No. 514PA11-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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DEFENDANT-APPELLANT'S NEW BRIEF

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ISSUES PRESENTED

I. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE UNDER N.C.G.S. § 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.G.S. § 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.G.S. § 15A-1340.19A, *ET SEQ.*, TO MR. JAMES' CASE DID NOT VIOLATE THE PROHIBITIONS AGAINST *EX POST FACTO* LAWS?

STATEMENT OF THE CASE

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) A jury later found Mr. James guilty 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 in prison 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.G.S. § 15A-1340.19A, *et seq.*, which was enacted after the *Miller* decision was issued. (R pp 21-22)

Mr. James's case was heard for resentencing beginning on December 5, 2014. Judge Johnson again presided over the case. Mr. James argued that

sentencing him under N.C.G.S. § 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. Additionally, he argued that the scheme 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 concluded that N.C.G.S. § 15A-1340.19A, *et seq.*, did not violate Mr. James' constitutional rights. (3T pp 405-06)

On December 12, 2014, at the conclusion of the resentencing hearing, Judge Johnson also imposed a sentence of life 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 holding 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, ___ N.C. App. ___, ___, 786 S.E.2d 73, 78 (2016). The Court also held that while the new sentencing scheme contained a presumption in favor of life without parole, the presumption did not violate *Miller*. *Id*. at ___, 786 S.E.2d at 80. 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 ___, 786 S.E.2d at 82. Finally, the Court remanded the case for further sentencing proceedings because Judge Johnson did not make sufficient findings of fact to support Mr. James's sentence of life without parole. *Id*. at ___, 786 S.E.2d at 84.

On June 3, 2016, Mr. James filed a notice of appeal and petition for discretionary review with this Court. The State filed a response and a conditional request for presentation of an additional issue on June 13, 2016. On March 16, 2017, this Court issued orders denying Mr. James' notice of appeal, but granting his petition for discretionary review and the State's conditional request for presentation of an additional issue.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Review of the decision of the Court of Appeals in this case is based on this Court's order allowing Mr. James' petition for discretionary review and the State's conditional request for review of an additional issue under N.C. R. App. P. 15 and N.C.G.S. § 7A-31.

STATEMENT OF THE FACTS

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' mother also began dating and eventually married another man. However, the man was violent. (1T p 43) In one incident when Mr. James was nine-years old, Mr. James confronted the man with a stick in order to protect his mother. (1T pp 105-06)

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) A separate report prepared by the Department of Social Services in May 2005 stated that Mr. James advised a social worker that he went to a party after running away from home. During the party, 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) Although Mr. James' account was not substantiated, the report concluded that Mr. James had been sexually assaulted by two individuals. (2T pp 215, 218, 297-97) Mr. James' father later teased Mr. James about the assault. (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 later adjudicated delinquent for communicating threats, but the assault petition was dismissed. (2T p 413) A report prepared as part of the case by the Department of Juvenile Justice and Delinquency Prevention stated that Mr. James had become active in tae kwon do and had a "very good relationship with his instructor." (2T p 264) Mr. James later lived with his tae kwon do instructor for two weeks between court hearings in the case. (1T p 86)

By May 2005, Mr. James was enrolled in a program to obtain his GED. According to a Mecklenburg County DSS report, Mr. James was making "excellent progress" in the program. (2T pp 224-25) 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. However, he was unable to enroll in the program because his foster parents refused to take him to the program's orientation. His social worker also failed to take him to the orientation because she 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)

Mr. James later became involved in a church-sponsored mentoring group. (R p 16) In early 2006, he met Curtis Jenkins through the group and

introduced Mr. Jenkins to his twenty-one year old friend Adrian Morene. Morene later suggested that they rob Mr. Jenkins. (R p 16) According to Mr. James, Morene threatened to harm his family if Mr. James did not help with the robbery. (R p 16) On May 11, 2006, Mr. James and Morene went to Mr. Jenkins' home. Mr. James rang the doorbell. After Mr. Jenkins answered the door, Morene threatened Mr. Jenkins with a BB gun that resembled a revolver. 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 December 2014 sentencing hearing in the case, Dr. Robert Custrini, a clinical psychologist, testified that when children reach puberty, they experience a spike in reward-seeking and sensation-seeking behavior. (2T p 312) According to Dr. Custrini, the presence of peers can increase the risk of reckless behavior in juveniles. (2T p 319) Dr. Custrini further explained that "most adolescents who commit serious crimes don't in fact re-offend into adulthood." (2T p 320) He also testified that there was no test that could predict the "future dangerousness" of children. (2T p 320)

At the conclusion of the resentencing hearing, the trial court found, among other things, that Mr. James was the "product of a broken home," that he had failed two grades in school as a result of being homeless, and that he had been adjudicated delinquent for threatening to kill his mother. (R pp 105-06) The court also found that by 2005, Mr. James had become active in tae kwon do and had "developed a good relationship with his instructor." (T p 106) Additionally, the court found that Mr. James was enrolled in a program to obtain his GED and develop life skills, and that by 2006 he was making progress. (R p 107) According to the court, Mr. James actively participated in the murder and did not show remorse for his involvement in the murder. (R pp 106, 109)

In finding of fact number 34, the court stated that it had

> considered the age of [Mr. James] 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 [Mr. James], but only helpful as to the light the juvenile investigation sheds upon [Mr. James'] 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 [Mr. James'] 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 [Mr. James'] 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 note that in some of the details and contentions

> the statement is self-serving and contradicted by physical evidence in the case.

(R p 109, A p 9)[1] The court then ruled that the mitigating factors were "insufficient to warrant imposition of a sentence of less than life without parole." (R p 109, A p 9)

STANDARD OF REVIEW

A decision of the Court of Appeals is reviewed by this Court for any error of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994).

ARGUMENT

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

When a juvenile defendant is convicted of first-degree murder, the trial court may not impose a sentence of life without parole unless the defendant is one of the "rarest" juveniles whose conduct reflects "permanent incorrigibility" or "irreparable corruption." *Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 620 (2016) (*citing Miller v. Alabama*, 567 U.S. ___, ___, 183 L. Ed. 2d 407, 424 (2012)). In the opinion below, the Court of Appeals upheld the sentencing scheme in N.C.G.S. § 15A-1340.19A, *et seq.*,

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[1] A copy of the sentencing order is included in the appendix. (A pp 1-10)

after concluding that it contained a presumption in favor of life without parole. *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 78 (2016). By upholding the sentencing scheme – and thereby sanctioning the presumption – the Court of Appeals rendered a decision that will result in sentences that violate the Eighth Amendment to the United States Constitution and Article I, § 27 of the North Carolina Constitution. If a sentence of life without parole is excessive for "all but the 'rare juvenile'" whose crime reflects irreparable corruption, *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620, then a presumption in favor of life without parole is unconstitutional and in conflict with *Miller* and *Montgomery*. As a result, the opinion below must be reversed.

A. The differences between children and adults "counsel against irrevocably sentencing" children to life in prison.

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" based in part on their lack of control over their environment, 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 convicted of 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*, 567 U.S. at ___, 183 L. Ed. 2d at 424. As part of its holding, the Court held that the differences between juveniles and adults "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Id*. According to the Court, sentences of life in prison without parole "will be uncommon" because juveniles have "diminished culpability and heightened capacity for change" and it is difficult to differentiate 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).

After *Miller*, at least three courts recognized that sentencing schemes for juvenile defendants convicted of first-degree murder may not start with a presumption in favor of life without parole. In *People v. Gutierrez*, 324 P.3d 245, 262 (Cal. 2014), the Supreme Court of California held that a sentencing scheme that contained a presumption in favor of life without parole would be in "serious tension" with *Miller*. In *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015), the Supreme Court of Connecticut held that *Miller* established, "in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." 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 (Iowa 2015). In each case, the appellate courts understood that a presumption in favor of life without parole was inconsistent with the Supreme Court's statements in *Miller* that sentences of life without parole should be "rare" and "uncommon."

In 2016, the Supreme Court of the United States decided *Montgomery v. Louisiana*, which provided additional authority for the conclusion that a

presumption in favor of life without parole is unconstitutional. The Court held that *Miller* was retroactive. *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620. In reaching its decision, however, the Court stated that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole . . . ." *Id*. at ___, 193 L. Ed. 2d at 619. According to the Court, *Miller* also "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id*. at ___, 193 L. Ed. 2d at 620. The Court reiterated that even if a sentencing judge considers a child's age before sentencing him or her to life 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).

The State itself acknowledges that a presumption in favor of life without parole would be "injurious to *Miller's* intent . . . ." State-Appellant's Brief, p. 10. Further, the State asserts that it is "clear" that the only presumption that would conform to *Miller* is a presumption in favor of life with parole. State-Appellant's Brief, p. 10. Thus, a sentencing scheme that contained a presumption in favor of life without parole would be unconstitutional under *Miller* and *Montgomery*.

B. North Carolina's sentencing scheme operates based on a presumption in favor of life without parole.

Seventeen days after the Supreme Court issued its opinion in *Miller* – and three and a half years before the *Montgomery* opinion – the North Carolina General Assembly enacted a new sentencing scheme for juvenile defendants convicted of first-degree murder. 2012 N.C. Sess. Laws Ch. 148 (S 635).[2] Under the new sentencing scheme, a juvenile defendant convicted of murder where the sole basis for conviction was felony murder must be sentenced to life with parole. N.C.G.S. § 15A-1340.19B(a)(1); (A p 2). All other juvenile defendants are entitled to a sentencing hearing in which the defendants may submit evidence of mitigating factors. N.C.G.S. § 15A-1340.19B(a)(2) and (c); (A p 2). There are eight enumerated mitigating factors, plus a catchall mitigating factor. N.C.G.S. § 15A-1340.19B(c); (A p 2). At the conclusion of the sentencing hearing, the court must "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.G.S. § 15A-1340.19C(a); (A p 3). The court must also make findings "on the absence or presence of any mitigating

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[2] Copies of the statutes are included in the appendix. (A pp 11-14)

factors and such other findings as the court deems appropriate to include in the order." *Id.*; (A p 3).

Careful examination of the sentencing scheme demonstrates that it contains a presumption in favor of life without parole and thereby violates *Miller* and *Montgomery*. First, N.C.G.S. § 15A-1340.19C(a) states that the trial court must consider mitigating factors to determine whether the defendant "should be sentenced to life imprisonment with parole instead of life imprisonment without parole." (emphasis added). The use of the phrase "instead of" strongly suggests that a sentence of life with parole is simply a secondary alternative to the default sentence of life without parole. The wording of N.C.G.S. § 15A-1340.19C(a) does not indicate that sentences of life with parole and life without parole are equal alternatives. For example, the provision does not state that the court must choose "either" or "between" life with parole and life without parole. Rather, the words "instead of" indicate that a sentence of life with parole is an option only after the court finds sufficient mitigating factors and decides not to impose a sentence of life without parole.

Second, the court's decision under the sentencing scheme is guided almost exclusively by the existence of mitigating factors. Under N.C.G.S. § 15A-1340.19B, defendants may present evidence of eight mitigating factors,

plus a catchall mitigating factor. However, mitigating factors are used by defendants to show that the case "warrant[s] a less severe sentence." *State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918 (2006). By including only mitigating factors in N.C.G.S. § 15A-1340.19B, the General Assembly created a scheme in which the sole decision is whether to push the sentence down from the default sentence of life without parole to the lesser sentence of life with parole.

Third, the statutory scheme does not require evidence of any aggravating factors that would render a juvenile eligible for the higher sentence of life without parole. Critically, the sentencing scheme does not require evidence that *Miller* and *Montgomery* found essential to support life without parole sentences: proof that the defendant was "irreparably corrupt" or "permanently incorrigible." More generally, there is no requirement that the court find any aggravating factors that the court could use to push the sentence up to the higher sentence of life without parole. Thus, although a trial court must justify a sentence of life with parole by finding mitigating factors, the court is not compelled to justify a sentence of life without parole by finding any aggravating factors. The court can simply impose life without parole without any aggravating factors at all.

In addition to the wording of N.C.G.S. § 15A-1340.19A, *et seq.*, the

order on Mr. James' sentence also reflects the presumption in favor of life without parole. After reciting 34 findings of fact, the trial court stated that the mitigating factors were "insufficient to warrant imposition of a sentence of less than life without parole." (R p 109) Had there been no presumption under the sentencing scheme, the court would not have had to state that the mitigating factors could not pull the sentence down from the higher sentence of life without parole. In other words, the order demonstrates that the court believed any mitigating factors in the case were not strong enough for the court to depart from the default sentence of life without parole. Under the court's reasoning, the mitigating evidence that Mr. James presented simply could not overcome the presumption in favor of life without parole that was embedded in the sentencing scheme for *Miller* cases.

The presumption in favor of life without parole is also reflected in cases that have reached the appellate division. For cases in which there was a choice between sentences of life without parole and life with parole, trial courts have imposed life without parole under N.C.G.S. § 15A-1340.19A, *et seq.*, in at least six cases. *State v. Antone*, 240 N.C. App. 408, 770 S.E.2d 128 (2015); *State v. Lovette*, 233 N.C. App. 706, 758 S.E.2d 399 (2014); Record on Appeal at 189, *State v. Santillan*, No. COA17-251; Record on Appeal at 145-53, *State v. Sims*, No. COA17-45; Record on Appeal at 61-62, *State v. May*,

No. COA16-1121; Record on Appeal at 37-42, *State v. Williams*, No. COA16-178.[3] In *State v. Antone*, the defendant later received a sentence of life with parole on remand from his first appeal. Record on Appeal at 55-56, *State v. Antone*, No. COA16-1203. However, these cases demonstrate that a sentence of life without parole is not an uncommon occurrence, but is instead the presumptive sentence under N.C.G.S. § 15A-1340.19A, *et seq*.

C. The Court of Appeals incorrectly determined that the presumption was constitutional.

In the opinion below, the Court of Appeals held in part that the presumption in favor of life without parole was proper because *Miller* did not impose a categorical bar on all life without parole sentences, but instead simply required sentencing courts to consider the juvenile's diminished culpability and heightened capacity for change before imposing such a sentence. *James*, ___ N.C. App. at ___, 786 S.E.2d at 79; (A p 28).[4] As support for its holding, the Court also cited *Montgomery*, stating

> [t]he 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

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[3] Mr. James requests that this Court take judicial notice of the records on appeal in the *Santillan*, *Sims*, *May*, *Williams*, and *Antone* appeals, which is permitted under *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998).

[4] A copy of the Court of Appeals' opinion is included in the appendix. (A pp 15-41)

> 599, 610-11, 136 S. Ct. 718 (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.

Id. The thrust of the Court of Appeals' holding was that *Miller* would tolerate a presumption in favor of life without parole because *Miller* was limited and only required sentencing courts to "consider" mitigating evidence before imposing sentences of life without parole. However, the Court's holding was based on a misapprehension of both *Miller* and *Montgomery*.

Before *Montgomery* was issued, some courts interpreted *Miller* narrowly and believed that it only involved a question of procedure. *See, e.g., State v. Huntley*, 118 So.3d 95, 103 (La. Ct. App. 2013) (holding that *Miller* "merely added a procedural safeguard that must be followed in order to impose" a sentence of life without parole). However, *Montgomery* established that while *Miller* had a "procedural component," it nevertheless "announced a substantive rule of constitutional law." *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620. After *Montgomery*, many courts recognized that *Miller* could not be construed narrowly. In *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016), the Oklahoma Court of Criminal Appeals held that there was "no genuine question that the rule in *Miller* as broadened in *Montgomery* rendered a life without parole sentence constitutionally impermissible" for all but the rare juvenile defendant who was irreparably corrupt. In *Veal v.*

State, 784 S.E.2d 403 (Ga. 2016), the Supreme Court of Georgia explained that it initially believed that "*Miller* established a *procedural* rule . . . ." (emphasis in original). "Nevertheless, the explication of *Miller* by the majority in *Montgomery* demonstrates that our previous understanding of *Miller* . . . was wrong . . . ." *Id*. at 410.

Although the Court of Appeals in this case cited *Montgomery*, its interpretation of both *Montgomery* and *Miller* was incorrect. Indeed, portions of *Montgomery* directly contradict the reasoning of the Court of Appeals. As explained in *Montgomery*, *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole . . . ." *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619. *Miller* recognized 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). Consequently, the Court of Appeals' understanding of *Miller* and *Montgomery* was flawed. *Miller* cannot be construed as narrowly as the Court of Appeals interpreted the case. To the contrary, *Montgomery* demonstrates that *Miller* is much broader and bars courts from imposing even discretionary sentences of life without parole unless the evidence indicates that the defendant is the

rare juvenile who is irreparably corrupt or permanently incorrigible. Based on *Montgomery*, a presumption in favor of life without parole violates the Eighth Amendment under *Miller*.

The Court of Appeals also upheld the presumption in favor of life without parole because it believed that with "proper application" of the sentencing scheme, "it may very well be the uncommon case that a juvenile is sentenced to life without parole." *James*, ___ N.C. App. at ___, 786 S.E.2d at 80 (*quoting Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 610-11); (A p 31). Here again, the Court of Appeals was mistaken. As described below in Issue II, the sentencing scheme is not written in a way that could be properly applied by sentencing courts to winnow cases down to the "rare" juvenile who warrants a sentence of life without parole. The statutes do not provide sufficient guidance on how the court should weigh the mitigating factors and decide on a sentence. Although the sentencing scheme directs courts to "consider" mitigating factors before choosing a sentence, *Montgomery* makes clear that mere "consideration" of mitigating factors is not enough. Even if a court considers the juvenile's youth before imposing a sentence of life without parole, the sentence still violates the Eighth Amendment "for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620 (*quoting Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424).

Further, the sentencing scheme's requirement that courts include findings on the "absence or presence" of mitigating factors would not lead courts to impose life without parole in only uncommon cases. Whether mitigating factors are absent or present does not answer the separate but essential question that must be answered under *Miller*: whether the defendant is one of the rarest juveniles whose conduct reflects permanent incorrigibility or irreparable corruption. Consequently, the Court of Appeals erred by concluding that "proper application" of the sentencing scheme – including the presumption of life without parole – would lead to life without parole sentences only in uncommon cases.

D. Conclusion.

Under *Miller*, a sentence of life without parole is barred for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620. Based on North Carolina's sentencing scheme, life without parole sentences will be imposed in cases that do not involve the "rarest" of juvenile offenders because the statutes contain a presumption in favor of life without parole. As the sentencing scheme violates *Miller* and *Montgomery*, the decision below, which upheld the statutes, must be reversed.

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

In addition to upholding the presumption in favor of life without parole under N.C.G.S. § 15A-1340.19A, *et seq.*, the Court of Appeals also held that the sentencing scheme did not violate Due Process because it was not unconstitutionally vague and would not lead to arbitrary sentencing decisions. *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 82 (2016); (A p 34). Contrary to the opinion below, the sentencing scheme does not provide sufficient guidance for courts to determine how to sentence juveniles convicted of first-degree murder. Under *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012) and *Montgomery v. Louisiana*, 577 U.S. ___, 193 L. Ed. 2d 599 (2016), life without parole sentences are only constitutional for the rare juvenile who is irreparably corrupt or permanently incorrigible. However, the limited procedures outlined in the sentencing scheme do not enable courts to identify those rare juveniles. As the sentencing scheme does not provide sufficient guidance for courts to determine the proper sentence for juveniles convicted of first-degree murder, the opinion below must be reversed.

A. The sentencing scheme is too vague to ensure that courts choose proportionate sentences under *Miller*.

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).

Here, the sentencing scheme under N.C.G.S. § 15A-1340.19A, *et seq.*, is too vague to ensure that trial courts comply with *Miller* and *Montgomery*. In *Miller*, the Supreme Court explained that the differences between juveniles and adults "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Id.* According to the Court, sentences of life in prison without parole

"will be uncommon" because of the 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).

Montgomery then "broadened" the rule in *Miller*. *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016). There, the Supreme Court clarified that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole . . . ." *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619. Instead, as recognized in *Montgomery*, *Miller* barred life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at ___, 193 L. Ed. 2d at 620. In addition, the Court reiterated that a sentence of life without parole is "excessive for all but the 'rare juvenile offender whose crime reflects irreparable corruption.'" *Id*.

The sentencing scheme under N.C.G.S. § 15A-1340.19A, *et seq*., is too vague to satisfy *Miller* and *Montgomery* and ensure that only the rare juvenile who is irreparably corrupt or permanently incorrigible is sentenced to life without parole. First, the primary directive under the sentencing scheme is that courts must "consider" any mitigating factors in deciding whether to impose life without parole instead of life with parole. N.C.G.S. §

15A-1340.19C(a). (A p 3) However, mere consideration of mitigating factors is not sufficient. Generally, a juvenile's age and development are mitigating factors of "great weight." *Eddings v. Oklahoma*, 455 U.S. 104, 116, 71 L. Ed. 2d 1, 12 (1982). Further, as explained in *Montgomery*, "[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.'" *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619 (*quoting Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424). Thus, a provision that simply directs courts to "consider" mitigating factors is not sufficient to guide a court in choosing the proper sentence.

Second, the requirement that the court make findings on the "absence or presence" of mitigating factors also does not satisfy *Miller* and *Montgomery*. Generally, the weighing of factors at sentencing should not be "a mere numerical tally." *Bryant v. State*, 824 A.2d 60, 75 (Md. 2003). *See also People v. Sauseda*, 50 N.E.3d 723, 728 (Ill. App. Ct. 2016) ("A fair sentence is not just the product of mechanically tallying factors in aggravation and mitigation and calculating the result."). In the context of juvenile sentencing, whether mitigating factors are absent or present does not address the core concern in *Miller*. The "difficult but essential question" that must be asked in a *Miller* case is whether the defendant is among the

very "'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams v. Alabama*, ___ U.S. ___, ___, 136 S. Ct. 1796, 1801 (2016) (Sotomayor, J., concurring) (*quoting Montgomery*, 577 U. S., at ___, 193 L. Ed. 2d at 620). A requirement that the court make a list of mitigating factors that may or may not be supported by the evidence does not answer that essential question.

Third, the sentencing scheme does not require trial courts to find any aggravating factors in order to identify those juveniles who might be eligible for a sentence of life without parole. 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). Under *Miller* and *Montgomery*, a life without parole sentence cannot be imposed unless the juvenile is "irreparably corrupt" or "permanently incorrigible." *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620. However, nothing in N.C.G.S. § 15A-1340.19A, *et seq.*, requires courts to limit life without parole sentences to cases involving only juveniles who are irreparably corrupt or permanently incorrigible. Indeed, a court can impose the higher sentence of life without parole without finding any aggravating

factors at all. The lack of any aggravating factors thus hinders the trial court's ability to winnow the class of juvenile defendants to those who might qualify for a sentence of life without parole.

Fourth, despite the lack of aggravating factors, there is a risk that trial courts will use mitigating factors as aggravating factors to justify the higher sentence of life without parole. In *State v. Hajtic*, 872 N.W.2d 410 (Iowa Ct. App. 2015), a *Miller* case, the Court of Appeals of Iowa granted a new sentencing hearing in part because the trial court considered the juvenile's age as an aggravating factor rather than a mitigating factor. Similarly, the prosecutor in this case argued that Mr. James deserved a sentence of life 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)

Fifth, the sentencing scheme does not place any burden on the State to prove any aggravating factor or other fact that might support the higher sentence of life without parole. Under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 303-04,

159 L. Ed. 2d 403, 413-414 (2004), the State bears the burden of proving to a jury beyond a reasonable doubt "any particular fact that the law makes essential to [the defendant's] punishment." *United States v. Booker*, 543 U.S. 220, 232, 160 L. Ed. 2d 621, 642 (2005). As described above, "irreparable corruption" or "permanent incorrigibility" are essential to a trial court's authority to impose a sentence of life without parole. *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620. Thus, if the State seeks a sentence of life without parole, it must be required to prove to a jury beyond a reasonable doubt that the juvenile is irreparably corrupt or permanently incorrigible. The State agrees that "the only presumption with which a juvenile defendant can enter the sentencing hearing is one of" life with parole and that such a presumption can only be changed "with the requisite hearing." State-Appellant's Brief, p. 10. Yet the State bears no burden at all under N.C.G.S. § 15A-1340.19A, *et seq.*, of proving any facts that might support a sentence of life without parole.

Sixth, nothing else in the sentencing scheme provides sufficient guidance to trial courts in determining whether the juvenile is part of the "vast majority" of juvenile offenders who do not warrant life without parole sentences or is one of the very rare juveniles who does. *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620. The Supreme Court observed in *Miller* that

life without parole sentences would 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). In 2013, the Supreme Judicial Court of Massachusetts barred life without parole sentences precisely because of the difficulty in identifying the rare juvenile who warrants life without parole. *Diatchenko v. DA*, 1 N.E.3d 270, 284 (Mass. 2013). According to the Court, current scientific research on adolescent brain development is unable to conclusively determine whether a juvenile is irreparably corrupt. *Id*.

Similarly, in 2016, the Supreme Court of Iowa barred life without parole sentences for the same reason. In the Court's words, the task of identifying which juvenile is irreparably corrupt was "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*, 879 N.W.2d 811, 836-37 (Iowa 2016). On April 25, 2017, the Court of Appeals of Washington banned life without parole sentences because discretionary sentencing schemes place judges in the "impossible position" of predicting which juveniles will be irretrievably corrupt. *State v. Bassett*, No. 47251-1-II, 2017 Wash. App. LEXIS 949, at *36 (Ct. App. Sep. 19, 2016).

Although N.C.G.S. § 15A-1340.19A, *et seq.*, preserves the ability of courts in this state to impose discretionary life without parole sentences for juveniles, it does not provide them with the means to answer the dispositive question under *Miller*: whether the juvenile will prove to be irreparably corrupt or permanently incorrigible.

Further, although the Supreme Court observed in *Montgomery* that *Miller* did not specifically require trial courts to make a finding of fact regarding a child's incorrigibility, it stated that the absence of any specific procedural mandate was grounded in concerns about federalism and did not "demean the substantive character of the federal right at issue." *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 621. The substantive right that states must guarantee is that no child whose crime reflects "transient immaturity" may be sentenced to life without parole. *Id.*

In order to guarantee this substantive right, some courts have concluded that a determination of irreparable corruption is necessary before a court can impose life without parole. The Supreme Court of Wyoming held that in *Miller* cases, trial courts "must set forth specific findings supporting a distinction between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013) (*quoting*

Miller, 567 at ___, 183 L. Ed. 2d at 424)). In *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016), the Supreme Court of Georgia vacated a life without parole sentence because the trial court failed to make a "distinct determination" that the juvenile was irreparably corrupt or permanently incorrigible. In *People v. Padilla*, 4 Cal. App. 5th 656, 673 (Cal. Ct. App. 2016), the Court of Appeal of California held that a trial court cannot impose life without parole unless it determines that "the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity."

Here, none of the procedures under N.C.G.S. § 15A-1340.19A, *et seq.*, approach the standards set in *Sen*, *Veal*, and *Padilla*, or otherwise enable trial courts to answer the difficult question of whether the juvenile is irreparably corrupt or permanently incorrigible before imposing a sentence of life without parole. Although N.C.G.S. § 15A-1340.19A, *et seq.*, provides courts with mitigating factors, mitigating factors alone do not provide sufficient guidance for courts to identify the rare juvenile who warrants a sentence of life without parole.

The lack of sufficient guidance is also reflected in this case. According to the evidence presented at the re-sentencing hearing, Mr. James showed an ability to be reformed. After taking tae kwon do lessons, he developed a "very

good relationship" with his instructor and even lived with the instructor for a brief period. (1T p 86, 2T p 264) Later, Mr. James made "excellent progress" in a GED program, (2T pp 224-25), and wanted to attend a program for at-risk youth, but could not do so only because his foster parents and social worker failed to provide transportation to the program. (2T p 223) Further, the psychologist, an expert in juvenile psychology, testified that science could not predict which juveniles would be dangerous in the future. (2T p 320) And, yet, despite evidence that Mr. James was amenable to reform and testimony that experts could not predict future dangerousness, the trial court still imposed a sentence of life without parole. Without finding any aggravating factors or making any determination supporting a conclusion that Mr. James was irreparably corrupt or permanently incorrigible, the court nevertheless chose the higher sentence of life without parole. The court's decision thus demonstrates the risk that unguided discretion poses in *Miller* cases: that juveniles who are not irreparably corrupt or permanently incorrigible will suffer disproportionate punishment under life without parole sentences.

B. Conclusion.

Although statutes are generally presumed to be constitutional, *State v. Sanders*, 37 N.C. App. 53, 54, 245 S.E.2d 397, 398 (1978), the presumption is

overcome in this case. As the session law that led to the enactment of N.C.G.S. § 15A-1340.19A, *et seq.*, suggests, the General Assembly intended to comply with *Miller*. 2012 N.C. Sess. Laws Ch. 148 (S 635). Nevertheless, "unbridled discretion, however benevolently motived, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18, 18 L. Ed. 2d 527, 541 (1967). The statutory scheme under N.C. Gen. Stat. § 15A-1340.19A, *et seq.*, does not provide sufficient guidance to courts that sentence juveniles convicted of first-degree murder. Without sufficient guidance, the statutory scheme simply results in the "arbitrary and capricious" imposition of the highest possible sentence for juveniles. *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L. Ed. 2d 398, 406 (1980). For this reason, the opinion below, which upheld the sentencing scheme, must be reversed.

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

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)). Here, the Court of Appeals erred by holding that Mr. James was not subject to more severe punishment under N.C.G.S. § 15A-1340.19A, *et seq*. and, thus, that

there was no *ex post facto* violation in this case. On the offense date for this case, the highest constitutional sentence that could have applied to Mr. James was for the Class B2 felony of second-degree murder. However, the two sentences available under N.C.G.S. § 15A-1340.19A, *et seq.* – life without parole and life with parole – are both greater than the highest term of years sentence for second-degree murder. Thus, as Mr. James faced greater punishment under the new sentencing scheme, the opinion below must be reversed and this case must be remanded for a new sentencing hearing in which a proper sentence can be imposed.

A. Mr. James faced greater punishment under the new law than the highest constitutional sentence in effect on the offense date for this case.

Criminal defendants are protected against *ex post facto* laws under Article I, § 16 of the North Carolina Constitution and Article I, § 10 of the United States Constitution. 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). "[T]wo critical elements 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)).

The first element of an *ex post facto* claim was met in this case. Specifically, the trial court sentenced Mr. James under N.C.G.S. § 15A-1340.19A, *et seq.*, which was a retrospective law as applied to him. N.C.G.S. § 15A-1340.19A, *et seq.*, was enacted on July 12, 2012. 2012 N.C. Sess. Laws Ch. 148. Although the new sentencing scheme applied prospectively, it also applied to offenses that occurred before its enactment. According to Section 3 of the session law, the new sentencing scheme is applicable to "any sentencing hearings held on or after" July 12, 2012. *Id*. Here, Mr. James' sentencing hearing began on December 5, 2014 and, thus, the new sentencing scheme applied to his case. However, the offense date for this case was May 12, 2006, which pre-dated the new sentencing scheme by several years. (R pp 4, 16-17) Consequently, N.C. Gen. Stat. § 15A-1340.19A, *et seq.*, was a retrospective law as applied to Mr. James.

In addition, the second element of an *ex post facto* claim was met because N.C.G.S. § 15A-1340.19A, *et seq.*, disadvantaged Mr. James. On the offense date for this case, North Carolina did not have a constitutional penalty for juveniles convicted of first-degree murder. In *United States v. Under Seal*, 819 F.3d 715, 726 (4th Cir. 2016), the Fourth Circuit Court of Appeals faced an issue similar to the one in this case. There, the

Government charged the juvenile defendant with the federal crime of murder in the aid of racketeering and then moved to transfer the case to adult court. However, the trial court denied the transfer motion. On appeal, the Fourth Circuit Court of Appeals upheld the denial of the transfer motion because the only sentences authorized by Congress for murder in the aid of racketeering on the offense date for the case – death or a mandatory sentence of life without parole – were unconstitutional under *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012). *Id.*

Similarly, there was no constitutional sentence for first-degree murder committed by a juvenile on the offense date for this case. According to N.C.G.S. § 14-17 (2006), any person under 18 years of age who committed first-degree murder faced a mandatory sentence of life without parole. However, the Supreme Court held in *Miller* that mandatory sentences of life without parole for juveniles are unconstitutional. *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424. Thus, as there was no constitutional sentence for first-degree murder on the offense date for this case, Mr. James could not be sentenced for that offense.

When a homicide statute mandates the imposition of an unconstitutional sentence, a court's only option is to impose "the most severe constitutional penalty established by the legislature for criminal homicide at

the time the offense was committed." *State v. Roberts*, 340 So.2d 263, 263 (La. 1976) (remanding for re-sentencing after the defendant's mandatory death sentence was vacated in *Roberts v. Louisiana*, 428 U.S. 325, 327, 49 L. Ed. 2d 974, 978 (1976). Accord *Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013) (juvenile homicide offender, subject to an unconstitutional mandatory sentencing scheme, was instead sentenced to life in prison with parole after 15 years, which was the "functional equivalent" of a sentence for second-degree murder). In this case, neither N.C.G.S. § 14-17 (2006) nor the Structured Sentencing Act provided courts with the authority to impose a sentence of less than life in prison without parole for first-degree murder. Rather, the only constitutional sentence for first-degree murder committed by a juvenile on the offense date for this case was a sentence for the next-highest offense: the Class B2 felony of second-degree murder. N.C.G.S. § 14-17 (2006).

Further, N.C.G.S. § 14-17 (2006) did not have a savings clause that would have provided a constitutional sentence for first-degree murder for juvenile defendants. For example, after discretionary death penalty schemes were struck down in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972), the North Carolina General Assembly enacted 1974 N.C. Sess. Laws Ch. 1201, which made the death penalty mandatory for first-degree murder.

Importantly, the new statute also stated, "In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment." *State v. Davis*, 290 N.C. 511, 548, 227 S.E.2d 97, 119 (1976) (*quoting* 1974 N.C. Sess. Laws Ch. 1201, § 7). After the Supreme Court of the United States invalidated the portion of 1974 N.C. Sess. Laws. Ch. 1201 that made death sentences mandatory in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976), death sentences imposed under the statute were converted to sentences of life imprisonment. *See, e.g., State v. Covington*, 290 N.C. 313, 348, 226 S.E.2d 629, 652 (1976) (ordering that sentences of life imprisonment be "substituted" for the mandatory death sentences that were invalidated by *Woodson*). Indeed, in *State v. Kirkman*, 293 N.C. 447, 238 S.E.2d 456 (1977), this Court rejected an *ex post facto* argument specifically because the savings clause in 1974 N.C. Sess. Laws Ch. 1201 became "operative" after *Woodson*.

In contrast to the statute at issue in *Kirkman*, the statute at issue in this case – N.C.G.S. § 14-17 (2006) – did not have any savings clause that could become operative upon a ruling that a mandatory sentence of life without parole was unconstitutional. *See, e.g.,* 2004 N.C. Sess. Laws. Ch. 178

(S 1054). As a result, there was no sentence available for first-degree murder for Mr. James' case. The next highest sentence that Mr. James could receive was for the lesser offense of second-degree murder. Moreover, with a prior record level I, (R pp 8-9), the highest presumptive sentence that Mr. James could have received for a Class B2 felony on the offense date for this case was 198 months. N.C.G.S. § 15A-1340.17 (2006). The new sentencing scheme thus disadvantaged Mr. James because the discretionary sentences of life without parole and life with parole under N.C.G.S. § 15A-1340.19A, *et seq.*, were more severe than the sentence Mr. James could have received if he had been sentenced based on the lawful provisions in effect in May 2006. Therefore, the Court of Appeals erred by holding that Mr. James was not disadvantaged by the new sentencing scheme and that no *ex post facto* violation occurred in this case.

B. The Court of Appeals incorrectly determined that Mr. James was not disadvantaged by the new law.

In rejecting Mr. James' argument that the new sentencing scheme violated the prohibitions on *ex post facto* laws, the Court of Appeals determined that the new sentencing scheme simply provided "sentencing guidelines" to address the concerns in *Miller*. *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 78 (2016); (A p 24). The Supreme Court of the United States rejected an *ex post facto* argument in a death penalty case on similar

grounds. *See Dobbert v. Florida*, 432 U.S. 282, 293, 53 L. Ed. 2d 344, 356 (1977) (upholding changes to a capital sentencing scheme because "a procedural change is not *ex post facto*"). However, the Court later held that "the *Ex Post Facto Clause* flatly prohibits retroactive application of penal legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267, 128 L. Ed. 2d 229, 253 (1994). Additionally, the changes required by *Miller* cannot be construed as merely procedural. The Supreme Court itself made clear in *Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 620 (2016) that while *Miller* had a "procedural component," it nevertheless "announced a substantive rule of constitutional law." Further, as part of the sentencing scheme under N.C.G.S. § 15A-1340.19 *et seq.*, the General Assembly created two entirely new sentences: a discretionary sentence of life with parole and a discretionary sentence of life without parole. Consequently, the new scheme does not merely involve procedural "guidelines" for juveniles convicted of first-degree murder.

Second, the Court of Appeals also held in *James*, ___ N.C. App. at ___, 786 S.E.2d at 78, that the new sentencing scheme did not impose a more severe punishment than the punishment that was allowed under N.C. Gen. Stat. § 14-17 (2011). (A p 25) However, as explained above, North Carolina did not have a constitutional penalty for juveniles convicted of first-degree

murder on the offense date for this case. Thus, the only constitutional sentence that could be imposed in Mr. James' case was a sentence for second-degree murder. As the two sentences of life without parole and life with parole available under N.C.G.S. § 15A-1340.19A, *et seq.* were higher than the terms of years sentence that Mr. James faced for second-degree murder, Mr. James actually did face more severe punishment under the law than if he had been sentenced based on constitutional provisions in effect on the offense date for his case.

Third, the Court of Appeals suggested that there was no *ex post facto* violation in this case because the General Assembly "acted quickly" to set up a new sentencing scheme after *Miller*. James, ___ N.C. App. at ___, 786 S.E.2d at 78; (A p 25). However, the question of whether the new sentencing scheme was enacted quickly did not answer, much less address, the second element of *ex post facto* claims: whether the defendant was disadvantaged by the new law. Put another way, the new sentencing scheme – and the speed with which it was enacted – did not cure the potential for *ex post facto* violations. Indeed, the requirement that the new sentencing scheme apply retrospectively was precisely why the new sentencing scheme violated the prohibitions against *ex post facto* laws in the first place. As described above, the new sentencing scheme allowed for the imposition of greater punishment

than Mr. James would have otherwise faced without the new law. As a result, the Court of Appeals erred by holding that the trial court properly applied the new sentencing scheme to Mr. James' case.

C. Conclusion.

"The Constitution 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, the sentencing scheme enacted after *Miller* disadvantaged Mr. James. Prior to the new sentencing scheme, Mr. James faced a term of years sentence for second-degree murder. After the new sentencing scheme, Mr. James faced discretionary sentences of life without parole or life with parole. Both options were higher than the 198 months Mr. James faced prior to the enactment of the new sentencing scheme. Accordingly, the Court of Appeals erred by upholding the trial court's application of the new sentencing scheme to Mr. James and this case must be remanded for a new sentencing hearing in which a proper sentence can be imposed.

CONCLUSION

For the foregoing reasons, Mr. James respectfully requests that this Court reverse the Court of Appeals' opinion in this case, vacate his sentence, and remand this case to superior court for resentencing.

Respectfully submitted this the 17th day of May, 2017.

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief has been duly served pursuant to Appellate Rule 26 upon 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 17th day of May, 2017.

(Electronic Submission)
David W. Andrews
Assistant Appellate Defender

No. 514PA11-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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APPENDIX

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