberg, *et al.*, *Age Differences in Future Orientation and Delay Discounting*, 80 *Child Dev.* 28, 28, 29 (2009).

[8] *Roper* also relied on a series of studies documenting the impossibility of reliably "differentiat[ing] between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 *U.S.* at 573 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1013-15 (2003), and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 701-06 (4th ed. text rev. 2000)).

cannot predict what kind of person a fifteen year old juvenile offender will be when he is thirty-five or fifty-five or seventy-five."). That inability to predict is equally present where the offense at issue is homicide. That is, the risk that courts will misjudge a juvenile's capacity for rehabilitation and impose an unconstitutionally severe punishment necessitates a ban on *all* sentences that do not afford a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

The data demonstrates that an overwhelming majority of juvenile offenders mature into law-abiding adults:

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage — between five and ten percent, according to most studies — become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited.
>
> [Laurence Steinberg, *Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol*. 459, 466 (2009).]

Which defendants will fall within that five to ten percent is not just unknown, but unknowable.[9] As *Graham* recognized, "'[i]t

[9] For a fuller discussion of the difficulties of predicting which youth offenders will continue to offend into adulthood, *see* Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 *Am. Psychologist* 797, 799 (2001); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2005); John F. Edens, *et al.*, *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 *Behav. Sci. & L.* 53, 59 (2001) (citing studies and noting difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed).

is difficult even for expert psychologists" — much less courts — "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 3029 (quoting *Roper*, 551 *U.S.* at 573); *Miller*, 132 *S. Ct.* at 2469 (same).

As noted, the impossibility of predicting incorrigibility is no less pronounced for juvenile homicide offenders. Indeed, the Court first recognized this problem in *Roper*, where the juvenile defendant (unlike Comer, who neither committed nor intentionally facilitated the murder) committed a brutal premeditated thrill-killing. *Roper*, 551 *U.S.* at 556-58, 573 (describing how the petitioner broke into victim's home, tied up its inhabitant, and threw her off a bridge). The *Roper* Court's observations about the difficulty of predicting incorrigibility among juvenile homicide offenders are consistent with myriad studies. For example, one longitudinal study of juvenile murder offenders showed that expert predictions that the juveniles would re-offend were wrong a staggering 87% of the time. Rolf Loeber, *et al.*, *The Prediction of Violence and Homicide in Young Men*, 73 *J. Consulting and Clinical Psychol*. 1074, 1074-75 (2005); *see also* Alex R. Piquero, *Youth Matters: The Meaning of* Miller *for Theory, Research, and Policy regarding Developmental/Life-Course Criminology*, 39 *N.E. J. on Crim.* &

Civ. Con. 347, 357 (2013) (favorably discussing the Loeber study). Another longitudinal study shows that 86% of juveniles who score in the top 20th percentile on diagnostic tests measuring psychopathy do not display psychopathic tendencies by age 24. *See, e.g.*, Donald R. Lynam, *et al.*, Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy, 116 *J. Abnormal Psychol.* 155, 160, 162 (2007).[10] Furthermore, a vast majority of individuals convicted of murder do not commit another homicide after their release. Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 1 (2002) (only 1.2% of individuals serving time for homicide are re-arrested for homicide). In other words, just as with nonhomicide offenders, it is impossible to predict whether a juvenile convicted of homicide will be among the vast majority who shed their antisocial tendencies and age into law-abiding individuals, or among the miniscule who prove incorrigible. Hence, it is crucially important that juvenile defendants be reassessed once they have matured into adults.

[10] *See also* Br. Of *Amicus* American Psychological Association *et. al.*, *Roper v. Simmons,* 2004 *U.S. S. Ct. Briefs LEXIS* 437 at 44-48 (citing studies showing that even psychopathic tendencies in youth are unreliable indicators of future propensity for criminality); John F. Edens, *et al.*, *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 *Behav. Sci. & L.* 53, 73 (2001) (existing studies "provide little support for the argument that psychopathy during adolescence is a robust predictor of future violence, particularly violence that occurs beyond late adolescence").

Indeed, these very considerations led the Massachusetts Supreme Judicial Court to announce a categorical rule against JLWOP for homicide offenders. As that Court noted:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an 'irretrievably depraved character,' can never be made, with integrity, by the [State] at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender.
>
> [*Diatchenko v. DA*, 2013 *Mass. LEXIS* 986, 29 (Mass. Dec. 24, 2013) (internal citation omitted).]

This Court should adopt the same categorical rule, and vacate Comer's conviction.

iii. *Graham*'s Conclusion That JLWOP for Nonhomicide Offenders Serves No Penological Function Applies Equally To Homicide Offenders.

Graham's finding that none of the traditional rationales for penal sanctions — *i.e.*, retribution, deterrence, incapacitation, and rehabilitation — provide an "adequate justification" for life without parole for juvenile nonhomicide offenders applies equally to juvenile homicide offenders. *Graham*, 560 *U.S.* at 71. This is especially so for those who, like Comer, are convicted of felony-murder. *See infra*, Section 1.A.2.

First, retribution cannot justify JLWOP, even for homicide offenses. That is because the Supreme Court has made it clear

that the retributive calculus hinges primarily on the blameworthiness of the offender and only secondarily on the harm caused by the offense. As the Court has repeatedly stated, the "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham*, 560 *U.S.* at 71 (quoting *Tison v. Arizona,* 481 *U.S.* 137, 149 (1987)); *Atkins v. Virginia*, 536 *U.S.* 304, 319 (2002) ("With respect to retribution – the interest in seeing that the offender gets his 'just deserts' – the severity of the appropriate punishment necessarily depends on the culpability of the offender."); *Enmund v. Florida*, 458 *U.S.* 782, 800 (1982) ("As for retribution as a justification for [execution], we think this very much depends on the degree of [the defendant's] culpability – what [his] intentions, expectations, and actions were."). Juveniles are, however, and for the reasons explained above, categorically less culpable for their criminal acts – acts that, as the U.S. Supreme Court has recognized, "represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings v. Oklahoma*, 455 *U.S.* 104, 115 n.11 (1982) (internal quotation marks omitted). Thus, the case for retribution can never "be as strong for a minor." *Roper*, 543 *U.S.* at 571.

To be sure, Petitioner recognizes that murder is unique in its "moral depravity and . . . injury to the person and to the public," and that society may therefore express its condemnation through the imposition of uniquely harsh sanctions. *Coker v. Georgia,* 433 *U.S.* 584, 598 (1977). In this regard, JLWOP for homicide offenders admittedly pits two competing considerations against each other: society's interest in expressing its condemnation of murder versus the constitutional prohibitation against imposing the harshest penalties on those with diminished culpability. However, the case law is unequivocal that the latter consideration governs. Indeed, the Supreme Court has routinely invalidated laws that impose the harshest penalties on homicide offenders who belonged to a class exhibiting diminished culpability. Thus, the Court has held that the "death penalty may not be imposed on certain classes of offenders, such as juveniles . . ., the insane, and the mentally retarded, *no matter how heinous the crime*." *Roper*, 543 *U.S.* at 568 (emphasis added) (citing *Thompson v. Oklahoma,* 487 *U.S.* 815 (1988) (prohibiting execution of fifteen-year-old defendant); *Ford* v. *Wainwright*, 477 *U.S.* 399 (1986) (prohibition on death penalty for mentally incompetent defendants); *Atkins v. Virginia*, 536 *U.S.* 304 (2002) (ban on capital punishment for intellectually disabled defendants).[11] And it has repeatedly affirmed that even

[11] New Jersey courts have reached the same conclusion. *State v. Nelson*, 173

juvenile offenders who commit "a heinous crime" cannot "with reliability be classified among the worst offenders." *Id*. at 569-70. In other words, while it is true that murder is different, so too are children: their categorically diminished blameworthiness undercuts any retributive rationale for imposing on them a punishment that irreversibly condemns them to grow old and die in prison.

Nor does deterrence justify JLWOP for homicide offenses. Deterrence only operates where the would-be offender (1) contemplates the likely consequences of his or her actions; and (2) is able to restrain his or her impulses accordingly. But as *Graham*, as well as numerous studies, have observed, juveniles are categorically "less likely [to] take a possible punishment into consideration when making decisions," and are incapable of modulating their behavior to avoid punitive repercussions. *Id*.; *see also* Steinberg & Scott, *Less Guilty by Reason of Adolescence*, 58 *Am. Psychologist* at 1012-14; Elizabeth Cauffman, *et al*., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 *Developmental Psychol.* 193, 194-95 (2010). And, again, the

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N.J. 417, 493 (2002) (Zazzali, J., concurring) ("Executions, our most extreme expression of indignation, cannot be carried out on a defendant whose irrationalities were exacerbated at the time of her criminal acts to such an extent as to undermine our confidence that she is fully culpable, so that the death penalty can exact its intended retributive value."); *State v. Koskovich*, 168 *N.J.* 448, 554 (2001) (Zazzali, J., concurring) ("Any retributive value to be gained from an execution is surely reduced where the offender lacks sufficient maturity to be considered fully culpable.").

impulsivity and lack of foresight that lead juveniles to disregard the possible repercussions of their crimes apply to all criminal acts, not just nonhomicide ones. *Miller*, 132 *S. Ct.* at 2465 ("[N]one 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."). That is, there is nothing in the scientific literature, case law, or logic that suggests that the biological impediments that inhibit juveniles from fully considering the consequences of their actions are any less pronounced where the juvenile commits murder.

Incapacitation is an equally unavailing rationale based as it is on the problematic assumption that a juvenile is incorrigible — an assumption that is false with regard to homicide and non-homicide offenders alike. *Graham*, 560 *U.S.* at 72-73 ("The characteristics of juveniles make th[e] judgment [that a youth is incorrigible] questionable."); *Roper*, 543 U.S. at 573 (noting, in the context of a murder case, the difficulty "expert psychologists" have in "differentiat[ing] between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."); *see also supra* Section I.A.1.ii. By

contrast, a rule that prohibits JLWOP for homicide offenders in no way undermines the state's interest in incapacitating juveniles who do prove incorrigible. *Graham* was clear that its holding did not require that the state eventually release someone imprisoned for a juvenile offense; rather, it held that because it is impossible to reliably assess whether a juvenile will mature out of criminality, states may not label a juvenile an unreformable threat to society "at the outset" *Graham*, 560 *U.S.* at 73 – as the court implicitly did here by foreclosing any real possibility of Mr. Comer ever being released. Thus, if a parole board finds that an individual imprisoned for juvenile offenses is a continued threat to society, the categorical bar on JWLOP would not prevent a state from continuing to incapacitate that individual.

Finally, the rehabilitation rationale not only fails to supply a justification for JLWOP, but actively weighs against such sentences. "[R]ehabilitation traditionally has been regarded as the overarching objective" in dealing with juvenile offenders. *State ex rel. J.L.A.*, 136 *N.J.* 370, 377 (1994). Yet, as *Graham* held, by barring a juvenile from ever reentering society, JLWOP "forswears altogether the rehabilitative ideal." *Id.* at 74.

In sum, there is no legitimate penological justification for sentencing juvenile homicide offenders to life without

parole. A punishment that does not "measurably contribute[] to [any] of those [penological] goals . . . 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence is an unconstitutional punishment." *State v. Marshall*, 130 *N.J.* 109, 190 (1992) (quoting *Coker,* 433 *U.S.* at 592). For this reason, this Court must vacate and reduce Comer's unconstitutional sentence.

iv. *Graham*'s Recognition That Juveniles Are a Categorically More Vulnerable Class of Defendants Necessitates a Ban On All JLWOP Sentences, Regardless of the Crime.

Graham rejected a case-by-case approach in favor of a categorical ban on JLWOP for nonhomicide offenses for a second reason: "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." 560 *U.S.* at 78. Specifically, the Court noted that juveniles' "impulsiveness. . . [and] reluctance to trust defense counsel . . . [are] factors [that] are likely to impair the quality of a juvenile defendant's representation." *Id.* The critical decisions made by juveniles — such as whether to accept a plea agreement, waive a jury trial, testify, or offer a statement at sentencing — enhance the risk that a judge will incorrectly conclude that a juvenile is incorrigible. *Id.* *Graham* thus adopted a categorical bar out of a concern that such difficulties would lead "a court or jury [to] erroneously

conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide." *Id.* at 78-79. Of course, that risk is equally present, irrespective of the juvenile's underlying offense. Accordingly, it counsels in favor of a wholesale ban on JLWOP for all offenses, including homicide.

2. Comer's Sentence is Unconstitutional Under *Graham* Because Felony-Murder Is Not A Qualifying "Homicide Offense."

All of that said, even if this Court believes that *Graham* and *Miller* do not compel the wholesale abolition of JLWOP, Petitioner's *de facto* life sentence without parole is still unconstitutional under *Graham*, which prohibits JLWOP for offenders who, like Comer, "did not kill or intend to kill." 560 *U.S.* at 69. Thus, *Graham* held that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability," *id.*: first, because juveniles are inherently less culpable, *id.* at 68, and second, because those who do not intend to kill are "categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 69. Accordingly, the Court concluded, the Eighth Amendment forbids sentencing them to life without parole. *Id.* Specifically, the Court in *Graham* determined that the "kinds of homicide that can subject a juvenile offender to life without parole must exclude instances

where," as in this case, "the juvenile himself neither kills nor intends to kill the victim." *Miller*, 132 *S. Ct.* at 2475-76 (Breyer, J., concurring) (citing *Graham*, 560 *U.S.* at 68-69).

Petitioner was convicted of felony-murder which, though denominated a homicide offense, *N.J.S.A.* 2C:11-3(a)(3), does not require a showing that he killed or intended to kill the victim. *See State v. Darby*, 200 *N.J. Super.* 327, 331 (App. Div. 1984) (conviction of felony murder "requires only a showing that a death was caused during the commission of (or attempted commission or flight from) one of the crimes designated in the statute. The State need not prove that the death was purposely or knowingly committed; a wholly unintended killing is murder if it results from the commission of the underlying felony.").

Here, there is no indication in the record that Petitioner Comer acted with an intent to kill. According to the State, Comer's accomplice, Mr. Adams, spontaneously shot the murder victim. Dec. 11, 2003 Trial Trans. at 52-54, attached as Ex. C. No evidence was presented that Comer facilitated the shooting or that he was or should have been aware that his accomplice intended to shoot Mr. Paul. Indeed, the State emphasized in its closing that the jury did not need to find that Comer acted with any intent that Mr. Paul be killed in order to find him guilty of felony-murder. Dec. 16, 2003 Trial Trans. at 181-84, attached as Ex. D. And the trial judge so instructed the jury.

Dec. 17, 2003 Trial Trans. at 46, attached as Ex. E (for purposes of felony-murder, "it does not matter that the act which caused death was committed recklessly or unintentionally or accidentally.").

That instruction flowed from the principle that felony-murder is based on "transferred intent," *i.e.,* that "the defendant's intent to commit the felony satisfies the intent to kill required for murder." *Miller*, 132 *S. Ct.* at 2476 (Breyer, J., concurring). But there are at least two problems with using the fiction of transferred intent to justify imposing JLWOP for felony-murder offenses. First, the United States Supreme Court "has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment." *Id.* Thus, for example, the Court has held that the state may not rely upon a theory of transferred intent to impose the death penalty on an adult. *Enmund v. Florida*, 458 *U.S.* 782, 788 (1982) (the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was "in the car by the side of the road . . . , waiting to help the robbers escape").

Second, there is no penological justification for imposing JLWOP on juveniles who did not kill or *actually* intend to kill. The fiction of transferred intent "is premised on the idea that one engaged in a dangerous felony should understand the risk

that the victim of the felony could be killed, even by a confederate." 132 *S. Ct.* at 2476 (Breyer, J., concurring). As the New Jersey Supreme Court has explained:

> The historical justification for the [felony-murder] rule is that it serves as a general deterrent against the commission of violent crimes. The rationale is that if potential felons realize that they will be culpable as murderers for a death that occurs during the commission of serious crimes.
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> [*State v. Martin*, 119 *N.J.* 2, 20 (1990) (citations omitted).]

However, that justification is uniquely problematic for juvenile defendants: "the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively." *Miller*, 132 *S. Ct.* at 2476 (Breyer, J., concurring). *See, e.g.,* Berry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 *Law & Ineq.* 263, 286-87 (2013) (citing studies showing that "[y]ouths do not have the physiological capacity of adults to exercise mature judgment or control impulses effectively"); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 *Tex. L. Rev.* 799, 814 (2003) (juveniles lack the "capacity and inclination to project events into the future" or "consider the long-term consequences of their actions in making choices"); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 *Vill. L.*

Rev. 1607, 1645 (1992) (reviewing research concluding that youthfulness impairs consideration of alternatives or weighing and comparing consequences).

As Justice Frankfurter wrote in *May v. Anderson*, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." 345 *U.S.* 528, 536 (1953). To apply the doctrine of transferred intent to juveniles is to commit the very "fallacious reasoning" against which Justice Frankfurter warned. For these reasons, felony-murder cannot be considered a qualifying homicide offense under *Graham* or *Miller*. Accordingly, whether or not this Court embraces a complete ban on JLWOP for homicide offenses, Comer's sentence is unconstitutional under *Graham* and must vacated.

B. *Graham* and *Miller*'s Principles Apply to Petitioner's Aggregate Sentence.

Under the sentence imposed upon Comer - 75 years, of which more than 68 are to be served without the possibility of parole - it is a virtual certainty that Comer will die in prison for crimes committed as a youth, without any "meaningful opportunity to obtain release based on demonstrated maturity and

rehabilitation." *Graham*, 560 *U.S.* at 75.[12] The fact that Comer will die under a cumulative term of years that amounts to *de facto* life without parole, as opposed to a formal LWOP sentence, has no bearing on the applicability of *Graham* and *Miller* to his case.

The constitutional principle established by *Graham* and *Miller* is clear: because juveniles are inherently more impulsive and because their characters are developing, the Eighth Amendment forbids states from "making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Graham*, 560 *U.S.* at 75. *Miller* emphasized that none of its discussion of the hallmark features of youth in *Roper* or *Graham* was specific to the type of crime, 132 *S. Ct.* at 2465; equally so, nothing in those decisions is specific to the *number* of crimes. *See Iowa v. Null*, 836 *N.W.*2d 41, 73 (2013) (holding that *Miller* and *Graham* apply to sentences for multiple counts that add up to the *de facto* life without parole); *People v. Caballero*, 55 *Cal.* 4th 262, 272-73 (2012) ("[T]he purported distinction between a single sentence of life without parole and

[12] The earliest Mr. Comer will be eligible for parole is after his 86th birthday, well past his life expectancy, which is approximately 64 years. *See* Centers for Disease Control, Health, United States, 2012 at 76, *available at* http://www.cdc.gov/nchs/data/hus/2012/018.pdf. Even were he to live long enough to serve out his term, the "prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society" as required by the Supreme Court. *Iowa v. Null*, 836 *N.W.*2d 41, 71 (2013) (quoting *Graham*, 560 *U.S.* at 76).

one of component parts adding up to 110 years to life is unpersuasive.").

Nor does it matter that Comer's sentence is not formally denominated life without parole. The core premises of *Graham* and *Miller* — that juveniles are less culpable and more capable of rehabilitation — prohibit irreversibly terminal sentences for youths, regardless of the label the court affixes to them. As one court noted:

> A term of years effectively denying any possibility of parole is no less severe than an LWOP term. Removing the "LWOP" designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless.
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> [*People v. Nuñez*, 195 *Cal. App.* 4th 414, 425 (Cal. App. 4th Dist. 2011).]

That view has been embraced by the majority of courts to have considered the issue. *See, e.g., Thomas v. Pennsylvania*, 2012 *WL* 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (to "distinguish sentences based on their label . . . would degrade the holding of the Supreme Court" in *Graham*); *People v. Caballero*, 282 *P*.3d 291, 295 (Cal. 2012) ("*Miller* therefore made it clear that *Graham*'s 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional

equivalent of a life without parole sentence imposed in this case."); *People v. Rainer*, 2013 *WL* 1490107, at *1, *12 (Colo. App. Apr. 11, 2013) (aggregate sentence which rendered defendant ineligible for parole until he reached the age of 75 constituted a "an unconstitutional de facto sentence to life without parole"); *Floyd v. State*, 87 *So.*3d 45, 45 (Fla. 1st DCA 2012) (aggregate sentence that exceeds juvenile offender's life expectancy is unconstitutional under *Graham*); *United States v. Mathurin*, 2011 *WL* 2580775 (S.D. Fla. June 29, 2011) (same).

The biological and sociological considerations on which *Graham* and *Miller*'s conclusions are based (*i.e.,* juveniles' lesser blameworthiness, the likelihood that they will mature into law-abiding citizens, and the impossibility of predicting which children will prove incorrigible) forbid the state from sentencing a juvenile to die in prison. Those considerations govern regardless of the label that a court affixes to the sentence. In short, Petitioner's *de facto* LWOP sentence is as constitutionally infirm as would be a formal sentence to life without parole, and to find otherwise would elevate form over substance, as courts are loathe to do. *Nuñez*, 195 *Cal. App.* 4th at 425; *see generally Jefferson County v. Acker*, 527 *U.S.* 423, 439 (1999) (courts must "look through form and behind labels to substance").

II. Petitioner's Sentence Violates The State Constitution.

Even if the Court were to find that the Eighth Amendment permits a JLWOP sentence for homicide offenses under *Miller*, the New Jersey State Constitution's ban on cruel and unusual punishment provides an independent basis for abolishing all JLWOP sentences. *N.J. Const.*, *art.* I, *para.* 12.

It is well-established that the United States Supreme Court's interpretation of the Federal Constitution "establish[es] not the ceiling but only 'the floor of minimum constitutional protections'" that this State's citizens enjoy. *State v. Eckel*, 185 *N.J.* 523, 538 (2006) (quoting *State v. Gilmore*, 103 *N.J.* 508, 524 (1986)). The function of the State Constitution, then, is to serve both "as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law." *State v. Hunt*, 91 *N.J.* 338, 346 (1982) (internal quotation marks omitted). *See also State v. Baker*, 81 *N.J.* 99, 126, n.8 (1979) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court's interpretation of federal law.") (internal quotation marks omitted).

Thus, New Jersey's courts have routinely invoked the State Constitution where federal law has been insufficiently protective of the rights of its citizens. *See, e.g.*, *New Jersey Coalition Against The War In The Middle East v. J.M.B Realty*, 138 *N.J.* 326 (1994) (State constitutional free speech protections broader than the Fist Amendment); *State v. Pierce*, 136 *N.J.* 184, 208-13 (1994) (pat-down search permissible under the Fourth Amendment violated the State Constitution); *State v. Hemple*, 120 *N.J.* 182, 196-97 (1990) (State Constitution prohibits warrantless searches of garbage bags left on curb for collection, notwithstanding their permissibility under the Fourth Amendment); *State v. Novembrino*, 105 *N.J.* 95 (1987) (refusing to adopt good faith exception to exclusionary rule as the U.S. Supreme Court had done); *State v. Gilmore*, 103 *N.J.* at 522-23 (State Constitution imposes greater restriction than the federal Equal Protection Clause on using peremptory challenges to dismiss potential jurors for race-based reasons); *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982) (State Constitution safeguards greater individual rights to health and privacy); *State v. Alston*, 88 *N.J.* 211 (1981) (recognizing greater standing to challenge validity of car search under the State Constitution); *In re Grady*, 85 *N.J.* 235, 249 (1981) (recognizing greater right to privacy under the State Constitution); *State v. Schmid*, 84 *N.J.* 535, 560 (1980) (recognizing a greater right of

free speech on private university campus); *State v. Baker*, 81 *N.J.* 99, 112-13 (1979) (deviating from U.S. Supreme Court precedent and finding that the State Constitution prohibits zoning regulations which limit residency based upon the number of unrelated individuals present in a unit); *In re Quinlan*, 70 *N.J.* 10, 19, 40-41, 51 (1976) (finding a right of choice to terminate life support systems as aspect of right of privacy); *State v. Johnson*, 68 *N.J.* 349, 353 (1975) (requiring a higher standard for waiver of right to withhold consent to a search); *Robinson v. Cahill*, 62 *N.J.* 473, 482 (1973) (finding a right to education under the State Constitution). *See generally* S. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 *Rutgers L. Rev.* 707 (1983); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev*. 489 (1977).[13]

Here, there are several factors that favor holding that the State Constitution independently prohibits all JLWOP, even if its Federal counterpart does not. First, this is certainly a case in which "[p]reviously established bodies of state law . . . suggest distinctive state constitutional rights." *State*

[13] This is so, even where the text of the State and Federal constitutional provisions are identical. *See, e.g., State v. Eckel*, 185 *N.J.* 523, 538 (2006) ("Although that paragraph is almost identical to the text of the Fourth Amendment to the Federal Constitution, we have not hesitated in the past to afford our citizens greater protection against unreasonable searches and seizures under Article I, Paragraph 7 than would be the case under its federal counterpart.").

v. Hunt, 91 *N.J.* 338, 365 (1982) (Handler, J., concurring); *accord State v. Muhammad*, 145 *N.J.* 23, 40 (1996). In this case, that body of law is New Jersey's unique and expansive death penalty jurisprudence. As explained above, JLWOP is "akin to the death penalty" and must be "treated . . . similarly." 132 *S. Ct.* at 2466; *see also id.* at 2046 (Thomas, J., dissenting) (recognizing that *Miller* "eviscerates . . . the 'death is different' distinction"). Thus, in *State v. Ramseur*, the New Jersey Supreme Court held that "[o]ur State Constitution provides an additional and, where appropriate, more expansive source of protections against the arbitrary and nonindividualized imposition of the death penalty." 106 *N.J.* 123, 190 (1987). In *State v. Gerald*, the New Jersey Supreme Court declined to follow the U.S. Supreme Court's ruling that the Eighth Amendment permitted death sentences for individuals who displayed only "reckless indifference to human life." 113 *N.J.* at 75-76. Finding federal proportionality principles insufficiently protective, the Court concluded that the State Constitution limited the application of the death penalty to those who "intended to kill." *Id.* at 75-76. In *State v. Martini*, the Supreme Court held that, unlike federal law, state law prohibits death-penalty convicts from waiving the right to post-conviction relief and gives counsel standing to challenge waiver. 144 *N.J.* 603, 618 (1996). And in *State v. Marshall*,

the Supreme Court repudiated *McCleskey v. Kemp*, 481 *U.S.* 279 (1987), which held that a defendant could not invoke evidence of widespread racial disparities in capital sentences to challenge his death sentence, but must instead adduce evidence of purposeful discrimination in his case. 130 *N.J.* 109, 207-209 (unlike federal law, 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"). In short, in these and other matters, deviation from federal law is the norm. Given that JLWOP is a sentence of death by other means, the State Constitution's more robust safeguards against cruel and unusual punishment command a complete abolition of JLWOP sentences.

Second, this case also involves matters of particular state interest and local concern, as well as matters in which the state's traditions and public attitudes are implicated. *Hunt*, 91 *N.J.* at 363-68 (Handler, J., concurring); *accord Muhammad*, 145 *N.J.* at 40. Here, there are two such areas: the treatment of juveniles, *see State in re A.C.*, 426 N.J. *Super.* 81, 94-95 (Ch. Div. 2011) (noting that each State is "'allowed to experiment further and to seek in new and different ways the elusive answers to the problems of the young'" (quoting *McKeiver v. Pa.*, 403 *U.S.* 528, 547 (1971)), and criminal justice more generally. *See United States v. Lopez,* 514 *U.S.* 549, 561 n.3

(1995) ("States possess primary authority for defining and enforcing the criminal law.") (quoting *Brecht v. Abrahamson,* 507 *U.S.* 619 (1993); *Engle v. Isaac,* 456 *U.S.* 107, 128 (1982); *Gerald,* 113 *N.J.* at 76 ("Resort to a state-constitutional analysis is especially appropriate" in criminal justice matters because they are "of particular state interest or local concern and do[] not require a uniform national policy.'") (quoting Ramseur, 106 *N.J.* at 167). In accordance with these principles, the New Jersey Supreme Court has often parted ways with the United States Supreme Court and interpreted the State Constitution to provide broader constitutional protections for criminal defendants. *See, e.g., State v. Norman,* 151 *N.J.* 5, 25 (1997) (finding greater state constitutional protection for criminal defendants from attorney conflicts of interest); *State v. Hogan,* 144 *N.J.* 216, 231 (1995) (finding greater state constitutional guarantee of indictment by a grand jury); *Doe v. Poritz,* 142 *N.J.* 1, 104 (1995) (state constitution more protective of convicted sex offenders' reputation); *Pierce*, 136 *N.J.* at 208-13 (recognizing greater state constitutional protection against unreasonable searches and seizures); *State v. Marshall,* 130 *N.J.* 109, 208-10 (1992) (state constitution provides greater equal protection rights to criminal defendants facing the death penalty); *Gilmore*, 103 *N.J.* at 523-24 (recognizing greater rights to a jury representative of the

community with respect to peremptory challenges); *Schmid,* 84 *N.J.* at 560 (State Constitution provides greater privacy rights of a criminal defendant). Indeed, New Jersey has long been at the forefront when it comes to the protection of juveniles in its criminal justice system; for example, the State legislature outlawed the death penalty for juveniles under age 18 fully two decades before the Supreme Court concluded that the law so required. *See L.* 1985, c. 478 (amending *N.J.S.A.* 2C:11-3 to prohibit the death penalty for juveniles); *see also State v. Koskovich*, 168 *N.J.* 448, 554 (2001) (Zazzali, J., concurring) (noting that the prohibition "expressed a generalization" that juveniles are less mature than addults). Likewise, New Jersey has led a national effort to reduce the number of juveniles held in secure detention. See New Jersey Juvenile Detention Alternatives Initiative (JDAI), 2011 Annual Data Report (Feb. 2012) at ii (noting that New Jersey was the "only state to be designated a national model for detention reform" for juveniles); *see also State in re A.C., 426 N.J. Super.* at 95 (Ch.Div. 2011) (discussing New Jersey's participation in JDAI). In sum, the constitutional rights of criminal defendants in general, and juvenile defendants in particular, are core matters of state interest and local concern; and New Jersey's courts and legislature have repeatedly evinced a greater solicitude for the rights of juveniles and criminal defendants than their federal

counterparts. This, too, provides a basis for holding the State Constitution provides an independent basis for prohibiting all JLWOP sentences.

Third, New Jersey's courts give a broader construction to State constitutional provisions where federal case law fails to "pay[] due regard to precedent and the policies underlying specific constitutional guarantees." *State v. Baker,* 81 *N.J.* 99, 112 n.8 (1979) (quoting Brennan, *State Constitutions,* 90 *Harv. L. Rev.* at 502). Here, as explained above, the policies underlying the ban on death sentences for juveniles and JLWOP for nonhomicide offenders — namely, the recognition that youths are inherently less blameworthy, that most juveniles mature into law abiding citizens, and that predicting incorrigibility is impossible — lead inexorably to the conclusion that any sentence that irreversibly condemns a juvenile to die in prison is disproportionate and unsuported by any penological rationale. Miller's decision to stop short of an unqualified bar on JLWOP represents a failure to pay due regard to those biological and sociological facts. *Cf. State v. Henderson*, 208 *N.J.* 208 (2011) (deviating from federal law and adopting more stringent procedures for identification testimony on the basis of social science evidence showing that such testimony is often unreliable and prejudicial). Accordingly, this Court need not, and should

not, be constrained by the misguided minimalism embodied in Miller's holding.

This is, in short, a paradigmatic example of a case in which the Court should rely on the State Constitution to protect the rights of New Jerseyans. Because JLWOP is effectively a death sentence, it implicates New Jersey's historical commitment to providing more robust safeguards against disproportionate punishment in the death penalty context. And because criminal justice in general, and juvenile justice in particular, are core areas of state concern, resort to the State Constitution is especially appropriate. Finally, insofar as the United States Supreme Court failed to fully heed the developmental science by abstaining from announcing a wholesale ban on JLWOP, this Court should not hesitate to follow the State Constitution, which independently requires a categorical bar on such a sentence.

III. In The Alternative, Comer is Entitled To a New Sentencing In Which the Court Considers All the Mitigating Factors of Youth Before the Judge May Impose an LWOP Sentence.

Even if this Court finds that Comer's sentence did not run afoul of a categorical ban under the Federal or State Constitution, Comer is still entitled to a re-sentencing consistent with the dictates of Miller. At a minimum, Miller requires that before a court sentence a juvenile to LWOP, it carefully consider: (1) the youth's "chronological age" and

related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the youth's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) "the incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys;" and (5) "the possibility of rehabilitation." 132 *S. Ct.* at 2468. Such a hearing must be consistent with the dictates of due process, which include the right to present evidence pertaining to each of these factors. State v. Oliver, 162 *N.J.* 580, 590 (2000) ("A sentencing proceeding, like a criminal trial, must satisfy the requirements of due process.").

Few of these factors were addressed at Comer's sentencing; and those that were received only the most cursory consideration. This was consistent with the sentencing statute under which the trial court proceeded, which included only one youth-based mitigating factor – that the "conduct of a youthful defendant was substantially influenced by another person more mature than the defendant." *N.J.S.A.* 2C:44-1(b)(13). And while Comer's counsel argued that Comer was influenced by his older co-defendant and expressed, in passing, a belief that Comer

stood a higher chance of rehabilitation if he were afforded the possibility of parole, Hrg. Trans. at 9, 14, defense counsel did not address in any detail Comer's immaturity and impetuousness, his family and home circumstances, the incompetencies associated with his youth, or the likelihood that he would age into a law-abiding person, *i.e.*, the factors prescribed by *Miller*. Nor would the Court have been obligated to consider such factors, given the absence of any provision in *N.J.S.A.* 2C:44-1(b) requiring a lesser sentence on the basis of these considerations.[14]

The Court, for its part, addressed none of those issues. As to the mitigating factors Comer's counsel did raise, the court dispensed with them with one brief and entirely conclusory sentence: "[n]othing in [Comer's] conduct or [his] background mitigates the crimes for which he stands before me convicted." Hrg. Trans. at 33. Even if this conclusion somehow satisfied the requirements of *N.J.S.A.* 2C:44-1, it plainly falls short of the detailed, individualized finding required by *Miller*.

Accordingly, Comer is, at a minimum, entitled to re-sentencing in accordance with the dictates of *Miller* and due process.

[14] While the Court was not obligated to consider these mitigating factors, it had discretion to consider them when fashioning its sentence. *State v. Rice*, 425 *N.J. Super.* 375, 381 (2012) (recognizing that courts may consider non-statutory mitigating factors). The record reveals, however, that it did not do so here.

IV. Comer is Entitled to Retroactive Relief Under the Rule Announced in *Miller.*

If the Court concludes that Comer's sentence violates a Federal or State constitutional ban on all JLWOP sentences, or more narrowly, that his sentence runs afoul of *Graham*'s prohibition against JLWOP for youths who did not kill or intend to kill, it need not read further. Though neither bar existed at the time Comer's sentence became final, newly announced constitutional rules that "prohibit a certain category of punishment of a class of defendants because of their status or offense" (*i.e.*, a rule prohibiting LWOP because the offender is a juvenile or because the offender did not act with requisite intent) are always given full retroactive effect. *Penry v. Lynaugh*, 492 *U.S.* 302, 330 (1989); *Teague v. Lane*, 489 *U.S.* 288, 308 (1989). *See also Moore v. Biter*, 725 *F.*3d 1184, 1190 (9th Cir. 2013) (noting that the *Graham* rule has been applied retroactively); *In re Sparks*, 657 *F.*3d 258, 262 (5th Cir. 2011) (*Atkins* and *Roper* rules prohibiting execution of intellectually disabled and juvenile offenders, respectively, are retroactive).

In fact, the Court need only engage in a retroactivity analysis if it embraces the narrowest possible reading of *Graham* and *Miller* – that is, if it finds that the State and Federal Constitutions require only that a judge carefully consider all of the mitigating factors of youth before sentencing a juvenile

felony-murder offender to life without parole. Even if the Court adopts that position, Comer is still entitled to a re-sentencing in accordance with the procedures mandated by *Miller.*

A. The Court Must Evaluate *Miller*'s Retroactivity Under State Retroactivity Principles.

Even though *Miller* articulated rights guaranteed by the Federal Constitution, this court must first look to state law to determine whether *Miller* should be given retroactive effect. It is well-established that "[i]n our system of dual sovereignty, state courts are free to apply whatever rules about retroactivity they prefer in their own collateral proceedings because the federal doctrine of non-retroactivity limits only the scope of federal collateral relief." *In re Morgan*, 717 *F.3d* 1186, 1193 (11th Cir. 2013) (citing *Danforth v. Minnesota*, 552 *U.S.* 264, 281 (2008)). And, indeed, numerous state courts have found *Miller* to be fully retroactive under state law, without regard to federal retroactivity principles. *See, e.g.*, *Iowa v. Lockheart*, 820 *N.W.2d* 769 (Ct. App. 2012); *Louisiana v. Simmons*, 99 *So. 3d* 28 (2012).

Furthermore, the *Miller* rule is not just an Eighth Amendment guarantee: it is also a state constitutional requirement, which therefore must be analyzed under state retroactivity law. That is, as discussed above, it is well-established that the protections contained in Article I,

Paragraph 12 of the New Jersey Constitution are at least as robust as those afforded by the Eighth Amendment. *See, e.g., Ramseur*, 106 *N.J.* at 348 (Eighth Amendment sets the "floor of minimum constitutional protection[s]" which the state Constitution may "enhance[]"). Thus, any increase in Federal constitutional protections, as occurred with *Miller*, per force results in an equivalent elevation in the rights guaranteed by the State Constitution. *See* Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 *Rutgers L.J.* 491, 507 (1984) ("the rights afforded [under the State Constitution] must be greater or the same as those afforded under federal law."). In other words, when the *Miller* Court enlarged the protections that the Eighth Amendment afforded juveniles, that augmentation was, by necessity, imported into Article I, Paragraph 12 of the New Jersey Constitution. And where, a right is anchored in both the Federal and State Constitutions, the court must accord retroactivity if *either* state or federal retroactivity principles so require. *See State v. Purnell*, 161 *N.J.* 44, 53 (1999).[15]

[15] Because *Miller* is fully retroactive under state retroactivity principles, which are broader than their federal analogue, *Purnell*, 161 *N.J.* at 59 (noting that "the federal standard under *Teague* is much stricter than our State standard for relief when a defendant seeks to collaterally attack a prior judgment of conviction"), this Court need not decide whether federal law also requires retroactive application. In fact, however, federal law compels the same result. Under federal law, courts must give retroactive effect to any "watershed rule of criminal procedure . . . [that] implicat[es]

B. *Miller* is Retroactive Under State Law

When assessing whether a new rule[16] applies retroactively or prospectively, the "the pivotal consideration" is the rule's "purpose." *State v. Feal*, 194 *N.J.* 293, 308 (2008) (quoting *State v. Knight*, 145 *N.J.* 233, 251 (1996)). To that end, the New Jersey Supreme Court has subdivided new rules into three general categories. The first category consists of rules the purpose of which "'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function' and which raise 'serious questions about the accuracy of guilty verdicts in past trials.'" *State v. Burstein*, 85 *N.J.* 394, 406-07 (1981) (quoting *Williams v. United States*, 401 *U.S.* 646, 653 (1971)). These rules are "given *complete* retroactive effect, regardless of how much the State justifiably relied on the old

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the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 *U.S.* 348, 351-52 (2004) (internal quotation marks omitted); *Teague*, 489 *U.S.* at 311. And *Miller*'s holding that a judge's failure to consider the mitigating factors of youth creates an unacceptably high likelihood of a disproportionate sentence qualifies as a watershed rule. *See*, e.g., *Illinois v. Williams*, 982 *N.E.*2d 181, 197 (Ill. App. Ct. 2012). Moreover, by vacating Miller's conviction, *Miller*, 132 *S. Ct.* at 2469, 2473-75, in the context of a habeas petition, the Supreme Court clearly signaled that its decision in that case would be retroactive. As the Court stated in *Teague*, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." 489 *U.S.* at 300. *See Diatchenko v. DA*, 2013 *Mass. LEXIS* 986, 22-24 (Mass. Dec. 24, 2013) (finding that the Supreme Court's application of *Miller* to the habeas petitioner requires full retraoctivity); *Iowa v. Ragland*, 836 *N.W.2d* 107, 114 (2013).

[16] The threshold question in retroactivity analysis under state law is whether a new rule of law has actually been announced. *State v. Burstein,* 85 *N.J.* 394, 403 (1981). And every court to consider the issue has found that *Miller*'s command that sentencing judging give near dispositive weight to all of the mitigating factors of youth before sentencing a juvenile to LWOP is a new rule. *See e.g.*, *In re Morgan*, 717 *F.3d* 1186 (11th Cir. 2013) (citing cases). Petitioner does not contest that conensus view.

rule or how much the administration of justice is burdened." 85 *N.J.* at 407 (emphasis in original). In the second category are rules "designed to enhance the reliability of the factfinding process but the old rule did not 'substantially' impair the accuracy of that process." *Id*. at 408. Where a rule falls into this category, courts must weigh the degree to which the old rule subverted the fact-finding process against "the countervailing State reliance on the old rule and the disruptive effect that retroactivity would have on the administration of justice." *Id.* Last are exclusionary rules, designed "solely to deter illegal police conduct." *Id*. Such rules are "virtually never given retroactive effect." *Id.*

Miller plainly falls within the first category. When assessing whether an old rule substantially impaired the factfinding process, the central question is "[one] of probabilities" — *i.e.*, what is the probability that, absent the new rule, a defendant will be convicted of a crime he did not commit or given a sentence the Constitution prohibits. *Adams v. Illinois*, 405 *U.S.* 278, 281 (1972).[17] *Miller* squarely held that reliable factfinding concerning a juvenile's culpability and

[17] Prior to *Teague v. Lane*, 489 *U.S.* at 308, both federal and state retroactivity law were governed by the standard set forth in *Linkletter v. Walker*, 381 *U.S.* 618 (1965). While *Teague* overruled *Linkletter* and articulated a stronger federal presumption against retroactivity, this state continues to follow the *Linkletter* standard. *See State v. Knight*, 145 *N.J.* 233, 253 (1996). Petitioner, therefore, relies on pre-*Teague* U.S. Supreme Court decisions because they employ the same retroactivity standard as that used by New Jersey courts today.

capacity for rehabilitation is severely impaired absent careful consideration of the "mitigating qualities of youth" and that failure to do so "poses *too great a risk* of disproportionate punishment." 132 *S. Ct.* at 2469 (emphasis added). Where, by contrast, judges properly consider these qualities, JLWOP will be, at most, "uncommon." *Id.* at 2469. Put differently, a *Miller* hearing does not merely result in a marginal decrease in the probability of a juvenile receiving LWOP; rather, such hearings will, in a vast majority of cases, be outcome determinative.

It makes no difference that the impairment occurs at sentencing as opposed to trial. Retroactivity has been afforded to, for example, the rule that defendants are entitled to counsel at sentencing, *McConnell v. Rhay*, 393 *U.S.* 2 (1968), as well as to the rule that juries depopulated of veniremen who oppose capital punishment may not impose the death penalty at sentencing. *Witherspoon v. Illinois*, 391 *U.S.* 510, 523, n.22 (1968) (permitting prosecutors to exclude veniremen based on opposition to the death penalty "necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate") (quoting *Linkletter* v. *Walker*, 381 *U.S.* 618 639 (1965)). Courts have also given retroactive effect to the rule that judges must take into account mitigating factors at sentencing before imposing the death penalty. *Eddings*, 455 *U.S.*

at 113-14; *Lockett v. Ohio*, 438 *U.S.* 586 (1978); *Dutton v. Brown*, 812 *F.*2d 593, 599 n.7 (10th Cir. 1987) (noting that "retroactive application" of *Lockett v. Ohio* is "required"); *Songer v. Wainwright*, 769 *F.*2d 1488, 1489 (11h Cir. 1985) (same). And this is so notwithstanding that, unlike in *Miller*, the Supreme Court has never suggested that such practices would make the death penalty "uncommon." Accordingly, this Court should accord full retroactivity to *Miller*.

Even if this Court were to find that *Miller* fits into the second category – that is, that the *Miller* rule enhances the reliability of factfinding at sentencing, but that its absence would "not substantially impair the accuracy of that process," *Burstein*, 85 *N.J.* at 408 — it must still be given full retroactive effect. Where a rule falls into this category, courts must weigh the impact on the individual versus "the effect a retroactive application would have on the administration of justice," and will generally avoid giving full retroactive effect to rules that would "impose unjustified burdens on our criminal justice system." *Knight*, 145 *N.J.* at 252 (1996) ("We have noted our concern about overwhelming courts with retrials, and our awareness of the difficulty in re-prosecuting cases in which the offense took place years in the past."). Where, however, a new rule would require reopening the cases of a "comparatively small" number of people, the court

must afford full retroactivity. *State v. Krol*, 68 *N.J.* 236, 267 & n. 15 (1975) (finding that there would be no detrimental effect on justice system if rule affecting thirty-nine persons were applied retroactively).

Here, the scales tip heavily in favor of full retroactivity. As explained above, the *Miller* rule is critical to ensuring that individuals are not improperly deemed incorrigible and sentenced to die for crimes committed as children. The state's interest in the efficient administration of justice pales by contrast. According to Department of Correction ("DOC") data, there are less than 50 individuals serving life without parole or its functional equivalent.[18] DOC Response to OPRA Request, Jan. 17, 2014, attached as Ex. F. Thus, applying *Miller* retroactively would neither "be chaotic" nor "overwhelm our courts." *State v. Catania*, 85 *N.J.* 418, 447 (1981).

[18] No individual in New Jersey is currently serving a formal term of JLWOP. *See* Sentencing Project: Juvenile Life Without Parole 2, n.3, *available at* http://sentencingproject.org/doc/publications/publications/jj_jlwopfactsheetJuly2010.pdf. That said, the state does not keep statistics on which individuals serving *de facto* JLWOP. However, according to DOC statistics, of the individuals sentenced and admitted at age 19 or younger, 50 are serving mandatory minimums between 30 and 45 years; only 17 are serving mandatory minimum sentences in excess of 45 years. Ex. F. Petitioner does not include in its estimate anyone who was sentenced and admitted at age 20 or 21 because while there may be some exceptional cases where an individual committed a crime at age 17 and was not sentenced until age 20 or 21, there are likely a higher number of individuals who committed crimes at age 18 and were sentenced to an excess of thirty years at age 19.

CONCLUSION

For the reasons stated above, Comer's sentence to *de facto* life without parole for crimes he committed as a minor violates the State and Federal Constitutions' prohibition of cruel and unusual punishment. Comer therefore requests a reduction in sentence, under *R.* 3:21-10(b)(5), consistent with the principles set out in *Graham v. Florida*, 130 *S. Ct.* 2011 (2010), and *Miller v. Alabama*, 132 *S. Ct.* 2455, 2464 (2010). Moreover, and in any event, the Court should re-sentence Comer in a manner which includes the careful consideration and proper weighing of the mitigating factors of youth, as required by *Miller*.

Respectfully Submitted,

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