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State of New Jersey, Plaintiff, v. James Comer, Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO. 084509 SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-1230-18T Criminal Action

PETITION FOR CERTIFICATION

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STATEMENT OF THE MATTER

This petition raises the question of whether N.J.S.A. 2C:11-3b(1), which mandates a minimum sentence of 30 years without parole, is unconstitutional as applied to juveniles. That question follows inexorably from United States Supreme Court jurisprudence, based upon now established science, that first barred the death penalty for juveniles, then prohibited sentences of life without parole (LWOP) for juveniles convicted of non-homicides, and then limited LWOP for juveniles convicted of homicide to those found incorrigible after consideration of youth and its attendant circumstances (the so-called *Miller* factors). *See Miller v. Alabama*, 567 U.S. 460, 470-75, 479-80 (2012) (citations omitted). In *State v. Zuber*, this Court extended that jurisprudence, holding that *Miller* "applies with equal strength" to *de facto* LWOP, even for multiple offenses. 227 N.J. 422, 446-47 (2017). But *Zuber* also recognized that a sentence of "[d]ecades" in prison without parole would raise "serious constitutional issues" in a future case. *Id.* at 452-53. Accordingly, the Court wrote:

> [T]o stave off possible future constitutional challenges to the current sentencing scheme, we ask the Legislature to consider enacting a statute that would provide for later review of juvenile sentences that have lengthy periods of parole ineligibility.
>
> [*Id.* at 430.]

Over three years later, however, the Legislature has not acted, and Comer is thus compelled to raise the challenge that *Zuber*

foresaw. Now, consistent with its constitutional duty, this Court should determine whether a mandatory minimum sentence of 30 years without parole for juveniles passes constitutional muster.

Comer was convicted in 2003 of armed robbery, felony-murder, and weapons offenses, and was sentenced to an aggregate term of 75 years. After *Miller*, this Court reversed his sentence as the "the practical equivalent of life without parole," remanding with instructions that, "the trial court should consider the *Miller* factors when it determines the length of [Comer's] sentence." *Zuber*, 227 N.J. at 429, 453. Comer argued on remand that such individualized consideration of all relevant factors suggested a sentence of less than 30 years, and that N.J.S.A. 2C:11-3b(1) was unconstitutional since "objective indicia of society's standards," the shortcomings of youth, the ways those shortcomings undercut penological rationales, and the harshness of a 30-year term, all rendered a 30-year mandatory minimum disproportionate for juveniles. The trial court, however, found that, "the legislature has made a determination [] that society abhors the taking of life," Sentencing Tr., *State v. Comer*, Dkt. No. 03-01-00231-I (Oct. 5, 2018), at 81:24-82:2, applied the mandatory minimum, and imposed an overall sentence of 30 years without parole.

Comer appealed, again challenging application of N.J.S.A. 2C:11-3b(1) to juveniles, but the Appellate Division affirmed. Declining to conduct the relevant proportionality analysis, the

court stated that Comer's challenge "should [] proceed in the Legislature," adding that, "[i]n the meantime, James Comer received a very substantial reduction of his original sentence," *State v. Comer*, Dkt. No. A-1230-18T2, at *30 (May 6, 2020) (hereinafter cited to in the attached Appendix, at 2a-32a), and holding that *State v. Pratt*, 226 N.J. Super. 307 (App. Div. 1988), which upheld N.J.S.A. 2C:11-3b(1) as applied to juveniles over 30 years ago, "remain[ed] good law," *id.* at 23a.

Comer now seeks certification on the seminal question left open in *Zuber* of whether a mandatory minimum penalty of 30 years without parole is constitutional for juveniles. The decision below should not be the final word on this question, fundamentally for two reasons. First, contrary to the Appellate Division's reasoning, "when legislative inaction threatens to abridge a fundamental right . . . , the judiciary must afford an appropriate remedy." *Abbott v. Burke*, 100 N.J. 269, 282 (1985). And second, the decision in *Pratt* – rendered long before seismic changes in the pertinent law, science, and societal consensus – should be revisited, because determinations of the appropriateness of punishment must necessarily evolve as society progresses. Here, contemporary analysis establishes that a mandatory sentence of 30 years for a juvenile is disproportionate. Accordingly, the Court should grant certification to further delineate the constitutional limits on juvenile sentencing.

QUESTION PRESENTED

1. Whether N.J.S.A. 2C:11-3b(1) is unconstitutional as applied to juveniles because it mandates a minimum sentence of 30 years without parole, barring sentencing courts from imposing a lesser term of years where individualized consideration of a juvenile's youth and attendant circumstances so warrant, in violation of Article I, paragraph 12 of the New Jersey Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

Certification is warranted:

> [I]f the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires.
>
> [*R.* 2:12-4.]

This case "presents a question of general public importance which has not been but should be settled by the Supreme Court," because it squarely raises an issue at the forefront of the recent sea-change in the constitutional law of juvenile sentencing: whether the Legislature may require a mandatory minimum sentence of 30 years without parole for all juveniles, or whether a sentence of that length may only be imposed after individualized consideration of all relevant facts, including the *Miller* factors.

That question asks this Court to write the next chapter in the recent and still evolving caselaw addressing juvenile

punishment. The relevant history began with *Roper v. Simmons*, which outlawed capital punishment for juveniles on the basis of research showing "[t]hree general differences between juveniles under 18 and adults[, which] demonstrate that juvenile[s] [] cannot with reliability be classified among the worst offenders." 543 U.S. 551, 569 (2005).[1]

The Court built on that foundation in *Graham v. Florida*, 560 U.S. 48 (2010). Noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," 560 U.S. at 68, *Graham* barred sentences of life without parole for juveniles convicted of non-homicide offenses, holding that such juveniles must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" at a point that permits "fulfillment outside prison walls" and "reconciliation with society," *id.* at 75, 79.

In *Miller*, because "the science and social science supporting *Roper*'s and *Graham*'s conclusions ha[d] become even stronger," 567 U.S. at 472 n.5, the Court held that a juvenile convicted of homicide might be constitutionally sentenced to life without parole only if he were determined incorrigible after

[1] These differences are "the comparative immaturity and irresponsibility of juveniles," the fact that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and that the "personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 569-70.

consideration of the *Miller* factors. 567 U.S. at 477-78. Synopsizing its recent jurisprudence in this area, *Miller* proclaimed, "children are different" under the Eighth Amendment, 567 U.S. at 481, giving rise to a "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children," *id.* at 474.

This Court recognized that imperative in *Zuber*, in which it held that the mandate of *Miller* – individualized sentencing on the basis of the *Miller* factors – "applies with equal strength to a sentence that is the practical equivalent of life without parole." 227 N.J. at 447. Thus, *Zuber* held, "judges must evaluate the *Miller* factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense" or "when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times[.]" *Id.*[2]

But *Zuber* left open the question of what constitutes "a lengthy period of parole ineligibility" such that individualized sentencing based on the *Miller* factors is required. However, anticipating "serious constitutional issues" in a prospective case where a juvenile had served "[d]ecades" in prison yet remained

[2] In *State in the Interest of C.K.*, the Court expanded on *Zuber* to strike down a lifetime registration requirement for juveniles convicted of certain sex offenses, holding that the requirement created an "irrebuttable presumption [that] disregards any individual assessment" contrary to "scientific and sociological studies [and] our jurisprudence." 233 N.J. 44, 74-75 (2018).

ineligible for parole, the Court "ask[ed] the Legislature to consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility." *Id.* at 452-53. In so requesting, the Court cited approvingly to statutes in other States, all but one of which provide an opportunity for parole or resentencing in less than 30 years. *Id.* at 452 n.4.

Three years have now passed, and the Legislature has not responded. Accordingly, it now falls to this Court to decide whether a 30-year term without parole is a "lengthy period of parole ineligibility" within the meaning of *Zuber,* 227 N.J. at 452, rendering the harsh mandatory sentencing regime here at issue – which by definition limits the impact of individualized decision-making – unconstitutional.

ERRORS COMPLAINED OF

I. THE APPELLATE DIVISION ERRED IN DEFERRING TO THE LEGISLATURE, WHICH FAILED TO ACT.

In rejecting Comer's challenge to N.J.S.A. 2C:11-3b(1), the Appellate Division held that the issue "should instead proceed in the Legislature, subject of course to the ultimate authority of the Supreme Court to assure compliance with the Constitution." 32a. "In the meantime," the Court added, "James Comer has received a very substantial reduction of his original sentence." *Id.*; *accord id.* at 12a (noting Comer "received an enormous 'real time' benefit

from the application of the *Miller* factors" on resentencing). But this approach is alarming, and wrong. First, it decides the case on an inappropriate basis – one resulting directly from the unconstitutional excessiveness of his original (correctly reduced) sentence. But even more fundamentally, certification should be granted because the deference to the Legislature upon which the Appellate Division relied is inappropriate where a defendant's constitutional rights are at issue, particularly where this Court already questioned the constitutionality of the existing statute and referred the matter to the Legislature, but the Legislature failed to act.

Thus, in *Zuber*, this Court specifically expressed its concern that the "current sentencing scheme" could result in a circumstance where a juvenile was rehabilitated after "[d]ecades" of incarceration, but nonetheless remained ineligible for parole. This, the Court stated, would raise "serious constitutional issues." 227 N.J. at 451-52. But because such a claim was not then before it, the Court appropriately "ask[ed] the Legislature to consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility" in order to "avoid a potential constitutional challenge in the future." *Id*. Thus, the Court asked the Legislature to draw a line demarcating the maximum term of years to which a juvenile could be sentenced without parole by creating a point in a juvenile's

sentence at which he would be entitled either to petition for resentencing or become parole-eligible. *Id.* ("[W]e defer to the Legislature" regarding "a maximum limit on parole ineligibility for juveniles[.]"). As examples, the Court cited the recent enactments of eight States, seven of which provided for parole eligibility or resentencing after between 15 and 25 years of imprisonment (the other did so after 30). *Id.* at 452 n.4.[3]

As the Appellate Division noted, the Legislature thereafter considered two bills: one (S. 3079 in 2017, reintroduced as S. 428 in 2018) that would have provided for parole eligibility at 30 years for murder and 20 years for all other crimes, and another (A. 1233, in 2018) that would have provided that juveniles sentenced to over 20 years could petition for resentencing after 10 years and become parole-eligible after 20. *See* 16a, 16a n.2. But the Legislature ultimately failed to pass either of those pieces of legislation, or any other bill responsive to the constitutional problem described by this Court in *Zuber*. In light of this legislative inaction, the judicial branch must now fulfill its essential responsibility to guarantee individual rights by invalidating an unconstitutional statute. *See Marbury v. Madison*, 1 Cranch 137, 170, 178 (1803) (holding, "[t]he province of the

[3] Since *Zuber*, Virginia and Oregon have passed similar legislation, providing an opportunity for release to all juveniles after 20 and 15 years, respectively. *See* Va. H.B. 35, Gen. Assemb. (Reg. Sess. 2020); Or. S.B. 1008, 80th Leg. Assemb. (Reg. Sess. 2019)).

court is, solely, to decide on the rights of individuals," and "if a law be in opposition to the constitution[,] . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."); *accord Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 196 (1961) ("The judicial obligation to protect the rights of individuals is as old as this country.").

Indeed, this Court has not hesitated to act in the face of legislative inaction. Thus, in the *Mount Laurel* line of cases, though the Court considered the issue of exclusionary zoning "especially appropriate for legislative resolution," the Court held that because the Legislature had failed to act, the Court would "exercise [its] traditional constitutional duty" and determine a remedy. *S. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Twp.*, 92 N.J. 158, 213 n.7 (1983) (*Mount Laurel II*); *accord id.* at 212 ("[E]nforcement of constitutional rights cannot await a supporting political consensus."); *accord Hills Dev. Co. v. Bernards Twp. in Somerset Cty.*, 103 N.J. 1, 24 (1986) (same). Likewise, the Court has repeatedly given meaning to the New Jersey Constitution's Thorough and Efficient Education Clause, N.J. Const. art. 8, § IV, ¶ 1, in response to legislative inaction, stating, "'just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence.'" *Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (quoting *Marbury*, 1 Cranch at 163); *see also Abbott*, 100 N.J. at 282 (citing

"the undeniable principle that when legislative inaction threatens to abridge a fundamental right such as education, the judiciary must afford an appropriate remedy"). *See also Cooper v. Nutley Sun Printing Co.*, 36 N.J. at 196-97 (rejecting argument that the Court was "powerless to safeguard [the] constitutional rights of employees [to organize and bargain collectively] without a statute regulating labor relations," because "[t]o find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.").

Finally, that Comer has already received a substantial reduction from his previously unconstitutional sentence is certainly not, as the Appellate Division suggested, a further basis for deference. 29a; 32a. Rather, if Comer is correct that N.J.S.A. 2C:11-3b(1) is unconstitutional as applied to juveniles, then his rights were violated at resentencing regardless of whether or not his new unconstitutional sentence is shorter than the old unconstitutional one. The Court should thus also grant certification to address the Appellate Division's unfortunate holding that a court may avoid constitutional adjudication when a party has already benefitted from a prior constitutional decision.

II. THE APPELLATE DIVISION ERRED BY RELYING UPON ITS OWN DECISION IN *STATE V. PRATT*, 226 N.J. SUPER. 307 (APP. DIV. 1988), DECIDED BEFORE THE PERTINENT CONSTITUTIONAL CASES.

The Appellate Division affirmed Comer's sentence based upon its decision over three decades ago in *Pratt*, which upheld N.J.S.A.

2C:11-3b(1) as applied to juveniles. 21a. But given the passage of time, and the decisions by the United States Supreme Court in *Roper*, *Graham*, *Miller* and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), as well as this Court's decision in *Zuber*, the Court should also grant certification in order to make clear that *Pratt* is no longer the governing precedent. Instead, the Court must engage in the kind of proportionality analysis required by the well-established jurisprudence applicable to determining the constitutionality of juvenile punishment. And that analysis, in turn, requires that a court "look beyond historical conceptions to ''the evolving standards of decency that mark the progress of a maturing society.''" *Graham*, 560 U.S. at 58 (internal citations omitted). Accordingly, courts up to and including the United States Supreme Court, revisit, and reverse, prior determinations of what is cruel and unusual punishment where societal consensus and scientific research have shifted. *See*, *e.g.*, *Roper*, 543 U.S. 551 (reversing *Stanford v. Kentucky*, 492 U.S. 361 (1989), decided 16 years earlier, in barring capital punishment for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 307, 314 (2002) (reversing *Penry v. Lynaugh*, 492 U.S. 302 (1989), decided 13 years earlier, in barring capital punishment for individuals with intellectual disability, noting, "much has changed").

In this case, "much has changed" since *Pratt,* which was decided 17 years before *Roper* recognized the "general differences"

between juveniles and adults, incorporating the science of adolescent development into the Eighth Amendment, and requiring the wholesale reform of juvenile sentencing law. *Pratt* was also, obviously, decided long before *Graham*, *Miller*, and this Court's decisions in *Zuber* and *C.K* – a body of case law that has further cemented the role of adolescent brain science in the proportionality review of juvenile sentencing, and which ultimately requires that "a State's most severe penalties cannot proceed as though they were not children." *Zuber*, 227 N.J. at 447. Tellingly, *Pratt* itself acknowledged the absence of relevant precedent at the time of its holding, stating, "our research has disclosed no reported New Jersey decision pertaining specifically to juveniles," 226 N.J. Super. at 326, clearly no longer the case.

Moreover, in upholding N.J.S.A. 2C:11-3b(1) as applied to juveniles, *Pratt* relied on both law and societal norms that have since been rejected. Thus, in *Pratt*, the juvenile defendant cited the death penalty decisions in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), for the proposition that the Eighth Amendment requires individualized sentencing. But the Appellate Division responded that "[t]hese decisions are plainly inapposite" because "'[d]eath as a punishment is unique in its severity and irrevocability.'" *Pratt*, 226 N.J. Super. at 325 (citation omitted). *Miller*, however, rejected that very contention, citing *Woodson* to support its

holding, *Miller*, 567 U.S. at 475, and making clear that, "if 'death is different,' children are different too," *id.* at 481.

Further, *Pratt* cited to "public concern about unrehabilitated, violent youthful offenders [that] ha[d] 'stimulated a 'just deserts' approach to juvenile crime.'" 226 N.J. Super. at 326 (citations omitted). But since *Pratt*, the fear of such "unrehabilitated, violent youthful offenders," *id.* – so-called "superpredators" – has proven unfounded, and worse, a product of invidious racial stereotypes. *See* Equal Justice Initiative, Report, "The Superpredator Myth, 20 Years Later" (2014), a*vailable at* https://eji.org/news/superpredator-myth-20-years-later/. As several of the academics who first promulgated the theory later conceded, "the superpredator myth . . . threw thousands of children into an ill-suited and excessive punishment regime." Amicus Curiae Br. of Jeffrey Fagan, *et. al* in Supp. of Pet. in *Miller v. Alabama*, 567 U.S. 460 (2012), 2012 WL 174240, at *37. Indeed, the modern revolution in juvenile sentencing reflects a specific effort to dismantle *Pratt*'s repudiated thinking.

Ultimately, rather than reconsidering *Pratt* in light of these developments, the Appellate Division held that "a change in constitutional law ha[s] to come from the Supreme Court." 26a. The Court should accept that invitation, and grant certification in order to effect just such a change.

III. THE TRIAL COURT AND APPELLATE DIVISION FAILED TO CORRECTLY APPLY THE REQUIRED PROPORTIONALITY ANALYSIS.

Finally, this Court should grant certification in order to properly address Comer's argument that, under the constitutional proportionality standard, N.J.S.A. 2C:11-3b(1) is unconstitutional as applied to juveniles. Determining whether a particular punishment is proportional for a category of individuals entails consideration of several factors: "objective indicia of society's standards," "the culpability of the offenders at issue in light of their crimes and characteristics," "the severity of the punishment in question," and "whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 61, 67; *accord Zuber*, 227 N.J. at 438 ("'The test to determine whether a punishment is cruel and unusual . . . is generally the same under both the Federal and State Constitutions.") (quoting *State v. Ramseur*, 106 N.J. 123, 169 (1987)). In this case, these factors all point to the disproportionality of a mandatory 30-year sentence without parole for a juvenile like Comer.

First, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's Legislatures,'" and in particular, "the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 312, 315 (2002) (citation omitted). Since the decisions in *Graham* and *Miller*, eight States and the District of Columbia have enacted

legislation requiring that all juveniles receive an opportunity for release in less than 30 years,[4] effectively barring a sentence of 30 years without parole for juveniles in *any* case, let alone in every case, as N.J.S.A. 2C:11-3b(1) requires.

Second, it is by now well-established that juveniles are categorically less culpable in view of "[t]hree general differences" that distinguish them from adults. *Roper*, 543 U.S. at 569. That is, adolescence is marked first, by heightened "immaturity, irresponsibility, impetuousness, and recklessness"; second by "susceptib[ility]to negative influences and outside pressures, including peer pressure"; and third by the fact that juvenile identities are "transient," meaning that a juvenile's "actions [are] less likely to be evidence of irretrievabl[e] deprav[ity]." *Miller*, 567 U.S. at 471, 476; *accord Zuber*, 227 N.J. at 440. These generalized differences mean that all juveniles have "'diminished culpability'" as a constitutional matter. *Zuber*, 227 N.J. at 444.

Third, sentencing a juvenile to 30 years without parole is

[4] *See* Cal. S.B. 394, Reg. Sess. (2017) (maximum juvenile term without parole is 25 years); Wyo. H.B. 23, 62nd Leg., Gen. Sess. (2013) (same); Va. H.B. 35, Gen. Assemb. (Reg. Sess. 2020) (20 years); Or. S.B. 1008, 80th Leg. Assemb. (Reg. Sess. 2019) (15 years); W. Va. H.B. 4210, 81 Leg., 2d Sess. (2014) (same); Fla. Chapter 2014-20 (2014) (juvenile may petition for parole or sentence reduction after serving, at most, 25 years); D.C. B21-0683, D.C. Act 21-568 (2016) (same, after 20); N.D. H.B. 1195, 65th Leg. Assemb. (2017) (same); Wa. RCW 9.94A.730 (2014) (same).

certainly harsh punishment. Thus, juveniles who serve 30 years in prison are highly vulnerable to lasting physical and psychiatric harms, including "accelerated aging," or "development of chronic illness and disability at a younger age," Brie Williams & Rita Abraldes, "Growing Older: Challenges of Prison and Reentry for the Aging Population," in *Public Health Behind Bars* 56 (ed. Robert B. Greifinger 2007). They are also at heightened risk of suffering the effects of "institutionalization," which manifests as "dependence on institutional structure . . . , hypervigilance, . . . alienation, . . . and a diminished sense of self-worth and personal value." Craig Haney, "The Psychological Impact of Incarceration: Implications for Postprison Adjustment," in *Prisoners Once Removed* 38 (eds. Jeremy Travis & Michelle Waul 2004). Juveniles incarcerated for 30 years or more are also less likely to achieve the hallmarks of adult life in free society upon release. As one study showed, individuals age 44 and older at the time of release, "received less support from family, were more likely to be insecurely housed . . . , [] were less likely to be employed[,]" were more dependent on public benefits and "shelters or transitional housing," and were more likely to settle "at the margins of society with little access to the mainstream social roles and opportunities that characterize full community participation." Bruce Western, *et al.*, "Stress and Hardship After Prison," 120 Am. J. of Soc. 1512, 1515, 1538 (2015). Thus, juveniles

who are imprisoned for a minimum of 30 years are likely to be released only after suffering physical and psychiatric injuries, and with diminished chances for independence in society. It is in this sense that sentences like the one here at issue fundamentally amount to a "forfeiture that is irrevocable," and deny a chance for "fulfillment outside prison" or "reconciliation with society." *Graham*, 560 U.S. at 69.

Fourth, and finally, a mandatory minimum sentence of 30 years cannot be justified by the recognized penological purposes of retribution, deterrence, incapacitation, or rehabilitation. As this Court recognized in *Zuber,* the retribution rationale has less force in the case of juveniles because their developmental shortcomings make them less culpable for their actions, and "[r]etribution . . . relates directly to the offender's personal culpability." 227 N.J. at 442-43. The same developmental shortcomings also give the deterrence rationale less weight, since, "[b]ecause juveniles are less responsible and more prone to impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions." *Id.* at 442-43 (citations and quotation marks omitted). And the incapacitation and rehabilitation rationales fail to justify the sentence at issue because established research shows that the overwhelming majority of juveniles who engage in criminality, including those convicted of murder, will desist from

crime long before 30 years. Thus, empirical studies show an "age-crime curve" whereby criminal involvement peaks in late adolescence and falls off sharply thereafter.[5] Indeed, most juveniles who participate in crime desist from all criminality either immediately or in their mid-20's, with only five to six percent persisting in crime up through their early 40's. *See* Terrie E. Moffitt, "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy," 100 PSYCH. R. 674, 676 (1993). As a result, incarcerating a juvenile offender until his mid-to-late 40's – as N.J.S.A. 2C:11-3b(1) requires in every case – cannot be justified under any legitimate penological rationale.

In sum, this Court should conduct the required proportionality analysis so that it can determine whether, as Comer contends, and as a number of other jurisdictions have concluded,[6]

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[5] *See* Laurence Steinberg, "The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability," 14 NEUROSCIENCE 513, 515 (2013); *see also* Howard N. Snyder, "Arrest in the United States, 1990-2010," Report, U.S. Dep't of Justice, Bureau of Justice Statistics 3-6 (2012) (showing arrest rates for murder in the U.S. peak at age 17 and drop off precipitously thereafter) (a*vailable at* https://bjs.gov/content/pub/pdf/aus9010.pdf).

[6] *See*, *e.g.*, *State v. Lyle*, 854 N.W.2d 378, 402 (Iowa 2014) (barring all mandatory minimum sentences for juveniles); *State v. Houston-Sconiers*, 391 P.3d 409 (Wa. 2017) (same); *State v. Link*, 441 P.3d 664 (Or. Ct. App. 2019), *rev. granted* 451 P.3d 1000 (holding mandatory minimum sentence of 30 years without parole unconstitutional for juveniles); *State v. Burton*, Case No. 94-

a mandatory minimum sentence of 30 years for juveniles is unconstitutional.

CONCLUSION

For the foregoing reasons, Comer's challenge to N.J.S.A. 2C:11-3b(1) presents "a question of general public importance which has not been but should be settled by the Supreme Court," and this Court should grant certification under *R.* 2:12-4.

Respectfully submitted,

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Dated: June 4, 2020

10478 (Fla. 13th Dist. Sept. 23, 2016)(same, for mandatory minimum of 40 years).

CERTIFICATION PURSUANT TO *R.* 2:12-7(A)

I hereby certify that this petition presents a substantial question and is filed in good faith and not for purposes of delay.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg

Dated: June 4, 2020