

19-8058

ORIGINAL

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

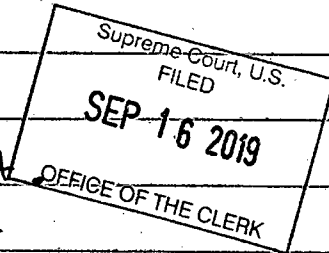
MAURICE BRACK,

Defendant - Petitioner,

v.

STATE OF NEW JERSEY,

Plaintiff - Respondent



ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI
ON BEHALF OF PRO SE PETITIONER

CRIMINAL ACTION

MAURICE BRACK

Pro Se Defendant - Petitioner

DEFENDANT-PETITIONER
IS CONFINED

QUESTIONS PRESENTED FOR REVIEW

1. Whether, due to the overwhelmingly objective indicia of a national consensus that surrounds the advanced research on adolescent brain development wholly disproving the presumption that juveniles who commit crimes think like adults and cannot be rehabilitated, it can still be held as Constitutional under the 8th Amendment for a Family Court to waive it's jurisdiction over a 14 year old adolescent for the sole purpose of exposing the 14 year old to adult penalties?
2. Whether New Jersey's recently revised juvenile waiver statute — N.J.S.A. 2A:4A-26.1.c.(1) — which now prohibits the Family Court from waiving it's jurisdiction over any juveniles under the age of 15 announced a new substantive rule that, under the Constitution, must be applied retroactively to cases on collateral review?

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STATEMENT OF JURISDICTION

On July 15, 2015, Brack filed a Petition for Post-Conviction Relief. Among other issues, Brack raised a central claim that N.J.S.A. 2A:4A-26.1.c(1), which prohibits the waiver from the Chancery Division (Family Court) to the Law Division (Adult Court) of any child under the age of 15, applied retroactively to his case. In support of this central claim, Brack argued that the Constitutional doctrines of "fundamental fairness" and "manifest injustice," as well as the 8th Amendment's prohibitions against "cruel and unusual punishment," all warranted the retroactive application of New Jersey's revised juvenile waiver statute.

Brack's Petition for Post-Conviction Relief was denied on February 22, 2017. The New Jersey Superior Court, Appellate Division affirmed in an unpublished opinion on December 21, 2018. On January 11, 2019, Brack filed a Petition for Certification to the Supreme Court of New Jersey. Certification was denied on June 18, 2019.

A petition for post-conviction relief under New Jersey Court Rule 3:22 is "New Jersey's analogue to the federal writ of habeas corpus." (State v. Preciose, 129 N.J. 451, 458 (1992)). Post-conviction relief is a state remedy providing a means for reviewing claims that, by their nature, could not have been asserted at trial or on direct appeal. (N.J. Court R. 3:22-4). A petition for post-conviction relief is cognizable if it is based upon a substantial denial of a defendant's constitutional rights, a lack of jurisdiction of the court, or an imposition of a sentence not in accordance with the law. (N.J. Court R. 3:22-2).

This Court has established the principle that "children are constitutionally different from adults for purposes of sentencing." (See Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); and Miller v.

Alabama, 567 U.S. 460 (2012)). This principle was the premise upon which the New Jersey Legislature raised the minimum age of juvenile waivers to adult court, from 14 years old to 15 years old.

"Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, states cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." (Montgomery v. Louisiana, 136 S.Ct. 718 (2016)). Protection against disproportionate punishment is the central substantive guarantee of the 8th Amendment and goes far beyond the manner of determining a defendant's sentence. (See Graham, Supra, at 59 ("The concept of proportionality is central to the Eighth Amendment.")). This Court has jurisdiction when a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. (U.S.S.Ct.R. 10 (c)).

STATEMENT OF THE CASE

The story of the case at bar began on August 18, 2006 in an area of Elizabeth, New Jersey with a predominant presence of gang activity. In an environment riddled with "gang member" peers and "gang leader" role models, Petitioner Brack succumbed to his inherent character deficiencies and became a member of a junior gang known as "LOX". Only 14 years old at the time, Brack had misguided aspirations of becoming a full-fledged member of the "Bloods" — not unlike any member of a junior gang. A victim of his susceptibility to negative influences and peer pressure, 14 year old Brack, on this day, took an impetuous and ill-considered action which led to a life being lost, and his life being changed forever.

Earlier in the evening on the day of the murder, Brack was attending the birthday party of one of the "gang leader" role models in his neighborhood, Lasheem Lee. The victim, ~~Ry~~ Rhykime Richardson, entered the courtyard where the party was taking place and punched Lee in the face. Lee shouted "[h]e just hit me," and yelled to the people in attendance to "catch his ass" and "go get that," referring to Mr. Richardson as he fled. At the direction of this "gang leader", a crowd of 50 or more people, including Brack, began chasing after Mr. Richardson.

Mr. Richardson eventually fell down in a parking lot, and Brack was the first pursuer to catch up with him. Brack prevented him from moving until the other pursuers began to arrive, and a severe beating ensued. After being beaten, stabbed, stomped and struck with a bike, Mr. Richardson died; the cause of death being a combination of blunt force trauma to his head and stab wounds that punctured his

lung.

As a result of the investigation into the murder, on October 3, 2008 Brack and 5 co-defendants were charged with 17 criminal counts. Brack was charged with first-degree murder, third-degree possession of a weapon (knife) for an unlawful purpose, and fourth-degree unlawful possession of a weapon (knife). The offenses were alleged to have occurred on August 18, 2006; when Brack was just 14 years old.

Probable cause was established after a hearing that was held on August 14, 2008. Under the repealed version of New Jersey's juvenile waiver statute, once the finding of probable cause was made, Brack incurred the burden of having to show "that the probability of his rehabilitation by the use of the procedures, services and facilities available to the court prior to "him" reaching the age of 19 substantially outweigh[ed] the reasons for waiver." (See Exhibit A: N.J.S.A. 2A:4A-26.7.2.(3)e (repealed August 10, 2015)). On August 27, 2008 after having determined that Brack had failed to meet this burden, the Honorable Fredric R. McDaniel, J.S.C., waived jurisdiction and transferred the matter from the Chancery Division (Family Court) to the Law Division (Adult Court).

A jury trial commenced in the Law Division on September 16, 2010, before the Honorable Scott J. Moynihan, J.S.C.. On October 4, 2010, the jury found Brack guilty of the murder charge, but acquitted him of both weapon (knife) charges. Judge Moynihan attributed this to "sufficient evidence from which they could find him guilty as an accomplice to someone who beat and/or stabbed the victim here," but did not find that Brack "himself was the person who stabbed Rhykime Richardson."

(See Exhibit B: Transcript of Sentence, pg. 24, at 15-22 (March 25, 2011)).

While arguing a Motion for a New Trial at Brack's sentencing hearing on March 25, 2011, the defense pointedly argued the fact that all of the other individuals charged in this case were "ending up with some sort of manslaughter conviction." (Id., pgs. 5, 6, at 25-2).

The significance of this argument was compounded upon when, after being denied the motion, defense counsel made a verbal motion for Brack to be sentenced one degree lower. This motion was made both in the interests of justice, and because Brack was set to receive a sentence of more than 3 times that of any other defendant in this matter. Brack, at 14 years old, was by far the youngest of the defendants in this matter; some of which were in their mid-to-late 20's. The immaturity of a 14 year old who was influenced by older, more mature people was pointed to in support of the motion.

The state agreed Brack's youth was "a very substantial mitigating factor." (Id., pg. 23, at 4-6). They contributed that "his youth was a big part of this and he was influenced by his desire to be in a gang with older people." (Id., pg. 23, at 17-19). The State even went as far as declaring that it was "not unsympathetic to the fact [Brack] was young at the time." (Id., pg. 24, at 13-14).

Judge Maynihan took into very limited consideration both the facts that Brack was only 14 years old at the time of the offense, and that the entire incident was engendered by Lasheem Lee, (Id., pg. 27, at 2-7); but stated that he did not "find any authority to sentence a murder conviction to a lower degree." (Id., pg. 28, at 4-5). Brack was subsequently sentenced to a term of 34 years incarceration, subject

to a Statutory mandatory 30 year Term of Parole Ineligibility. Brack appealed, and on October 22, 2014, the Appellate Division affirmed his Conviction and Sentence in an Unpublished Opinion. On April 28, 2015 the Supreme Court of New Jersey denied Brack's subsequent Petition for Certification.

On July 15, 2015, Brack filed a Petition for Post-Conviction Relief (P.C.R.). Among other issues, Brack raised a central claim that N.J.S.A. 2A:4A-26.1.c (1), which was signed into law on August 10, 2015, and now prohibits the waiver from the Chancery Division (Family Court) to the Law Division (Adult Court) of any child under the age of 15, applied ~~felt~~ retroactively to his case according to New Jersey's retroactivity laws. (See Exhibit C: N.J.S.A. 2A:4A-26 (revised August 10, 2015)). As secondary rationales in support of his central claim, Brack argued that the Constitutional doctrines of "fundamental fairness" and "manifest injustice", as well as the 8th Amendment's prohibitions against "Cruel and Unusual Punishment", all warranted the retroactive application of New Jersey's revised Juvenile Waiver Statute.

Judge Moynihan denied Brack's petition on February 22, 2017 (2t A-43-A-53). In doing so, Judge Moynihan held that New Jersey's "savings statute", N.J.S.A. 1:1-15, prohibited the retroactive application of N.J.S.A. 2A:4A-26.1.c (1) to Brack's case because he had been sentenced prior to it being enacted by the legislature. Judge Moynihan, without any discussion, settled Brack's Constitutional claims by holding that "cloaking a retroactivity argument in Constitutional garb does not change the fact that the new law is not retroactive under the 'Savings Clause'." (See Exhibit D: Opinion by Judge Moynihan denying P.C.R. (February 22, 2017) (2t pg A-53)). Additionally, in holding that "the enforcement of the 'savings clause'"

is not punishment," Judge Moynihan presented that Brack had argued "that the sentence imposed upon him was violative of the prohibition against cruel and unusual punishment." (Id., at Pg. 10). Because that ground was rejected on appeal, Judge Moynihan held that "the bar of grounds previously decided on appeal... applies." (Id.). This holding was erroneous and misguided because Brack was essentially challenging the constitutionality of his being waived as a 14 year old, not the constitutionality of his sentence.

Brack appealed Judge Moynihan's decision, and the Appellate Division affirmed in an unpublished opinion on December 21, 2018.

In addressing the issue of retroactivity, the Appellate Division simply noted that Brack had been sentenced prior to the enactment of N.J.S.A. 2A:4A-26.1.c (1), and affirmed the denial of his Petition for P.C.R.. Brack's constitutional claims were dismissed as lacking "sufficient merit to warrant discussion in a written opinion."

(See Exhibit E: Opinion by Appellate Division Affirming denial of P.C.R., at pgs. 11, 12 (December 21, 2018)). On January 11, 2019, Brack filed a Petition for Certification to the Supreme Court of New Jersey. His Petition was denied on June 18, 2019. Brack is now petitioning this Court for a Writ of Certiorari in order to resolve the constitutional questions he raised on collateral review in New Jersey courts; as a result of the New Jersey courts declining to engage in any analysis of these constitutional questions. (See Exhibit K: ORDER by the Supreme Court of New Jersey denying certification. (June 18, 2019) (21 A-242-A-243)).

LEGAL ARGUMENT

I. THE PROFOUND ADVANCES IN OUR SCIENTIFIC UNDERSTANDING OF ADOLESCENT DEVELOPMENT HAVE TRIGGERED A SEISMIC SHIFT IN JUVENILE JUSTICE JURISPRUDENCE NATIONWIDE.

In the last 14 years, profound advances in our scientific understanding of adolescent development have triggered a seismic shift in juvenile justice jurisprudence around the country. Paving the way for change is a trilogy of this Court's decisions: Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); and Miller v. Alabama, 567 U.S. 460 (2012). These landmark decisions have already worked to change the face of juvenile justice nationwide, and they continue to motivate legislators around the country to make significant changes to their laws in the name of juvenile justice reform.

A. Roper v. Simmons

The journey toward a Constitutionally sufficient juvenile justice system in this nation began in 2005, where, in Roper v. Simmons, *supra*, this Court held that juveniles are less culpable than adults due to their lack of maturity, their susceptibility to negative influences and peer pressure, and their premature character development. This Court stressed the fact that these "[t]hree general differences between juveniles and adults," taken together, mean that the "irresponsible conduct [of juveniles] is not as morally reprehensible as that of an adult," and "demonstrat[es] that juvenile offenders

cannot with reliability be classified among the worst offenders." (Id., at 569-70 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion))).

"[A]s any parent knows and as the scientific and sociological ~~set~~ studies... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.'" (Id., (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))). Because of those qualities, juveniles are more likely to take "impetuous and ill-considered actions," and are "overrepresented statistically in virtually every category of reckless behavior." (Id., (citing Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Prospective, 12 Developmental Rev. 339 (1992))).

"[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (Id.). They "have less control, or less experience with control, over their own environment." (Id.). Furthermore, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed," and they "have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." (Id., at 570).

Because "the signature qualities of youth are transient," "impetuousness and recklessness... can subside" as juveniles mature, and there is "a greater possibility... that a minor's character deficiencies will be reformed." (Id., (quoting Johnson, supra, at 368)) (However, this Court recognized "[it] is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the

rare juvenile offender whose crime reflects irreparable corruption." (Id., at 573) (emphasis added)).

B. Graham v. Florida

In 2010, this Court's decision in Graham v. Florida, *supra*, built on that foundation. As in Roper, *supra*, this Court pointed to "objective indicia of national consensus," and stressed its findings about the nature of juveniles. (Id., at 62, 68). Noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," this Court identified, as a key difference, that "parts of the brain involved in behavior control continue to mature through late adolescence." (Id.). As a result of these fundamental differences, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character.'" (Id.) (quoting Roper, *supra*).

The traditional goals of sentencing and punishment — retribution, deterrence, incapacitation and rehabilitation — were pointedly discussed in Graham, *supra*. Adequate justification for the imposition of long-term sentences upon juveniles diminishes alongside their culpability. Closely related to an offenders personal culpability are the goals of retribution and deterrence, and they fail to be met in these instances because juveniles are less responsible and more prone to "impetuous and ill-considered actions and decisions," they are less likely to take a possible punishment into consideration when making decisions." (Id., at 72 (quoting Johnson, *supra*, at 367)).

The goal of incapacitation assumes a juvenile either is, or "will

be a danger to society." (Id.). This goal cannot be met by simply removing said "danger" from society for an extensive amount of time, especially in circumstances where this period of time objectively surpasses what could be considered a reasonable rehabilitation period. This Court, in Graham, supra, repeated its warning given in Roper, supra, that even experts cannot determine at the outset that a juvenile is irreparably corrupt, and effectively suggested that rehabilitation is the foremost important goal when it comes to the imposition of sentences upon juvenile offenders. (Id., at 72-73).

This Court held that "[a] state is not required to guarantee eventual freedom to "juvenile offenders; but the state must, however, give them "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (Id., at 74-75). This Court did not define "meaningful opportunity." Instead, it noted that "[i]t is for the state, in the first instance, to explore the means and mechanisms for compliance." (Id., at 75).

C. Miller v. Alabama

Miller v. Alabama, supra, added another important dimension to this Court's new laws surrounding juvenile sentencing. In Miller, supra, this Court returned to the principles it outlined in Roper, supra, and Graham, supra; namely, that "children are Constitutionally different from adults for purposes of sentencing" and "have diminished culpability and greater prospects for reform." (Id., 132 S. Ct. at 2464). Mandatory penalty schemes, this Court noted, "prevent the sentencer from taking account of " "youth and its attendant characteristics." (Id., at 2460, 2466). "That contravenes Graham's

(and also Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (Id., at 2466).

Against that backdrop, this Court outlined five factors, ("the Miller factors"), which are particularly instructive for sentencing judges when determining a juvenile offenders sentence:

"[1]... consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences.

[2]... tak[e] 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]... 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]... the possibility 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... mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."

(Id., at 2468 (citations omitted)). (This Court should note that Brack was sentenced prior to the Miller decision and did not receive the benefit of any of these factors, although all can be specifically applied to his case. Going further, even had Brack faced sentencing after Miller,

his conviction as an adult carried a statutory mandatory 30 year parole ineligibility to which would negate any presumed benefit he could have received from having "the Miller factors" applied to his case at sentencing.).

In the end, citing Roper, supra, and Graham, supra, this Court observed that the "harshest possible penalt[ies] will be uncommon" because of how difficult it is to conclude at an early age that a juvenile is irreparably corrupt. (Id.).

With this trilogy of cases, this Court has shed light on the significant Constitutional differences between children and adults. Children possess many distinctive and transitory mental traits which expose them to an increased susceptibility to environmental vulnerabilities and corruption. Juveniles have not changed, but our understanding of them has. The principles at the heart of each of these three cases teach us a very important lesson, that youth matters under the Constitution.

II. NEW JERSEY'S LEGISLATORS ACKNOWLEDGE
THIS COURT'S NEWLY FORMED PRINCIPLE THAT
YOUTH MATTERS UNDER THE CONSTITUTION
BY PROVIDING WIDER EIGHTH AMENDMENT
PROTECTIONS FOR JUVENILE OFFENDERS FOLLOWING
SIGNIFICANT REFORMS TO THE STATE'S
JUVENILE JUSTICE SYSTEM.

This Court's newly formed principle dictating that youth matters

under the Constitution has had an impressive impact with legislators across the country. Eliminating "the practice of prosecuting, sentencing, and incarcerating people under 18 as adults" is a "trend [that] is gaining ground." (See Raising the Age: Shifting to a Safer and More Effective Juvenile Justice System, Justice Policy Institute (March 7, 2017)). In the first quarter of 2017, "there [were] only seven states left with lower ages of criminal responsibility, the fewest number of states in decades." (Id., at "Report's Executive Summary"). Although New Jersey happens to be one of the few remaining states that subject juveniles to adult punishments, its legislators have not ignored the objective indicia of national consensus surrounding the fundamental and significant differences between children and adults. And the "foundation stone" for this national consensus is this Court's line of precedents holding upper echelon adult punishments disproportionate when applied to juveniles: Roper, supra, Graham, supra, and Miller, supra.

New Jersey State ~~Senator~~ Senator Nellie Pou acknowledged this newly formed Constitutional principle on April 28, 2014, by introducing S.2003, a bill that proposed certain reforms to New Jersey's juvenile justice system. Under this bill, "the age requirement for a juvenile case to be transferred from family court to adult criminal court [was] raised from 14 years of age or older... based on new research on adolescent brain development disproving the presumption that juveniles who commit crimes think like adults and cannot be rehabilitated." (See Exhibit F: S.2003 as Introduced, at 7 (April 28, 2014)). Scientific knowledge regarding the limited

biological development of the teenage mind has advanced and society no longer thinks of a 14 year old as a fully developed individual who might be incapable of rehabilitation. The improvements in magnetic resonance imaging technology have shown that the frontal lobe, where decisions regarding judgement and risk-taking are made, does not fully develop in juveniles until their mid-20's. (See Michele Deitch, et al., From Time Out to Hard Time: Young Children in the Adult Criminal Justice System, at 13-14 (2009), <http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>, (discussing the cognitive and psychological development of juveniles; specifically frontal lobe development and its relation to decision-making in juveniles); See also, Graham, supra, at 68, ("As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.") (alterations in original) (citations ommitted) (quoting Roper, supra, at 569-70, 573)).

Senator Pou made it clear that raising the age of juvenile waivers under this bill was intended not only to conform New Jersey's juvenile waiver laws to this Court's findings regarding the nature of juveniles, but to also afford juveniles that are only 14 years old the greater 8th Amendment protections dictated by this Court's holdings in Roper, supra, Graham, supra, and Miller, supra. The revised waiver statute was intended to mitigate

the legislatively perceived undue severity of the punitive sentencing previously meted out to adolescent offenders after waiver under the existing waiver law, and better address the treatment needs of children. (See Reforms to the Juvenile Justice System: Committee Meeting on S. 2003 Before the S. Law & Pub. Safety Comm'n, 216th Leg., 2d Sess. (March 12, 2015) (statement of Sen. Nellie Pou); see also Michael Booth, Christie OK's Juvenile Justice Reforms, N.J.L.J. (August 11, 2015), <http://www.njlawjournal.com/id=1202734482923/Christie-OK's-Juvenile-Justice-Reforms?slreturn=20160319110141>). The increase in the minimum waiver age is part of that emphasis on rehabilitation rather than punishment, a part of the effort to ensure that children do not become prey to adult inmates, nor suffer the many societal consequences of an adult criminal record. (See Reforms to the Juvenile Justice System, supra, (statement of Sen. Nellie Pou)).

This legislation was signed into law by New Jersey Governor Chris Christie on August 10, 2015, and became effective March 1, 2016; repealing and replacing N.J.S.A. 2A:4A-26.7. (See Act of August 10, 2015, ch. 89, 2015 N.J. Laws 89). This Court's line of precedent holding certain punishments disproportionate when applied to juveniles made the Constitutional distinction between children and adults as it relates to purposes of sentencing. New Jersey legislators chose to expand the scope of the 8th Amendment protections that their statutes afford juveniles in direct accord with this newly established Constitutional distinction.

Most importantly, New Jersey's legislators — in their sovereign administration of their criminal justice system — expanded the scope of the 8th Amendment protections it affords juveniles to include a very specific prohibition against waiving 14 year olds up to face adult

penalties. "The Legislature, in raising the age requirement for waiver by one year, determined that children who commit offenses when under the age of 15 should never be waived up to face adult penalties." (State In the Interest of J.F., a Juvenile, N.J. App. Div., Dckt. No. A-03 92-15 T3 (June 16, 2016) (emphasis added))).

III. AN ACCUSED 14 YEAR OLD ADOLESCENT'S 8TH AMENDMENT RIGHT AGAINST "CRUEL AND UNUSUAL PUNISHMENTS" IS VIOLATED WHEN A FAMILY COURT WAIVES IT'S JURISDICTION IN ORDER TO EXPOSE THE 14 YEAR OLD TO ADULT CRIMINAL PENALTIES.

The 8th Amendment of the U.S. Constitution prohibits "cruel and unusual punishments." (U.S. Const. Amend. VIII). The 8th Amendment is "made applicable to the States by the Due Process Clause of the 14th Amendment." (Graham, supra, at 53). A similar prohibition is contained in the N.J. Constitution, at Art. 1, ¶ 12, ("cruel and unusual punishments shall not be inflicted"). This Court has not confined the prohibition embodied in the 8th Amendment to "barbarous" methods that were generally outlawed during the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency. This Court recognized early in the 20th century that "a principle, to be vital, must be capable of wider application than the mischief which gave it birth." (Weems v. United States, 217 U.S. 349, 373 (1910)). Therefore, the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning

as public opinion becomes enlightened by a humane justice." (*Id.*, at 378). (See also, *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion); *Furman v. Georgia*, 408 U.S. at 429-30 (1972)).

The 8th Amendment has not been regarded as a static concept, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop, supra*, at 100). A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." (*Id.*) "[A]n assessment of contemporary values concerning the infliction of a

challenged sanction is relevant to the application of the Eighth Amendment." (*Gregg v. Georgia*, 428 U.S. 153 (1976)). This "assessment does not call for subjective judgment." (*Id.*) It requires, rather, that this Court "look to objective indicia that reflect the public attitude toward a given sanction." (*Id.*) "In assessing a punishment selected by a

democratically elected legislature against the constitutional measure, this Court presumes its validity. And a heavy burden rests on those who would attack the judgment of the representatives of the people." (*Id.*) "This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." (*Id.*)

This Court has already pointed to an "objective indicia of national consensus" regarding the nature of juveniles and how much different they are from adults than what was originally perceived back in the 1980's and 1990's. (*Graham, supra*, at 62, 68). In the present case, the "sanction" in question once allowed for the removal of an accused 14 year old offenders' rights as a juvenile, without the 14 year olds' consent, for the purpose of waiving Family Court

jurisdiction and transferring the 14 year old up to Adult Court to face adult penalties. Petitioner Brack, 14 years old at the time of his offense, incurred this "sanction" pursuant to an outdated New Jersey Statute that was passed into law all the way back in 1982, and unconstitutionally "saddled" him "with the burden of proving" that he could be rehabilitated before his 19th birthday. (See Exhibit A: N.J.S.A. 2A:4A-26.7.2.(3)e (repealed August 10, 2015)). After raising the minimum waiver age to 15 years old, the revised waiver statute not only rightfully shifted the burden to the prosecution to show the necessity for waiver, but also added a provision to allow the Court discretion to deny the waiver of jurisdiction if it is clearly convinced that the prosecution abused its discretion in the now requisite consideration of 11 factors prior to seeking the waiver of a juvenile. (See Exhibit C: N.J.S.A. 2A:4A-26.1.c.(3) (revised August 10, 2015)).

In Graham, supra, this Court reaffirmed its earlier findings in Roper, supra, noting that "juveniles have lessened culpability" because, "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." (Id., at 68 (quoting Roper, supra, at 569-70)). This Court also reiterated the fact that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (Id. (quoting Roper, supra, at 570)). In concluding that the Constitution compelled different treatment of juveniles as compared to adults for sentencing purposes, this Court held that the differences between adults and children arise from "children's 'diminished culpability and greater prospects

for reform." (Miller v. Alabama, supra).

The New Jersey Legislature recognized, unquestioningly, these fundamental differences between juveniles and adults, and revised their outdated 1982 juvenile waiver statute to both conform with the constitutional measures recently founded by this Court and adopt the contemporary standards of today's society. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (Furman, supra). New Jersey legislators responded almost immediately by enacting their new juvenile waiver statute only 3 years after this Court's decision in Miller, supra. Unquestionably adopting this Court's standards, the New Jersey Legislature passed the revised waiver statute with the intention of mitigating the legislatively perceived undue severity of the punitive [adult level] sentencing previously meted out to adolescent offenders after waiver under the existing waiver law, and better address the treatment needs of children. (See Reforms to the Juvenile Justice System, supra). The Appellate Division expounded upon this legislative intent, holding that "in raising the age requirement for waiver by one year," the legislature "determined that children who commit offenses when under the age of fifteen should never be waived up to face adult penalties." (State in the Interest of J.F., 446 N.J. Super. 39, at 60 (N.J. Super. Ct., App. Div. 2016) (emphasis added)); (compare Graham, supra, at 82 (holding that juveniles convicted of non-homicide offenses should never be sentenced to life without parole.) (emphasis added)); also State v. Bay, 112 N.J. 45 (1988) (holding that the legislature had never intended to subject juveniles to capital punishment after finding that the legislative history of the new statute "speaks unmistakably of an intent to preclude

execution of any juvenile offenders...". (Id., at 102) (emphasis in original)))).

In Atkins v. Virginia, 536 U.S. 304 (2002), this Court observed that "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." (emphasis added). Again, this Court observed that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (Id., at 311-12 (quoting Trop, supra, at 100-101)). And this Court relies upon "objective factors to the maximum possible extent" when applying the 8th Amendment. (Id., at 312). Among those "objective factors", this Court held that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (Perry v. Lynaugh, 492 U.S. 302, 331 (1989)).

The recurring theme in support of Petitioner Brack's contention is that Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency; and the argument that such standards require that the 8th Amendment be construed as prohibiting the waiver of 14 year old adolescents from Family Court to Adult Court is the fact that since the turn of the century, this Court has decided 3 major precedent setting cases that surround the underdevelopment of juveniles, and at least 9 states have enacted new statutes raising the minimum age requirement for juvenile waivers — including New Jersey.

There are currently 46 states that have raised the age of adult criminal responsibility to 18 years old, leaving only 4 states remaining

in our country that even allow for juveniles of any age to be processed through the justice system as an adult. Those states are as follows:

- Georgia, with a minimum waiver age of 17 years old;
- Texas, with a minimum waiver age of 17 years old;
- New Jersey, with a minimum waiver age of 15 years old; and
- Arizona, with a minimum waiver age of 14 years old.

Each of these enactments, combined with the fact that only one state in our country has maintained provisions that allow for 14 year old children to be processed through the justice system as adults, speak volumes towards clearly establishing the "evolving standards of decency" that are the hallmark of assessing Brack's claim that the waiver of a 14 year old to adult court constitutes "cruel and unusual" punishment in violation of 8th Amendment protections. After taking together the legislative enactments which establish the requisite evolving standards of decency against which a cruel and unusual punishment claim must be weighed, and the trilogy of this Court's cases involving the fundamental differences between juveniles and adults for the purposes of sentencing — Roper, supra, Graham, supra, and Miller, supra — it becomes reasonably clear that, at least in New Jersey and 48 other states, the waiver of a 14 year old to adult court constitutes cruel and unusual punishment.

IV. NEW JERSEY'S REVISED JUVENILE WAIVER STATUTE PROHIBITING THE WAIVER OF JUVENILES UNDER 15 YEARS OLD TO ADULT COURT ANNOUNCED A NEW SUBSTANTIVE

RULE THAT, UNDER THE CONSTITUTION,
MUST BE APPLIED RETROACTIVELY TO
CASES ON COLLATERAL REVIEW.

This Court has held a procedural rule to be a rule which "regulate[s] only the manner of determining the defendant's culpability." (Schriro v. Summerlin, 542 U.S. 348, at 353 (2004)). A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." (Perry v. Lynaugh, 492 U.S. 302, at 330 (1989); see also Schriro, *supra*, at 353 (A substantive rule "alters the range of conduct or the class of persons that the law punishes")). Under this standard, and for the reasons explained below, N.J.S.A. 2A:4A-26.1c(1) (Exhibit C), announced a new substantive rule that, under the Constitution, must be retroactive in cases on collateral review.

The New Jersey legislature's foundation for revising their juvenile waiver statute was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include Roper, *supra*, Graham, *supra*, and Miller, *supra*. The legislature adopted the principle established in this trilogy of cases that "children are constitutionally different from adults for purposes of sentencing," and that these differences result from children's "diminished culpability and greater prospects for reform." (Miller, *supra* (citing Roper, *supra*, at 569-70; and Graham, *supra*, at 68)). The revised waiver statute was passed with the intention of mitigating the legislatively perceived undue severity of the punitive [adult] sentencing previously meted out to adolescent offenders after waiver under the existing waiver law, and better address the

treatment needs of children. (See Reforms to the Juvenile Justice System, supra). The legislature's adoption of this constitutional principle could not be any more objective.

N.J.S.A. 2A:4A-26.1.c(1) prohibits the waiver of jurisdiction over any case involving a child younger than 15 years of age from juvenile court to adult court. The revised waiver statute does not include exceptions to this bar for any offenses or juveniles; it is a complete bar. Accordingly, the Superior Court of New Jersey, Appellate Division interpreted legislative intent as follows:

"The legislature, in raising the age requirement for waiver by one year, determined that children who commit offenses when under the age of fifteen should never be waived up to face adult penalties." (State in the Interest of J.F., 446 N.J. Super. 39, at 60 (N.J. Super. Ct., App. Div. 2016) (emphasis added)).

Compare here, where the Supreme Court of New Jersey held in State v. Bey, supra, that the legislature intended to retroactively apply a new statute precluding the execution of juveniles tried as adults after ruling that the legislature had never intended to subject juveniles to capital punishment. (Id., at 98, 101). The court found that the legislative history of the new statute "speaks unmistakably of an intent to preclude execution of any juvenile offenders." (Id., at 102 (emphasis in original)); see also Graham, supra, at 82 (holding ruling to be retroactive to cases on collateral review after finding that juveniles convicted of non-homicide offenses should never be sentenced to life without parole.)).

Petitioner Brack contends that the Appellate Division's usage of the term "never" as applied to the waiver of children under the age of 15

should be interpreted analogous to its usage as applied in both Bay, supra, and Graham, supra, and thereby serve as a significant guidepost for this Court to utilize in reaching its decision regarding the retroactivity of N.J.S.A. 2A:4A-26.1.c(1) to cases on collateral review; as in all instances referenced above it implies "at no time", past, present, or future. Going further, due to New Jersey's legislators clear adoption of this Court's principle that "children are constitutionally different from adults for purposes of sentencing" and raised "the age requirement for waiver by one year", they effectively rendered the waiver of jurisdiction an unconstitutional penalty for "a class of defendants because of their status" — that is, juvenile offenders under the age of 15 at the time of their offense. (Perry, supra, at 330).

New Jersey's "savings statute", N.J.S.A. 1:1-15, which is essentially a grandfather clause, establishes two tracks of analysis for determining how statutes are applied: one for substantive statutes — those effecting a "liability, penalty or forfeiture" — which are applied prospectively absent an exception provided under Gibbons v. Gibbons, 86 N.J. 515, 521-22 (1981); and one for statutes that relate to "matters of practice or mode[s] of procedure," which are generally applied retroactively. (N.J.S.A. 1:1-15). After applying its analysis of the revised waiver statute to the "Gibbons Test" for substantive statutes, the Appellate Division held that retroactive application of the statute is warranted for 14 year old juveniles whose cases were not adjudicated before the date of enactment. (See State in the Interest of J.F., supra, at 58; see also, State in the Interest of C.F., 444 N.J. Super. 179, 190-91 (N.J. Super. Ct., App. Div. 2016)).

This holding was reached by applying the second exception under the "Gibbons Test", which provides for retroactive application of a substantive

statute when it is "ameliorative or curative." (Gibbons, *supra*, at 522-23). "Under the second exception to the general rule, the term 'ameliorative' refers only to criminal laws that effect a reduction in a criminal penalty." (Street v. Universal Mar., 300 N.J. Super. 578, 582 (N.J. Super. Ct., App. Div. 1997) (quoting Kendall v. Smedeker, 219 N.J. Super. 283, 286 (N.J. Super. Ct., App. Div. 1987))). "The ameliorative exception first appeared in New Jersey in the case of *In re Smigelski*, 30 N.J. 513, 527 (1959), in which the Supreme Court held that a statutory amendment restricting a juvenile's possible commitment was ameliorative and thus could be applied retroactively." (See Kendall, *supra*, at 286). After noting "[t]he [t]he ameliorative amendment must be aimed at mitigating a legislatively perceived undue severity in the existing criminal law," the Appellate Division held "the revised waiver statute was intended to ameliorate the punitive sentencing previously meted out to adolescent offenders after waiver" and "intended to address the treatment needs of children." (State in the Interest of J.F., *supra*, at 61 (quoting Kendall, *supra*, at 286 n.1)).

As a result, N.J.S.A. 2A:HA-26.1.c(1) announced a substantive rule under New Jersey's well-established "Gibbons Test", to which the Appellate Division held to be retroactive because it mitigated "a legislatively perceived undue severity in the existing criminal law." (Kendall, *supra*, at 286 n.1). The statute also announced a substantive rule of constitutional law because it "categorically bar[s]" the waiver to adult court "for [the] class of [juvenile] offenders" 14 years old at the time of their offense — accord Roper, *supra*, Graham, *supra*, Atkins, *supra*, and Bey, *supra*. Analogous to other substantive rules, the revised waiver statute is retroactive.

because it "' necessarily carr[ies] a significant risk that a defendant'" — here, 14 year old children — "' faces a punishment that the law cannot impose upon him.'" (Schriro, supra, at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998))).

In the event that New Jersey adopts a contention that the revised waiver statute is procedural, it would be because New Jersey courts have rendered opinions deeming it as such; effectively muddying the waters that surround this issue. Neither the New Jersey Superior Court, Appellate Division, nor the Supreme Court of New Jersey have chosen to engage in any meaningful analysis of which distinguishes between whether the waiver statute is wholly substantive or procedural, or whether it is procedural with substantive ramifications. While it is not illogical to view the waiver statute as determining the extent of "liability" or "penalty" that a juvenile faces — which constitutes a substantive law under New Jersey's "Gibbons" rule — the statute is not in and of itself a penalty scheme. The statute simply determines by it's guidelines whether a juvenile should be kept under the jurisdiction of the Chancery Division (Family Court), or whether jurisdiction should be waived to the Law Division (Adult Court); thereby directly implicating the rights of a child to remain a child in the eyes of the law.

While the juvenile waiver statute does have a secondary affect on both a juvenile's liability and penalty, the core of the statute has been noted by the relevant legislative committees as relating to the "process for determining whether a juvenile case should be transferred to an adult court." New Jersey courts have observed the same, holding that waiver determinations "are largely procedural in nature." (State in Interest of N.H., 226 N.J. 242, 249 (2016); see also, State ex rel. Y.S., 396 N.J. Super. ←

459, 471 (N.J. Super. Ct., Ch. Div. 2007) (Finding waiver of case from juvenile court to adult court "a procedural matter").

To be clear, N.J.S.A. 2A:4A-26 is, at its core, a procedural statute, for it sets out within it the procedures by which juvenile offenders are processed in the justice system. But to contend that because the revised waiver statute is "largely procedural in nature", then it must have set forth a procedural rule is fallacious. Such a position conflates a procedural requirement necessary to implement a substantive guarantee with a rule that "regulate[s] only the manner of determining the defendant's culpability." (Schirò, supra, at 353). Due process requires procedures to be taken before the removal of rights can be deemed justified; but those procedural requirements do not transform substantive rules into procedural ones. This Court has held that "[s]ome rules have both procedural and substantive ramifications". (Mackey v. United States, 401 U.S. 667, at 692, n.7 (1971)). The substantive ramification here is the revised waiver statute placed the waiver of 14 year olds to adult court beyond New Jersey's power to impose, thereby categorically barring a penalty for a class of offenders.

New Jersey Legislature enacted the revised waiver statute to, among other things, repeal the State's power to expose a 14 year old child whose crimes reflect transient immaturity to adult criminal penalties, of which they deemed to be "undu[ly] severe". This Court can reasonably interpret this action to have been taken to protect a 14 year old child's rights against disproportionate punishment under the 8th Amendment. New Jersey courts have already declared N.J.S.A. 2A:4A-26.1.c(1) to be a substantive rule, but declined to retroactively apply the rule to Brack's case pursuant to a "grandfather clause".

"There is no grandfather clause that permits States to enforce

punishments the Constitution forbids." (Montgomery v. Louisiana, 136 S. Ct. 718, at 731 (2016)). "[A]n unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. . . . To conclude otherwise would undercut the Constitution's substantive guarantees." (Id.), "States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome" of a prisoner's challenge to the lawfulness of their confinement. (Id., at 732).

As a final point, it must be noted that the retroactive application of N.J.S.A. 2A:4A-26.1.c(1) on collateral review will in no way implicate New Jersey's weighty interests in ensuring the finality of convictions and sentences. Unlike cases where retroactivity would require new trials or waiver hearings, the remedy here would be far narrower. The Supreme Court of New Jersey has held, as a matter instructive to this contention, that the remedy for an unlawful waiver to adult court is to convert the adult finding of guilt to a finding of delinquency and remand the matter to the Chancery Division (Family Court) for resentencing. (See State v. Johnson, 18 N.J. 422, at 432-33 (1955)). The State adopted this exact position when it submitted "that if the Court were to apply N.J.S.A. 2A:4A-26.1(c)(1) retroactively, its application should only operate to allow the Family Court to modify his [Brack's] sentence, not vacate his conviction." (See Exhibit I: Brief on Behalf of Plaintiff - Respondent (N. J. Super. Ct., App. Div., May 11, 2018, at pg. 33))).

CONCLUSION

For the foregoing reasons, Petitioner Brack respectfully requests that this Honorable Court grant Certiorari to answer the important questions presented herein.

DATED: September 16, 2019.

Respectfully Submitted,

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