NO. 514PA11-2 **TWENTY-SIXTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Mecklenburg**
	)	**No. COA15-684**
HARRY SHAROD JAMES	**)**	**06 CRS 222499-599**

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STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

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STATE OF NORTH CAROLINA	**)**	
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HARRY SHAROD JAMES	**)**	**06 CRS 222499-599**

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STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW
STATE'S MOTION TO DISMISS DEFENDANT'S NOTICE OF APPEAL (CONSTITUTIONAL QUESTION)
AND
STATE'S CONDITIONAL REQUEST FOR PRESENTATION OF AN ADDITIONAL ISSUE UNDER N.C. R. APP. P. 15(d)

****

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina, by and through Roy Cooper, Attorney General, and Sandra Wallace-Smith, Special Deputy Attorney General, and requests that this Court deny Defendant's petition for discretionary review (PDR) under N.C. Gen. Stat. § 7A-31(c) and moves that this Court dismiss Defendant's notice of appeal (constitutional question) under N.C. Gen. Stat. § 7A-30(1) dated 3

June 2016. If this Court is inclined to allow Defendant's PDR, the State respectfully requests review of an additional issue pursuant to N.C. R. App. P. 15(d), as explained in more detail below.

In support of this response, the State shows the Court the following:

PROCEDURAL HISTORY

On 10 June 2010, the jury found Defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule; the jury also found Defendant guilty of robbery with a dangerous weapon. Honorable Robert F. Johnson, Superior Court Judge, presided at the Criminal Session of Superior Court, Mecklenburg County, sentenced defendant to life imprisonment without parole for the murder conviction and to a concurrent sentence of sixty-four to eighty-six months imprisonment for the robbery conviction.

After briefing by the parties and oral argument, Defendant's conviction and sentence was affirmed by the Court of Appeals on 18 October 2011. (R pp. 16-20) Defendant filed a PDR. In the interim, Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) was decided. To ensure compliance with Miller, N.C. Gen. Stat. § 15A-1340.19 et seq. was enacted. On 23 August 2012, this Court allowed Defendant's PDR and ordered the case remanded for resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19 et seq.

On 5 December 2014, a resentencing hearing was held in which Judge Johnson presided. On 12 December 2014, at the conclusion of the resentencing hearing, Judge Johnson sentenced Defendant to life without parole. Defendant gave oral notice of appeal.

After briefing by Defendant and the State, oral argument was heard in the Court of Appeals on 11 November 2015. In an opinion authored by Judge McCullough with Judge Bryant and Judge Geer concurring, the Court of Appeals affirmed that N.C. Gen. Stat. § 15A-1340.19A et seq. was constitutional and in compliance with Miller. However, the Court also held that the trial court's order, although extensive in detailing evidence elicited at the sentencing hearing and facts of the offense, did not make clear whether any of the findings were mitigating or not. The case was reversed and remanded in part to the trial court for further sentencing proceedings. State v. James, No. COA15-684, slip op. (N.C. Ct. App. May 3, 2016)(attached to Def.'s PDR)

On 3 June 2016, Defendant filed a PDR in this Court challenging the Court of Appeals' above-noted holding as to the constitutionality of N.C. Gen. Stat. §15A-1340.19A et seq.

FACTS

For a summary of the evidence presented, the State respectfully directs this

Court's attention to the Court of Appeals' opinion, James slip op. at 1-7 and Brief of the State, pp. 3-6.

REASONS WHY THIS COURT SHOULD DISMISS THE APPEAL AND DENY DISCRETIONARY REVIEW

Under N.C. Gen. Stat. § 7A-30(1), "an appeal may be taken as a matter of right to the Supreme Court from any decision of the Court of Appeals rendered in a case which directly involves a substantial question arising under the Constitution of the United States or of this State." State v. Colson, 274 N.C. 295, 300-01, 163 S.E.2d 376, 380 (1968), cert. denied, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). This Court has addressed the defendant's burden in showing entitlement to such an appeal:

> [A]n appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal.

Id. at 305, 163 S.E.2d at 382

Defendant has also filed a petition for discretionary review under N.C. Gen. Stat. § 7A-31(c). This Court may certify an issue for discretionary review when:

> (1) The subject matter of the appeal has significant public interest, or

> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C. Gen. Stat. § 7A-31(c).

This Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973). The decision of the Court of Appeals is correct as a matter of law. As such, this Court should dismiss Defendant's appeal and deny his petition.

I. THE COURT OF APPEAL CORRECTLY HELD THAT N.C. GEN. STAT. § 15A-1340.19 ET SEQ. DOES NOT CONTAIN AN UNCONSTITUTIONAL PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE.

Defendant maintains that N.C. Gen. Stat. § 15A-1340.19A et seq. created an unconstitutional presumption in favor of life without parole. The State argued that there was no presumption in favor of life without parole created by the statute. (see additional issue set out below). The Court of Appeals rejected the State's presumption argument, but held that the presumption of life without parole (LWOP) is not unconstitutional, because a presumption of LWOP does not make sentences of

LWOP the norm, rather the exception. Quoting Montgomery the Court of Appeals went on to say:

> Miller simply requires '"that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison."' Montgomery v. Louisiana, __ U.S. __, __, 193 L. Ed. 2d 599, 610-11 (2016) (quoting Miller, 567 U.S. at __, 183 L. Ed. 2d at 424). A review of N.C. Gen. Stat. § 15A-1340.19A et seq. reveals the sentencing guidelines do just that. Instead of imposing a mandatory sentence of life without parole, the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A et seq. require the sentencing court to hold a sentencing hearing during which the defendant may submit mitigating circumstances, including the defendant's "youth (and all that accompanies it)[,]" Miller, 576 U.S. at __, 183 L. Ed. 2d at 424, which the trial court must consider in determining whether to sentence defendant to life without parole or life with parole.

James, No. COA15-684, slip op. at 14

Contrary to Defendant's assertion the Court of Appeals' decision does not violate Miller where the court found that a presumption in favor of life without parole created by the statute does not render it unconstitutional. As the Court states, " [w]ith proper application of the sentencing guidelines in light of Miller, it may very well be the uncommon case that a juvenile is sentenced to life without parole under N.C. Gen. Stat. § 15A-1340.19A et seq." James, COA15-684, slip op. 16. In his brief to the Court of Appeals, Defendant takes issue with the fact that there were no aggravating factors contained in § 15A-1340.19B that could elevate a juvenile's

sentence to LWOP. (Defendant's Brief pp. 15-16). He argues that by including only mitigating factors the General Assembly clearly designed LWOP as the default sentence. However, Miller Court determining that LWOP for juveniles should be uncommon, did not feel it necessary to require that an aggravating factor at juvenile sentencing hearing was required.

While the Miller Court certainly could have held that findings of aggravating factors, found beyond a reasonable doubt, were constitutionally required to support a sentence of LWOP for juveniles, it did not. And, while our legislature certainly could have provided for the presentation of aggravating circumstances to be proven to a jury, it was not constitutionally required to do so. The only "individualized considerations" the Miller Court held constitutionally required were those concerning alleged mitigation of youth. As such, Miller appears to implicitly hold that no aggravation at all need be shown to impose LWOP.

The Miller Court was unquestionably aware of Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and their progeny, as well as the various states' sentencing schemes including those which allow the imposition of the death penalty. Yet, the Court did not tailor its ruling to those schemes, or mandate a similar framework. To the contrary, the Miller Court is silent on the question of the necessity of finding

aggravating factors. Graham v. Florida, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), and Roper v. Simmons, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), which established that "children are constitutionally different from adults for purposes of sentencing," and the individualized sentencing cases led the Court only to the conclusion that a sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Miller, 132 S. Ct. at 2475, 183 L. Ed. 2d at 430.

As the Court of Appeals stated,

> "nothing in N.C. Gen. Stat. § 15A-1340.19A et seq. conflicts with the Court's belief that sentences of life without parole for juvenile defendants will be uncommon or the substantive rule of law. N.C. Gen. Stat. § 15A-1340.19C(a) requires the sentencing court to take mitigating factors into consideration. With proper application of the sentencing guidelines in light of Miller, it may very well be the uncommon case that a juvenile is sentenced to life without parole under N.C. Gen. Stat. § 15A-1340.19A et seq."

James, COA15-684, slip op. 16. Guidance is provided by the statute which ensures such proper application.

A plain reading of N.C. Gen. Stat. § 15A-1340.19A et seq. sets out the considerations the court is to weigh in order to reach its sentencing decision. It provides that the Court "shall consider any mitigating factors," "all the circumstances of the offense," and "the particular circumstances of the defendant" in order to

determine whether defendant should be sentenced to LWP or LWOP. See N.C. Gen. Stat. § 15A-1340.19C(a). The Act plainly sets out the mitigating factors, including a catchall, and mandates their consideration. N.C. Gen. Stat. § 15A-1340.19(B)(c)(1-9). The court's sentencing decision is binary, LWP or LWOP. Id. § 15A-1340.19C(a). The court must reduce its findings and decision to writing detailing the presence or absence of the mitigating factors in support of its decision. Id.

Under N.C. Gen. Stat. § 15A-1340.19A et seq. instead of weighing and balancing aggravating and mitigating factors, the trial court is tasked with finding the absence or presence of mitigating factors and weighing them against "the circumstances of the offense and the particular circumstances of the defendant." N.C. Gen. Stat. § 15A-1340.19C(a). This is comparable to what the trial court does under the Structured Sentencing Act ("SSA") where the trial court is tasked with weighing and balancing aggravating and mitigating factors in order to determine whether to depart from the presumptive range.

Under the SSA, it is within sole discretion of the trial court to determine the weight to be given to each aggravating or mitigating factor and the extent to which the sentence may exceed the presumptive term, and in order to win reversal, a defendant must show there is no support in the record for trial court's decision. State v. Little, 163 N.C. App. 235, 244, 593 S.E.2d 113, 119 (2004), disc. review denied

and appeal dismissed, 358 N.C. 736, 602 S.E.2d 366 (2004), appeal dismissed, 359 N.C. 855, 619 S.E.2d 857 (2005) (holding that the weight given aggravating factors is within the sound discretion of the sentencing judge and should not be re-evaluated by the appellate courts). In short, the task before the court under N.C. Gen. Stat. § 15A-1340.19A et seq. is the same as Structured Sentencing Act ("SSA") where the court is weighting aggravating and mitigating factors, their comparable guidance is clear.

Quite simply, a trial court considered the mitigating evidence of a defendant's youth, the facts and circumstances of the crime, a defendant's circumstances, and in the reasoned exercise of its discretion, and not as the result of a presumption, can determine a defendant is deserving of LWOP.[1]

The Court of Appeals correctly determined N.C. Gen. Stat. § 15A-1340.19A et seq. did not create an unconstitutional presumption in favor of life without parole.

II. THE COURT OF APPEALS CORRECTLY HELD N.C. GEN. STAT. § 15A-1340.19A ET SEQ. IS NOT UNCONSTITUTIONALLY VAGUE OR ARBITRARY.

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[1]In the present case the Court of Appeals stated “[w]hile the order was extensive in detailing the evidence, it did not ‘include findings on the absence or presence of any mitigating factors’ as mandated in N.C. Gen. Stat. § 15A-1340.19C(a).” James, COA15-684, slip op 26. The Court held that the remand for further sentencing proceedings “is based solely on the trial court’s consideration of inadequate findings as to the presence or absence of mitigating factors to support its determination. James, COA15-684, slip op 27.

Defendant contends N.C. Gen. Stat. § 15A-1340.19A et seq. violates the Due Process Clause of the Fourteenth Amendment because it fails to provide the court with sufficient guidance on its application and is unconstitutionally vague.

A statute is unconstitutionally vague if it fails to provide explicit standards for those who apply the law. Rhyne v. K-mart Corp., 358 N.C. 160 186, 594 S.E.2d 1, 19 (2004). Mere differences of opinion as to the statute's applicability do not render it unconstitutionally vague. Id. at 187, 594 S.E.2d at 19. Indeed, constitutional requirements are met when the statute's language prescribes boundaries sufficiently distinct for judges to interpret and administer uniformly.

The Miller decision does not categorically bar life without parole but held only that a sentencer must consider "the mitigating qualities of youth" before sentencing a juvenile to LWOP. Id. at 2467, 183 L. Ed. 2d at 422. It does not require the finding of any aggravating factors to support such a sentence, or the submission of any evidence or factors to a jury. Miller "mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics." Id. at 2471, 183 L. Ed. 2d at 426.

Miller identified the mitigating qualities of youth which ought to inform the sentencing decision, but which were necessarily overlooked under a mandatory sentencing scheme. Id. at 2468, 183 L. Ed. 2d at 423. In line with Miller, N.C. Gen.

Stat. § 15A-1340.19A et seq. requires the trial court to find the absence or presence of mitigating factors and weighing them against "the circumstances of the offense and the particular circumstances of the defendant." N.C. Gen. Stat. § 15A-1340.19C(a). This is the type of weighing and balancing which the trial court does under SSA in order to determine whether to depart from the presumptive range of a sentence. It is a method that trial courts regularly implements. The task of weighing and balancing mitigating factors, the circumstances of the offense, and the particular circumstances of the defendant, is a procedural process employed by the trial court judge as part of the normal function of their position. This is certainly a fact that was not lost on the Legislature.

Defendant also argues that since the Miller Court made comparisons between capital punishment for adults and sentences of life without parole for juveniles, they must be implying that the sentence guidelines for juveniles should also mimic that of capital defendants. However, it was Graham, Roper, and the individualized sentencing cases that led the Miller Court to only mandate that a sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Miller, ___ U.S. at ___, 132 S. Ct. at 2475, 183 L. Ed. 2d at 430. Certainly if the Miller Court intended juvenile sentencing to emulate capital sentencing, they would have allowed for the presentation of aggravating

factors.

In State v. Lovette, 233 N.C. App. 706, 758 S.E.2d 399 (2014), the court correctly articulated that "our capital sentencing statutes have no application. Although there is some common constitutional ground between adult capital sentencing and sentencing a juvenile to life imprisonment without parole, these similarities do not mean the United States Supreme Court has directed or even encouraged the states to treat cases such as this under an adult capital sentencing scheme." Id. See James, COA15-684, slip op. 20-21.

Defendant also argues that N.C. Gen. Stat. § 15A-1340.19A et seq. does not require the State to prove any aggravating factors that might support the greater sentence of LWOP, further denying the trial court the guidance needed to determine which juveniles should receive a sentence of LWOP. As discussed hereinabove, Miller does not require proof of aggravating factors to justify the imposition of LWOP, but does require that a juvenile be permitted to present the mitigating evidence of youth and that the sentencing court have the discretion to sentence the juvenile to something lesser than LWOP.

Miller requires adherence to certain procedures before juveniles can be sentenced to LWOP. Specifically, juvenile offenders must be allowed to present, and that the court must be allowed to consider, evidence of the mitigating effects of their

youth in order to impose some lesser punishment. Id. at ___, 132 S. Ct. at 2467, 183 L. Ed. 2d at 422. As mandated by Miller, N.C. Gen. Stat. § 15A-1340.19A et seq. establishes those procedures and provides for alternative punishments, LWOP OR LWP.

Thus, the hallmark of N.C. Gen. Stat. § 15A-1340.19A et seq. is the reasoned exercise of discretion to fashion the formal legal consequence – as defined by the General Assembly – associated with a conviction, taking into consideration the particulars of the crime and of the defendant. The task before the court under N.C. Gen. Stat. § 15A-1340.19A et seq. is the same as the Structured Sentencing Act where the court weights aggravating and mitigating factors, their comparable guidance makes manifest N.C. Gen. Stat. § 15A-1340.19A et seq. comports with due process. As the Court of Appeals stated,

> the guidelines comply precisely with the requirements in Miller. The sentencing guidelines require a sentencing hearing at which a defendant may present mitigating factors related to youth and its attendant characteristics which, in turn, the sentencing court must consider before imposing a sentence of life without parole. Although N.C. Gen. Stat. § 15A-1340.19C(a) simply directs the court to "consider" mitigating factors, when viewed in light of the circumstances surrounding enactment, that is through the lens of Miller, we hold N.C. Gen. Stat. § 15A-1340.19A et seq. is not unconstitutionally vague and will not lead to arbitrary sentencing decisions. The discretion of the sentencing court is guided by Miller and the mitigating factors provided in N.C. Gen. Stat. § 15A-1340.19B(c).

James, No. COA15-684, slip op. at 20

Defendant has failed to show this issue merits this Court's review.

III. THE APPEALS COURT CORRECTLY FOUND THAT N.C. GEN. STAT. § 15A-1340.19A ET SEQ. DOES NOT VIOLATE THE PROHIBITIONS AGAINST EX POST FACTO LAWS.

N.C. Gen. Stat. § 15A-1340.19A et seq. was enacted to comply with the Miller decision. The Act is not an ex post facto law, but is a procedural law which does not disadvantage defendant. In essence, the statute does not affect the substance of Defendant's conviction or sentence. But rather it provides a remedy to enforce Miller by providing a method for a defendant's juvenile characteristics to be considered at sentencing. State v. Vance, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991).

N.C. Gen. Stat. § 15A-1340.19A et seq. actually provides the juvenile defendant with more, rather than less, judicial protection at the sentencing procedure. They are both procedural in nature and ameliorative. Therefore, there is no violation of ex post facto clause with its retroactive application to Defendant. Dobbert v. Florida, 432 U.S. 282, 292-297, 97 S. Ct. 2290, 2296-2299 (1977), State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990)

N.C. Gen. Stat. § 15A-1340.19A et seq. effects procedural changes mandated by Miller and provides juvenile offenders with a sentencing hearing at which they

have an opportunity to present mitigating evidence and provides the court with a sentencing discretion. It did not alter the definition of first degree murder, nor did it increase the punishment to which Defendant was eligible as a result of his conviction. Procedural statutes do not violate the ex post facto clause.

Defendant nonetheless argues application of N.C. Gen. Stat. § 15A-1340.19A et seq. disadvantages him. He claims that at the time of his offense North Carolina did not have a constitutional penalty for juvenile offenders inasmuch as there existed no alternative penalty as Miller later mandated. Consequently, Defendant concludes this case ought to be remanded for resentencing with directions that he be sentenced to the highest available constitutional penalty for homicide in effect at the time he committed his offense, i.e., the penalty for second degree murder.

Defendant supports this argument with citations to three cases where the state's highest court was called upon to fashion a sentencing remedy after the United States Supreme Court had declared the penalty imposed unconstitutional, i.e., where there existed a lawful conviction for which there was no constitutional penalty. In State v. Roberts, 340 So.2d 263 (La. 1976), the Louisiana Supreme Court had to fashion a remedy on direct remand after the United States Supreme Court declared its mandatory death sentence for first degree murder unconstitutional. See Roberts v. Louisiana, 428 U.S. 325 (1976). In Jackson v. Norris, 426 S.W.3d 906 (Ark. 2013)

and Commonwealth v. Brown, 466 Mass. 676, 1 N.E.3d 259 (2013), the Arkansas and Massachusetts Supreme Courts had to fashion remedies after the Miller Court had declared mandatory LWOP for juveniles unconstitutional. In each case, the court reaffirmed the conviction, and remanded with directions that defendant be sentenced to the most severe constitutional penalty established by the legislature for criminal homicide at the time the offense was committed.

These cases are all inapposite because in each instance the respective state legislatures had not yet cured the constitutional infirmities in their sentencing schemes. In Roberts and Jackson, the courts fashioned remedies on direct remand, since the respective legislatures had not yet had the opportunity to act. See e.g., Jackson, 426 S.W.3d at 908 (Arkansas law has "no provisions in the capital murder statute for a lesser sentence for persons under the age of eighteen"). Brown was decided in December 2013, nearly a year and a half after Miller, but the Massachusetts Legislature had not yet enacted a sentencing scheme addressing the infirmities identified in Miller. See Brown, 466 Mass. at 690, 1 N.E.2d at 270 ("we emphasize that the application of severability principles in sentencing juveniles like [Defendant] is a temporary remedy – one that we hope the Legislature will soon address by creating a new, constitutional sentencing scheme for juveniles convicted

of homicide crimes.") This court need not fashion a sentencing remedy inasmuch as the North Carolina General Assembly timely enacted a constitutional penalty.

Defendant invites this Court to make false comparisons. First, Miller did not categorically declare LWOP for juvenile offenders unconstitutional, it only required the provision of certain sentencing procedures and the possibility of a lesser sentence. Second, the North Carolina General Assembly had already amended its sentencing scheme to address Miller's mandates. Third, as this court has held many times, "new rules of criminal procedure . . . must be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Lovette, 225 N.C. App. 456, 471, 737 S.E.2d 431, 441 (internal citations and quotation marks omitted); see S.L. 2012-148, § 3 ("This act is effective when it becomes law and is applicable to any sentencing hearings held on or after that date. This act also applies to any resentencing hearings required by law for a defendant who was under the age of 18 years at the time of the offense, was sentenced to life imprisonment without parole prior to the effective date of this act, and for whom a resentencing hearing has been ordered.")

The Court of Appeals correctly held that the Act "does not impose a more severe punishment..., but instead provides sentencing guidelines that comply with the United States Supreme Court's decision in Miller and allows the trial court discretion

to impose a lesser punishment based on applicable mitigating factors, defendant could not be disadvantaged by the application of N.C. Gen. Stat. § 15A-1340.19A et seq."

The decision of the Court of Appeals is correct as a matter of law. Defendant has failed to demonstrate that the decision involves a substantial constitutional question or that this case meets any of the criteria for discretionary review.

CONDITIONAL REQUEST FOR PRESENTATION OF AN ADDITIONAL ISSUE PURSUANT TO N.C. R. APP. P. 15(d)

For the reasons set forth above, Defendant's PDR should be denied because the Court of Appeals' ruling below is correct and this case satisfies none of the criteria for discretionary review under N.C. Gen. Stat. § 7A-31(c). However, in the event this Court certifies this case for review, the State would seek to present an issue in addition to the one presented by Defendant. See N.C. R. App. P. 15(d). In specific, the State would seek to present the following additional issue:

> Whether the Court of Appeals erred by holding N.C. Gen. Stat. § 15A-1340.19A et seq. created a presumption in favor of life without.

N.C. Gen. Stat. § 15A-1340.19A et seq. language does not give rise to a mandatory presumption in favor of LWOP. Defendant points to that part of the statute which provides:

> The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular

> circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole **instead of** life imprisonment without parole.

N.C. Gen. Stat. § 15A-1340.19C(a) (emphasis supplied). Defendant contends that the "instead of" language creates a mandatory presumption in favor of LWOP. Defendant wholly overlooks other parts of the Act which plainly cast the sentencing choice between LWOP and LWP. See N.C. Gen. Stat. § 15A-1340.19(B)(a)(2) (where the defendant is convicted of other than felony murder "then the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, **or** a lesser sentence of life imprisonment with parole.") (emphasis supplied).

Even if the language in the two above-cited statutory provisions gives rise to a patent ambiguity, this Court nevertheless ought to construe the Act in the same way the Guttierrez Court construed § 190.5(b). People v. Guttierrez, 58 Cal. 4th 1354, 324 P.3d 245 (2014). Indeed, under North Carolina law this Court is obliged to interpret them as non-contradictory. See Brown v. Brown, 353 N.C. 220, 226, 539 S.E.2d 621, 625 (2000) (courts presume that the General Assembly would not contradict itself in the same statute); see also Petty v. Owen, 140 N.C. App. 494, 499, 537 S.E.2d 216, 219 (2000) (where the application of two separate statutory provisions, each clear and unambiguous standing alone, provides incompatible

results, the provisions must be interpreted and reconciled so as to give effect to the overall purposes of the legislative act).

Here the first indication of the General Assembly intent is stated plainly in the Act's title, "to **comply** with the ... decision in Miller." See S.L. 2012-148 (emphasis supplied). It is inconceivable that the General Assembly would enact legislation intended to comport with the mandates of Miller which by its very terms offends them. See Brown, 353 N.C. at 224, 539 S.E.2d at 623 (noting that "[a]lthough the title of an act cannot control when the text is clear, the title is an indication of legislative intent." (citations omitted))

Secondly, the intent of the North Carolina General Assembly is plainly set forth in language of N.C. Gen. Stat. § 15A-1340.19A et seq., which directs the court to find the absence or presence of mitigating factors of youth, considering the circumstances surrounding the crime.

Additionally, the absence of aggravating factors does not create a presumption in favor of LWOP. Defendant claims that the absence of statutory aggravating factors makes manifest that the Act creates a presumption in favor of LWOP because mitigating factors are only considered to lessen a sentence. Miller does not require any findings in aggravation before a court could sentence a juvenile to LWOP. The Miller Court was unquestionably aware of Apprendi, Blakely, and its progeny.

Indeed, if the Miller Court thought aggravating factors were necessary to insure constitutional compliance they could have easily made it a requirement. By choosing not to do so it seems clear they did deem it necessary.

CONCLUSION

WHEREFORE, the State moves that Defendant's appeal be dismissed and the petition for discretionary review be denied. In the alternative, if this Court allows the PDR, the State respectfully requests review of the additional issue set forth above.

Electronically submitted this the 13th day of June, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW and NOTICE OF APPEAL upon the DEFENDANT by electronically mailing the same in PDF format to his counsel of record, using the following electronic address:

David W. Andrews
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This the 13th day of June, 2016.

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