No. 514PA11-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	From Mecklenburg County
v.	)	No. COA15-684
	)	06 CRS 222499-500
HARRY SHAROD JAMES	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER N.C. GEN. STAT. § 7A-31(C)(1) and (C)(2)
AND
NOTICE OF APPEAL UNDER N.C. GEN. STAT. § 7A-30(1)
(SUBSTANTIAL CONSTITUTIONAL QUESTION)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Harry Sharod James, through undersigned counsel, respectfully petitions this Court to certify for review the May 3, 2016 decision of the Court of Appeals upholding the constitutionality of N.C. Gen. Stat. § 15A-1340.19A, *et. seq*. This Court should grant discretionary review because the subject matter of this appeal has significant public interest and involves legal principles of major significance to the jurisprudence of the State. Specifically, this appeal involves issues of first impression regarding the constitutionality of recently-enacted statutes that govern sentencing procedures for juveniles convicted of first-degree murder. This Court should also allow Mr. James' notice of appeal because the decision below directly involves substantial questions arising under Article I, §§ 16, 19, and 27 of the

North Carolina Constitution; Article I, § 10 of the United States Constitution; and the Eighth and Fourteenth Amendments to the United States Constitution.

In support of this petition, Mr. James shows the following:

SUMMARY OF THE PERTINENT FACTS

Mr. James was indicted on June 19, 2006 for first-degree murder and armed robbery. (R pp 4-5) At the time of the offenses, Mr. James was 16 years old. (R pp 2-3, 16) Mr. James was later found guilty by a jury of both charges. (R pp 6-7) For the first-degree murder charge, the jury found Mr. James guilty based on theories of felony murder and murder by premeditation and deliberation. (R p 6) On June 10, 2010, the Honorable Robert F. Johnson sentenced Mr. James to concurrent terms of life imprisonment without parole for first-degree murder and 64-86 months for armed robbery. (R pp 10-13)

Mr. James appealed his convictions. On October 18, 2011, the Court of Appeals affirmed his convictions and ruled that his mandatory sentence of life without parole did not violate Article I, § 27 of the North Carolina Constitution or the Eighth Amendment to the United States Constitution. *State v. James*, 216 N.C. App. 417, 716 S.E.2d 876 (2011). (R pp 16-20) Mr. James then filed a petition for discretionary review with this Court. While the petition was pending, the Supreme Court of the United States decided *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012). On August 23, 2012, this Court granted the petition for discretionary

review in part and remanded the case to superior court for resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, which was enacted after the *Miller* decision was issued. (R pp 21-22)

On remand, Mr. James argued that sentencing him under N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, would violate the *ex post facto* provisions of the North Carolina and United States constitutions and that he should be sentenced instead to the Class B2 felony of second-degree murder. (R pp 28-34, 1T pp 20-21, 2T p 365, 3T p 387) He also argued that the new sentencing scheme violated the Eighth Amendment and Article I, § 27 of the North Carolina Constitution because it contained a presumption in favor of life without parole and that it violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution because it was vague and failed to provide sufficient guidance on its application. (R pp 35-46, 1T pp 22-25, 3T pp 388-91) On December 12, 2014, Judge Johnson denied the arguments and ruled that N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, did not violate Mr. James' constitutional rights. (3T pp 405-06)

Mr. James also presented evidence regarding the sentence that he should receive. According to the evidence, Mr. James was born on July 30, 1989 to Harry James, Sr. and Agnes Brunson. (R pp 2-3, 1T p 41) The relationship between Mr. James' parents was violent. Both Mr. James and his younger sister saw fights

between their parents, who eventually divorced based partly on physical violence. (1T pp 43, 65) After his parents divorced, Mr. James' living arrangements became unstable. He moved back and forth between his parents, relatives, a friend of his mother, and his tae kwon do instructor. (1T pp 42, 55, 65-66, 86, 103) When Mr. James was with his mother, they lived at times in homeless shelters, apartments, and motels. (1T pp 44, 106, 119, 125)

Mr. James also suffered physical abuse by his parents. According to a Cabarrus County Child Protective Services report and a Mecklenburg County investigation assessment, Mr. James' father punched Mr. James several times and then grabbed him by the collar during an incident in November 2002. (1T pp 108, 121) A separate investigation assessment from Mecklenburg County described an incident in late 2002 in which Mr. James' mother, in response to a mess that Mr. James made with sugar, grabbed Mr. James by the collar, wrestled with him, and scratched his neck. Mr. James' mother was later subject to a temporary restraining order that prevented her from being in contact with her children. (1T pp 115-17)

A Department of Juvenile Justice report stated that by 2005, Mr. James had a "history of leaving home angry or frustrated" about his mother's relationship with his father. (1T p 123) During one incident after Mr. James left home, he was raped by an older male who he befriended while living on the street. (1T p 123) In another incident, Mr. James was at a party when two men grabbed him and tried to

have anal sex with him. However, Mr. James called out to a friend, who stopped the men. (2T p 270) Mr. James' father later teased Mr. James about the attempted rape. (2T p 270)

On March 13, 2005, Mr. James was charged in a juvenile delinquency petition with assault with a deadly weapon and communicating threats. (2T pp 268, 287) The petition alleged that Mr. James put Clorox in a bottle of salad dressing and threatened to cut his mother's throat. (2T p 215) Mr. James was adjudicated delinquent for communicating threats, but the assault petition was dismissed. (2T p 413)

In November 2005, Mr. James was living in a foster home. (2T p 223) He planned to attend a program for at-risk youth in January 2006, but he was unable to enroll in the program because his parents refused to take him to the program's orientation and his social worker mistakenly believed he had fled on the day of the orientation. (2T p 223) Although Mr. James was ready to attend the orientation, he could not go and was told to attend the next session in July 2006. (2T p 223)

By May 2006, Mr. James was involved in a church-sponsored mentoring group. (R p 16) He met Curtis Jenkins through the group and introduced Mr. Jenkins to his twenty-one year old friend Adrian Morene. Morene suggested that they rob Mr. Jenkins. (R p 16) On May 11, 2006, they went to Mr. Jenkins' home.

Mr. James rang the doorbell. After Mr. Jenkins answered the door, Morene accosted Mr. Jenkins with a BB gun. He also told Mr. James to get Mr. Jenkins' wallet and any item they could pawn. (R p 17) Morene hit Mr. Jenkins with the gun, stabbed him, and then smothered him with pillows. Mr. James and Morene then left in Mr. Jenkins' car, withdrew cash from Mr. Jenkins' bank account, and set off for Chicago. They were later stopped by a highway patrol officer in Kentucky and arrested. (R p 17)

At the conclusion of the resentencing hearing, Judge Johnson imposed a sentence of life in prison without parole. (3T p 476) Mr. James appealed again to the Court of Appeals, arguing that Judge Johnson erred by rejecting his constitutional arguments and sentencing him to prison for life without parole. On May 3, 2016, the Court of Appeals issued an opinion in which it held that Judge Johnson did not violate the prohibitions against *ex post facto* laws by applying the new sentencing scheme to Mr. James' case. *State v. James*, No. COA15-684, slip op. at 8-11 (N.C. Ct. App. May 3, 2016). The Court also held that the new sentencing scheme contained a presumption in favor of life without parole and that the presumption did not violate *Miller*. *Id*. at 12-17. In addition, the Court held that the new sentencing scheme was not vague and did not violate Mr. James' right to due process. *Id*. at 17-21. Finally, the Court remanded the case for further sentencing proceedings because Judge Johnson did not make sufficient findings of

fact to support his decision to sentence Mr. James to prison for life without parole. *Id*. at 22-27.

REASONS WHY CERTIFICATION AND DISCRETIONARY REVIEW SHOULD BE ALLOWED

It is critical that this Court certify this case for review. This case presents three significant constitutional claims involving the sentencing of juvenile defendants convicted of first-degree murder. These claims are part of a fast-developing area of the law and involve the highest possible punishment that courts can impose on juvenile defendants. Thus, these claims have significant public interest and involve legal principles of major significance to the jurisprudence of the state. Further, in light of recent changes in this area of the law, trial judges need guidance from this Court on how defendants should be sentenced for murders committed when the defendants were juveniles. These claims will also continue to arise until they are definitively resolved by this Court. Accordingly, this Court should certify this case for review and address the merits of each claim.

I. THE COURT OF APPEALS MISAPPREHENDED *MILLER V. ALABAMA*, 567 U.S. ___, 183 L. ED. 2D 407 (2012), WHEN IT HELD THAT THE PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE UNDER N.C. GEN. STAT. § 15A-1340.19A, *ET. SEQ.*, WAS CONSTITUTIONAL.

This Court should first review the Court of Appeals' determination that the sentencing scheme under N.C. Gen. Stat. § 15A-1349.19A, *et. seq.* for juveniles convicted of first-degree murder comports with the Eighth Amendment to the

United States Constitution and Article I, § 27 of the North Carolina Constitution. The Court of Appeals held that the sentencing scheme contains a presumption favoring sentences of life without parole and that the presumption is constitutional. *State v. James*, No. COA15-684, slip op. at 13-17 (N.C. Ct. App. May 3, 2016). Although the Court purported to rely on *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012), to support its holding, its analysis of the *Miller* decision was flawed. As many courts have now recognized, sentences of life without parole can only be imposed on the "worst-of-the-worst juvenile murderers…." *Veal v. State*, No. S15A1721, 2016 Ga. LEXIS 243, at *24 (Ga. Mar. 21, 2016). By upholding a presumption in favor of life without parole, the Court of Appeals issued a decision that violates *Miller* and would lead to life without parole sentences for juveniles who are not among the worst offenders. This Court should therefore accept this case for review and reverse the opinion below.

Defendants in criminal cases are protected against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 27 of the North Carolina Constitution. Over the past decade, the Supreme Court of the United States has struck down sentencing schemes under the Eighth Amendment because of differences between juveniles and adults. In 2005, the Court held that it was unconstitutional to impose capital punishment for crimes that the defendant committed while under the age of 18.

Roper v. Simmons, 543 U.S. 551, 573, 161 L. Ed. 2d 1, 24 (2005). The Court based its decision on three general differences between juveniles and adults: (1) juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility," (2) they "are more vulnerable or susceptible to negative influences and outside pressures," and (3) their character "is not as well formed." *Id*. at 569-70, 161 L. Ed. 2d at 22 (citation omitted). Five years later, the Court relied on these differences to prohibit sentences of life without parole for juveniles who commit non-homicide offenses. *Graham v. Florida*, 560 U.S. 48, 68, 74, 176 L. Ed. 2d 825, 841, 845 (2010).

In 2012, the Court again cited the differences between juveniles and adults as grounds to hold that mandatory sentences of life without parole for juvenile homicide offenders violated the Eighth Amendment ban on cruel and unusual punishments. *Miller v. Alabama*, 567 U.S. at ___, 183 L. Ed. 2d at 424. Although the Court stopped short of imposing a "categorical bar" on sentences of life without parole for juveniles in *Miller*, it nevertheless stated that such sentences "will be uncommon" because of the "great difficulty" differentiating between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. (*quoting Roper*, 543 U.S. at 573, 161 L. Ed. 2d at 24). The Court also made clear that the differences between adults and juveniles "counsel against irrevocably

sentencing [juveniles] to a lifetime in prison." *Id*.

After the decision in *Miller* was issued, appellate courts around the country addressed the constitutionality of discretionary sentencing schemes in which the trial court could impose a sentence of life without parole after considering individualized factors involving the juvenile's age and circumstances. The Seventh Circuit Court of Appeals observed that the Supreme Court expressed "great skepticism" in *Miller* toward sentences of life without parole for juveniles convicted of first-degree murder. *McKinley v. Butler*, 809 F.3d 908, 914 (7th Cir. 2016). The Supreme Court of California held that a presumption in favor of life without parole under California's statutory scheme would be in "serious tension" with *Miller*. *People v. Gutierrez*, 58 Cal. 4th 1354, 1379, 324 P.3d 245, 262 (2014). The Supreme Court of Iowa held that "the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence." *State v. Seats*, 865 N.W.2d 545, 555 (2015). Finally, the Supreme Judicial Court of Massachusetts held that even the discretionary imposition of a sentence of life without parole for a juvenile offender violated the Massachusetts Constitution. *Diatchenko v. District Attorney*, 466 Mass. 655, 671, 1 N.E.3d 270, 284-85 (2013).

Then, on January 25, 2016, the Supreme Court of the United States issued its

decision in *Montgomery v. Louisiana*, 577 U.S. ___, 193 L. Ed. 2d 599 (2016). Although the Court held that *Miller* was retroactive, *Id*. at ___, 193 L. Ed. 2d at 620, its holding also shed additional light on the requirements of *Miller*. Specifically, the Court held in *Montgomery* that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id*. at ___, 193 L. Ed. 2d at 619 (*quoting Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424) (emphasis added).

At least two state appellate courts have considered the impact of *Montgomery* on sentencing schemes for juveniles convicted of first-degree murder. The Appellate Court of Illinois observed that *Miller* prohibited mandatory sentences of life without parole for juvenile offenders. *People v. Nieto*, No. 1-12-1604, 2016 Ill. App. LEXIS 169, at *21 (Ill. App. Ct. Mar. 23, 2016). However, the Court also noted that the "language in *Montgomery*…strongly suggests that *Miller* does more." *Id*. Under *Montgomery*, a juvenile must be given an opportunity to show that he "belongs to the large population of juveniles not subject to natural life in prison without parole, even where his life sentence resulted from the trial court's exercise of discretion." *Id*. at *22.

The Supreme Court of Georgia observed that it had previously viewed a trial court's discretion to impose a sentence of life without parole for a juvenile as

"fairly broad" even after *Miller*. *Veal v. State*, No. S15A1721, 2016 Ga. LEXIS 243, at *19 (Ga. Mar. 21, 2016). "But then came *Montgomery*." *Id*. at 20. According to the Supreme Court of Georgia, *Montgomery* "undermine[d]" its precedent indicating that trial courts had "significant discretion" in deciding whether juvenile offenders should be sentenced to life in prison for life without parole. *Id*. at *22. Based on *Montgomery*, the Supreme Court of Georgia held that trial courts can only impose life without parole sentences on the "worst-of-the-worst juvenile murderers…." *Id*. at *25.

On May 23, 2016, the Supreme Court of the United States again re-visited *Miller* when it granted, vacated, and remanded the appeal in *Adams v. Alabama*, No. 15-6289, slip op. (U.S. May 23, 2016) in light of *Montgomery v. Louisiana*, 577 U.S. ___, 193 L. Ed. 2d 599 (2016). In a concurring opinion, Justice Sotomayor, joined by Justice Ginsburg, reiterated that a sentence of life without parole is only appropriate for the "very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id*. at 4 (*citing Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620). Less than a week later, the Supreme Court of Iowa barred trial courts from imposing life without parole sentences in cases involving juvenile defendants because "the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related

prospects for self-regulation and rehabilitation." *State v. Sweet*, No. 14-0455, 2016 Iowa Sup. LEXIS 64, at *62 (Iowa May 27, 2016).

In contrast to many of the cases that followed *Miller* and *Montgomery*, the Court of Appeals in this case issued a decision that gave trial courts greater authority to impose sentences of life without parole. As support for its decision, the Court relied on the understanding that *Miller* and *Montgomery* only require a sentencing court to consider the mitigating factors of youth before sentencing a juvenile offender to prison for life without parole. *James*, slip op. at 14. However, neither *Miller* nor *Montgomery* can be construed so narrowly. In both *Miller* and *Montgomery*, the Supreme Court of the United States established that a sentence of life without parole is "excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619 (*quoting Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424). Thus, it is not enough for a court to merely consider mitigating factors before imposing a sentence of life without parole. If, as *Miller* and *Montgomery* hold, a sentence of life without parole is proper only in rare and uncommon cases, then a presumption of life without parole is unconstitutional. Consequently, the decision below – which expressly permits such a presumption – cannot stand.

II. THE COURT OF APPEALS ERRED WHEN IT HELD THAT N.C. GEN. STAT. § 15A-1340.19A, *ET. SEQ.*, WAS NOT UNCONSTITUTIONALLY VAGUE AND WILL NOT LEAD TO ARBITRARY SENTENCING DECISIONS.

Review is also warranted in this case because the Court of Appeals erroneously concluded that the sentencing procedures outlined in N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, provide sufficient guidance to trial courts. As support for its conclusion, the Court relied primarily on provisions in the statutory scheme that enable defendants to present mitigating factors related to youth, which the trial court must then consider before deciding on a sentence. *State v. James*, No. COA15-684, slip op. at 20 (N.C. Ct. App. May 3, 2016). However, a defendant's ability to present mitigating factors and a requirement that the court merely consider those factors is not sufficient to satisfy due process. As a sentence of life without parole is reserved only for the "rare juvenile offender whose crime reflects irreparable corruption," *Miller v. Alabama*, 567 U.S. ___, ___, 183 L. Ed. 2d 407, 424 (2012) (*quoting Roper v. Simmons*, 543 U.S. 551, 573, 161 L. Ed. 2d 1, 24 (2005)), the statutory scheme lacks sufficient procedures that would narrow the class of juvenile defendants convicted of first-degree murder to those who truly warrant such a sentence. Consequently, this Court should accept this case for review and reverse the opinion below.

Defendants in criminal cases are entitled to due process of law under the Fourteenth Amendment to the United States Constitution and Article. I, § 19 of the

North Carolina Constitution. *State v. Patton*, 260 N.C. 359, 366, 132 S.E.2d 891, 895 (1963). In general, due process guarantees "fundamental fairness" in court proceedings. *Ake v. Oklahoma*, 470 U.S. 68, 75, 84 L. Ed. 2d 53, 61 (1985). In addition, an "essential element" of due process is that statutes contain "sufficiently definite criteria to govern a court's exercise of discretion." *State v. Green*, 348 N.C. 588, 595, 502 S.E.2d 819, 823 (1998).

A statute violates a defendant's right to due process when it is vague and fails to provide sufficient guidance on its application. *City of Chicago v. Morales*, 527 U.S. 41, 60, 144 L. Ed. 2d 67, 82 (1999). The prohibition of vagueness in criminal statutes applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson v. United States*, 576 U.S. ___, ___, 192 L. Ed. 2d 569, 578 (2015). A statute is unconstitutionally vague if fails to give "sufficiently clear guidelines and definitions for judges . . . to interpret and administer it uniformly." *State v. Locklear*, 84 N.C. App. 637, 643, 353 S.E.2d 666 (1987).

In *Miller v. Alabama*, 567 U.S. ___, ___, 183 L. Ed. 2d 407, 424 (2012), the Supreme Court of the United States held that mandatory sentences of life without parole for juveniles convicted of first-degree murder violated the Eighth Amendment to the United States Constitution. Although the Court did not dictate a specific procedure for sentencing juveniles convicted of first-degree murder,

there are two aspects of the opinion in *Miller* that indicate how sentencing hearings in those cases should occur. First, the Court stated that discretionary sentences of life without parole for juvenile offenders would be "uncommon" because the differences between adults and juveniles "counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at ___, 183 L. Ed. 2d at 424. This part of *Miller* was later strengthened in *Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 619 (2016), which held that even a discretionary sentence of life without parole would be "excessive" if it were imposed on any "but the 'rare juvenile offender whose crime reflects irreparable corruption.'" (*quoting Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424).

Second, in prohibiting mandatory sentences of life without parole, the Court relied on the comparison in *Graham v. Florida*, 560 U.S. 48, 68, 74, 176 L. Ed. 2d 825, 841, 845 (2010), between capital punishment for adults and sentences of life without parole for juveniles. *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at ___. Based on that comparison, the Court stated that a sentence of life in prison without parole for juveniles is "akin to the death penalty." *Id*. at ___, 183 L. Ed. 2d at 421. The Court also recognized that death penalty cases require "individualized sentencing" in which capital punishment is reserved "only for the most culpable defendants committing the most serious offense."

In the decision below, the Court of Appeals stated, based on *State v. Lovette*,

233 N.C. App. 706, 758 S.E.2d 399 (2014), that a comparison to death penalty cases was not appropriate because the Supreme Court in *Miller* did not direct states to treat juvenile cases as capital cases for purposes of sentencing. *James*, No. COA15-684, slip op. at 20-21. However, the comparison was entirely apt. In *Miller*, the Supreme Court relied on "two strands of precedent" to hold that mandatory sentences of life without parole were unconstitutional. The first strand involved "categorical bans on sentencing practices based on the mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 417. The second strand was specifically based on death penalty cases, which require courts to "consider the characteristics of a defendant and the details of the offense before sentencing him to death." *Id.* Indeed, the Court explained that the correspondence of juvenile life without parole sentences to the death penalty was what made the second strand of precedent "relevant" to its analysis in *Miller*. *Id.* at ___, 183 L. Ed. 2d at 421.

Further, the Supreme Court necessarily linked juvenile life without parole cases to death penalty cases as part of its holding. The Court itself noted that death sentences were "reserved only for the most culpable defendants committing the most serious offenses." *Id.* at ___, 183 L. Ed. at 421. Similarly, the Court held that sentences of life with parole were reserved only for "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 U.S. at ___, 183 L. Ed.

2d at 424 (*quoting Roper*, 543 U.S. at 573, 161 L. Ed. 2d at 24). Thus, as both death penalty cases and juvenile life without parole cases require courts to identify those defendants who are most deserving of the highest possible punishment, the Court of Appeals was mistaken to discount the comparison between death penalty cases and juvenile life without parole cases.

In light of these two aspects of *Miller*, the statutory scheme under N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, is unconstitutionally vague. The statutory scheme does not provide sufficient guidance on how a court should weigh mitigating factors in deciding between a sentence of life without parole or life with parole. The sole guidance provided by N.C. Gen. Stat. § 15A-1340.19C(a) is a directive that the trial court "consider" any mitigating factors in determining the sentence. In capital cases, statutes "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (footnoted omitted). A requirement that the court merely "consider" mitigating factors falls well below this standard.

A generic directive to "consider" mitigating factors also fails to comply with *Miller* itself. The Supreme Court stated in *Miller* that the differences between adults and juveniles "counsel against irrevocably sentencing them to a lifetime in

prison." *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424. The Court then held in *Montgomery* that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619. Based on *Miller*, Justice Sotomayor issued a concurring opinion in *Adams v. Alabama*, No. 15-6289, slip op. at 4 (U.S. May 23, 2016), in which she criticized cases where "factfinders did not put 'great weight' on considerations that we have described as particularly important in evaluating the culpability of juveniles, such as intellectual disability, an abusive upbringing, and evidence of impulsivity and immaturity." Consequently, it is not sufficient for a trial court to merely consider mitigating factors before sentencing a juvenile defendant convicted of first-degree murder.

Additionally, there is a risk under the statutory scheme that a court could use the mitigating factors described in N.C. Gen. Stat. § 15A-1340.19B to justify the higher sentence of life without parole. In *State v. Seats*, 865 N.W.2d 545 (2015), the trial court sentenced the defendant to life in prison without parole for a murder committed when he was a juvenile. The Supreme Court of Iowa remanded the case for re-sentencing because the trial court failed to consider mitigating factors related to the defendant's youth as required by *Miller*. *Id.* at 556. However, the Court also observed that the trial court "appeared to use [the defendant's] family

and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating, not mitigating factors." *Id*. at 557.

Similarly, the prosecutor argued in this case that Mr. James deserved a sentence of life in prison without parole based on catch-all provision under N.C. Gen. Stat. § 15A-1340.19B(c)(9). Although the catch-all provision covers any other "mitigating factor or circumstance," the prosecutor argued that it covered "any other factor" and that the circumstances of the crime, when viewed under the catch-all provision, warranted the higher sentence of life in prison without parole. (3T pp 418-422)

Third, the statutory scheme does not require the State to prove any aggravating factors. Although the Supreme Court did not specifically discuss aggravating factors in *Miller*, aggravating factors were not necessary to its holding because the case involved only a mandatory sentencing scheme. Nevertheless, aggravating factors must necessarily factor into a discretionary sentencing scheme under *Miller*. According to *Miller*, a sentence of life without parole can only be imposed in an exceptional case involving "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424 (*quoting Roper*, 543 U.S. at 573, 161 L. Ed. 2d at 24).

Aggravating factors are a necessary component in identifying that "rare" juvenile. Aggravating factors play a "constitutionally necessary function" of narrowing the class of individuals eligible for a higher penalty, *Zant v. Stephens*, 462 U.S. 862, 878, 77 L. Ed. 2d 235, 250-51 (1983), and guiding the trial court in choosing a sentence for the defendant. *Poland v. Arizona*, 476 U.S. 147, 156, 90 L. Ed. 2d 123, 132 (1986). Indeed, "[t]he framework for the sentencer set forth by *Miller* is not unlike the guideline scheme" in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), which requires the defendant to admit to aggravating factors or juries to find aggravating factors beyond a reasonable doubt before a court can impose a sentence in excess of the presumptive range. Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. Rev. 553, 583 (2015). *See also People v. Skinner*, 312 Mich. App. 15, 49, 877 N.W.2d 482, ___ (2015) (holding that courts may not sentence juveniles to life without parole under Michigan's *Miller* fix law without a jury finding aggravating factors beyond a reasonable doubt). Thus, without aggravating factors, the statutory scheme under N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, hinders the trial court's ability to winnow the class of juvenile defendants to those who actually warrant a sentence of life without parole.

While statutes are generally presumed to be constitutional, *State v. Sanders*, 37 N.C. App. 53, 54, 245 S.E.2d 397, 398 (1978), such a presumption is not determinative in this case. The Supreme Court of the United States has long

warned that "[d]iscretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496, 97 L. Ed. 469, 509 (1953). Here, the trial court sentenced Mr. James under a sentencing scheme that failed to provide sufficient guidance for courts to decide between a sentence of life in prison without parole and life in prison with parole. As the Court of Appeals erroneously upheld a sentencing scheme that could only lead to arbitrary sentencing decisions, this Court should accept review of this case and reverse the decision below.

III. THE COURT OF APPEALS ERRED WHEN IT HELD THAT APPLYING N.C. GEN. STAT. § 15A-1340.19A, *ET. SEQ.*, TO MR. JAMES' CASE DID NOT VIOLATE THE PROHIBITIONS AGAINST *EX POST FACTO* LAWS.

This Court should also certify for review the Court of Appeals' ruling on Mr. James' *ex post facto* argument. According to the Court of Appeals, the trial court's decision to apply N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, did not disadvantage Mr. James – and thereby violate his *ex post facto* rights – because the General Assembly "acted quickly" to set up a sentencing scheme in response to *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012), and the punishments defined by the new sentencing scheme were not more severe than the punishment Mr. James faced under the sentence mandated prior to *Miller*. *State v. James*, No. COA15-684, slip op. at 11 (N.C. Ct. App. May 3, 2016). Neither part of the Court's reasoning was correct. An *ex post facto* claim does not turn on the speed with which the legislature enacts new statutes. Further, Mr. James actually did

face more severe sentencing options under N.C. Gen. Stat. § 15A-1340.19A, *et. seq.* Consequently, this Court should certify this case for review and reverse the decision below.

Criminal defendants are protected against *ex post facto* laws under N.C. Const. Art. I, § 16 and U.S. Const. Art. I, § 10. An *ex post facto* law is one that "allows imposition of a different or greater punishment than was permitted when the crime was committed…." *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991). There are "two critical elements [that] must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id. (quoting Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981)).

As the Court of Appeals observed, there was no dispute that N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, was retrospective. *James*, slip op. at 8-9. However, the Court erred by rejecting Mr. James' argument that he was disadvantaged by N.C. Gen. Stat. § 15A-1340.19A, *et. seq*. First, the Court erroneously concluded that Mr. James was not prejudiced by the provisions of N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, because the General Assembly "acted quickly" in passing the new sentencing scheme. In his appeal, Mr. James compared his case to *State v. Roberts*, 340 So.2d 263 (La.1976); *Jackson v. Norris*, 426 S.W.3d 906, 908 (2013);

and *Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259 (2013). In each case, the defendants faced mandatory sentences for first-degree murder that were later held to be unconstitutional. As courts were barred from imposing mandatory sentences, the appellate courts in each case sentenced the defendants to the next highest sentence authorized by law. *See Roberts*, 340 So.2d at 263; *Jackson*, 426 S.W.3d at 911; and *Brown*, 466 Mass. at 682-83, 1 N.E.3d at 264-65.

When the Court of Appeals reviewed the *Roberts*, *Jackson*, and *Brown* cases, it rejected the comparison to the cases because "there [was] no indication that the legislatures in those states enacted new sentencing guidelines that controlled after the mandatory sentences provided in their respective statutes were determined unconstitutional." *James*, slip op. at 10. According to the Court of Appeals, the critical distinction was that in contrast to the legislatures in *Roberts*, *Jackson*, and *Brown*, the North Carolina General Assembly "acted quickly" to set up a sentencing scheme after the decision in Miller was issued. *Id*. However, neither *Roberts*, *Jackson*, nor *Brown* turned on the existence of legislation directing courts to sentence the defendants in a particular manner. Although the Court of Appeals quoted part of the decision in *Brown* stating that the legislature had not set up procedures for sentencing defendants who were affected by the prohibition against mandatory sentencing, *id*., that portion of the decision was not part of the holding in *Brown*, but was simply a statement made by the trial judge in the case.

See Brown, 466 Mass. at 679, 1 N.E.3d at 262.

Additionally – and more importantly – whether the state legislatures in *Roberts*, *Jackson*, and *Brown* enacted sentencing schemes after the mandatory sentences were held unconstitutional was irrelevant to the *ex post facto* analysis. The *Ex Post Facto* Clause "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey v. Washington*, 301 U.S. 397, 401, 81 L. Ed. 1182, 1186 (1937). Here, Mr. James was subject to a "new punitive measure" for a murder that had already been "consummated." Consequently, the Court of Appeals erred by rejecting Mr. James' *ex post facto* argument on the ground that General Assembly enacted N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, in response to *Miller*.

Second, the Court of Appeals erroneously concluded that Mr. James was not disadvantaged by N.C. Gen. Stat. § 15A-1340.19A, *et. seq.* On the offense date for this case, N.C. Gen. Stat. § 14-17 (2006) mandated only one sentence for juvenile offenders: life in prison without parole. However, the Supreme Court of the United States held that mandatory sentences of life in prison without parole for juveniles are unconstitutional. *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424. Moreover, N.C. Gen. Stat. § 14-17 did not provide any alternative sentences for juvenile offenders convicted of first-degree murder. Instead, the next highest sentence then available under N.C. Gen. Stat. § 14-17 was a term of years sentence

for the Class B2 felony of second-degree murder. With a Prior Record Level I, (R pp 8-9), Mr. James could have received a presumptive sentence as high as 157 to 198 months for a Class B2 felony. *See* N.C. Gen. Stat. §§ 14-17, 15A-1340.17 (2006).

By contrast, N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, authorized courts to sentence juveniles convicted of first-degree murder based on premeditation and deliberation to life in prison without parole or life in prison with parole. As a result, the new law disadvantaged Mr. James because it provided sentencing options that were harsher that the sentence Mr. James could have received if he had been sentenced based on the only lawful provision that remained under N.C. Gen. Stat. § 14-17 for juvenile offenders convicted of murders committed in 2006.

Any law that "inflicts a greater punishment" for a crime than when the crime was committed violates the constitutional prohibition on *ex post facto* laws. *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990) (*quoting Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)). This Court should accept this case for review and reverse the Court of Appeals' opinion on Mr. James' *ex post facto* claim because Mr. James was subject to greater punishment under N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, than he would have faced if he had been sentenced to a term of years for the Class B2 felony of second-degree murder.

ISSUES TO BE BRIEFED

I. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE UNDER N.C. GEN. STAT. § 15A-1340.19A, *ET. SEQ.*, DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT?

II. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE PROCEDURES UNDER N.C. GEN. STAT. § 15A-1340.19A, *ET. SEQ.*, WERE NOT UNCONSTITUTIONALLY VAGUE AND WOULD NOT LEAD TO ARBITRARY SENTENCING DECISIONS?

III. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT APPLYING N.C. GEN. STAT. § 15A-1340.19A, *ET. SEQ.*, TO MR. JAMES' CASE DID NOT VIOLATE THE PROHIBITIONS AGAINST *EX POST FACTO* LAWS?

CONCLUSION

WHEREFORE, Harry James, the Petitioner herein, respectfully requests that this Court review the decision issued by the Court of Appeals in this case.

This the 3rd day of June, 2016.

(Electronic Submission)
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Notice of Appeal and Petition for Discretionary Review has been duly served upon Ms. Sandra Wallace-Smith, Special Deputy Attorney General, North Carolina Department of Justice, Appellate Section, Post Office Box 629, Raleigh, North Carolina, 27602, by sending it in an email to: swsmith@ncdoj.gov.

This the 3rd day of June, 2016.

(Electronic Submission)
David W. Andrews
Assistant Appellate Defender

No. TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	From Mecklenburg County
v.	)	No. COA15-684
	)	06 CRS 222499-500
HARRY SHAROD JAMES	)	

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APPENDIX

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Table of Contents

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-684

Filed: 3 May 2016

Mecklenburg County, No. 06 CRS 222499

STATE OF NORTH CAROLINA

v.

HARRY SHAROD JAMES

Appeal by defendant from judgment entered 12 December 2014 by Judge Robert F. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defenders David W. Andrews and Barbara S. Blackman, for defendant-appellant.

McCULLOUGH, Judge.

Harry Sharod James ("defendant") appeals from judgment entered upon his resentencing for first-degree murder as ordered by our Supreme Court. For the following reasons, we affirm the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq*., but reverse and remand this case for further resentencing proceedings.

I. Background

On 19 June 2006, a Mecklenburg County Grand Jury indicted defendant on one count of murder and one count of robbery with a dangerous weapon. The

indictments were the result of events that occurred on 12 May 2006 when defendant was sixteen years old.

At the conclusion of defendant's trial on 10 June 2010, a jury returned verdicts finding defendant guilty of first-degree murder both on the basis of malice, premeditation, and deliberation and under the first-degree felony murder rule and finding defendant guilty of robbery with a dangerous weapon. The trial court then entered separate judgments sentencing defendant to a term of life imprisonment without the possibility of parole for first-degree murder and sentencing defendant to a concurrent term of 64 to 86 months imprisonment for robbery with a dangerous weapon. Defendant's sentence of life without parole for first-degree murder was mandated by the version of N.C. Gen. Stat. § 14-17 in effect at that time. *See* N.C. Gen. Stat. § 14-17 (2010).

Defendant appealed to this Court and, among other issues, argued a sentence of life without the possibility of parole for a juvenile was cruel and unusual punishment in violation of the juvenile's rights under the Eight Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. In asserting his argument, defendant identified two cases in which petitions for writ of certiorari were pending before the United States Supreme Court seeking review of the constitutionality of sentences of life without parole for juveniles.

On 18 October 2011, this Court filed an unpublished opinion in defendant's case holding the constitutional issue was not preserved for appeal and finding no error below. *State v. James*, __ N.C. App. __, 716 S.E.2d 876, available at 2011 WL 4917045 (18 October 2011) (unpub.). In so holding, we explained that defendant failed to preserve the issue by objecting at trial and, although significant changes in the applicable law may warrant review in some instances where an issue is not otherwise preserved, there had been no change in the law as it relates to sentencing juveniles to life without parole because the petitions for writ of certiorari in the cases referenced by defendant were still pending before the United States Supreme Court and there was no guarantee the Court would grant certiorari in either case, much less hold that sentences of life without parole for juveniles are unconstitutional. *Id.* at *5. From this Court's unanimous decision, defendant petitioned our Supreme Court for discretionary review.

Before our Supreme Court acted regarding defendant's petition in this case, the United States Supreme Court granted certiorari in the two cases referenced in defendant's argument to this Court, heard arguments in those cases in tandem on 20 March 2012, and issued its decision in *Miller v. Alabama*, 567 U.S. __, 183 L. Ed. 2d 407 (2012), on 25 June 2012. In *Miller*, the Court meticulously reviewed its decisions in *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) (holding imposition of the death penalty on juvenile offenders is prohibited by the Eighth

Amendment), and *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010) (holding the imposition of a sentence of life without parole on a juvenile offender who did not commit homicide is prohibited by the Eighth Amendment), and then held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at __, 183 L. Ed. 2d at 424. The Court summarized the rationale for its holding as follows:

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

Id. at __, 183 L. Ed. 2d at 423 (internal citations omitted). More concisely, "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*. at __, 183 L. Ed. 2d at 422. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too

great a risk of disproportionate punishment." *Id.* at __, 183 L. Ed. 2d at 424. Thus, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at __, 183 L. Ed. 2d at 430.

In response to *Miller*, our General Assembly approved "an act to amend the state sentencing laws to comply with the United States Supreme Court decision in *Miller v. Alabama*" (the "Act") on 12 July 2012. *See* 2012 N.C. Sess. Laws 148 (eff. 12 July 2012). To meet the requirements of *Miller*, the first section of the Act established new sentencing guidelines for defendants convicted of first-degree murder who were under the age of eighteen at the time of their offense. *See* 2012 N.C. Sess. Laws 148, sec. 1. The new sentencing guidelines, originally designated to be codified in Article 93 of Chapter 15A of the North Carolina General Statutes as N.C. Gen. Stat. §§ 15A-1476 to -1479, are now codified in Part 2A of Chapter 81B of Chapter 15A of the North Carolina General Statutes as N.C. Gen. Stat. §§ 15A-1340.19A to -1340.19D. N.C. Gen. Stat. § 14-17 was later amended to indicate that juveniles were to be sentenced pursuant to the new sentencing guidelines. *See* 2013 N.C. Sess. Laws 410, sec. 3(a) (eff. 23 August 2013) (amending N.C. Gen. Stat. § 14-17 to provide that "any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, *except that any such person who was under 18*

years of age at the time of the murder shall be punished in accordance with Part 2A of Article 81B of Chapter 15A of the General Statutes.") (emphasis added).

Following the enactment of the Act, our Supreme Court, by special order on 23 August 2012, allowed defendant's petition in this case as follows:

> Defendant's Petition for Discretionary Review as amended is allowed for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to [the new sentencing guidelines].

State v. James, 366 N.C. 214, 748 S.E.2d 527 (2012).

Prior to defendant's case coming on for resentencing, defendant filed various motions with memorandums of law seeking to avoid resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq*. Those motions raised many of the same issues now before this Court on appeal.

On 5 December 2014, defendant's case came on for a resentencing hearing in Mecklenburg County Superior Court before the Honorable Robert F. Johnson. That sentencing hearing continued on 8 December 2014 and concluded on 12 December 2014. Upon considering defendant's motions, the trial court denied the motions and proceeded to resentence defendant to life imprisonment without parole for first-degree murder pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq*. The judgment indicated it was *nunc pro tunc* 10 June 2010. A resentencing order filed the same day was attached to the judgment. Defendant gave notice of appeal in open court.

II. Discussion

In *State v. Lovette*, 225 N.C. App. 456, 737 S.E.2d 432 (2013) ("*Lovette I*"), this Court summarized the pertinent portions of the new sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq*. as follows:

> [N.C. Gen. Stat. §] 15A-1340.19B(a) provides that if the defendant was convicted of first-degree murder *solely* on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2012). In all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A-1340.19B, 15A-1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole. N.C. Gen. Stat. §§ 15A-1340.19B(a)(2), 15A-1340.19C(a).

Id. at 470, 737 S.E.2d at 441 (footnote omitted). Defendant now asserts constitutional arguments against his resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq*. Defendant also argues the trial court failed to make proper findings of fact and abused its discretion in imposing a sentence of life without parole. We address the issues in the order they are raised on appeal.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "The

standard of review for application of mitigating factors is an abuse of discretion." *State v. Hull*, __ N.C. App. __, __, 762 S.E.2d 915, 920 (2014).

1. *Ex Post Facto*

Defendant first argues that his resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq*. violates the constitutional prohibitions on *ex post facto* laws. *See* U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. Defendant contends he should have been resentenced "consistent with sentencing alternatives available as of the date of the commission of the offense[,]" specifically, "within the range for the lesser-included offense of second-degree murder." We are not persuaded.

Pertinent to this appeal, our Courts have "defined an *ex post facto* law as one which . . . allows imposition of a different or greater punishment than was permitted when the crime was committed . . . ." *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991) (citing *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)). Our Courts have also recognized that "[t]here are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects." *State v. Barnes*, 345 N.C. 184, 234, 481 S.E.2d 44, 71 (1997).

There is no dispute concerning the first element in this case. N.C. Gen. Stat. § 15A-1340.19A *et seq*. was enacted on 12 July 2012, over six years after defendant

committed the offense on 12 May 2006. Thus, the trial court's application of N.C. Gen. Stat. § 15A-1340.19A *et seq*. in resentencing defendant was retroactive.

Regarding the second element, defendant claims he was disadvantaged by the retroactive application of N.C. Gen. Stat. § 15A-1340.19A *et seq*. Upon review, we hold there is no merit to defendant's claim. As noted above, at the time defendant committed the offense, N.C. Gen. Stat. § 14-17 mandated that defendant be sentenced to life without parole. N.C. Gen. Stat. § 15A-1340.19A *et seq*., enacted by the General Assembly in response to the United States Supreme Court's holding in *Miller* that mandatory sentences of life without parole for juvenile offenders are unconstitutional, does not impose a different or greater punishment than was permitted when the crime was committed; nor does it disadvantage defendant in any way. N.C. Gen. Stat. § 15A-1340.19A *et seq*. merely provides sentencing guidelines that address the concerns raised in *Miller* by requiring a sentencing hearing in which the trial court must consider mitigating circumstances before imposing a sentence of life without parole, the harshest penalty for a juvenile. Thus, under N.C. Gen. Stat. § 15A-1340.19A *et seq*., the harshest penalty remains life without parole, but the trial court has the option of imposing a lesser sentence of life imprisonment with parole. *See* N.C. Gen. Stat. § 15A-1340.19B(a)(2).

Nevertheless, defendant contends that he should have been resentenced to the most severe constitutional penalty at the time the offense was committed. Defendant

claims "[t]he only constitutional sentence [he] could have received was a sentence within the range for the lesser-included offense of second-degree murder[,]" which would have resulted in a lesser sentence. In support of his argument, defendant relies on cases from other jurisdictions. *See State v. Roberts*, 340 So. 2d 263 (La. 1976); *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013); *Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013). Yet, in the cases cited by defendant, there is no indication that the legislatures in those states enacted new sentencing guidelines that controlled after the mandatory sentences provided in their respective statutes were determined unconstitutional. In fact, the court in *Brown* indicated that the trial judge's sentencing approach was due in part to the fact that "the Legislature had not prescribed the procedures for the individualized sentencing hearing contemplated by *Miller*[.]" 1 N.E.3d at 262. As a result, the courts in those cases severed the unconstitutional portions of the statutes in effect at the time of the offenses and sentenced the defendants pursuant to the remaining constitutional portions of the statutes.[1]

[1] In *Roberts*, the defendant's death sentence was unconstitutional and the court remanded with instructions for the lower court to resentence the defendant to "imprisonment at hard labor for life without eligibility for parole, probation or suspension of sentence for a period of twenty years[,]" the most severe constitutional penalty for criminal homicide at the time. 340 So. 2d at 263-64. In *Jackson*, the juvenile defendant's mandatory sentence of life without parole for capital murder was unconstitutional and the court remanded with instructions that the lower court "hold a sentencing hearing where [the defendant] may present *Miller* evidence for consideration[]" and "[the defendant's] sentence must fall within the statutory discretionary sentencing range for a Class Y felony[,] . . . a discretionary sentencing range of not less than ten years and not more than forty years, or life." 426 S.W.3d at 911. In *Brown*, the juvenile defendant's mandatory sentence of life without parole for first-

In the present case, however, the General Assembly acted quickly in response to *Miller* and passed the Act, establishing new sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq*. for juveniles convicted of first-degree murder. The General Assembly made clear that N.C. Gen. Stat. § 15A-1340.19A *et seq*. was to apply retroactively, providing in the third section of the Act that, in addition to sentencing hearings held on or after the effective date of the Act, the Act "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." 2012 N.C. Sess. Laws 148, sec. 3.

Because N.C. Gen. Stat. § 15A-1340.19A *et seq*. does not impose a more severe punishment than that originally mandated in N.C. Gen. Stat. § 14-17, 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*. Thus, there is no violation of the constitutional prohibitions on *ex post facto* laws.

2. Presumption

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degree murder was unconstitutional and the court remanded to the lower court for resentencing with instructions that the defendant be sentenced to a mandatory sentence of life with the possibility of parole. 1 N.E.3d at 268.

Defendant next argues N.C. Gen. Stat. § 15A-1340.19A *et seq*. violates the constitutional guarantees against cruel and unusual punishment. S*ee* U.S. Const. Amend. 8; N.C. Const. art. I, § 27. Specifically, defendant contends N.C. Gen. Stat. § 15A-1340.19A *et seq*. presumptively favors a sentence of life without parole for juveniles convicted of first-degree murder and, therefore, the risk of disproportionate punishment under N.C. Gen. Stat. § 15A-1340.19A *et seq*. is as great as it was when N.C. Gen. Stat. § 14-17 mandated a sentence of life without parole for juveniles convicted of first-degree murder.

Defendant relies on the language in N.C. Gen. Stat. § 15A-1340.19A *et seq*. to support his argument that there is a presumption in favor of life without parole. Specifically, defendant points to N.C. Gen. Stat. § 15A-1340.19C(a), which provides, "[t]he 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 added). Defendant contends that the inclusion of only "mitigating factors" and the use of "instead of" demonstrates there is a presumption in favor of life without parole.

We first note that the use of "instead of," considered alone, does not show there is a presumption in favor of life without parole. Even the definitions of "instead of"

quoted by defendant, *see Duer v. Hoover & Bracken Energies, Inc*. 753 P.2d 395, 398 (Okla. Ct. App. 1986) ("as a substitute for or alternative to"); The American Heritage Dictionary of the English Language, 909 (5th ed. 2011) ("[i]n place of something previously mentioned"), seem to indicate that "instead of" is merely used to distinguish between sentencing options. This is consistent with N.C. Gen. Stat. § 15A-1340.19B(a)(2), which states, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17, *or* a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2) (emphasis added).

Yet, the reason for the General Assembly's use of "instead of" in N.C. Gen. Stat. § 15A-1340.19C(a), as opposed to "or," becomes clear when considered in light of the fact that the sentencing guidelines require the court to consider only mitigating factors. Because the statutes only provide for mitigation from life without parole to life with parole and not the other way around, it seems the General Assembly has designated life without parole as the default sentence, or the starting point for the court's sentencing analysis. Thus, to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption.

We decline, however, to hold that presumption is unconstitutional and we do not think N.C. Gen. Stat. § 15A-1340.19A *et seq*. "turns *Miller* on its head by making

life without parole sentences the norm, rather than the exception[,]" as defendant asserts. In *Miller*, the Court made clear that it was not holding sentences of life without parole for juveniles unconstitutional. *See* 567 U.S. at __, 183 L. Ed. 2d at 424 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.") The Court's holding in *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. As noted in our discussion of defendant's first issue, these sentencing guidelines seem to comply precisely with the requirements of *Miller*.

Moreover, given that N.C. Gen. Stat. § 15A-1340.19A *et seq*. was enacted in response to *Miller* to allow the youth of a defendant and its attendant characteristics to be considered in determining whether a lesser sentence than life without parole is warranted, it seems commonsense that the sentencing guidelines would begin with life without parole, the sentence provided for adults in N.C. Gen. Stat. § 14-17 that the new guidelines were designed to deviate from. *See* N.C. Gen. Stat. § 15A-1340.19B(a)(2) (referring to "life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17[]"). This commonsense approach is supported by repeated references to mitigation in *Miller* and the cases it relies on. For example, the Court in *Miller* refers to the "mitigating qualities of youth," 567 U.S. at __, 183 L. Ed. 2d at 422, and explains that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." 567 U.S. at __, 183 L. Ed. 2d at 430.

While the Court did indicate in *Miller* that it thought "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon[,]" the Court explained that its belief was based on "all [it had] said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change[]" and "the great difficulty [it] noted in *Roper* and *Graham* of distinguishing at [an] early age between 'the juvenile offender whose crime reflects unfortunate yet

transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " 576 U.S. at __, 183 L. Ed. 2d at 424 (quoting *Roper*, 543 U.S. at 573, 161 L. Ed. 2d 1; *Graham*, 560 U.S. at 68, 176 L. Ed. 2d 825). Explaining that *Miller* announced a substantive rule of constitutional law, the Court has since stated that although *Miller* "did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*[,] *Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, __ U.S. at __, 193 L. Ed. 2d at 620.

Upon review, 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*.

For these reasons, we hold it is not inappropriate, much less unconstitutional, for the sentencing analysis in N.C. Gen. Stat. § 15A-1340.19A *et seq*. to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender

should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm.

3. Due Process

In his last constitutional challenge, defendant argues N.C. Gen. Stat. § 15A-1340.19A *et seq*. deprives him of the right to due process of law, s*ee* U.S. Const. Amend. 14; N.C. Const. art. I, § 19, because the law is unconstitutionally vague and will lead to arbitrary sentencing decisions for juvenile offenders.

In *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), our Supreme Court explained that "[i]t is an essential element of due process of law that statutes contain sufficiently definite criteria to govern a court's exercise of discretion." 348 N.C. at 596, 502 S.E.2d at 823. In construing whether a statute contains sufficient criteria, the Court begins with the presumption that the statute is constitutional. *Id*. at 596, 502 S.E.2d at 824. The court then strictly construes the statute in a manner that allows the intent of the legislature to control. *Id*. Intent of the legislature may be determined by the circumstances surrounding enactment of the statute. *Id*.

> Under a challenge for vagueness, the [United States] Supreme Court has held that a statute is unconstitutionally vague if it either: (1) fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"; or (2) fails to "provide explicit standards for those who apply [the law]."

Id. at 597, 502 S.E.2d at 824 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)). The North Carolina standard is nearly identical. *Id*.

(citing *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) ("When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.")).

As in *Green*, defendant only challenges the second prong of the vagueness standard, the "guidance" component, in this case. Defendant does not challenge the vagueness standard's first prong, the "notice" requirement.

Specifically, defendant contrasts the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq*. with those for capital sentencing, N.C. Gen. Stat. § 15A-2000, and structured sentencing, N.C. Gen. Stat. § 15A-1340.16, in that the sentencing guidelines do not provide for the consideration of aggravating factors. Because the sentencing guidelines do not provide a process to weigh aggravating and mitigating factors, defendant contends the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq*. "fail[] to provide any process by which a court can identify the few children who warrant life in prison without parole." We disagree.

A review of sentencing guidelines is important. N.C. Gen. Stat. § 15A-1340.19B sets forth the procedure for sentencing a defendant who was a juvenile at the time they committed first-degree murder. As previously quoted, it first requires that if defendant is not convicted of first-degree murder solely on the basis of the felony murder rule, "the court shall conduct a hearing to determine whether the

defendant should be sentenced to life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17, or a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2). Subsection (b) then provides for the consideration of evidence at the sentencing hearing. Subsection (b) does not require evidence presented during the guilt determination phase of the trial to be resubmitted, but provides that "[e]vidence, including evidence in rebuttal, may be presented as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received." N.C. Gen. Stat. § 15A-1340.19B(b). That evidence includes evidence of mitigating factors. Specifically, subsection (c) provides that a defendant "may submit mitigating circumstances to the court[.]" N.C. Gen. Stat. § 15A-1340.19B(c). Those mitigating circumstances may include, but are not limited to, the following: "(1) Age at the time of the offense[;] (2) Immaturity[;] (3) Ability to appreciate the risks and consequences of the conduct[;] (4) Intellectual capacity[;] (5) Prior record[;] (6) Mental health[;] (7) Familial or peer pressure exerted upon the defendant[; and] (8) Likelihood that the defendant would benefit from rehabilitation in confinement." *Id.* The list also includes, "(9) Any other mitigating factor or circumstance." *Id.* Both the State and the defendant are "permitted to present argument for or against the sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(d). In conjunction with N.C. Gen. Stat. § 15A-1340.19B, N.C. Gen. Stat. § 15A-1340.19C requires "[t]he court [to] 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).

Upon review of these sentencing guidelines, we reiterate what we have noted in our discussion of the first two issues on appeal – 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).

We also note that in addressing a comparison between the discretion afforded in N.C. Gen. Stat. § 15A-1340.19A *et seq*. and capital punishment sentencing similar to defendant's comparison in this case, in *State v. Lovette*, __ N.C. App. __, 758 S.E.2d 399 (2014) ("*Lovette II*"), this Court stated that "our capital sentencing statutes have

no application[.]" __ N.C. App. at __, 758 S.E.2d at 406. This Court further explained that "[a]lthough 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*.

Defendant also argues N.C. Gen. Stat. § 15A-1340.19A *et seq*. violates his right to trial by jury. In support of his arguments, defendant again compares N.C. Gen. Stat. § 15A-1340.19A *et seq*. to capital sentencing and structured sentencing, which require a jury to determine the existence of aggravating factors. *See State v. Everette*, 361 N.C. 646, 650, 652 S.E.2d 241, 244 (2007) ("[I]n most instances, aggravating factors increasing a defendant's sentence must be submitted to a jury and proved beyond a reasonable doubt.") (citing *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004)). However, as defendant asserts in his void for vagueness argument, N.C. Gen. Stat. § 15A-1340.19A *et seq*. does not require the finding of aggravating factors. The sentencing guidelines only require the sentencing court to consider the mitigating circumstances of defendant's youth to determine whether a lesser punishment of life without parole is appropriate. Thus, no jury determination was required and defendant's argument is without merit.

4. Findings of Fact

In the first non-constitutional issue raised on appeal, defendant contends the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. We agree.

N.C. Gen. Stat. § 15A-1340.19C provides that "[t]he order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." N.C. Gen. Stat. § 15A-1340.19C(a). In *State v. Antone*, __ N.C. App. __, 770 S.E.2d 128 (2015), this Court noted that " 'use of the language "shall" is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.' " __ N.C. App. at __, 770 S.E.2d at 130 (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)). This Court then reversed the trial court's decision in *Antone* to sentence the juvenile offender to life without parole, holding the trial court's one-page sentencing order did not contain sufficient findings of fact to meet the mandate in N.C. Gen. Stat. § 15A-1340A.19C(a). *Id*. at __, 770 S.E.2d at 130. This Court explained as follows:

> The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.
>
> We also note that portions of the findings of fact are more

> recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.19B(c). If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

Id. at __, 770 S.E.2d at 130-31 (internal citations omitted).

The present case is easily distinguishable from *Antone* in that the trial court's order spans ten pages and includes thirty-four findings of fact. Yet, despite acknowledging that the resentencing order "describes in great detail trial facts as to the offense and evidence elicited at the resentencing hearing[,]" defendant still contends the findings are insufficient. Defendant asserts that "[n]owhere in the order did the resentencing court indicate which evidence demonstrated 'the absence or presence of any mitigating factors.' " We agree.

As the defendant acknowledges, the trial court did issue many findings concerning both the circumstances of the offense and the circumstances of defendant. Many of those findings go to factors identified as mitigating factors in N.C. Gen. Stat. § 15A-1340.19B(c), such as age, upbringing, living environment, prior incidents, and intelligence. But, it is unclear from the order whether many of the findings are mitigating or not. For example, and as pointed out by defendant, the trial court found in finding number twenty-three, "[d]efendant was once a member of the 'Bloods' gang and wore a self-made tattoo of a 'B' on his arm." Yet that finding further provided,

"[a]s of October, 2005 [defendant] was no longer affiliated with the gang. He had been referred to the Charlotte Mecklenburg Police Department 'Gang of One' program that worked with former gang members." This finding could be interpreted different ways – defendant was capable of rehabilitation or rehabilitative efforts had failed. Similarly, the trial court found in finding of fact number nine that "[a]t the time of the crime [defendant] was 16 years, 9 months old." While the finding makes clear that defendant was a juvenile, it is unclear whether defendant's age is mitigating or not. In finding of fact number twenty-six, the trial court found that "individuals around the age of 16 can typically engage in cognitive behavior which requires thinking through things and reasoning, but not necessarily self-control." In that same finding, however, the trial court also found, "[t]hings that may affect an individual's psycho-social development may be environment, basic needs, adult supervision, stressful and toxic environment, peer pressure, group behavior, violence, neglect, and physical and/or sexual abuse." The trial court's other findings show that defendant has experienced many of those things found by the trial court to affect development.

Instead of identifying which findings it considered mitigating and which were not, after making its findings, the trial court summarized its considerations in finding of fact thirty-four as follows:

> The Court, has considered the age of the Defendant at the time of the murder, his level of maturity or immaturity, his

> ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the Defendant, but only helpful as to the light the juvenile investigation sheds upon Defendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by Defendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered Defendant's statements to the police and his contention that it was his co-defendant . . . who planned and directed the commission of the crimes against [the victim], the Court does not note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the Defendant that the mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

This finding in no way demonstrates the "absence or presence of any mitigating factors." It simply lists the trial court's considerations and final determination. We hold this finding insufficient and require the trial court to identify which considerations are mitigating and which are not.

Additionally, other considerations listed by the trial court are not supported by findings. "[A] finding of 'irreparable corruption' is not required," *Lovette II*, __ N.C. App. at __, 758 S.E.2d at 408, but "the likelihood of whether a defendant would benefit from rehabilitation in confinement[] is a significant factor." *Antone*, __ N.C. App. at

__, 770 S.E.2d at 130. In finding of fact thirty-four, the trial court indicated that it took into consideration "the likelihood that [defendant] would benefit from rehabilitation in confinement." Yet, there is no finding of fact concerning the likelihood of rehabilitation. In fact, in finding of fact number twenty-seven, the trial court found that the clinical psychologist "was unable to say with any certainty that . . . [defendant] would or would not reoffend."

While 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).

5. Abuse of Discretion

In the last issue on appeal, defendant argues the trial court abused its discretion in resentencing him to life without parole under N.C. Gen. Stat. § 15A-1340.19A *et seq*. In support of his argument, defendant distinguishes the circumstances in his case from those considered in *Lovette II*, in which this Court determined the trial court did not err in sentencing a juvenile offender to life without parole. __ N.C. App. at __, 758 S.E.2d at 410.

As this Court stated in *Lovette II*, "[t]he findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole[.]" *Id*. at __, 758 S.E.2d at 408. "The trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason

and could not have been the result of a reasoned decision." *State v. Westall*, 116 N.C. App. 534, 551, 449 S.E.2d 24, 34 (1994). Having just held the trial court did not issue adequate findings of fact, we must hold the trial court abused its discretion in sentencing defendant to life without parole. This holding, however, expresses no opinion on whether such sentence may be appropriate on remand; it 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.

III. Conclusion

For the reasons discussed, we affirm the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq*. However, the trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors as required by N.C. Gen. Stat. § 15A-1340.19C(a). As a result, it is difficult for this Court to review the trial court's determination that life without parole was appropriate in this case and we must reverse and remand to the trial court for further sentencing proceedings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and GEER concur.