2C:11-3

LEGISLATIVE HISTORY CHECKLIST

NJSA:	2C:11-3		(Death penalty--exclude juveniles--require State Supreme Court review of all cases)
LAWS OF:	1985		**CHAPTER:** 478
BILL NO:	S2652		
Sponsor(s):	Russo		
Date Introduced:	January 28, 1985		
Committee:	**Assembly:**	Judiciary	
	Senate:	Judiciary	
Amended during passage:		Yes	Amendments during passage denoted by asterisks.
Date of Passage:		**Assembly:**	January 13, 1986
		Senate:	June 17, 1985
Date of Approval:	January 17, 1986		

Following statements are attached if available:

Sponsor statement:		Yes
Committee statement:	**Assembly**	Yes
	Senate	Yes
Fiscal Note:		No
Veto Message:		No
Message on Signing:		No

Following were printed:

Reports:	No
Hearings:	No

See newspaper clippings--attached:

"New law could spare lives of juvenile slay suspects," 1-21-86 Daily Journal.
"Law bans execution of youths in Jersey," 1-18-86 Trenton Times.
"Death penalty bill goes to Kean," 1-14-86 Bergen Record.
"Death penalty barred for youths who kill," 1-18-86 Star Ledger.
"Death penalty and juveniles," 3-18-86 Star Ledger.

[OFFICIAL COPY REPRINT]

SENATE, No. 2652

STATE OF NEW JERSEY

INTRODUCED JANUARY 28, 1985

By Senator RUSSO

Referred to Committee on Judiciary

AN ACT concerning capital punishment and amending N. J. S. 2C:11–3.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N. J. S. 2C:11–3 is amended to read as follows:

2C:11–3. Murder. a. Except as provided in section 2C:11–4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

***—Senate committee amendment adopted May 2, 1985.**

physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. Murder is a crime of the first degree but a person convicted of murder may be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or 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.

c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment, of anything of pecuniary value shall be sentenced as provided hereafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury.

(2) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection. The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish

the existence of any aggravating or mitigating factor. Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(3) The jury, or if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factors is found to exist, the verdict shall also state whether it is or is not outweighed by any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that any aggravating factors which exist are outweighed by one or more mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has previously been convicted of murder;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of any thing of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in 2C:27–1, while the victim was engaged in the performance of his

official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section [may] *shall* be appealed, pursuant to the rules of court, to the Supreme Court, which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.*

f. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.

2. This act shall take effect immediately.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

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STATEMENT

This bill would mandate that each case in which a death penalty is imposed be reviewed by the New Jersey Supreme Court. The bill also provides if a defendant fails or refuses to appeal a death penalty conviction that the appeal will be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court.

S2652 (1985)

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE, No. 2652

STATE OF NEW JERSEY

DATED: APRIL 29, 1985

This bill would require the Supreme Court review of each case in which a death penalty is imposed. If a defendant fails or refuses to appeal, then the appeal will be taken on the defendant's behalf by the Public Defender or other counsel appointed by the Supreme Court.

The committee adopted an amendment which would clarify that a juvenile tried and convicted of murder as an adult may not be sentenced to death. With regard to this amendment, the committee wished to stress that it was not the intent of the Legislature to have juveniles eligible for capital punishment and that this clarification should be applied to pending cases.

ASSEMBLY JUDICIARY COMMITTEE

STATEMENT TO

SENATE, No. 2652

(Without Recommendation)

STATE OF NEW JERSEY

DATED: AUGUST 12, 1985

This bill would require the Supreme Court review of each case in which a death penalty is imposed. If a defendant fails or refuses to appeal, then the appeal will be taken on the defendant's behalf by the Public Defender or other counsel appointed by the Supreme Court.

The Senate Judiciary Committee adopted an amendment which would clarify that a juvenile tried and convicted of murder as an adult may not be sentenced to death. With regard to this amendment, the Senate committee wished to stress that it was not the intent of the Legislature to have juveniles eligible for capital punishment and that this clarification should be applied to pending cases.

The members of the Assembly Judiciary Committee voted to release this bill after much debate and with some reservation. It was therefore released, but without recommendation, because the consensus of the committee was that the bill involved important moral issues deserving the attention of the full Assembly.

One particular issue which remains unresolved is whether the exclusion of juveniles from receiving the death penalty in essence violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution because of discrimination to all those remaining in the class who will receive the death penalty. In its attempt to reach an answer to this question, the committee had the benefit of considering memoranda prepared by the Division of Criminal Justice in the Department of Law and Public Safety and the Office of the Public Defender in the Department of the Public Advocate.

The memorandum by the Division of Criminal Justice reads as follows:

The function of the equal protection clause is to measure the validity of classifications created by State law. The equal protection clause does not mean that a state may not treat one class of individuals or entities different from others. The test is whether the difference in treatment is an invidious discrimination. The crucial question in equal protection cases is whether there is an appropriate governmental interest suitably

furthered by the differential treatment. Equal protection analysis requires strict scrutiny of legislative classifications only when the classification impermissibly interferes with the exercise of a fundamental right, *e.g.*, rights guaranteed by the First Amendment, or operates to the peculiar dsiadvantage of a suspect class. Age alone is not a suspect classification; it does not create a discrete and insular group in need of extraordinary protection from majoritorian political process. See, *e.g., Massachusetts Bd. of Retirement v. Murgin,* 427 *U.S.* 307 (1976). Indeed, given the indications in case law to date considering the issue of whether the death penalty may constitutionally be imposed on juveniles, it is safe to assume that the Legislature may elect to exclude that group, even if it is not constitutionally compelled to do so (an as yet unresolved question). See *Eddings v. Oklahoma,* 455 *U.S.* 104 (1982). Clearly, youth is a factor which must be considered in any particular case; logically, there is no reason the Legislature can not consider it in all cases as a conclusively mitigating factor. Further, the United States Supreme Court has repeatedly indicated that the exercise of mercy in capital cases does not render the death penalty as applied unconstitutional, as long as the imposition of the penalty is not arbitrary or capricious or imposed in a "freakish manner." *Gregg v. Georgia,* 428 *U.S.* 586 (1978); *Gardner v. Florida,* 430 *U.S.* 349 (1977); *Roberts v. Louisiana,* 428 *U.S.* 325, 333 (1976).

The memorandum submitted by the Office of the Public Defender concluded that the age of a capital offender can be used as a legitimate criteria for exemption from the death penalty. The memorandum reads as follows:

The age of a capital offender can be used as the basis for exemption from the death penalty without violation of the Fourteenth Amendment's equal protection guarantee. This point is well illustrated by the fact that nine (9) states have provisions to exempt minors from the penalty. These states however vary on the age at which a minor is subjected to the possibility of facing a death sentence. In most instances, though, young juveniles rarely face capital sentences because they cannot be transferred to adult court.

While there are thirty-eight (38) states with death penalty statutes, at least seventeen (17) take age into account as a mitigating factor in sentencing. This demonstrates that age is still an important consideration in states without specific exemptions for juveniles who can be transferred to adult court.

Perhaps the most important indication of the constitutionality of exempting certain individuals based upon their age is the absence of any attack on the nine (9) states with just such provisions. Age classifications have survived attack in other areas of the law when they

have been challenged on equal protection grounds. The reason for their survival, as will be seen, has been because the courts have found that the Legislature has defined legitimate State goals which are rationally related to their use of age classifications.

The Federal Youth Corrections Act, 18 U.S.C.A. 5001 established in 1958, has provided for the majority of cases involving equal protection challenges to disparities in sentencing based on age. The basic issue in challenges to the act has been, whether age can be used as a legitimate criteria to give different sentences to individuals who have committed the same or similar offenses. The basic sentence for individuals sentenced under the act is an indeterminate sentence of 4 to 6 years or 4 years incarceration with 2 years probation. 18 U.S.C.A. 4216. The act applies to those individuals who have been determined to be "juveniles" and individuals between 18 and 21 who are classified as "youthful offenders," and in some cases may even apply to individuals ages 21 to 25 if the court finds that they will benefit from the sentencing procedure; these individuals are classified as "young adult offenders."

In a case relating to the Federal Youth Corrections Act the defendant challenged a statute, 18 U.S.C. § 340 (1) (g) (3) (s. pp. 111, 1977) which provided for different sentences for juvenile petty offenders and adult petty offenders. *United States v. Jenkins*, 734 F. 2d 1323 (9th Cir. 1983). Jenkins was convicted by a magistrate for simple assault, a petty offense, while visiting a United States Army post, and was sentenced to two years probation. Jenkins appealed his sentence claiming that the magistrate did not have the authority to impose a two year probationary term on him while being limited in imposing a term of no longer than six months probation on a "youth offender" for a petty offense.

The court's analysis focused on Jenkins' classification and on the constitutionality of the statute. First, the court determined that Jenkins was not classified as a youth offender and was therefore not entitled to a limited probationary period. This determination was done without explanation as to why Jenkins did not qualify or was not given the opportunity to be treated as a youthful offender.

The court also found the statute constitutional stating that ". . . when challenged on equal protection grounds statutory distinctions requiring different sentencing treatment based on the age of the offender have been upheld as long as the sentence serves the purpose for which it was designed." *United States* v. *Jenkins* at 1327. This determination, that the sentence was rationally related to legitimate goals, was and is the key in upholding the constitutionality of the statute. The court discovered through legislative history that in limiting the magistrate's authority to sentence a youth offender, Congress was concerned about the possibility of youth offenders serving long sentences under the

Youth Corrections Act for misdemeanors and petty offenses. *United States* v. *Jenkins* at 1322.

Jenkins is the only case within the federal Youth Corrections Act that has explored the fact that juveniles or youth offenders can be sentenced to shorter periods of time than individuals who are classified as adults. The majority of other cases arising out of the Youth Corrections Act have dealt with imposing longer sentences on youthful offenders, who if classified as adults, would have faced shorter sentence.

In an early case, *Carter* v. *United States,* 306 F. 2d 283 (D. C. Cir. 1962), dealing clearly with the federal Youth Corrections Act, Carter pled guilty to petty larceny, assuming that he would only face one year in jail as an adult. Instead, the court sentenced Carter under the act, and by doing so, Carter faced a "youth offender" indeterminate sentence of from four to six years. In determining the constitutionality of the act and the disparity in sentencing, the court turned to the rationale for treating young offenders differently than adult offenders and why they received harsher treatment for the same offense. The court found that the act's goal of rehabilitation as opposed to incarceration was sufficiently related to the need for imposing longer sentences.

The basic theory of the act is rehabilitation and in a sense this rehabilitation may be regarded as comprising the quid pro quo for a longer confinement but under different conditions and terms than a defendant would undergo in ordinary prison. The Youth Corrections Act provides for and affords youthful offenders in the discretion of the Judge, not heavier penalties and punishment than that imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and social redemption restoration. *Carter* v. *United States* at 285.

This type of analysis has been the mainstay of most challenges to the federal Youth Corrections Act. See *United States* v. *Balleteros,* 691 F. 2d 869 (9th Cir. 1982); *Guidry* v. *United States,* 433 F. 2d 969 (5th Cir. 1970).

While the test to meet equal protection guarantees for this type of legislation seems simple when stated (disparate treatment must be rationally related to legitimate goals), legislative goals must be more than mere words, they must prove themselves in fact.

In *U. S. ex rel Sero* v. *Prieser,* 506 F. 2d 1115 (2d Cir. 1974), *cert,* den. 95 S. Ct. 1598, the Supreme Court of New York overturned the sentences of young offenders who had committed misdemeanors and were sentenced to four (4) years in a reformatory. This sentence was

in sharp contrast to the one (1) year maximum term of confinement for adults committing misdemeanors. The court found that in 1970 New York abolished the distinction between reformatories and prisons. This led to the integration of young offenders and adult offenders in the same facilities. In considering the constitutional challenge, the court found that the state's legislative goals could no longer be met. Young offenders had been confined to such long sentences in reformatories in an effort to "provide education, moral guidance and vocational training." N. Y. Corrections Law McKinney's Constitutional Law C. 43, § 314 (McKinney 1968). However, the court found that when New York dissolved the distinction between reformatories and prisons, there was no longer any effort made to provide young adults with any special services or attention. On these facts the court could no longer justify disparate treatment in sentencing for youthful offenders.

Finally, while not many cases exist that explore equal protection issues in disparate sentencing for youthful or juvenile offenders, courts usually give little consideration to the merits of these cases, when it can be demonstrated that the State has set up legislation which is rationally related to legitimate goals.