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July 1, 2024

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On the Letter-Petition

LETTER-PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089524
APP. DIV. DKT. NO. A-3911-21

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent	:	On Petition for Certification to the
	:	Superior Court of New Jersey,
v.	:	Appellate Division.
	:	
SEAN JONES,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Thomas W. Sumners, Jr., P.J.A.D.
		Hon. Lisa Rose, J.A.D.
		Hon. Ellen Torregrossa-O'Connor, J.A.D.

DEFENDANT IS CONFINED

Honorable Justices:

Please accept this letter is in lieu of a formal petition for certification.

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QUESTION PRESENTED

Should State v. Comer, 249 N.J. 359 (2022) -- which requires a resentencing after an adolescent offender under age eighteen has served twenty years -- extend to adolescents aged eighteen to twenty?

STATEMENT OF THE CASE

A procedural history and statement of facts are contained in defendant Sean Jones's main Appellate Division brief. The Appellate Division decision contains the crucial facts: Jones was eighteen years old at the time of the offenses in 1987 and 1988, and he has since been incarcerated. (Pa 18, 19, 22)[1] Under two separate indictments, the operative consecutive sentences are thirty years, with a thirty-year parole bar, for murder; twenty years, with a ten-year parole bar, for first-degree aggravated manslaughter; and ten years, with a five-year parole bar, for first-degree robbery. Jones's aggregate parole bar is forty-five years. (Pa 19)

On July 26, 2022, Jones filed a pro se motion for resentencing in the Law Division. (Pa 19; Da 28-51) Jones cited developmental science establishing that adolescents under age eighteen and adolescents aged eighteen to twenty are cognitively similar. He also cited a Washington Supreme Court

[1] "Pa" refers to the appendix attached to this petition. "Db" will refer to Jones's main Appellate Division brief. "Da" will refer to the appendix attached to that brief. "Drb" will refer to Jones's Appellate Division reply brief.

case, In re Monschke, 482 P.3d 276 (Wash. 2021), that relied on the science in extending constitutional protection against long sentences through age twenty. (Pa 20) Jones argued that, as an eighteen-year-old offender, he should be entitled to the same lookback resentencing as younger adolescents under State v. Comer, 249 N.J. 359 (2022). (Pa 19-20) In the alternative, Jones requested a hearing to consider expert testimony on the science. Finally, Jones requested the appointment of counsel on his motion. (Pa 20)

On July 29, 2022 -- three days after Jones's pro se motion was filed -- the Honorable Christopher S. Romanyshyn, J.S.C., filed a written order and statement of reasons denying resentencing. (Pa 1-6, 21) The court wrote that the motion could be decided based on Jones's papers because of the "undisputed facts related to the defendant's age [i.e., eighteen] when he committed the crimes." (Pa 3, 21) The court acknowledged the developmental science and the Monschke decision suggesting that "'no meaningful cognitive difference' exists between juveniles and eighteen- to twenty-year-old[s]." (Pa 4-5, 6, 21-22) The court, however, asserted that New Jersey's Comer decision "was plainly limited to juveniles" and was "binding." (Pa 6, 22)

The Law Division did not mention in its decision that Jones had applied for the assignment of counsel on the motion. (Pa 1-6)

The Office of the Public Defender then voluntarily undertook to

represent Jones and appealed to the Appellate Division on his behalf. Appellate counsel expanded upon the arguments that eighteen- to twenty-year-olds continue in a period of late adolescence; that Comer should be extended to age twenty; that eighteen-year-old offender Jones should have a Comer resentencing; and that, as an alternative, a hearing should be held on the developmental science. (Pa 9, 28; Db 8-26) In connection with these arguments, counsel argued that the issue of extending Comer was "open" and should be decided by the lower courts. (Pa 30-31; Drb 3-5) Appellate counsel also argued that Jones should have been appointed counsel in the Law Division and that Jones's request for counsel should not have been ignored. (Pa 9, 28, 34-36; Db 26-37)

An Appellate Division panel consisting of the Honorable Thomas W. Sumners, Jr., P.J.A.D., the Honorable Lisa Rose, J.A.D., and the Honorable Ellen Torregrossa-O'Connor, J.A.D., consolidated Jones's appeal with two unrelated appeals. The other two defendants -- Timothy Harris, age eighteen when offending, and Richard Roche, age twenty when offending -- were similarly arguing to extend Comer. (Pa 22-28) The other two were also complaining about the Law Division's failure to appoint counsel on their pro se resentencing motions. (Pa 9, 28, 34-36)

In a published decision authored by Judge Rose, the panel did not reach the merits of extending Comer from adolescents under eighteen to eighteen- to

twenty-year-olds; instead, the panel held that the lower courts lack the institutional authority to extend Comer. (Pa 31-33). The panel gave two main rationales. First, the panel traced the history of the leading United States and New Jersey Supreme Court cases and concluded that Comer "was limited to juvenile offenders" and "neither explicitly not implicitly extended this right of sentence review to offenders who between [sic] eighteen and twenty years of age when they committed their crimes." (Pa 10-15, 31) Second, the panel extensively quoted language from State v. Ryan, 249 N.J. 581 (2022), suggesting that the sentence of a person older than seventeen "d[id] not implicate Miller or Zuber." (Pa 31-33) (quoting Ryan, 249 N.J. at 586-87, 596, 600-01). In this connection, the panel noted a Ryan footnote quoting the United States Supreme Court to the effect that age eighteen "is the point where society draws the line for many purposes." (Pa 33) (quoting Ryan, 249 N.J. at 600 n.10, which quoted, in turn, Roper v. Simmons, 543 U.S. 551, 574 (2005)). The panel concluded that it was "bound" by precedent not to extend Comer. (Pa 33)

The panel then rejected out-of-hand that counsel should have been appointed to the defendants in the Law Division. The panel asserted that good cause did not exist to appoint counsel because the defendants' pro se arguments to extend Comer "were not difficult or possibly meritorious." (Pa 35-36)

Jones now petitions for certification and is joined by Harris and Roche.

At this writing, Jones is fifty-four years old and has been incarcerated since the age of eighteen. (Pa 22)

LEGAL ARGUMENT

CERTIFICATION SHOULD BE GRANTED ON THE IMPORTANT ISSUE OF WHETHER STATE V. COMER, 249 N.J. 359 (2022) -- WHICH REQUIRES A RESENTENCING AFTER AN ADOLESCENT OFFENDER UNDER AGE EIGHTEEN HAS SERVED TWENTY YEARS -- SHOULD EXTEND TO ADOLESCENTS AGED EIGHTEEN TO TWENTY. N.J. CONST. ART. I, ¶ 12.

It is extraordinarily important for the Supreme Court to grant certification in the consolidated cases of Jones, Harris, and Roche. The issue of extending Comer to eighteen- to twenty-year-olds -- and thus ending the cruel and unusual punishment of this class of late adolescents -- is important in itself. In addition, the present published Appellate Division decision disavows the power of the lower courts to decide the issue. If the issue is ever going to be decided, the Supreme Court must do it. Certification should be granted.

Like many important arguments, the argument to extend Comer is not complicated. (A longer version is in Jones's Appellate Division briefs.) Cruel and unusual punishment is unconstitutional. U.S. Const. amend. VIII, XIV; N.J. Const. art. I, ¶ 12. Under a series of decisions, this constitutional protection limits the severity of the sentence that may be imposed on an adolescent

offender under age eighteen. An offender who was under eighteen may not receive the death penalty, Roper v. Simmons, 543 U.S. 551 (2005); may not receive life without parole for a non-homicide offense, Graham v. Florida, 560 U.S. 48 (2010); and may not receive life without parole for a homicide -- except in the unusual circumstance that the adolescent offender is found to be incorrigible, Miller v. Alabama, 567 U.S. 460 (2012). Moreover, a court must make this finding of incorrigibility before sentencing an adolescent under eighteen to a lengthy term of years that approaches life without parole. State v. Zuber, 227 N.J. 422 (2017).

In the Comer decision, this Court held that the mandatory thirty-year parole bar for murder, see N.J.S.A. 2C:11-3(b)(1), violates New Jersey's protection against cruel and unusual punishment when applied to an adolescent under eighteen. Instead, after serving twenty years in prison, an offender who was under eighteen must be resentenced and considered for release. Comer, 249 N.J. at 401, 403.

The decision emphasized that a punishment is unconstitutional if any one of the following three propositions is true: (1) the punishment does not "conform with contemporary standards of decency"; (2) the punishment is "grossly disproportionate to the offense"; or (3) the punishment goes "beyond what is necessary to accomplish any legitimate penological objective." Id. at

383.

In applying this analysis, the Comer decision, like all of the other landmark decisions listed above, relied upon developmental science. This science is summarized in the Miller factors. Essentially, the brains of adolescents under eighteen are still maturing. Therefore, they act impetuously, heedless of risks and consequences. They are susceptible to negative influences from peers and family. And they have difficulty dealing with the legal system. Yet no matter how bad their youthful misbehavior, these adolescents are overwhelmingly likely to reform and desist from offending as their brains mature. See Comer, 249 N.J. at 387, 399 n.5 (citing Miller, 567 U.S. at 477-78).

The Miller factors caused this Court to hold that a mandatory thirty-year parole bar, when applied to adolescents under eighteen, fails two of the three tests for cruel and unusual punishment. Given the immaturity and diminished culpability of these adolescents, the thirty-year bar is in many cases grossly disproportionate to the offense. Comer, 249 N.J. at 397-98. Given these same characteristics -- plus adolescents' likelihood of reform with maturity -- the punishment goes beyond what is necessary for retribution, deterrence, incapacitation, or rehabilitation. Id. at 398-400.

The Court also held that a thirty-year parole bar for adolescents under eighteen violates contemporary standards of decency. The Court cited a

national trend, based on the Miller factors, of affording adolescents under eighteen greater constitutional protection against severe sentence sentences; cited New Jersey legislation that afforded these adolescents various sorts of protection against long sentences; and cited statutes and practices in other states that increasingly allowed adolescents under eighteen to be resentenced or paroled before thirty years. Comer, 249 N.J. at 390-96.

The main constitutional concerns, explained the Court, were (1) the mandatory imposition of a "decades-long" sentence without consideration of individualized circumstances and (2) the lack of a provision for the sentencing court to review the sentence after the adolescent has likely matured and re-formed. See id. at 401.

The Court concluded that all adolescent offenders under eighteen are entitled to be resentenced after twenty years in prison. The resentencing court should consider the Miller factors and decide whether the offender has matured, been rehabilitated, and is fit for release. Comer, 249 N.J. at 401, 403. The resentencing court will have the discretion to impose any base sentence within the statutory range, and to impose a parole disqualifier as low as twenty years. Id. at 403.

Based on incontrovertible developmental science, the Miller/Zuber/Comer line of cases should extend at least through age twenty. The science is

summarized in Jones's main Appellate Division brief. (Db 15-22) Petitioner also expects that this Court will have the benefit of amicus briefs from leading academics and organizations summarizing the science. Essentially, peoples' brains continue maturing well into their twenties. The characteristics described in the Miller factors -- the youthful impetuosity and heedlessness, the susceptibility to family and peer influences, and the overwhelming likelihood of reform -- are also characteristic of eighteen- to twenty-year-olds. Developmental scientists call this age group "late adolescents." See Center for Law, Brain & Behavior at Massachusetts General Hospital, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers (January 27, 2022); Grace Icenogle and Elizabeth Cauffman, Adolescent Decision Making: A Decade in Review, 31 Journal of Research on Adolescence 1006 (2021); Robert J. McCaffrey and Cecil R. Reynolds, Neuroscience and Death as a Penalty for Late Adolescents, 7 Journal of Pediatric Neuropsychology 3 (2021). As an authoritative review of the science put it:

> There is no clear way to differentiate in clinically or practically meaningful ways the functioning of the brains of 17-year-olds from those aged 18, 19, and 20 in terms of risk-taking behaviors, the ability to anticipate the consequences of their actions (i.e., engage in a real time cost-benefit analysis in the context of a crime, as well as being able to engage in what some states define as deliberateness in committing a homicide during another felony act), to evaluate and avoid negative influences of others, and to demonstrate fully

> formed characterological traits not subject to substantive change over the next decade of their lives.

McCaffrey and Reynolds (2021), supra, at 4.

Other states are heeding the developmental scientists and are extending protections to late adolescents under their Eighth Amendment analogues. The Washington State Supreme Court held that eighteen- through twenty-year-olds are entitled to the same protection as juveniles against life sentences. In re Monschke, 482 P.3d 276, 288 (Wash. 2021). This decision was reached after the court independently examined the developmental science. Id. at 284-86. The court concluded that "no meaningful cognitive difference" exists between adolescents under eighteen and adolescents aged eighteen to twenty. Id. at 287, 288. Therefore, under the Washington Constitution, Miller protections were extended up to age twenty. Id. at 288. See also State v. Carter, 548 P.3d 935 (Wash. 2024) (reaffirming Monschke and holding that late adolescents sentenced to life without parole could be resentenced to determinate terms of any length).

Similarly, Miller protections were extended to eighteen-year-old offenders under the Michigan Constitution -- with a further extension to twenty-year-olds likely. See People v. Parks, 987 N.W.2d 161, 171 (Mich. 2022). Similar to the Washington court, the Michigan Supreme Court independently examined the developmental science and found it incontrovertible. Id. at 173. The court

described the scientific consensus that eighteen-year-olds continue in a period of "late adolescence." Id. at 174. Late adolescents share with younger teenagers the characteristics outlined in the Miller factors -- particularly a lack of appreciation of risks and consequences, a tendency to act impetuously and under peer pressure, and a likelihood of desisting from misbehavior once their brains mature. Id. at 174-75, 178. The court concluded that "in terms of neurological development, there is no meaningful distinction between those who are 17 years old and those who are 18 years old." Id. at 75. Therefore, Miller had to apply to eighteen-year-olds. Id. at 176-83.

Because defendant Parks offended when he was eighteen, the Michigan Supreme Court did not reach the issue of whether Miller protections might extend to older offenders. But the court noted that the Miller factors appeared to apply "in some form" into the twenties and thus hinted at further extension. See id. at 171.

In yet another similar decision, the Massachusetts Supreme Judicial Court extended Massachusetts's constitutional protection through age twenty. See Commonwealth v. Mattis, 224 N.E.3d 410, 415, 428 (Mass. 2024). Massachusetts's twist on Miller is an absolute ban on life-without-parole sentences for adolescent offenders. Id. at 415, 420. In extending that protection through age twenty, the court relied heavily on developmental science, which had been

presented in this case at an evidentiary hearing. See id. at 416-18, 428. Again, the science showed that eighteen- to twenty-year-old offenders share the characteristics outlined in the Miller factors -- particularly a tendency to act impetuously, to seek new sensations, to succumb to peer pressure, and to desist from misbehavior after brain maturation. Id. at 420-24.

In short, the developmental science shows that adolescents under eighteen and late adolescents share the Miller characteristics. Therefore, constitutional protections against lengthy sentences that are enshrined in Miller, Zuber, and Comer should extend at least through age twenty. In particular, Comer applies as follows. Given late adolescents' immaturity and diminished culpability, a thirty-year parole bar with no lookback resentencing is in many cases grossly disproportionate to the offense. See Comer, 249 N.J. at 397-98. Given these same characteristics -- plus late adolescents' likelihood of reform with maturity -- the standard punishment goes beyond what is necessary for retribution, deterrence, incapacitation, or rehabilitation. See id. at 398-400. Thus, for late adolescents, the standard punishment fails two of the three tests for cruel and unusual punishment.[2] Late adolescents, like adolescents under eighteen,

[2] Because all three tests must be passed, see id. at 383, we need not consider the third test, whether the punishment conforms to contemporary standards of decency. Nevertheless, the Massachusetts Supreme Court perceived a domestic and international trend away from extreme sentences for late adolescents aged

should be eligible for resentencing after twenty years.

The logic is inescapable. Two of the tests in Comer were decided based entirely on the Miller factors. The Miller factors are applicable at least through age twenty. Therefore, Comer must be extended through age twenty -- and certainly to an eighteen-year-old offender like Jones.

Yet in the published decision here, the Appellate Division panel refused to reach the merits and apply this inescapable logic. Thus, the panel made no reference to Comer's three-part test for cruel and unusual punishment. Nor did the panel dispute that the Miller factors apply equally to eighteen- to twenty-year-olds. Rather than reach the merits, the panel viewed the extension of Comer as foreclosed by controlling precedent.

To the contrary, this issue is open: the New Jersey Supreme Court has not yet decided whether Comer should extend beyond age seventeen. The offenders at issue in Comer were fourteen and seventeen, and the Court had no occasion to opine on any other age. See Comer, 249 N.J. at 371, 374. The same

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eighteen through twenty. The court also noted the many ways that the law treats those under twenty-one as irresponsible. See Mattis, 224 N.E.3d at 424-28. A trend is also emerging, in statutory as well as constitutional law, of retroactively affording late adolescents the benefit of parole or resentencing. See The Sentencing Project, The Second Look Movement: A Review of the Nation's Sentence Review Laws (May 15, 2024), available at https://www.sentencingproject.org/app/uploads/2024/05/ Second-Look-Movement.pdf. Even though the argument is not required, we expect to expand upon contemporary standards of decency in our supplementary brief if certification is granted.

can be said of the cases leading up to Comer. Simmons was seventeen. Simmons, 543 U.S. at 556. Graham was sixteen. Graham, 560 U.S. at 53. The defendants in Miller were fourteen. Miller, 567 U.S. at 465, 467. The defendants in Zuber were seventeen. Zuber, 227 N.J. at 430, 433.

Thus, one will search these cases in vain for any substantial discussion of late adolescents aged eighteen through twenty. No analysis of the specific characteristics of this age group is to be found. No analysis of whether the Miller factors apply to this age group is to be found. No application of any constitutional test to this age group is to be found. And ultimately, no decision is to be found on whether constitutional protection should extend to this age group.

Yet the Jones panel seemed to take the copious language in these cases referring to "juveniles," "children," and the like out of context. This language was not meant to limit constitutional protection to age seventeen. It was meant to extend protection to age seventeen. Consider, for example, the language from Simmons discussing how eighteen "is the point where society draws the line for many purposes." Simmons, 543 U.S. at 574. Let us examine more of the relevant passage:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never

> reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in Thompson drew the line at 16. In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Id.

Read in the full context, this passage was extending protection against the death penalty from fifteen-year-olds, see Thompson v. Oklahoma, 487 U.S. 815 (1988), to seventeen-year-olds like the defendant Simmons. In other words, the "line" was being moved from sixteen to eighteen. In this respect, the court had analyzed at length how contemporary standards of decency were against the death penalty for adolescents below eighteen, Simmons, 543 U.S. at 564-67, and how the penalty was disproportionate and served no penological purpose for adolescents below eighteen, id. at 568-74. Whether the constitutional line should move any further beyond eighteen was not before the court, and no older age was analyzed. Nor was any older age before the courts in any of the other leading decisions mentioned above.

Likewise, the Jones panel took the language of Ryan out of context. Ryan was not younger than eighteen and was not even younger than twenty-one. Rather, he was a twenty-three-year-old offender who argued that a prior

offense committed when he was under eighteen should not count as one of three "strikes" subjecting him to a life sentence. Ryan, 249 N.J. at 587-88, 590. Ryan creatively argued that Miller and Zuber were triggered because his life sentence was essentially caused by the offense committed when he was under eighteen; Ryan's argument, in other words, treated his life sentence as an additional penalty for his prior offense. See id. at 590, 601. In rejecting this argument, the Supreme Court emphasized that a recidivist statute did not mean that a crime other than the "latest crime" of the twenty-three-year-old was being penalized; therefore, the Court viewed cases protecting those under eighteen against long sentences as irrelevant. See id. at 600-01.

Thus, Ryan never argued that the Miller/Zuber line of cases should apply beyond age seventeen. The Supreme Court, in turn, had no occasion to reject such an argument; in stating that Miller/Zuber did not apply to offenders over seventeen, the Supreme Court was simply emphasizing what was not disputed by the twenty-three-year-old Ryan. Ryan did not resolve an issue that was never litigated. The Jones panel was mistaken in its reading of the precedent.

In short, the issue of extending constitutional protection beyond age seventeen remains open. The lower courts are mistaken in avoiding the issue. But, wrong or right, we now have a published Appellate Division opinion that will prevent any court except the Supreme Court from considering whether

constitutional protection should be extended. Any resentencing motion arguing to extend Comer will be quickly rejected without reaching the merits -- just as Jones's motion was rejected in a mere three days.

And it gets worse. The published decision here also rejected the appointment of counsel on Comer-extension motions. Resentencing motions are almost inevitably filed pro se in the Law Division -- just like those of Jones, Roche, and Harris. With few exceptions, the policy of the Office of the Public Defender has been to get involved in these motions only when appointed by the courts. (An exception was made in the present appeals.) Thus, going forward, Comer-extension motions will remain pro se in the Law Division before they are quickly rejected. Just as in Jones's case, little information is liable to be presented about the facts of the offense or about the offender's reform in the subsequent decades. Moreover, a pro se prisoner is unable to do detailed research into the scientific literature; recruit and pay experts on the developmental science; or submit expert reports. Finally, a hearing on the science or on any other topic will be out of the question under the Jones decision.

The issue of extending Comer to late adolescents should not be left where it is now -- undecided, and without even the prospect of a more detailed record to decide the issue. As the Appellate Division pointed out and as this Court knows by now, many long-serving incarcerated people are filing

resentencing motions asking for Comer to be applied through age twenty. (Pa 15-16) These middle-aged and elderly people understand the significance of the developmental science and recent court decisions. They can finally imagine an end to the disproportionate punishment for their adolescent offenses. The hopes of these people should not be dashed without entertaining their claims.

It should be added that the three consolidated cases here are the perfect vehicle to decide whether to extend Comer. Because the defendants are two eighteen-year-old offenders and one twenty-year-old offender, they cover the entire age range granted constitutional protection in Washington and Massachusetts; no necessity will arise, as in Michigan, of considering the age range in piecemeal fashion.

In sum, events have played out so that only this Court can decide whether to extend Comer to late adolescents. Therefore, certification should be granted to consider the issue. Because the developmental science is clear and incontrovertible, this Court can read the science itself and extend constitutional protection, as happened in Washington and Michigan. But if the Court wants a better record -- such as a Massachusetts-style hearing on the developmental science -- the Court should grant certification, remand for a hearing, and retain jurisdiction. See State v. Henderson, 208 N.J. 208, 217-18 (2011). There is no other way.

CONCLUSION

For the reasons stated, certification should be granted.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: ____/s/ Peter T. Blum_____
PETER T. BLUM
Assistant Deputy Public Defender

CERTIFICATION OF GOOD FAITH

I hereby certify that the foregoing petition presents substantial questions of law and is filed in good faith and not for purposes of delay.

BY: _____/s/ Peter T. Blum_____
PETER T. BLUM
Assistant Deputy Public Defender