

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 084509  
App. Div. Docket No. A-1230-18

STATE OF NEW JERSEY, : CRIMINAL ACTION  
 :  
Plaintiff-Petitioner, : On Grant Of Petition For  
 : Certification From Judgment of  
v. : the Superior Court Of New  
 : Jersey, Appellate Division.  
JAMES COMER, :  
 : Sat Below:  
Defendant-Respondent. :  
 : Honorable Jack M. Sabatino,  
 : P.J.A.D.  
 : Honorable Thomas W. Sumners,  
 : Jr., J.A.D.  
 : Honorable Richard J. Geiger  
 : J.A.D.

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BRIEF ON BEHALF OF AMICUS CURIAE  
THE NEW JERSEY OFFICE OF THE PUBLIC DEFENDER

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**PRELIMINARY STATEMENT**

Mr. Comer has been imprisoned for more than twenty years for a crime committed when he was minor. A man tragically lost his life during that offense. But no fact-finder ever determined that Mr. Comer killed or intended to kill. Instead, Mr. Comer was found guilty of felony murder, allowing Mr. Comer to be held liable for the actions co-defendants that could have led to the death. This Court subsequently determined that Mr. Comer and other children who received very long sentences should have those sentences reexamined because children are fundamentally different from adults, less morally culpable for their actions (even when they involve serious crime), likely to mature and be rehabilitated, and, therefore, should be given special consideration for sentencing purposes. State v. Zuber, 227 N.J. 422 (2017).

On remand, the resentencing court, considering the circumstances of not only the offense, but Mr. Comer's immaturity at the time of the crime and his subsequent maturation and rehabilitation, determined to give Mr. Comer a thirty-year sentence. The imposition of the lowest statutorily available sentence confirmed the court's belief that Mr. Comer is not dangerous and that his crime was, like the vast majority of serious offenses committed by children, the result of the transient characteristics of youth. Despite Mr. Comer's demonstrated

maturation and rehabilitation, the resentencing court was compelled to order that Mr. Comer remain in prison for more than an additional decade (until he served thirty years) because of the mandatory sentencing provisions of N.J.S.A. 2C:11-3b, which make no distinction between children and adults. The automatic and mandatory application of the sentencing provisions of N.J.S.A. 2C:11-3b to juveniles in the same manner as adults does not recognize the difference in their culpability, but instead imposes a punishment designed for adults on juveniles.

Moreover, that statute fails to distinguish between those who had the mens rea to commit murder and those who were only participants in an underlying felony, subjecting children who never killed or intended to kill anyone to decades of imprisonment for the acts of co-defendants. The mandatory thirty-year imprisonment ignores the reality that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Graham v. Florida 560 U.S. 48, 69 (2010). Despite the Criminal Code's stated dedication to "differentiate among offenders with a view to a just individualization in their treatment, and "advance the use of generally accepted scientific methods and knowledge in sentencing offenders," N.J.S.A. 2C:1-2(b)(6) & (7), the imposition of



identical mandatory minimums on children as adults ignores those stated fundamental objectives.

The Office of the Public Defender, representing the majority of young offenders currently serving such a mandatory minimum sentence, contends that it is cruel and unusual to mandate that these children be required to spend the same thirty years in prison that more blameworthy mature adult offenders are required to serve. We join with not only counsel for Mr. Comer, but many in the scientific, educational, and legal communities, in recognition of the cruelty of ignoring the age of young offenders and the capacity of children for rehabilitation when imposing such lengthy mandatory minimum sentences upon juveniles as if they possessed the same faculties, strengths, formed characters, and abilities as fully mature adults. Children are different.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The Office of the Public Defender accepts the procedural history and facts relevant to the matter currently before this Court as set forth in the Appellate Division's opinion.<sup>1</sup>

**STANDARD OF REVIEW**

This constitutional question concerning a statutory sentencing provision is to be reviewed de novo. Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 139 (2015). No deference need be given to either the Law Division or Appellate Division's interpretation of constitutional rights. Id. Instead, this Court must independently interpret the Federal and New Jersey Constitutions de novo to determine whether the mandatory application of the sentencing requirement of N.J.S.A. 2C:11-3b, which condemns someone to spend at least three decades

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<sup>1</sup> The Office of the Public Defender does not accept, however, the Appellate Division's recitation of facts relating to co-defendant Ibn Adams, another juvenile defendant in this case. Though the Appellate Division opinion states that Mr. Adams shot the decedent, this conclusion is not supported by the jury verdict. Instead, this version of events was put forth by the adult co-defendant who negotiated a plea requiring he serve as a State's witness and limiting his sentencing exposure. However, it is clear the jury rejected his version of events by acquitting Mr. Adams of the count of purposeful/knowing murder lodged against him. Instead, he and Mr. Comer, both children at the time of the offense, were found guilty of conspiracy to commit robbery, robberies, weapons offenses, and felony murder. These children were each sentenced to spend more than sixty years of their lives in prison without the possibility of parole while the more mature adult co-defendant's sentencing exposure was limited to no more than twenty years. State v. Adams, 194 N.J. 186, 191-198 (2008).

imprisoned, is constitutional as applied to children found guilty under the statute.

LEGAL ARGUMENT

POINT I

UNDER THE LEGAL AND SCIENTIFIC PRINCIPLES EMBRACED IN ROPER V. SIMMONS, 543 U.S. 551 (2005), GRAHAM V. FLORIDA, 560 U.S. 48 (2010), MILLER V. ALABAMA, 567 U.S. 460 (2012), STATE V. ZUBER, 227 N.J. 422 (2017), AND STATE IN THE INTEREST OF C.K., 233 N.J. 44 (2018), THE MANDATORY THIRTY-YEAR PAROLE INELIGIBILITY PROVISIONS OF N.J.S.A. 2C:11-3(B)(1) ARE UNCONSTITUTIONAL AS APPLIED TO JUVENILES, ESPECIALLY THOSE WHO HAVE BEEN FOUND GUILTY OF FELONY MURDER. U.S. CONST., AMENDS. VIII, XIV; N.J. CONST., ART. I, PAR. 12.

The current mandatory sentencing provisions of N.J.S.A. 2C:11-3 violate the prohibitions against cruel and unusual punishment enshrined in both our federal and state constitutions. The mandatory thirty-year term of imprisonment for children who commit serious crimes, without regard to their diminished moral culpability, capacity for rehabilitation, or constitutionally distinct status serves no legitimate penological objective, but controverts the enunciated purposes of our criminal code. Therefore, the Office of the public Defender joins with Mr. Comer in arguing that judges should not be required to sentence children, who are inherently less morally and legally culpable for their offenses than fully mature adults, to the same mandatory minimum term of incarceration as fully mature adults who commit similar crimes. This is cruel and unusual punishment. Such a sentencing mandate

is particularly cruel when that punishment requires incarceration for three decades, a term that greatly exceeds the general time period needed for rehabilitation of a teenage offender.

Furthermore, this sentence is even more constitutionally offensive in cases where the young person being condemned to spend those critical decades in prison has not been convicted of killing by their own hand or intending to kill, but instead has been found guilty of felony murder based on the actions of co-defendants. The mandatory imposition of such a harsh sentence fails to conform with standards of decency, is disproportionate, and also serves no legitimate penological purpose.

In determining whether a sentence violates the cruel and unusual prohibitions of the state and federal constitutions, courts consider three inquiries:

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. Ramseur, 106 N.J. 123, 169 (1987) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)). If "the punishment fails any one of the three tests, it is invalid." State v. Gerald, 113 N.J. 40, 78 (1988).

Our criminal code contains various enunciated principles that serve to ensure that our sentencing practices comport with constitutional requirements and do not result in the imposition of cruel and unusual punishments. The New Jersey Criminal Code is designed to, among other things: "promote the correction and rehabilitation of offenders"; "insure the public safety . . . through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public protection"; "safeguard offenders against excessive, disproportionate or arbitrary punishment"; "differentiate among offenders with a view to a just individualization in their treatment, and "advance the use of generally accepted scientific methods and knowledge in sentencing offenders." N.J.S.A. 2C:1-2(b) (1), (3), (4), (6) & (7).

Yet the mandatory banishment of children from the greater society for three decades does not meet any of these objectives, but often controverts them. Constitutional prohibitions against cruel and unusual punishment necessarily prohibit juvenile offenders from being subjected to the same mandatory thirty-year minimum sentence as adults, especially for a felony murder conviction where the child is being punished for someone else taking a life.

**A. The Constitution Does Not Allow Judges To Be Required To Force Children To Endure The Same Mandatory Minimum Of Thirty Years Of Imprisonment That Fully Mature Adults Face**

It amounts to cruel and unusual punishment to require judges to impose the same mandatory minimum sentence required of adults on children, a constitutionally distinct and less blameworthy group of offenders. For all the reasons explained in the ALCU brief, this required thirty-year banishment of children is a disproportionate punishment that fails to comport with contemporary standards of decency. This mandatory sentence is also clearly “beyond what is necessary to accomplish any legitimate penological objective” and, therefore, is unconstitutional. Ramseur, 106 N.J. at 169.

**1. The Mandatory Sentence Is Not Needed For Rehabilitation**

To be sure, both the Federal Supreme Court and this Court have declared that children are less culpable for their wrongs than adults and that this difference should affect sentencing determinations. Miller v. Alabama, 567 U.S 460 (2012); State v. Zuber, 227 N.J. 422 (2017). Among other characteristics, juveniles’ classic inability to engage in the same type of impulse control and anticipation of consequences renders them less blameworthy for their actions than mature adults who have fully developed behavior regulation capabilities. “Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. . . parts of the

brain involved in behavior control continue to mature through late adolescence. . . . Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character.” Graham v. Florida 560 U.S. 48 (2010) (citing Roper v. Simmons, 543 U.S. 551, 570 (2005)) (internal quotations marks omitted).

The unique characteristics of children call into question the rehabilitative efficacy of mandating the imposition of long sentences that duplicate those imposed on fully developed adults, on this constitutionally distinct class of offenders. The mandatory sentence at issue in this case, thirty years, ignores the unique ability of children to be rehabilitated, the fact that even serious criminal behavior is likely the result of the transient characteristics of youth, and the reality that most of these young people will mature and be expected to be rehabilitate. Zuber, 227 N.J. at 440.

Instead of promoting rehabilitation, such lengthy sentences may actually hamper rehabilitation and overall personal development, and negatively impact prospects for reentry. The Graham Court acknowledged that correctional facilities may use the fact that a person is serving a lengthy sentence as a basis to deny them access to certain rehabilitative programs. Graham, 560 U.S. at 74. Juvenile offenders ordered to serve long sentences in



New Jersey who are represented by amicus counsel, Rutgers Law Clinic, report being prevented from accessing certain classes or programs because they would not be eligible for parole for decades. This, of course, hinders rehabilitation. "The absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident." Id. at 74.

As detailed in the brief submitted by Mr. Comer's counsel, young people incarcerated in adult spaces are likely to undergo particular traumas such a sexual assaults and institutional violence. Of course, these experiences also can inhibit rehabilitation.<sup>2</sup>

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<sup>22</sup> In addition to negatively impacting the rehabilitation process, long sentences inhibit the inextricably related reentry and reintegration process. "A person's health generally declines more rapidly in prison. This is partly a function of the relatively inadequate access to health care services of many individuals before they came to prison, and partly related to the stressful environment of a correctional institution" Marc Mauer, Long-Term Sentences: Time To Reconsider The Scale Of Punishment, 87 UMKC L. Rev. 113, 122 (2018). Upon release after such a lengthy sentence, juvenile offenders are, therefore, less likely to be able to fully contribute to the community and more likely to require assistance. Moreover, as detailed by Mr. Comer's counsel, the mandatory imposition of a thirty-year prison term is particularly cruel because the child is being condemned to spend their most productive years behind walls, often losing among other things the opportunity to build careers or amass basic resources to sustain themselves should they finally be released during middle or late age and to form or maintain familial and social relationships that are crucial to the reentry process.

**2. The mandatory sentence does not address a legitimate need to incapacitate**

The vast majority of people desist from crime as they mature. Consequently, mandatory thirty-year sentences go far beyond any legitimate need to incapacitate a juvenile offender. "A longstanding finding in the criminology literature is that involvement in criminal activity is strongly dependent on age, an outcome that cuts across race and class lines. Increased involvement in crime begins in the mid-teen years and rises sharply, but for a relatively short period of time. For most crimes, these rates of involvement begin declining by a person's early to mid-twenties and continue on a downward trajectory." Marc Mauer, Long-Term Sentences: Time To Reconsider The Scale Of Punishment, 87 UMKC L. Rev. 113, 122(2018).

In fact, criminal careers do not last very long. Research by the criminologist Alfred Blumstein of Carnegie Mellon and colleagues has found that for the eight serious crimes closely tracked by the F.B.I. – murder, rape, robbery, aggravated assault, burglary, larceny-theft, arson and car theft – five to 10 years is the typical duration that adults commit these crimes, as measured by arrests. Dana Goldstein, Too Old To Commit Crime?, N.Y. TIMES

(Mar. 20, 2015).<sup>3</sup> It also is well-documented that the likelihood a person will commit a crime drops dramatically after the age of 25:

Peak crime rates occur in the late teens and early twenties, depending on the type of offense, and then fall. As one illustration, nearly two-thirds of everyone arrested in the United States for robbery in one year were under the age of 25. Local statistics are similarly telling - more than 40 percent of all violent crime reported to the Richland County (Columbia, South Carolina) Sheriff's Department over the past five years involves suspects under the age of 25, and half of all defendants for violent offenses in San Francisco, California are young adults, who make up only eight percent of the city's population.

The basic point that as individuals age, they are less likely to commit new crimes is also evident in recidivism data of individuals released from prison. A study of parolees from Florida's prison system concluded that a significant decline in recidivism rates appears for individuals released after age 25.

Josh Gupta-Kagan, The Intersection Between Young Adult Sentencing And Mass Incarceration, 18 Wis. L. Rev. 669, 716-717 (2018).

Given the reality that criminal careers are relatively short-lived and most young people desist from crime as they mature, there is no a need to impose three decades of imprisonment for the

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<sup>3</sup> Available at <https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html>.

protection of society. Such harsh mandatory sentences far exceed any legitimate need for incapacitation.

In the event that a particular juvenile offender may require a more lengthy period of incapacitation than others, parole panels have the ability to prevent their release. When a person's institutional record suggests they have not matured as expected and would be likely to engage in further crime, a parole panel can decline to provide them with the earliest expected release date. But there is no reason to require mandatory periods of parole ineligibility at the outset that keep all minors locked up from the time they were children until they are in their mid or late forties - far past the time the vast majority will mature and desist from crime.

### **3. The Mandatory Sentence Does Not Serve As A Deterrent**

Deterrence "has been repeatedly identified in all facets of the criminal justice system as one of the most important factors in sentencing" and "is the key to the proper understanding of protecting the public." State v. Megargel, 143 N.J. 484, 501 (1996) (citing State in the Interest of C.A.H. & B.A.R., 89 N.J. 326, 334 (1982)); accord State v. Fuentes, 217 N.J. 57, 78-79 (2014). Even if the imposition of such harsh sentences could possibly have some deterrent effect on others, such general deterrence "has relatively insignificant penal value," State v. Jarbath, 114 N.J.

394, 405 (1989) (citing State v. Gardner, 113 N.J. 510, 520 (1989)), and sentencing courts should focus on specific deterrence. Fuentes, 217 N.J. at 79.

The threat of severe legal punishment is unlikely a specific deterrent for young people, who, by nature of their immaturity are less likely than mature adults to be driven by risk avoidance and consideration of any potential undesirable consequences of their actions. Roper, 543 U.S. at 569; Miller, 567 U.S. at 477. The thirty-year banishment from society is not a necessary or effective deterrent for this constitutionally distinct class of defendants who were most likely acting in light of the transient characteristics of youth without regard to possible penal consequences.

Moreover, the deterrent effect of lengthy sentences on people of any age is questionable. As outlined by the heralded National Academies of Sciences report on mass incarceration, the relationship between sentence length and crime rate is nonlinear, but rather decreases in slope as the sentence length increases. National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences at 138-39 (2014). As sentences get longer, the deterrent effect of extending the sentence decreases -- for each additional month or year added to a long sentence, the marginal increased deterrent value of that additional month or year becomes less and less, approaching zero. Id. at 139. The report

concluded that "increasing already long sentences has no material deterrent effect." Id. at 140.

#### **4. Retribution Is Not A Legitimate Justification For The Mandatory Sentences**

Retribution, cannot serve as a sufficient basis to subject those who are, as a class, less blameworthy than other offenders, to thirty years of incarceration.<sup>4</sup> "Children are constitutionally different from adults for purposes of sentencing" and "have diminished culpability and greater prospects for reform." Zuber, 227 N.J. 444 (citing Graham 560 U.S. at 68). Their lack of maturity renders juveniles less blameworthy for their actions than adults. "A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an

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<sup>4</sup> To the extent the death of a person, regardless of the individual child's actual culpability, might be posited as justification for retributive sentencing, the waiver itself, which is more likely to occur in cases of homicide than most other offenses, has already subjected the child to significantly harsher consequences. According to a recent report by the Juvenile Justice Commission, Juvenile Waiver Practice In New Jersey 8, 18 (2019), during 2016-2017, of the four categories of offenses in which waiver was requested for more than ten children, the only crime for which courts granted that waiver more than half of the time was homicide. Courts granted waiver when requested in 41% of robbery cases, 44% of sexual assault cases, and 32% of aggravated assault cases. But a requested waiver was granted in 82% of homicide cases. Consequently, it seems that the death itself has already subjected many children to adult prosecution, preventing them from receiving the more protective and rehabilitative aspects of juvenile court. The report is available at [www.nj.gov/oag/jjc/2019-1011 Waiver Report 2016-2017.pdf](http://www.nj.gov/oag/jjc/2019-1011%20Waiver%20Report%202016-2017.pdf).

adult.'" Graham, 560 U.S. at 68 (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)). Imposing identical sentences on children that are imposed on more morally culpable adults requires a disregard of what science and experience make clear, simply to allow the retrieval of "a pound of flesh" from a juvenile offender.<sup>5</sup>

**B. It Is Cruel and Unusual To Mandate That Children Who Did Not Kill Or Intend To Kill Be Subject To The Same Three-Decade Minimum Term Of Imprisonment As Mature Adults Who Killed By Their Own Hand.**

The cruel and unusual nature of the mandatory thirty-year parole disqualifier as applied to juveniles is only further illuminated when considered in the context of felony murder convictions - the offense for which Mr. Comer and so many others have been sentenced. Such sentences are unconstitutional when considered in light of any of the three factors - decency, proportionality, penological purposes - to be examined when determining if a sentence violates prohibitions against cruel and unusual punishments.

**1. The mandatory thirty-year term does not conform with**

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<sup>5</sup> It is not clear that the majority of victims or survivors, some of the people most directly impacted by the crime, even desire this retribution. Tom Jackmon, A Growing Group Of Prosecutors, Who Say The Job Is More Than Locking People Up, Wants To Help Free Criminals, Too, Washington Post, December 7, 2020. ("'Victims really prefer prison reform that's done meaningfully and safely,' Renée Williams of the National Center for Victims of Crime said, 'rather than keeping individuals in prison longer.' She said victims want to be heard and notified of releases but that '60 percent of victims would prefer prison spending be focused on rehabilitation over long sentences.'").

**contemporary standards of decency**

Preliminarily, the soundness of the moral and intellectual rationales underpinning felony murder convictions has long been questioned. Felony murder is “one of the most persistently and widely criticized features of American criminal law,” with scholars and practitioners routinely characterizing it as unprincipled and irrational. Guyora Binder, The Origins of American Felony Murder Rules, 57 Stan. L. Rev. 59, 60 (2004). The maintenance of this form of guilt in the legal system jettisons the long-held notion that one’s state of mind and intent to commit the charged act, is germane to a determination of guilt for the act.

England did away with this theory of culpability more than sixty years ago, and most of its former colonies have rightly done the same. Abbie VanSickle, If He Didn’t Kill Anyone, Why Is It Murder?, N.Y. Times, June 27, 2018.<sup>6</sup> In addition, the American Law Institute purposefully excluded felony murder from the various types of criminal homicide that might warrant prosecution. See Model Penal Code § 210.2 commentary at 37 (1980) (noting the difficulty in identifying a “[p]rincipled argument in favor of felony-murder”). Many states have either done away with felony murder or moved to significantly limit the situations that

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<sup>6</sup> Available at <https://www.nytimes.com/2018/06/27/us/california-felony-murder.html>.



constitute felony murder.<sup>7</sup> Nevertheless, this relic remains a basis for prosecution in various jurisdictions throughout the United States, including New Jersey.

There are also clearly potentially unfair outcomes from prosecutions for felony murder. For instance, data establishes that the felony-murder rule results in racially disparate outcomes, further perpetuating racial disparities in incarceration rates. Kat Albrecht, Data Transparency & The Disparate Impact of the Felony Murder Rule, Duke Center for Firearms Law, Aug. 11, 2020.<sup>8</sup>

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<sup>7</sup> See Commonwealth v. Brown, 81 N.E.3d 1173, 1178 (Mass. 2017) (narrowing felony murder doctrine to require proof of malice); State v. Doucette, 470 A.2d 676, 683 (Vt. 1983) (holding that felony-murder requires proof of malice and does not encompass an accidental or unintentional killing); People v. Aaron, 299 N.W.2d 304, 324-26 (Mich. 1980) (reinterpreting malice as not including commission of felony, thereby abolishing felony-murder doctrine); Cal. Pen. Code § 1170.95 (narrowing felony-murder rule and permitting petitions to vacate prior convictions); Del. Code Ann. tit. 11, §§ 635, 636 (requiring defendant to act with recklessness, for murder in the first degree, or criminal negligence, for murder in the second degree); Haw. Rev. Stat. §§ 707-701, 707-701.5 (eliminating felony-murder rule); Ky. Rev. Stat. Ann. § 507.020(1)(a) (same). Several other states are considering legislation to amend or abolish their felony-murder statutes. See, e.g., Jen Moynihan, Colorado Lawmakers Consider Changes to State's Felony Murder Law, KRDO.COM, Mar. 25, 2021, available at <https://krdo.com/news/local-news/2021/03/25/colorado-legislation-proposes-changes-to-states-felony-murder-law/>.

<sup>8</sup> Available at <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/>.

This Court has already declared that it is indecent to treat children as if they are adults when imposing sentence, holding that:

our laws and jurisprudence recognize that juveniles are different from adults—that juveniles are not fully formed, that they are still developing and maturing, that their mistakes and wrongdoing are often the result of factors related to their youth, and therefore they are more amenable to rehabilitation and more worthy of redemption. Our juvenile justice system is a testament to society's judgment that children bear a special status, and therefore a unique approach must be taken in dealing with juvenile offenders, both in measuring culpability and setting an appropriate disposition.

State in Interest of C.K., 233 N.J. 44, 67 (2018). But the current mandatory sentencing provisions of N.J.S.A. 2C:11-3 don't permit judges to follow this Court's directive and take a unique approach when sentencing children. As a society, we accept that children are different. Though felony murder as a basis for criminal liability may have been upheld by this Court, any purported rationales for maintaining the current mandatory sentence for defendants convicted of felony murder are simply inapplicable for juveniles. "Imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at 474.

**2. The Mandatory Sentence Is Grossly Disproportionate To The Offense**

Some of the hallmark transient characteristics of youth are the very circumstances that lead to felony murder scenarios and the very factors that make adolescents less blameworthy than others found guilty under N.J.S.A. 2C:11-3(a)(3). Imposing the same thirty-year sentence on a child who did not kill or intend to kill as would be imposed on an adult who purposefully killed someone is simply grossly disproportionate given that the child has a twice diminished culpability.

Both Federal and New Jersey courts have held that it is a basic sentencing principle to treat those who did not actually kill or intend to kill differently than those who did. It is "fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting H. Hart, *Punishment and Responsibility* 162 (1968)). In short, "the severest sanctions should be reserved for actors exhibiting the most culpable mental states." State v. Gerald, 113 N.J. 40, 149 (1988) (Handler, J., concurring).

In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court prohibited imposition of the death penalty in cases where the defendant did not kill or intend to kill. The Court in Tison v. Arizona, 481 U.S. 137, 171 (1987), however, modified the holding Edmonds, to allow for the State to put someone to death,

regardless of their lack of killing another or even intended to kill them if they somehow had a major personal involvement in the underlying felony and showed reckless indifference to human life.

Dissenting, Justice Brennan explained that:

the criminal law must ensure that the punishment an individual receives conforms to the choices that individual has made. Differential punishment of reckless and intentional actions is therefore essential if we are to retain "the relation between criminal liability and moral culpability" on which criminal justice depends.

Tison v. Arizona, 481 U.S. 137, 171 (1987) (Brennen, dissenting) (citing People v. Washington, 402 P. 2d 130, 134 (1965) (opinion of Traynor, C. J.)).

In State v. Gerald this Court rejected the logic of the Tison majority that eliminated the sentencing distinction to be made between those who killed or intended to kill and those who did not. 113 N.J. 40 (1988). At a time when this State still sentenced people to death, New Jersey determined that, except when someone hired a person to commit a murder in their stead, only the person who killed or intended to kill should face that punishment. Id. This holding prohibited most people convicted of felony murder from this punishment.<sup>9</sup> These principles necessarily mean that it

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<sup>9</sup> The State constitution was later amended to allow for the death penalty when the actor actually intended to cause serious bodily injury. State v. Yothers, 282 N.J. Super 86 (App. Div. 1995). But

is disproportionate to require imposition of the same punishment for murder and felony murder.

While it might be tempting to dismiss this jurisprudence when considering the questions presented in this matter because there life was at stake, death penalty jurisprudence has been superimposed upon the legal analysis in juvenile sentencing matters such as the question of life without parole or its functional equivalent as in Graham, Miller, and Zuber. This historical recognition that those who kill as a principal are more morally culpable than those who do not kill by their own hand is further support for treating those children, who have twice diminished culpability differently than those adults who purposefully kill.

As young people, children are less morally culpable for a death that happens at the hands of another with whom they were engaged in a different crime. They were still immature at the time of the offense, and subject to all of the characteristics of youth which include "chronological age and its hallmark features among them immaturity, impetuosity, and failure to appreciate risks and consequences." Zuber, 227 N.J. at 445 (citing Miller, 567 U.S. at

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this Court again affirmed the important distinction between those who intend to kill and those who do not for sentencing purposes finding that the death penalty could only be imposed upon a finding that, "the defendant was aware that it was practically certain that his conduct would cause serious bodily injury that then resulted in the victim's death, knew that the injury created a substantial risk of death and that it was highly probable that death would result." State v. Cruz, 163 N.J. 403, 418 (2000). Of course, the legislature subsequently enacted amendments in 2007 that repealed the death penalty. State v. Troxell, 434 N.J. Super. 502, 510 (App. Div. 2014).

477). Their unique susceptibility to outside influences also renders them less culpable because they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” Zuber, 227 N.J. at 440 (citing Roper, 543 U.S. at 569).

The lack of prefrontal cortex development dramatically impacts an adolescent’s susceptibility to peer influence. Scientific teams studying this phenomenon report:

The presence of peers increases risk taking among adolescents but not adults. We posited that the presence of peers may promote adolescent risk taking by sensitizing brain regions associated with the anticipation of potential rewards. Using fMRI, we measured brain activity in adolescents, young adults, and adults as they made decisions in a simulated driving task. Participants completed one task block while alone, and one block while their performance was observed by peers in an adjacent room. During peer observation blocks, adolescents selectively demonstrated greater activation in reward-related brain regions, including the ventral striatum and orbitofrontal cortex, and activity in these regions predicted subsequent risk taking. Brain areas associated with cognitive control were less strongly recruited by adolescents than adults, but activity in the cognitive control system did not vary with social context. Results suggest that the presence of peers increases adolescent risk taking by heightening sensitivity to the potential reward value of risky decisions.

Albert Chein, et al., Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry, 14:2 Developmental Sci. F1, F1 (2011).<sup>10</sup>

Notably, these same transient characteristics of youth (impetuosity, failure to appreciate risks and consequences, and susceptibility to outside influences) are the very things that render young people more likely to engage in criminal activity with others, especially family members and peers - the very circumstances that lead to felony murder situations. The rationale that a juvenile participant in a felony, anticipating the possibility of the horrible outcome of each other's actions, is morally and, therefore legally, as culpable for another co-defendant's conduct as the actual actor is simply not supported by what we know and accept about the juvenile brain.

At least two United States Supreme Court Justices have already reached this conclusion. As Justice Breyer, joined by Justice Sotomayor, noted in his concurrence in the Miller decision:

The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. This rule has been based on the

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<sup>10</sup> The PBS Series Brains on Trial with Alan Alda, September 25, 2013, features the world-renowned adolescent brain researcher Laurence Steinberg and demonstrates the Chien study and the findings in action. A short, four-minute video clip featuring Dr. Laurence Steinberg and an adolescent participating in the study is available at: [www.youtube.com/watch?v=rt9MyNo65eI](http://www.youtube.com/watch?v=rt9MyNo65eI).

idea of "transferred intent"; the defendant's intent to commit the felony satisfies the intent to kill required for murder.

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As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment.

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At base, the theory of transferring a defendant's 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. Yet 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. Ante, at 471-472, 183 L. Ed. 2d, at 418-419. Justice Frankfurter cautioned, "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty toward children." May v. Anderson, 345 U.S. 528, 536, 73 S. Ct. 840, 97 L. Ed. 1221, 67 Ohio Law Abs. 468 (1953) (concurring opinion).

Miller, 567 U.S. 491-92 (Breyer, concurring) (certain internal citations omitted).

Whether or not children should be subjected to the label of murderer for a taking of life they neither committed nor intended to commit, they certainly should not be subjected to the same punishment as a fully mature adult who intended the loss of life. As the U.S. Supreme Court stated in Graham, 560 U.S. at 69, "when compared to an adult murderer, a juvenile offender who did not kill or intend to



kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.”

It is notable that it is only when a child is waived up to the adult system that they are subjected to a judicial and legislative blindness to how their felony murder conviction is fundamentally different than a conviction for murder as a principal for punishment purposes. In New Jersey, while a child who is adjudicated delinquent of purposeful and knowing murder normally may face up to twenty years of incarceration, a child adjudicated delinquent of felony murder may only be subjected to ten years of confinement. N.J.S.A. 2A:4A-44d(1) (a), (b). Such a difference in treatment is well-founded. Children who were sentenced in adult court for felony murder have a twice diminished culpability when compared to adults who killed. The current mandatory sentencing provisions do not allow judges to impose sentences that reflect that reality.

**3. The Mandatory Sentence Goes Beyond What Is Necessary To Accomplish The Penological Objectives Of Deterrence, Incapacitation, Rehabilitation, Or Retribution**

**a. These Sentences Do Not Serve To Rehabilitate**

As discussed above, such long, mandatory sentences do not promote rehabilitation. Children who do not have fully formed characters and whose crimes are most likely the result of the transient characteristics of youth, are unlikely to require three

decades of prison to be rehabilitated, a process naturally expected to come about as their brains develop. Indeed, as previously discussed, it is the transient factors of youth that most likely lead to children being involved in tragic felony murder situations. Yet, these factors are transient and the young people involved are likely to mature and outgrow the characteristics that resulted in the earlier criminal behavior. A fourteen or fifteen-year-old, currently the youngest people who could ever be subjected to adult sentencing,<sup>11</sup> would rarely be expected to require thirty years before a parole panel should be able to consider if they have been rehabilitated.

**b. The Sentences Go Beyond What Is Needed To Incapacitate**

Similarly, such a lengthy sentence is not justified by a need to incapacitate the child who neither killed nor intended to kill. "Recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders. For these reasons, statutes

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<sup>11</sup> The amendment to the waiver statute, raising the age at which children can be waived from fourteen to fifteen, was not made retroactive. Consequently, there are people serving lengthy adult sentences in New Jersey prisons for crimes committed years ago when they were fourteen.

mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.” National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences at 155 (2014). Juvenile offenders by their very nature are likely to desist from crime once they mature. Therefore, it cannot be said that the teenager who committed a very serious crime can be expected to be committing crime at a high rate or be extremely dangerous decades after their brain has matured.

In the case of a child convicted of felony murder, the connection between a long sentence and the incapacitation objective is even less supportable. The juvenile did not intend for the bad act to occur, nor did they actually commit the homicide. It is difficult to see why society needs these young actors who lacked the foresight to see that their co-defendant might act in a way that would result in someone’s death to be locked away for any time greater than those who were convicted of recklessly causing a death, such as in the case of aggravated manslaughter. They pose no greater danger and did not purposely cause a death. Judges should not be mandated to prevent their release for three decades.

**c. The Mandatory Sentence Does Not Serve A Legitimate Deterrent Objective**

The deterrence rationale cannot justify mandatory sentences for felony murder for children. In addition to the reasons discussed above concerning the lack of deterrent value in imposing such long sentences on children convicted of any crime, it serves even less of a purpose in the felony murder context. Minors are unlikely to know, or even contemplate that something like a felony murder rule even exists. It is difficult for adults, let alone children, to understand that the law would hold them responsible for something they did not do, or even intend to do. Even if the juvenile was aware of such a basis for guilt, as explained by science, because of the chemical and structural state of the teenage/very young adult brain, these young people are particularly bad at predicting possible outcomes or ramifications of their actions. Roper, 543 U.S. at 569; Miller, 567 U.S. at 477.

Quite simply, children fail to anticipate that they are at risk of such a horrible outcome as a death resulting from their participation in a crime. Just as they are unable to anticipate the possible negative outcomes of their own actions, they are certainly unable to anticipate what their co-defendants may do or what tragic consequences might flow from their actions. Their inability to make such a prediction of a resulting death as a result of participation in an underlying crime such a robbery is understandable, not only

because of their youth and all that entails, but because in reality very few such encounters actually do result in such a terrible loss of life. Beth Caldwell, The Twice Diminished Culpability Of Juvenile Accomplices To Felony Murder, 11 U.C. Irvine L. Rev. 905, 915 (2021) (citing Enmund, 458 U.S. at 799 (describing research on the frequency with which homicides occur in the course of robberies)).

Locking away a child for that long does not meet the goal of deterrence. As noted before, other teens are unlikely to be dissuaded by potential legal punishments precisely because by nature they fail "to appreciate risks and consequences." Zuber, 227 at 445 (citing Miller, 567 U.S. at 477). Additionally, children are unlikely to even be aware they could be so harshly punished for an act not done by their own hand, thereby eliminating any possibility of being deterred.

**d. The Sentence Goes Beyond Any Legitimate Retributive Purpose**

Retribution also fails to justify these sentences. It is hard to see the justice in subjecting a child who already has been treated as an adult and subjected to adult consequences for an offense that is, unfortunately, particularly likely to be precipitated by the circumstances of youth, to the same type of punishment as adults who kill. "Because [t]he heart of the

retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." Miller, 567 U.S. at 472 (citing Graham, 560 U.S. at 71-72). If, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" Graham, 560 U.S. at 69, then society cannot require that these children be subjected the same punishment as more culpable adults.

**CONCLUSION**

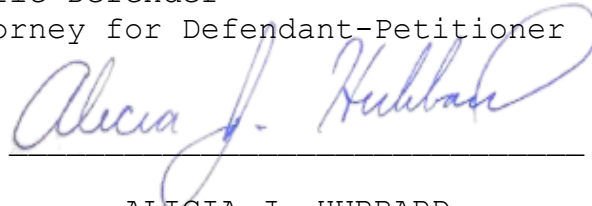
Our criminal code makes clear that sentencing should be informed by science. N.J.S.A. 2C:1-2(7). The science that this Court has accepted confirms that children are different from adults. Indeed, both this Court and the United States Supreme Court have acknowledged that they are constitutionally different. Yet, the current mandatory sentencing scheme ignores that constitutional difference, failing to distinguish between those who have fully developed brains, characters and adult autonomy, from juveniles who are not as developed, do not have the same type of fully developed characters or impulse control, and who are not as able to extricate themselves from the family and peer-influenced situations in which they find themselves. Society gains little but loses much by mandating that children serve all of their most productive years of their lives behind bars. These sentences preclude them from establishing the social ties and financial means necessary for reintegration into the community as a self-sufficient contributor. Despite rehabilitation and maturation that renders them unlikely to reoffend, the mandate condemns them to remain incarcerated at the public's expense. Yet, this lengthy incarceration is not justifiable as a means of appropriate retribution, deterrence, rehabilitation, or incapacitation. Judges should be permitted to consider the science and the purposes of

sentencing when imposing sentence for a child and, thereby, avoid imposition of a cruel and unusual punishment. Sentencing schemes must reflect the fundamental truth that children are different.

Respectfully submitted,

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