FILED, Clerk of the Supreme Court, 23 Jul 2021, **084509**

Supreme Court of New Jersey

STATE OF NEW JERSEY,	:	DOCKET NO. 084509 (A-42-20)
Plaintiff-Respondent,	:	
v.	:	
JAMES COMER,	:	CRIMINAL ACTION
Defendant-Appellant.	:	

On Certification from a Judgment of the Superior Court, Appellate Division.

Sat Below:
Hon. Jack M. Sabatino, P.J.A.D.
Hon. Thomas W. Sumners, J.A.D.
Hon. Richard J. Geiger, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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4T = Transcript of the resentencing, October 5, 2018
Da = Defendant's Appellate Division appendix
Db = Defendant's Appellate Division brief
Dsb = Defendant's supplemental brief to this Court
Dsa = Defendant's supplemental brief appendix to this Court
Pca = Defendant's petition for certification appendix
PSR = Defendant's Presentence Investigation Report
ACDLb = Association of Criminal Defense Attorneys amicus brief
CFSYb = Campaign for the Fair Sentencing of Youth, et al amicus Brief
OPDb = New Jersey Office of the Public Defender amicus brief

Preliminary Statement

In 2003, a jury of defendant James Comer's peers found him responsible beyond a reasonable doubt for the murder and robbery of George Paul, as well as several other robberies and related offenses. The trial court had sentenced defendant to 75 years with a 68-year period of parole ineligibility. Defendant would have been 85 at his first chance for parole.

Following a remand by this Court, State v. Zuber, 227 N.J. 422, cert. denied, 138 S. Ct. 152 (2017), the sentencing judge followed this Court's mandate and considered all relevant sentencing criteria—the statutory aggravating and mitigating factors, the factors that govern whether consecutive or concurrent sentences are appropriate, and the factors from Miller v. Alabama, 567 U.S. 460 (2012), which take into account certain characteristics of youth not theretofore part of the sentencing calculus. Exercising his considerable discretion in this area, the judge imposed the most lenient sentence allowable by law—30 years with 30 years of parole ineligibility for Paul's murder, and concurrent terms on everything else. Legally, the judge could go no lower. Defendant will now be released in nine years. He'll be just 47.

Still dissatisfied despite being eligible for parole almost four decades sooner, defendant argues that N.J.S.A. 2C:11-3b(1), the statute that sets the mandatory minimum sentence for murder

at 30 years with no parole eligibility, is unconstitutional as applied to defendants, like him, who were under 18 at the time they committed murder. This argument must fail, as it did in both the trial court and the Appellate Division.

While the legal landscape of how juvenile sentences are imposed has changed in recent years, not one of those decisions has diminished the seriousness of murder, or demanded that statutes that set minimum terms of imprisonment that allow murderers a meaningful opportunity at a chance for release fall as unconstitutional. So long as defendants like Comer are given the individualized sentencing consideration the federal and state constitutions demand—consideration he no doubt received here—nothing prohibits the Legislature from setting a mandatory minimum sentence for murder that is proportionate to the criminal law's most serious offense, and satisfies the penological goals sentencing statutes strive to achieve.

Defendant's position, like his crimes themselves, focus only on himself. But more than 20 years after he left George Paul to die, defendant still fails to take responsibility for his crimes. Nor does he seem to appreciate the significance of any murder, let alone the one he caused. The Legislature, however, still takes seriously the unjustified taking of life, even by those who are 17. Despite recently amending the juvenile waiver statute and the murder statute to soften or

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remove certain punishments for juvenile offenders, the Legislature did not amend the ordinary sentencing range for murder, including felony murder, for those who commit the ultimate crime at 17. Through its silence, it is indisputable that the Legislature still believes that a 30-year sentence without parole ineligibility is the minimum punishment required for those who kill, even if they do so before their eighteenth birthday. That decision is not just reasonable. It's constitutional.

Counter-statement of Procedural History and Facts[1]

In Zuber, this Court summarized the facts underlying defendant's convictions for murder and other offenses:

> Defendant James Comer participated in four armed robberies in the evening of April 17 and the early morning of April 18, 2000. During the second robbery, Ibn Adams, an accomplice, shot and killed [George Paul]. Comer was seventeen years old at the time of the robberies.
>
> Comer was prosecuted as an adult. After a joint trial with Adams, a jury convicted Comer of multiple counts related to the robberies, including one count of felony murder. The trial judge sentenced Comer as follows: (1) 30 years' imprisonment with 30 years of parole ineligibility for first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); (2-4) three consecutive terms of 15 years' imprisonment with an 85-percent period of parole ineligibility for three counts of first-degree armed robbery, N.J.S.A. 2C:15-1; (5-9) five concurrent terms of 4 years' imprisonment for weapons offenses, N.J.S.A. 2C:39-5(b); (10) one concurrent term of 4 years' imprisonment for theft, N.J.S.A. 2C:20-3(a).
>
> Comer's aggregate sentence was 75 years in prison with 68 years and 3 months of parole ineligibility. Comer will not be eligible for parole until 2068, when he would be 85 years old. Comer raised six arguments on appeal, including that his sentence was excessive. The Appellate Division affirmed his convictions and sentence, and this Court affirmed. State v. Adams, 194 N.J. 186, 191 (2008). Comer filed a petition for post-conviction relief in 2008, in which he challenged the imposition of consecutive sentences and raised several other claims. The trial judge denied relief. The Appellate Division remanded for an evidentiary hearing and later affirmed.

[1] Because they are intertwined, the State has combined these for the Court's convenience.

> In 2014, Comer filed a motion to correct an illegal sentence. He argued that his sentence amounted to life without parole, and was therefore illegal under Graham [v. Florida, 560 U.S. 48 (2010)] and Miller. When Comer was first sentenced in 2004, the trial judge was not required to evaluate the mitigating effects of youth, which Miller later addressed. In a detailed written opinion, the same trial judge concluded in 2014 that, because he had not considered the Miller factors, Comer was entitled to be resentenced.
>
> [Zuber, 227 N.J. at 433-34.]

After granting direct certification, 226 N.J. 205 (2016), this Court affirmed the trial court's decision that defendant was entitled to be resentenced. Zuber, 227 N.J. at 453. It held defendant was entitled to a new sentencing in which the court was to consider the aggravating and mitigating factors in N.J.S.A. 2C:44-1, the Yarbough[2] factors, and the Miller factors, before imposing a new sentence. Ibid.

Resentencing proceedings began on August 2, 2018, with defendant calling several witnesses on his behalf. (2T; 3T). Defendant said nothing, just as he did at his first sentencing, still taking no responsibility for his crimes. (1T15-2 to 4; 4T64-11 to 13); see also (2T47-4 to 6); (PSR 3; PSR 11); (Da59) (referring to other murderers as "real murderers" in his 2018 psychiatric evaluation).

---

[2] See State v. Yarbough, 100 N.J. 627, 643-44 (1985) (imposing criteria for determining whether to run multiple sentences consecutive to or concurrent with one another), cert. denied, 475 U.S. 1014 (1986).

On October 5, 2018, after considering the parties' arguments and the evidence presented at the August 2 proceeding, the sentencing judge resentenced defendant on count three, murder, to the mandatory minimum sentence: 30 years with a 30-year period of parole ineligibility. He then merged several counts and imposed concurrent sentences on the remaining ones. Defendant's aggregate sentence is therefore 30 years with a 30-year period of parole ineligibility. Defendant has already served more than two-thirds of that sentence. (4T82-5 to 86-11; Da40 to 43).

Importantly, the judge considered and rejected the defense's argument that N.J.S.A. 2C:11-3b(1), is unconstitutional as applied to defendants who were juveniles at the time of their offenses. The judge also concluded that, even if he accepted defendant's constitutional argument, he would not impose a lesser sentence because, considering the aggravating and mitigating factors, the Yarbough factors, and the Miller factors, 30 years with a 30-year period of parole ineligibility is an appropriate sentence in this case. (4T81-1 to 82-4).

The Appellate Division affirmed. State v. Comer, No. A-1230-18T2 (App. Div. May 6, 2020); (Pca3 to 32). It rejected defendant's constitutional argument, relying on State v. Pratt, 226 N.J. Super. 307 (App. Div.), certif. denied, 114 N.J. 314 (1988), which upheld the 30-year mandatory minimum sentence "as

applied to offenders who commit murder under the age of eighteen[,]" and decisions from this Court that acknowledge the power to proscribe punishment rests with the Legislature. (Pca5; Pca21 to 23) (citing, among others, State v. Des Marets, 92 N.J. 62 (1983)). The panel also correctly recognized that it is the Legislature, not the courts, that has the power and the "policy prerogative" to change the statute to give offenders like defendant the relief he seeks, and that bills have been introduced in recent years proposing to do so, but none have passed. (Pca5; Pca30 to 32).

In explaining why it could not take the "drastic action" defendant sought—striking down a duly enacted and long-standing criminal statute as unconstitutional—the panel cogently explained:

> As the State argues, the actions (and inactions) of our Legislature show that it still approves of courts trying certain juveniles as adults and subjecting them to adult punishment. Although the Legislature has increased the age of waiver to fifteen, it nonetheless maintained the process of trying certain juveniles as adults. When it recently amended the murder statute to conform with Miller and Zuber by eliminating the possibility of a life without parole term for juveniles tried as adults, it nevertheless maintained the thirty-year minimum for all offenders.
>
> Despite its substantial research and advocacy, the defense has failed to establish that the thirty-year parole bar as applied to juvenile murderers fails to conform with current standards of decency or is such as to shock the

> general conscience and to violate principles of fundamental fairness. Although Comer eloquently raises a number of policy arguments that support imposition of a lesser term on juveniles, he has not shown that a thirty-year minimum is grossly disproportionate to the offense.
>
> Murder is the most serious crime that a person can commit. Even taking into account the articles and cases Comer cites from a few other jurisdictions, we are not prepared to upset settled law and declare a thirty-year minimum is grossly disproportionate to that crime when it is committed by a juvenile.
>
> Nor has the United States Supreme Court ever held this. As that Court noted in Graham, although the Eighth Amendment imposes certain limitations, society is still generally entitled to impose severe punishments for severe crimes. Murder is one of them.
>
> [(Pca30 to 31) (internal citations omitted; emphases added).]

The panel also rejected any notion that defendant's sentence is the functional equivalent of life without parole:

> We have serious doubts that a thirty-year minimum imposed upon a juvenile offender constitutionally amounts to a life without parole ("LWOP") sentence or its functional equivalent. Where, as here, the juvenile commits the murder at the age of seventeen, he will be eligible for parole at approximately the age of forty-seven, assuming no other prior sentences need to be completed first. We recognize the Court in Zuber rejected the use of life expectancy tables to determine whether a sentence amounts to an LWOP sentence. Even so, we are unpersuaded that a prospect of release before the age of fifty is tantamount to a life sentence. The thirty years re-imposed here on Comer at his resentencing did not violate any Supreme Court holdings.
>
> [(Pca31) (internal citation omitted).]

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Finally, while the panel recognized that this Court has ultimate say over what is constitutional, it wisely recognized that "[t]he debate over applying the thirty-year minimum to juvenile murderers should instead proceed in the Legislature...." (Pca32).

Defendant sought certification, which this Court granted on March 26, 2021. State v. Comer, 245 N.J. 484 (2021).

Legal Argument

Point I

N.J.S.A. 2C:11-3b(1) as applied to juvenile offenders who are waived to the Law Division and convicted of murder is constitutional.

Sentenced to the mandatory minimum for murder under N.J.S.A. 2C:11-3b(1), defendant claims that statute is unconstitutional as applied to juveniles, like him, who killed before their eighteenth birthday. For the reasons that follow, defendant cannot meet his heavy burden to show that the statute is unconstitutional beyond a reasonable doubt.

A. Defendant must overcome: (1) the presumption that statutes are presumed constitutional and can only be struck down if unconstitutional beyond a reasonable doubt; and (2) the maxim that it is the Legislature, not the courts, that sets punishments for crimes.

Courts presume statutes are constitutional, "and the burden of establishing unconstitutionality is on the party challenging [the statute's] validity." State v. Auringer, 335 N.J. Super. 94, 99–100 (App. Div. 2000) (citing State v. One 1990 Honda Accord, 154 N.J. 373, 376 (1998); General Motors Corp. v. City of Linden, 150 N.J. 522, 532 (1997)). This is no easy feat. See Williams v. State, 375 N.J. Super. 485, 506 (App. Div. 2005) (describing the burden as "onerous."), aff'd sub nom. In re P.L. 2001, C. 362, 186 N.J. 368 (2006). This Court has explained:

> Defendant must shoulder a heavy burden to prevail

> on his claim that the [s]tatute is unconstitutional. He must hurdle the strong presumption of constitutionality that attaches to this and every other law. Indeed, from the time of Chief Justice Marshall, case law has steadfastly held to the principle that every possible presumption favors the validity of an act of the Legislature.
>
> The foundation for that presumption is solid and clear: the challenged law represents the considered action of a body composed of popularly elected representatives, and, as Justice Oliver Wendell Holmes admonished, it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts[.] As a result, courts exercise the power to invalidate a statute on constitutional grounds with extreme self restraint.
>
> [State v. Buckner, 223 N.J. 1, 14 (2015) (internal markings and citations omitted; emphasis added).]

For a court to disregard such restraint and strike down such considered action by the people's body, the challenger must show "unmistakably" that the enactment's "repugnancy" to the Constitution is "clear beyond reasonable doubt." Ibid. (citations omitted). If reasonable people "might differ," the challenge fails, and the will of the citizenry, as announced by their representatives in duly-enacted legislation, prevails. Id. at 15 (internal markings and citation omitted).

Though the burden could be no heavier—beyond a reasonable doubt is the highest burden of proof in our law, see Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 184 (2006)—defendant here

must also overcome the maxim that it is the Legislature, not the courts, that determines punishment for crimes. Chief Justice Wilentz put it this way:

> The judiciary does not determine the punishment for crimes. That is up to the Legislature. There is no law, no constitutional provision, that explicitly so provides, it is simply one of the most basic understandings of the allocation of governmental powers among the three branches.... One of the categories of legislation that the judiciary has no power to adopt is that defining crimes and providing for their punishment. If this Court adopted a rule purporting to make it a crime to drive a car on Sundays, that rule would be beyond our power; and if we said that the crime of theft by deception involving more than $75,000 (N.J.S.A. 2C:20-4 and 20-2b(1)(a)) was a crime of the fourth degree instead of a crime of the second-degree as provided for by the Legislature, that too would be beyond our power. Although the simplicity of the examples may conceal potential complexities, they tell what the true issue of this case is: who controls punishment—the Legislature or the Court. There is no doubt about the answer.
>
> [State v. Cannon, 128 N.J. 546, 559-60 (1992) (citation omitted; emphases added).]

See also Des Marets, 92 N.J. at 82 (noting that the Judiciary's "clear obligation is to give full effect to the legislative intent, whether we agree or not.") (emphasis added).

B. The Murder Statute & Recent Legislative Changes

It is against that backdrop that this Court must approach defendant's constitutional challenge to N.J.S.A. 2C:11-3b(1). That statute provides:

> [A] person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

Subsections (2), (3), and (4) require a sentence of life without parole under certain circumstances not relevant here. Ibid. In all, there are three sentencing options available for murder: 30 years with a 30-year period of parole ineligibility; a term of years between 30 and life with a 30-year period of parole ineligibility; or life without the possibility of parole. See Cannel, N.J. Criminal Code Annotated, comment 4 on N.J.S.A. 2C:11-3 (2021); see also State v. Martin, 213 N.J. Super. 426, 440 (App. Div. 1986) (discussing legislative history of murder's sentencing provision), rev'd o.g., 119 N.J. 2 (1990).

Before 2017, a juvenile waived up to adult court could have been sentenced to any of these three options. But, after Zuber, the Legislature amended the statute to eliminate mandatory life without parole for juveniles. See Cannel, ante, at comment 1 (discussing with L. 2017, c. 150). Now, N.J.S.A. 2C:11-3b(5) provides: "A juvenile who has been tried as an adult and convicted of murder shall be sentenced pursuant to paragraph (1) of this subsection."

Just a few years earlier, in 2015, the Legislature amended

the juvenile waiver statute in several significant ways. See L. 2015, c. 89. Importantly, one way in which the Legislature did not alter the statute is that juveniles aged 15, 16, or 17 can still be waived up to adult court for murder, including felony murder, and still be sentenced pursuant to N.J.S.A. 2C:11-3b(1). See N.J.S.A. 2A:4A-26.1c(2)(a).

Taken together, the Legislature still believes a sentence of at least 30 years with no parole eligibility is a permissible sentence for murderers who are 17 years old.

C. Federal & State Constitutional Provisions & Jurisprudence

Defendant claims N.J.S.A. 2C:11-3b(1) as applied to juveniles who commit murder violates the Eighth Amendment of the United States Constitution and Article 1, paragraph 12 of the New Jersey Constitution. (Dsb12). Both provisions prohibit infliction of "cruel and unusual punishments." Zuber, 227 N.J. at 437-38 (citations omitted). This Court has, in its capital jurisprudence, interpreted the state constitution to offer greater protection to criminal defendants. Id. at 438; see also State v. Gerald, 113 N.J. 40, 76 (1988).

Although this Court has never addressed the constitutional issue now before it, the Appellate Division did so more than 30 years ago in Pratt. There, Pratt committed a murder at 15, was waived to adult court for prosecution, was convicted, and was

sentenced to 30 years without parole eligibility. 226 N.J. Super. at 308-09. He alleged his sentence was cruel and unusual punishment. Id. at 309, 324.

Rejecting this claim, Judge Baime began by noting that, "[t]he broad power to determine punishment for the commission of crimes is committed to the legislative and not the judicial branch of government." Id. at 324-25. "[T]he judiciary 'will not interfere with the prescribed form of penalty unless it is so clearly arbitrary and without rational relation to the offense or so disproportionate to the offense as to transgress ...constitutional boundaries.'" Id. at 325 (quoting State v. Smith, 58 N.J. 202, 211 (1971)). While Pratt's sentence could be viewed as "harsh," as defendant claims his is, (Dsb25), so was his crime: "'Murder is the most heinous and vile offense proscribed by our criminal laws,' [and so] it cannot fairly be said that the punishment 'violates principles of fundamental fairness,' is 'grossly disproportionate' to the seriousness of the offense or 'goes beyond what is necessary to accomplish any legitimate penal aim.'" Id. at 309, 326–27 (quoting State v. Serrone, 95 N.J. 23, 27 (1983), and Des Marets, 92 N.J. at 82); accord Graham, 560 U.S. at 69 ("There is a line between homicide and other serious violent offenses against the individual.").

Pratt remains good law. No decision from either this Court or the United States Supreme Court forbids or even casts doubt

upon the sentence of 30 years without parole eligibility for murder. Moreover, the recent amendments to both the juvenile waiver statute and the murder statute make clear that the Legislature still believes a sentence of at least 30 years with no parole eligibility is a permissible sentence for juvenile murderers who are 17 years old, like defendant here. Accord Pratt, 226 N.J. Super. at 326 n. 3 (discussing then-recent amendments to N.J.S.A. 2C:11-3, and observing that "the Legislature clearly intended that the 30 year minimum term be applied to juveniles," and "discern[ing] no justifiable basis to question that judgment.").

It is, of course, undisputed that there has been a sea change in this area since Pratt as it relates to the most serious punishments for juveniles: the death penalty and life imprisonment without the possibility of parole. In Roper v. Simmons, 543 U.S. 551, 578 (2005), the Court declared the death penalty violated the Eighth Amendment when imposed upon juvenile offenders.

Then, in 2010, in Graham, the Court held that the Eighth Amendment categorically prohibits sentences of life without parole for juveniles convicted of non-homicide offenses. 560 U.S. at 82. The Court pointed out, however, that "[a] State is not required to guarantee eventual freedom to" such offenders. Id. at 74–75. Instead, the states must give those defendants

"some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75 (emphasis added). The Court did not define "meaningful opportunity"; it left that decision to the states "in the first instance." Ibid. The Court concluded that "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." Ibid. But, it "does prohibit states from making the judgment at the outset that those offenders never will be fit to reenter society." Ibid.

In Miller, in 2012, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. There the Court invoked two lines of precedent. In one, relying on Graham and others, the Court noted that "children are constitutionally different from adults for purposes of sentencing" and "have diminished culpability and greater prospects for reform." Id. at 471. In other words, "[y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Id. at 473 (emphasis added).

A second line of precedent, taken from capital cases, mandates individualized sentencing before imposing the death penalty. Id. at 476. In those cases, the Court "insisted ...

that a sentencer have the ability to consider the 'mitigating qualities of youth'" before imposing the ultimate punishment. Ibid. (citation omitted). The Miller Court set forth five factors that a sentencing court must consider before "irrevocably sentencing [a juvenile offender] to a lifetime in prison." Id. at 480. Known as "the Miller factors," they are:

> Mandatory life without parole for a juvenile
>
> [1] precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
>
> [2] It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.
>
> [3] It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.
>
> [4] Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.
>
> [5] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.
>
> [Id. at 477-78.]

As in Graham, the Miller Court did not foreclose life without parole for juveniles convicted of a homicide offense. Id. at

480. But the Court required sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Ibid. (emphasis added). Miller, the Supreme Court later determined, announced a substantive rule of constitutional law that applies retroactively. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

Then, in Zuber, this Court held that sentencing judges must evaluate the Miller factors when they sentence a defendant who was a juvenile at the time they committed their offense to a lengthy period of parole ineligibility that renders the sentence the "practical equivalent" of life without parole. Zuber, 227 N.J. at 446-47. It further held that a sentencing court must also consider the familiar Yarbough factors when deciding whether to impose consecutive sentences on a juvenile which may result in not just any sentence, but one with a lengthy period of parole ineligibility that constitutes the "practical equivalent" of life without parole. Id. at 448, 450. Judges in their analysis must "exercise a heightened level of care before imposing multiple consecutive sentences" on juvenile defendants. Id. at 450.

Since Zuber, the Appellate Division has held that an aggregate term of life with a 35-year period of parole ineligibility is not the functional equivalent of a life-

without-parole sentence when imposed on a defendant who was 14 when he committed felony murder and related offenses. State v. Bass, 457 N.J. Super. 1, 4, 13-14 (App. Div. 2018), certif. denied, 238 N.J. 364 (2019). That court has also upheld a life sentence with a 30-year period of parole ineligibility imposed on a defendant who was 17 when he committed murder, deeming it not the "functional equivalent of life without parole." State v. Tormasi, 466 N.J. Super. 51, 66 (App. Div. 2021). The court correctly observed that "[a] life sentence subject to a thirty-year parole-bar is far from a de facto life sentence without parole when imposed on a juvenile offender, who will be eligible for release by age forty-seven." Ibid.

Earlier this year, in Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021), the Supreme Court rejected Jones's claim that a sentencer had to first find a defendant "permanently incorrigible" before imposing a sentence of life without parole for homicide. The Court noted that Miller mandates a process—that a sentencer must consider the offender's youth and attendant characteristics before imposing a life-without-parole sentence—and a formal factual finding of permanent incorrigibility is not required. Ibid. (citing Miller, 567 U.S. at 483, and Montgomery, 577 U.S. at 211). The Court also made clear that "any homicide, and particularly a homicide committed by an individual under 18, is a horrific tragedy for all

involved and for all affected." Id. at 1322. But "the proper sentence in such a case raises profound questions of morality and social policy[,]" questions that belong to the States, whose legislatures "make those broad moral and policy judgments in the first instance when enacting their sentencing laws." Ibid.; accord Cannon, 128 N.J. at 559-60.

D. N.J.S.A. 2C:11-3b(1)'s mandatory minimum sentence of 30 years with a 30-year period of parole ineligibility does not violate the constitutional prohibition of "cruel and unusual punishments" when applied to juvenile murderers.

It is against this backdrop that this Court must now confront the question before it: Does N.J.S.A. 2C:11-3b(1) as applied to offenders who were juveniles when they committed murder violate the Eighth Amendment of the United States Constitution or Article 1, paragraph 12 of the New Jersey Constitution? (Dsb12). The tests under both the federal and state provisions are "generally the same." Zuber, 227 N.J. at 438. "The test poses three questions: '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?'" Ibid. (citation omitted). The answer under either constitutional provision is also the same in this case: N.J.S.A. 2C:11-3b(1)'s mandatory minimum 30-year-sentence does not

violate the constitutional prohibition of "cruel and unusual punishments" when applied to juvenile murderers.

i. Contemporary standards of decency do not foreclose a sentence of 30 years without parole for murder.

The State agrees with defendant that, "'the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (Dsb20) (quoting Adkins v. Virginia, 536 U.S. 304, 312 (2002)). Here, our Legislature mandates a 30-year sentence with no parole eligibility for the most serious crime, murder, and has for decades. And it has reenforced that determination recently when it amended both the homicide statute and the juvenile waiver statute and left in place the mandatory minimum sentence for those who were 17 when they committed murder. As noted above, the Legislature 1) amended the murder statute to eliminate mandatory life without parole for juveniles, see N.J.S.A. 2C:11-3b(5), and 2) amended the juvenile waiver statute in several significant ways, but did not prohibit the waiver of 17-year-olds to adult court for murder, including felony murder, see N.J.S.A. 2A:4A-26.1c(2)(a). Taken together, the Legislature still believes a sentence of at least 30 years with no parole eligibility is a permissible sentence for murderers who are 17.

Defendant can point to no "'national consensus'" to the

contrary. Zuber, 227 N.J. at 439 (quoting Roper, 543 U.S. at 559-60). Arguing that the "'consistency of the direction of change'" supports his position, defendant says that 11 jurisdictions "effectively bar sentences of 30 years without parole eligibility for juveniles...." (Dsb21). While the State cannot argue with the results of the democratic process in those jurisdictions—something our Legislature obviously has the right to do if it thinks it appropriate—it cannot be ignored that a good number of the statutes cited by defendant still allow for sentences of 25 or even 30 years for juvenile murderers.[3] Thus, a great majority of states' legislatures still permit the very sentence defendant challenges here (or one very close to it) as outside contemporary standards of decency.[4] In other words, New Jersey's sentencing scheme for murders is not so far afield from the national consensus that a duly enacted and longstanding statute must be struck down as unconstitutional beyond a reasonable doubt. Buckner, 223 N.J. at 14.

Recent proposed legislation advances the ball no further for defendant. Defendant and some amici correctly note that

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[3] As defendant's own research indicates, at least nine states permit such sentences despite recent amendments to their statutes. See (Dsb20 to 21 n. 7-9) (and citations therein).

[4] Similarly, with the average resentence post-Montgomery being around 25 years for all offenses, see (Dsb22), New Jersey's 30-year minimum for the most serious offense of all, murder, is not inconsistent with society's contemporary standards of decency.

several bills have been introduced in the Legislature that would permit resentencing or create early parole eligibility for juvenile offenders. See (Db24 n. 7) (citing A. 1233 (introduced Jan. 9, 2018); (ACDLb12 to 13) (citing A. 3091 (introduced Feb. 24, 2020)); (CFSYb29) (citing A. 3091 and S. 428 (introduced Jan. 9, 2018)). But none of these proposals made it out of committee. Defendant and amici extrapolate from these proposed pieces of legislation, which have never been supported by more than half-a-dozen legislators, that this signals a belief that a sentence of 30 years without parole for a juvenile is no longer consistent with contemporary standards. While it may be true that the legislators who introduced and sponsored the bills think so, until any of their bills pass, it constitutes nothing more than the opinion of a few about what the law should be, not what it is.

Defendant also points to two cases from other states where mandatory penalties short of life without parole as applied to juveniles were struck down. See (Dsb42 to 43). One is State v. Lyle, 854 N.W.2d 378, 380 (Iowa 2014), where the Supreme Court of Iowa struck down all statutorily imposed mandatory minimum sentences for juveniles. Lyle, however, is an outlier. In State v. Anderson, 87 N.E.3d 1203, 1211 (Ohio 2017), Ohio's high court rejected Lyle, finding "no evidence of a national consensus against the imposition of mandatory sentences on juvenile

offenders tried as adults." Defendant Anderson even conceded this point. Id. at 1210-11.

Ohio is not alone in rejecting Lyle as an outlier. See, e.g., State v. Rivera, 172 A.3d 260, 278 (Conn. App. Ct. 2017) ("[O]ur Supreme Court [has] recently rejected the applicability of Lyle to our state jurisprudence." (citing State v. Taylor G., 110 A.3d 338, 349 n. 2 (Conn. 2015)); Burrell v. State, 207 A.3d 137, 144 (Del. 2019) (rejecting Lyle and other cases, and finding and collecting "ample—and, we think—more persuasive authority from other states that rejects [Lyle's] approach"; State v. Thompson, 245 So. 3d 302, 307 (La. Ct. App. 2017) (rejecting Lyle); see also People v. Wilson, 62 N.E.3d 329, 340 (Ill. App. Ct. 2016), aff'd sub nom. People v. Hunter, 104 N.E.3d 358 (Ill. 2017); State v. Barbeau, 883 N.W.2d 520, 534 (Wis. Ct. App.), rev. denied, 891 N.W.2d 408 (Wis. 2016), cert. denied, 137 S. Ct. 821 (2017).

Indeed, even Lyle itself recognizes that its decision—decided by the narrowest of margins (4-3)—is unique. See 854 N.W.2d at 387 ("[The] state of the law arguably projects a consensus in society in favor of permitting juveniles to be given mandatory minimum statutory sentences.") (emphasis added); see also People v. Banks, 36 N.E.3d 432, 506 (Ill. 2015) (mandatory minimum sentence for first-degree murder did not violate juvenile defendant's constitutional rights to be free

from cruel and unusual punishment) (cited in Barbeau, 883 N.W.2d at 532); State v. Vang, 847 N.W.2d 248, 262–63 (Minn. 2014) (mandatory minimum sentence of life imprisonment with possibility of release after 30 years for first-degree felony murder for juvenile did not violate Eighth Amendment); Commonwealth v. Lawrence, 99 A.3d 116, 121–22 (Pa. Super. Ct. 2014) (statute imposing a mandatory minimum of 35 years on a juvenile defendant convicted of first-degree murder did not violate Eighth Amendment), app. denied, 114 A.3d 416 (Pa. 2015); State v. Link, 441 P.3d 664, 695 n. 12 (Ct. App. Or. 2019) (Tookey, J., dissenting) (collecting cases), rev'd, 482 P.3d 28 (Or. 2021) (holding unanimously that Oregon's sentencing scheme for juvenile murderers is constitutional).

Even Lyle itself left open the possibility that some juveniles could still be sentenced to a mandatory minimum sentence. 854 N.W.2d at 403. And, in State v. Roby, 897 N.W.2d 127, 148 (Iowa 2017), the Supreme Court of Iowa addressed that open question and held that its state constitution "does not categorically prohibit the imposition of a minimum term of incarceration without the possibility of parole on a juvenile offender, provided the court only imposes it after a complete and careful consideration of the relevant mitigating factors of youth."

Other states are in accord. For example, in State v.

Smith, 836 S.E.2d 348, 348 (S.C. 2019), Smith received an aggregate mandatory sentence of 35 years without parole ineligibility. Echoing the arguments made by defendant here, Smith argued the sentencing statute was unconstitutional because "it treats juvenile and adult homicide offenders equally for sentencing purposes, in that both juveniles and adults are subject to the same mandatory minimum sentence" and because "such a result ignores the scientific and constitutional differences between juveniles and adults recognized by the Supreme Court in its juvenile sentencing cases." Id. at 349. The court rejected those arguments, joining "the overwhelming majority of jurisdictions that [have] found mandatory minimum sentences constitutional under the Eighth Amendment and Miller." Id. at 350; see id. at n. 6 (collecting cases).

The Smith court also rejected the other case defendant cites, State v. Houston-Sconiers, 391 P.3d 409, 420 (Wash. 2017); (Dsb43), as an outlier. There defendants stole Halloween candy and got a sentence of 36-45 years. Id. at 414. That absurd result is a far cry from this case. This Court too should reject these outliers and hold the same, as N.J.S.A. 2C:11-3b(1) when applied to 17-year-old murderers does not go beyond contemporary standards of decency.

ii. A 30-year sentence without parole is not grossly disproportionate to murder.

Second, a 30-year sentence with no parole eligibility is not grossly disproportionate to murder. Murder remains the most heinous crime punished by our Criminal Code. Yarbough, 100 N.J. at 632; Serrone, 95 N.J. at 27; Pratt, 226 N.J. Super. at 326; (Pca30 to 31). Moreover, by requiring proportionality between the offender and the offense and its victims, "the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." Roper, 543 U.S. at 560. A 30-year sentence with no parole eligibility is not disproportionate to the harm imposed on society when one person kills another. Defendant does not seriously contend otherwise. See (Dsb19) ("Comer does not here argue that it is necessarily unconstitutional to sentence a juvenile homicide offender to a term of 30 years or more without eligibility for parole, just as a sentence of life without parole is not necessarily disproportionate for a juvenile offender under Miller.").

This remains true even if the defendant is convicted of felony murder, as defendant was here. See State v. Johnson, 206 N.J. Super. 341, 348-49 (App. Div. 1985) (rejecting constitutional challenge to 30-year minimum sentence for felony murder, and concluding that "pitting the offense proscribed by N.J.S.A. 2C:11-3b against the extent of punishment provided

therein, we find no disproportionality. The punishment does not go beyond what appears to be a reasonable expedient to achieve the public purpose of punishment for an egregious offense."), certif. denied, 104 N.J. 382 (1986); see also State v. Dunne, 124 N.J. 303, 320 (1991) ("The sentence of thirty years without parole was required for murder under N.J.S.A. 2C:11-3 and does not constitute a cruel and unusual imprisonment disproportionate to the offense of murder.") (citing Johnson); State v. McClain, 263 N.J. Super. 488, 497 (App. Div.) (reaffirming Johnson), certif. denied, 134 N.J. 477 (1993). As noted in State v. Rumblin, "[l]egislative mandatory sentencing provisions have consistently withstood cruel and unusual punishment claims." 326 N.J. Super. 296, 303 (App. Div. 1999) (citing, among others, State v. Maldonado, 137 N.J. 536, 556–60 (1994), Des Marets, 92 N.J. at 82, and Johnson), aff'd, 166 N.J. 550 (2001)). Critically, despite these attacks, the Legislature has never wavered from a 30-year minimum sentence for murder, including felony murder.

Graham itself recognizes that felony murder belongs in the same class as other types of murder. There the Court observed that it "has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, 560 U.S. at 69 (emphasis added). Homicide

crimes differ in a moral sense. Ibid. And the predicate crimes for felony murder, by their nature, are such that death is a predictable result of their commission. Martin, 119 N.J. at 19-28. Defendants who did not foresee such a result are not held criminally responsible as if they did. See State v. Walker, 203 N.J. 73, 83-84 (2010) (discussing N.J.S.A. 2C:11-3a(3), the statutory defense to felony murder).

Notably, even when the Legislature has acted in the areas of criminal responsibility and punishment for juveniles, it has not adopted defendant's and amici's proposal. When the Legislature amended the juvenile waiver statute in 2015, it left felony murder as a waivable offense. N.J.S.A. 2A:4A-26.1c(2)(a). And it did not alter in any way the available sentences for such offenders if convicted, N.J.S.A. 2A:4A-26.1f(1), just as it did not change the murder statute in this regard when it amended it in 2017, L. 2017, c. 150. This silence is telling. As one judge put it, "since the Legislature had specifically acted in one area and refrained from acting in another, the basic proposition recognized therein was that intent can be gleaned from the Legislature's failure to do that which it could have easily done." Trustees of Local 478 v. Pirozzi, 198 N.J. Super. 297, 313 (Law Div. 1983), aff'd, 198 N.J. Super. 318 (App. Div. 1984). The Legislature therefore still believes felony murder is an "egregious offense"

warranting serious punishment, even for those who are 17, and 30 years is not "grossly disproportionate" to that grievous offense.

iii. A 30-year sentence with no parole eligibility is not beyond what is necessary to accomplish legitimate penological objectives.

Third, a 30-year sentence with no parole eligibility is not beyond what is necessary to accomplish legitimate penological objectives. "Criminal punishment can have different goals, and choosing among them is within a legislature's discretion[,]" not a court's. Graham, 560 U.S. at 71. These goals are retribution, deterrence, incapacitation, and rehabilitation. Ibid. All four objectives are advanced by a 30-year sentence without parole eligibility for murder, even for younger offenders.

Beginning with retribution, the United States Supreme Court has explained that, "[s]ociety is entitled to impose severe sanctions...to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." Ibid. "The Eighth Amendment does not excuse children's crimes, nor does it shield them from all punishment." Jones, 141 S. Ct. at 1340 (Sotomayor, J., dissenting). Given their lower culpability for crime in general, "the case for retribution is not as strong with a minor as with an adult[,]" and

"[r]etribution is not proportional if the law's most severe penalty is imposed" Roper, 543 U.S. at 571 (emphases added). But it's not irrelevant either. While weaker, retribution remains a legitimate penological justification, especially for murder, and especially when something less than the "most severe penalty" is imposed. Despite defendant's and amici's strained attempts to analogize defendant's sentence here with life without parole or some other irrevocable penalty, most defendants who commit murder at 17 will be eligible for parole at 47, thus satisfying the legitimate goal of retribution while not condemning them to a "lifetime of incarceration without the possibility of parole." Miller, 567 U.S. at 473.

Deterrence is also important.[5] Murder, including felony murder, must be deterred—a statement so obvious hardly more need be said. See Martin, 119 N.J. at 20 ("The historical justification for the [felony murder] rule is that it serves as a general deterrent against the commission of violent crimes."). And while Graham found this rationale diminished because juveniles are less likely to be deterred based on possible

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[5] Several amici agree. See (OPDb14) ("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.'" (quoting State v. Megargel, 143 N.J. 484, 501 (1996), and citing State v. Fuentes, 217 N.J. 57, 78-79 (2014), and State in the Interest of C.A.H. & B.A.R., 89 N.J. 326, 334 (1982)); (ACDLb5) ("Certainly, deterrence and rehabilitation are relevant to juvenile offenders.").

punishments, particularly when that punishment is life without parole and rarely imposed, 560 U.S. at 72, here the Court is considering a sentence far less severe and far more common. Deterrence, both specific to a given offender and general to the public at large, remains relevant, even if to some lesser extent than when sentencing adults. See N.J.S.A. 2C:44-1a(9) (mandating courts consider "[t]he need for deterring the defendant and others from violating the law" when imposing sentence) (emphasis added).

Incapacitation, too, is a legitimate consideration. "Recidivism is a serious risk to public safety, and so incapacitation is an important goal." Graham, 560 U.S. at 72. And "of course murderers, too, recidivate, and the state has an interest in severely punishing the crime of murder." People v. Edwards, 246 Cal. Rptr. 3d 40, 54–55 (Ct. App.), rev. denied, (Cal. 2019). While no one can disagree that incapacitation alone does not justify forever imprisoning juveniles, defendant and others similarly sentenced will not be imprisoned forever, or even to a term that can be fairly deemed its "functional equivalent." They will have the opportunity to rejoin society at a relatively young age, usually 47. They will have what defendants like Miller, Graham, and Zuber did not—a "chance for fulfillment outside prison walls, [a] chance for reconciliation with society, hope." Jones, 141 S. Ct. at 1340 (Sotomayor, J.,

dissenting). So, while it "cannot override all other considerations," incapacitation remains a legitimate consideration for those who commit the serious crime of murder. Graham, 560 U.S. at 73.

For similar reasons, rehabilitation remains a legitimate and important goal. Accord (ACDLb5). In rejecting rehabilitation as a legitimate goal when a juvenile is sentenced to prison for the rest of his life, the Graham Court explained that such a sentence

> forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society.... For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.
>
> [Id. at 74 (citations omitted).]

Not so here. Since defendant will be released, and at only 47, he no doubt has the opportunity to rehabilitate himself while incarcerated. In fact, as the record makes clear, defendant has already availed himself of many programs that should make him a productive member of society upon his release, and the sentencing court considered those in imposing the lowest sentence authorized by law. See, e.g., (2T5-19 to 22; 4T7-19 to 24; 4T30-1 to 31-10; 4T35-8 to 11; 4T74-15 to 25; 4T80-3 to 7; 4T82-14 to 16; Da42; Da77 to 78). Again, defendant and others

similarly sentenced will have the opportunity to rejoin society at a relatively young age,[6] and so the State's desire to see them come out rehabilitated is strong.

Defendant admits that an offender released in his or her mid-to-late 40's can be rehabilitated, but he laments that reintegration will be "more difficult[.]" (Dsb30). But recent jurisprudence requires a defendant a meaningful opportunity for release; it does not require that reintegration be easy, or no more difficult than for one who did not commit murder.

It cannot be forgotten, as it so often is in these types of cases, that a person—a husband, son, nephew, cousin, and father of four, (1T21-17 to 28-23)—is dead, and defendant is responsible for that death. Defendant will be released at age 47—plenty of time for defendant to build and enjoy life, a luxury not afforded to George Paul. His cousin Vanessa put it best at sentencing:

> We think about how George has no possibility for the future with his children or his family because those possibilities were taken from him permanently on that night.
>
> The most horrific of all, we think over and over again that George is actually dead with no possibility of ever coming back....

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[6] As one study cited by defendant notes, "[a]fter their early 40s... termination rates [from criminal activity] are quite high[,]" Laub & Sampson, Understanding Desistance from Crime, 28 Crime & Just. 1, 17 (2001) (quoted in Db39 and cited at Dsb36), putting defendant right on track for a crime-free life after his release.

> [R]emember that George is dead with no consideration to be drawn from. George's sentence handed down by the...Defendants and their actions was life. There are no do-overs, no future, no possibility, nothing left for George....
>
> George had no opportunity to age, no consideration to survive.
>
> [(4T56-24 to 57-20); see also (1T21-3 to 27-12.]

iv. Defendant offers no alternative sentencing scheme for juvenile murders if this Court strikes down N.J.S.A. 2C:11-3b(1).

Finally, while defendant claims N.J.S.A. 2C:11-3b(1) is unconstitutional as applied to him and all juvenile murderers, his brief is a cliffhanger. Should this Court agree with him, then what? Defendant doesn't say.[7] If this Court is going to strike down an entire sentencing scheme as unconstitutional, it must be prepared to replace it with a permissible one. See, e.g., State v. Natale, 184 N.J. 458, 466 (2005) (holding that presumptive sentencing terms under the Criminal Code violated the Sixth Amendment, but then "bring[ing] the Code into compliance" by eliminating such terms and restructuring how sentences are to be imposed). If struck down, what will the new range be for murder? 25 to life? 10? Probation? Where would such a range come from? How will this Court decide?

[7] At the re-sentencing, defendant selected a number that would result in his parole eligibility very soon. (4T39-1 to 10). Of course, that is not a workable standard for future cases.

Respectfully, it shouldn't. Defendant's and amici's policy claims, some of which are legitimate,[8] may find support in the Legislature, for it is that body that should consider, and if it deems appropriate implement, the legislative changes they seek. Until then, however, this Court should "give full effect to the legislative intent," as it is written, whether it agrees "or not." Des Marets, 92 N.J. at 82.

Defendant and OPD cite to the juvenile sentencing statute, pointing out that there, felony murder is not punished as severely as purposeful and knowing murder. (Dsb33 n. 22; OPDb27); see N.J.S.A. 2A:4A-44d(1)(a) & (b). If that is their proposal here, it must fail. Subjecting waived juveniles to the same sentencing exposure as non-waived juveniles all but erases the clear will of the Legislature, which has set up two different sentencing schemes for two different classes of offenders—determinate ranges for persons convicted in criminal court, versus indeterminate, always-reviewable sentences for those adjudicated delinquent in juvenile court. Compare N.J.S.A. 2C:43-6a (setting sentencing ranges for those convicted of a crime) with N.J.S.A. 2A:4A-44d(1) (setting maximum terms

[8] For example, if true that prison regulations and policy hamper some inmates' ability to rehabilitate, including those eligible for parole at 46 or 47, (OPDb10 to 11), that needs to change so that juvenile murderers are as rehabilitated and ready for reintegration as possible. But those institutional shortcomings are not a basis to strike down a statute as unconstitutional.

for those adjudicated delinquent following a threshold determination that incarceration is required). As this Court has recognized, the latter "is perhaps the central feature of the youthful offender statutes...and the plain consequence of such sentences is that they may be legitimately terminated at any point." Des Marets, 92 N.J. at 74.

In fact, their suggestion ignores entirely the juvenile waiver process, which is also a product of the Legislature. Permitting waived offenders to receive indeterminate sentences ignores entirely this comprehensive process, and treats them the same as non-waived offenders. If the Legislature wanted to treat all juvenile offenders the same, they could have. Instead, they set up a process that considers youth at the outset, long before sentencing determinations are made, and ensures that only the most criminally responsible juveniles are subjected to prosecution in criminal court and, if convicted, lengthier sentences.

Indeed, many of the factors required by Miller and Zuber are already considered by the Family Part judge during the juvenile waiver process. A judge faced with a State's application to waive a juvenile to criminal court must consider, among other things:

> (a) The nature and circumstances of the offense charged;...

> (c) Degree of the juvenile's culpability;
>
> (d) Age and maturity of the juvenile;
>
> (e) Any classification that the juvenile is eligible for special education...;
>
> (f) Degree of criminal sophistication exhibited by the juvenile;
>
> (g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed...;
>
> (h) If the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the response of the juvenile to the programs provided at the facility...;
>
> (i) Current or prior involvement of the juvenile with child welfare agencies; [and]
>
> (j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile....
>
> [N.J.S.A. 2A:4A-26.1c(3).]

These factors bear a striking resemblance to the Miller factors, which require sentencing judges to consider: a defendant's chronological age and its hallmark features, notably immaturity, impetuosity, and failure to appreciate risks and consequences; the defendant's family and home environment; the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; that the defendant might have been charged and convicted of a lesser offense if not for

incompetencies associated with youth; and the possibility of rehabilitation. See Miller, 567 U.S. at 477-78.

Thus, youth does matter, and it is factored into the juvenile equation from the beginning. A juvenile who presents many of the "'mitigating qualities of youth'" that would reduce punishment at sentencing are unlikely to be waived to criminal court in the first place. Zuber, 227 N.J. at 429 (quoting Miller, 567 U.S. at 476). And the ones who are waived get to have all the mitigating qualities of youth considered again if they are convicted and subjected to a lengthy sentence that is the functional equivalent of life without parole. But if a juvenile subjected to the waiver process, who has had their youth seriously considered by a judge, can receive the same sentence as a juvenile who was not waived up, either because the State did not seek it or a judge did not grant it, there is practically little left of the juvenile waiver process.

At bottom, this Court in Zuber asked the Legislature to examine the issue and act. 227 N.J. at 452-53. As of today, it has not thought it appropriate to do so. To be sure, it would be quicker and easier to simply strike down a statute as unconstitutional than it would be to wait for legislative action. But "the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn't some bug in the constitutional design:

it’s the point of the design[.]” Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting). This Court is not “a super-legislature,” Newark Sup. Officers Ass’n v. City of Newark, 98 N.J. 212, 222 (1985), and it recognized as much when it showed judicial restraint and deferred to the Legislature resolution of the issue. Zuber, 227 N.J. at 453 (“To the extent the parties and amici urge this Court to impose a maximum limit on parole ineligibility for juveniles of thirty years, we defer to the Legislature on that question.”). That it’s taking longer than some hope is not a reason to reverse course now and do what this Court rightly did not do in Zuber—rewrite the statute.

Conclusion

Article I, paragraph 12's prohibition on cruel and unusual punishments, like the Eighth Amendment's, "guarantees individuals the right not to be subjected to excessive sanction." Miller, 567 U.S. at 469 (internal markings omitted). The death penalty and mandatory life without parole are such sanctions. Thirty years for murder is not.

For all of the aforementioned reasons, this Court should decline defendant's invitation to strike down N.J.S.A. 2C:11-3b(1) as unconstitutional as applied to murderers who were under 18 at the time of their crime and affirm the judgment below.

Respectfully submitted,

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