

March 4, 2016

**VIA HAND-DELIVERY**

Mark Neary, Clerk  
Supreme Court of New Jersey  
Richard J. Hughes Justice Complex  
25 Market Street, 5<sup>th</sup> Floor  
Trenton, NJ 08625-0006

**RE: State of New Jersey v. James Comer, Docket No. A-4854-14**

Dear Mr. Neary:

Enclosed for filing on behalf of the above-referenced Petitioner/Cross-Appellant James Comer, please find the original and five (5) copies of the following:

1. Petitioner/Cross-Appellant's Notice of Motion for Direct Certification and Consolidation and for Extension of Time for Filing Same;
2. Certification of Lawrence S. Lustberg, Esq., in Support of Motion for Direct Certification and Consolidation and for Extension of Time for Filing Same; and
3. Certification of Service.

Thank you for your kind attention to this matter.

Respectfully submitted,



Lawrence S. Lustberg

cc: LeeAnn Cunningham, Esq. w/encs. via email  
Alexander Shalom, Esq. w/encs. via email

**GIBBONS P.C.**

One Gateway Center  
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llustberg@gibbonslaw.com  
Lawrence S. Lustberg  
*Attorney for Petitioner/Cross-Appellant James Comer*

STATE OF NEW JERSEY,

Appellant/Cross-Appellee,

VS.

JAMES COMER,

Petitioner/Cross-Appellant.

SUPREME COURT OF NEW JERSEY  
Docket No. A-4854-14

Criminal Action

On Appeal From:  
Superior Court of New Jersey,  
Law Division, Essex County

Honorable Thomas R. Vena, J.S.C

**NOTICE OF MOTION FOR DIRECT  
CERTIFICATION AND CONSOLIDATION  
AND FOR EXTENSION OF TIME FOR  
FILING SAME**

**NOTICE OF MOTION**

**TO:**

LeeAnn Cunningham, Esq.  
Special Deputy Attorney General  
Essex County Prosecutor's Office  
50 West Market Street, 3<sup>rd</sup> Floor  
Newark New Jersey 07102

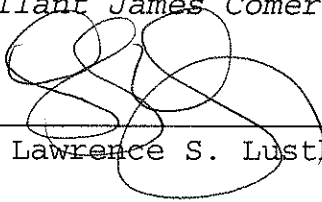
**COUNSEL:**

**PLEASE TAKE NOTICE** that Petitioner/Cross-Appellant James Comer, by and through his undersigned attorneys, Gibbons P.C. (Lawrence S. Lustberg, Esq., and Avram D. Frey, Esq., appearing) hereby moves before the Supreme Court of New Jersey for an Order pursuant to R. 2:12-2, granting direct certification of appeal and cross-appeal in the above-captioned matter, and consolidation with *State v. Zuber*, Docket No. A-4169-11T2, and for extension of time for filing this motion under R. 2:4-4.

**PLEASE TAKE FURTHER NOTICE** that in support of this motion Petitioner/Cross-Appellant shall rely upon the Certification of Lawrence S. Lustberg, Esq., filed herewith.

Respectfully submitted,

**GIBBONS P.C.**  
**One Gateway Center**  
**Newark, New Jersey 07102-5310**  
**(973) 596-4500**  
*Attorney for Petitioner/Cross-Appellant James Comer*

By:   
Lawrence S. Lustberg

Dated: March 4, 2016

**GIBBONS P.C.**

One Gateway Center  
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llustberg@gibbonslaw.com  
Lawrence S. Lustberg  
*Attorneys for Petitioner/Cross-Appellant James Comer*

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Appellant/Cross-Appellee,

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Superior Court of New Jersey,  
Law Division, Essex County

Honorable Thomas R. Vena, J.S.C

**CERTIFICATION OF  
LAWRENCE S. LUSTBERG, ESQ.**

LAWRENCE S. LUSTBERG, ESQ., of full age, hereby certifies  
as follows:

1. I am an attorney-at-law of the States of New Jersey and New York and Director of the John J. Gibbons Fellowship in Public Interest and Constitutional Law at Gibbons P.C., attorneys for Petitioner/Cross-Appellant James Comer in the above-captioned matter. I submit this certification in support of Mr. Comer's Motion for Direct Certification and Consolidation

with *State v. Zuber*, Case No. A-4169-11T2, and for Extension of Time for Filing Same under R. 2:4-4.

2. This Court granted certification in *Zuber* on February 12, 2016; notice that it had done so was posted on the Court's website on February 16, 2016. *Zuber* presents several questions related to the United States Supreme Court decision in *Graham v. Florida*, 560 U.S. 48 (2010) (barring life without parole ("LWOP") sentences for juvenile, nonhomicide offenders): (1) whether *Graham* applies to term-of-years sentences that are functionally equivalent to life without parole ("de facto LWOP"), or instead only to sentences formally designated "life without parole;" (2) if *Graham* applies to sentences of de facto LWOP, how New Jersey courts should determine when a term-of-years sentence amounts to de facto LWOP; and (3) whether *Graham* applies even to some term-of-years sentences short of de facto LWOP because *Graham's* language that juvenile nonhomicide offenders must be afforded "some meaningful opportunity for release based on demonstrated maturity and rehabilitation," 460 U.S. at 75, precludes mere "geriatric release," see *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (holding that 52.5 year term without parole eligibility for juvenile nonhomicide offender violated *Graham* because defendant would be in late 60's at first opportunity for release).

3. Petitioner James Comer was convicted of felony murder,

armed robbery, and weapons-related charges for offenses that occurred when he was 17 years and three months old. He was sentenced to an aggregate term of 75 years, of which 68 years and 3 months are without parole eligibility. The trial court below determined that Comer's sentence amounted to *de facto* LWOP.

4. Comer filed the present motion on June 13, 2014, alleging that his sentence is illegal and requires correction under R. 3:21-10(b). Comer's claims rely on the United States Supreme Court's recent decisions addressing the constitutional limits on the sentencing of juveniles in light of their unique brain physiology and development, *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for juveniles), *Graham*, 460 U.S. 48, and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) (forbidding LWOP for juvenile homicide offenders where not preceded by consideration of the mitigating factors of youth).

5. Specifically, Comer's motion presented the following issues: (1) whether *Graham* and *Miller* apply to *de facto* LWOP sentences like Comer's; (2) whether LWOP is unconstitutional under all circumstances for juvenile offenders, particularly under the New Jersey Constitution, given this State's long history of more expansive protection of the rights of criminal defendants in general and juveniles in particular; (3) whether LWOP is unconstitutional under the State and Federal

Constitutions for the narrower group of juvenile offenders who, like Comer, neither killed nor intended to kill; and (4) whether Comer's sentence violates the holding of *Miller*, which has now been held to apply retroactively, *Montgomery v. Louisiana*, 136 S.Ct. 718 (2015), because Comer's sentence was not preceded by consideration of the mitigating factors of his youth.

6. The trial court held that Comer's term-of-years sentence amounted to *de facto* life without parole and was accordingly governed by *Graham* and *Miller*. The court further held that *Miller* applied retroactively under New Jersey law, and that the rule in *Miller* was violated in Comer's case because his sentencing did not adequately include consideration of the mitigating factors of youth. The trial court rejected, however, Comer's arguments that *Graham* prohibits life without parole specifically for juveniles who neither kill nor intend to kill, and that the State Constitution prohibits sentencing juveniles to life without parole under all circumstances.

7. The State sought leave to appeal to the Superior Court of New Jersey, Appellate Division, which, on June 29, 2015, granted the motion. In its appeal, the State argues that *de facto* LWOP is not the constitutional equivalent to sentences formally designated "life without parole;" that *Miller* does not apply to all LWOP sentences imposed upon juveniles but only to mandatory LWOP sentences; and that Mr. Comer's sentence was, in any event,

consistent with *Miller*.

8. Comer moved for leave to cross-appeal which motion was granted on July 6, 2015. Comer's cross-appeal challenges the trial court's ruling on his claims that LWOP is unconstitutional for juvenile offenders under all circumstances, and certainly in cases where the defendant neither killed nor intended to kill.

9. The State filed its initial brief on November 9, 2015. Petitioner submitted his brief in response and cross-appeal on December 24, 2015. On January 21, 2016, the State submitted a reply. Petitioner filed a reply in support of his original cross-appeal on February 9, 2016. Further, both sides have filed letters, pursuant to R. 2:6-11(d), addressing the import of the United States Supreme Court's January 25, 2016 decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2015), Comer on January 27, 2016 and the State on February 11, 2016.

10. The issues in this case have thus been fully briefed in the Appellate Division.

11. This Court should grant direct certification of Comer's suit and should consolidate this matter with *Zuber* for argument and consideration so as to most efficiently and thoroughly address the full range of issues, with the benefit of the fullest possible briefing, arising out of the United States Supreme Court's decisions in *Roper*, *Graham*, *Miller*, and *Montgomery*. These decisions, based upon current medical and



social science research regarding the adolescent brain, combine to describe constitutional limits on sentencing juvenile offenders to LWOP. In light of New Jersey's established concern for the rights of criminal defendants and juveniles, the implication of these holdings and their underlying principles is a matter of great public interest. R. 2:12-4 (direct certification appropriate where appeal "presents a question of general public importance which has not been but should be settled by the Supreme Court"); see, e.g., *Burgos v. State*, 225 N.J. 175, 183 (2015) (direct certification granted to resolve apparent conflict between State and Federal constitutional Contracts Clause with Debt Limitation Clause of State Constitution arising out of State non-payment of statutory contributions to certain pension funds); *Garden State Equality v. Dow*, 216 N.J. 314, 319 (2013) (direct certification granted to determine whether State Civil Union Act violated State Equal Protection Clause by prohibiting same-sex marriage in light of *United States v. Windsor*, 570 U.S. \_\_\_, 133 S.Ct. 2675 (2013)); *State v. Brennan*, 183 N.J. 202, 205 (2005) (direct certification granted to determine admissibility of evidence of Battered Women's Syndrome to support defense of duress in criminal prosecution); *State v. Town of Morrison*, 179 N.J. 279, 284 (1992) (direct certification granted in eminent domain matter where town alleged that Department of Transportation failed to

provide appraisals of neighboring property); *In re Bd. of Educ.*, 99 N.J. 523, 527 (1985) (direct certification granted in suit bringing First Amendment challenge to statute requiring non-union public employees to pay dues to majority-representative unions).

12. Comer also asks this Court to consolidate his case with *Zuber* because the two cases share a critical set of issues underlying the fundamental constitutional questions before the Court: whether *de facto* LWOP is constitutionally equivalent to sentences formally designated "life without parole," and if so, how *de facto* LWOP is to be determined in individual cases. These are precisely the circumstances under which such consolidation on appeal is, as this Court has held, appropriate. *See, e.g., In re Adoption of N.J.A.C. 5:96*, 215 N.J. 578 (2013) (consolidation of appeals from builders' association and affordable housing advocacy organizations in challenge to substantive rules under *Mount Laurel* doctrine); *State v. Gaitan*, 209 N.J. 339 (2012) (consolidating appeals from separate defendants that both raised issue of retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010)); *State v. Hernandez*, 208 N.J. 24 (2011) (consolidating appeals raising the common issue of proper interpretation of R. 3:21-8 concerning award of jail credits); *State v. Clarke*, 203 N.J. 166 (2010) (consolidating appeals that presented identical issue of propriety of remand to conduct

plenary hearings on defendants' requests for admission to drug court); *State v. Pena-Flores*, 198 N.J. 6 (2009) (consolidating appeals raising common issue of scope of automobile exception to the warrant requirement under State Constitution); *State v. Sweet*, 195 N.J. 357 (2008) (consolidating appeals raising common issue concerning introduction of Breathalyzer-related evidence in driving while intoxicated cases under Confrontation Clause).

13. Indeed, it is under just such circumstances that this Court has simultaneously granted direct certification and consolidation so as to address common issues raised by separate claimants. See, e.g., *Lang v. Baker*, 101 N.J. 147, 150 n.1 (1985) (granting direct certification and consolidating with case already granted certification in light of common issue of whether statement of damages under R. 4:5-2 effectively caps recoverable damages at trial).

14. To be sure, beyond the question of whether *de facto* LWOP is constitutionally equivalent to sentences formally labeled "life without parole," Comer's motion raises certain issues not present in *Zuber*. Specifically, Comer raises questions pertinent to juvenile homicide offenses, which are, of course, the most likely to result in LWOP sentences. Those questions require the Court to determine whether LWOP may, under *Graham*, be imposed on juvenile offenders who neither killed nor intended to kill, *Graham*, 560 U.S. at 69 ("[W]hen compared to an adult

murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”), and indeed, whether an LWOP sentence may ever be imposed on a juvenile offender, and if so, under what circumstances, following *Miller* and *Montgomery*. Certainly, these issues must be resolved, and the Court’s grant of certification in *Zuber* provides it with the opportunity to do so as part of its consideration of when, if ever, juvenile offenders may receive term-of-years sentences that amount to life without parole. Of course, that *Comer*’s case presents somewhat different but closely related issues to those in *Zuber* is no bar to consolidation. See, e.g., *Walker v. Giuffre*, 209 N.J. 124, 128 (2012) (consolidating distinct actions on appeal “[a]lthough the two appeals arise in the context of different fee-shifting statutes and although each confronts this Court with its own unique challenges[] because they present one overarching question concerning the continuing validity of the [contingency-enhancement of *Rendine v. Pantzer*, 141 N.J. 292 (1995)]”); *State v. Molina*, 187 N.J. 531 (2006) (consolidating appeals to determine rule for “within time” relief under R. 2:4-4(a) as to four separate defendants presenting unique legal questions under the rule).

15. Under R. 2:12-2(a), a motion for direct certification to this Court is to be filed within ten days from the filing of the last briefs in the Appellate Division. Undersigned Counsel

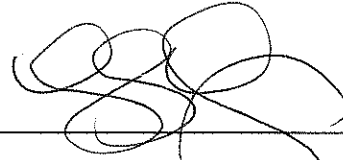
respectfully request that this Court nonetheless accept Comer's Motion for Direct Certification and Consolidation as timely filed by extending the time for filing under R. 2:4-4. It has only been a little more than two weeks since the Court posted its grant of certification in *Zuber*. As soon as we realized that certification had been granted in *Zuber* we began work on this motion. Unfortunately, however, due to the fact that my colleague here at Gibbons P.C., Avram Frey, Esq., who works on this case with me, was studying for and then sat for the New Jersey Bar Exam on February 24 and 25, while I was fully engaged with other matters (including that I am preparing for a seven-week jury trial beginning this coming Monday in the United States District Court, and had a complex Appellate Division argument on February 23, 2016), we were unable to complete the motion until today.

16. Because, in spite of these extenuating circumstances, this filing is submitted soon after the deadline, no party would be prejudiced by the filing of Comer's motion at this time.

17. In light of the foregoing, Comer respectfully moves this Honorable Court to grant direct certification of this matter, to consolidate this matter with *State v. Zuber*, and for acceptance of this filing as timely under R. 2:4-4.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made

by me are willfully false, I am subject to punishment.

A handwritten signature in black ink, consisting of several overlapping loops and curves, positioned above a horizontal line.

Lawrence S. Lustberg, Esq.

Dated: March 4, 2016

**GIBBONS P.C.**

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Newark, New Jersey 07102-5310  
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**CERTIFICATION OF SERVICE**

I hereby certify that, on March 4, 2016 the original and five (5) copies of the following documents were hand-delivered to the Honorable Chief Justice and Appellate Justices, Supreme Court of New Jersey, Richard J. Hughes Justice Complex, P.O. Box 006, Trenton, New Jersey 08625, Attn: Mark Neary, Clerk:

Petitioner/Cross-Appellant's Notice of Motion for Direct Certification and Consolidation and for Extension of Time for Filing Same;

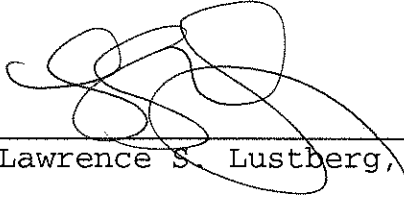
Certification of Lawrence S. Lustberg, Esq., in Support of Motion for Direct Certification and Consolidation and for Extension of Time for Filing Same; and

Certification of Service.

I hereby certify that, pursuant to R. 2:8-1(b), on March 4, 2016, I caused a copy of the above-referenced documents to be served via email and regular mail upon:

LeeAnn Cunningham, Esq.  
Special Deputy Attorney General/Acting Assistant Prosecutor  
Essex County Prosecutor's Office  
50 West Market Street, 3<sup>rd</sup> Floor  
Newark New Jersey 07102

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Lawrence S. Lustberg, Esq.

Dated: March 4, 2016