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

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Mecklenburg**
	)	
HARRY SHAROD JAMES	**)**	

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NEW BRIEF FOR THE STATE
(APPELLEE)

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ISSUES PRESENTED

I. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT N.C. GEN. STAT. § 15A-1340.19 ET SEQ. PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT?

II. WAS THE COURT OF APPEALS CORRECT IN HOLDING N.C. GEN. STAT. § 15A-1340.19A ET SEQ. IS NOT UNCONSTITUTIONALLY VAGUE OR ARBITRARY?

III. WAS THE COURT OF APPEALS CORRECT IN FINDING THAT N.C. GEN. STAT. § 15A-1340.19A ET SEQ. DOES NOT VIOLATE THE PROHIBITIONS AGAINST EX POST FACTO LAWS?

STATEMENT OF THE CASE

On 10 June 2010, the jury found Defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule; the jury also found Defendant guilty of robbery with a dangerous weapon. Defendant was 16 when to the crimes were committed. Honorable Robert F. Johnson, Superior Court Judge, presided at the Criminal Session of Superior Court, Mecklenburg County, sentenced defendant to life imprisonment without parole for the murder conviction, and to a concurrent sentence of sixty-four to eighty-six months imprisonment for the robbery conviction.

Defendant's conviction and sentence was affirmed by the Court of Appeals. State v. James 216 N.C. App. 417, 716 S.E.3d 876 (2011). Defendant filed a Petition for Discretionary Review (PDR). In the interim, Miller v. Alabama, 567 U.S. 460, 183 L. Ed. 2d 407 (2012) was decided. To ensure compliance with Miller, N.C. Gen. Stat. § 15A-1340.19 et seq. was enacted by the legislature. On 23 August 2012, this Court allowed Defendant's PDR and ordered the case remanded for re-sentencing pursuant to N.C. Gen. Stat. § 15A-1340.19 et seq.

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

After briefing by Defendant and the State, oral argument was heard in the Court of Appeals on 11 November 2015. In an opinion authored by Judge McCullough with Judge Bryant and Judge Geer concurring, the Court of Appeals affirmed that N.C. Gen. Stat. § 15A-1340.19A et seq. was constitutional and in compliance with Miller. However, the Court also held that the trial court's order, although extensive in detailing evidence elicited at the sentencing hearing and facts of the offense, did not make clear whether any of the findings were mitigating or not. The case was reversed and remanded in part to the trial court for further sentencing proceedings. State v. James, ___ N.C. ___, 786 S.E.2d 73 (2016). On 3 June 2016, Defendant filed a PDR seeking review of the Court of Appeals' above-noted holding as to the constitutionality of N.C. Gen. Stat. § 15A-1340.19A et seq.

STATEMENT OF THE FACTS

For a summary of the evidence presented at trial, the State respectfully directs this Court's attention to the Court of Appeals' opinion. (Rpp 16-18 and COA11-244 Brief of the State, pp 2-5). State v. James, 216 N.C. App. 417, 716 S.E.2d 876 (2011).

At Defendant's re-sentencing hearing the evidence presented show that:

Defendant was about five years old when his mother and father divorced. Aiysah, his younger sister, was four. (Tpp 41, 54). During the marriage there

was abuse between the mother and father that was witnessed by both Defendant and Aiysah. (Tpp 43, 59). However, the parents' abuse was never directed towards their children. (Tp 59). After the divorce, Defendant and his sister lived back and forth between their mother and father, although Defendant lived mainly with his Mother. (Tpp 55, 69). Because of his mother's financial situation and the hostile relationship between the parents, Defendant's living arrangements were unstable. He moved around often and on one occasion lived in a shelter. (Tpp 44, 66). Defendant often ran away from home. This resulted in his mother having to file missing person reports. One of the times that Defendant ran away, he was sexually assaulted by two boys. (Tp 218).

Defendant's mother made sure he attended church regularly. Sheila Stuckey, a friend of Mrs. James, testified that she knew defendant until he was about 13 years old. She would see him at bible study during the week and at Sunday service (Tpp 64-65). But when Defendant was around 12 or 13 he became a member of a gang "the Bloods." (Tpp 66, 69, 290). Mrs. James sought help for her son through church and other extracurricular activities such as Black Belt USA, hoping to provide positive male role models in his life and support beyond their relationship. (Tpp 73, 76, 82, 264).

Kerton Washington, a church member, was one of the people who tried to provide that support. In talking to Defendant, he became concerned when

Defendant stated when he went downtown, sometimes he would jump in and out of people's cars when they stopped. (Tpp 73, 77). There were other members of the church who counseled and engaged Defendant. (Tpp 76-77). Abdullah Sihlangu, an instructor with Black Belt USA, also tried to help. He talked with Mrs. James about Defendant and developed a plan to help him. (Tpp 82-88). In 2005, Mrs. James stated that she also tried to get Defendant help through counseling or treatment but he refused to participate. (Tpp 265-267).

Another person that tried to help Defendant was Curtis Jenkins.

> Defendant became acquainted with the victim, Curtis Laquan Jenkins, through a church sponsored group, 'Becoming a Man' ('BAM'), where Jenkins served as defendant's mentor. Defendant, 16 years old at the time, took his 21-year-old friend, Adrian Morene, [his codefendant] to a BAM event where he introduced Morene to Jenkins. (R p 16).

Mr. Jenkins was later robbed and murdered by the pair.

The only evidence of physical abuse Defendant was subjected to by his parents occurred on or about 18 November 2002. On that date, Defendant and his mother had a confrontation over some spilled sugar.

> She asked Defendant to clean it up, he balled up his fist, called her names, and refused to clean up the sugar. At this point in time Defendant had been battling with his mother for about two months, Agnes James [Defendant's mother] admitted to grabbing his collar, wrestling with him, falling to the floor and causing a scratch on Defendant's neck. (Tpp 254-255).

Defendant insisted on returning to his father. Upon seeing the scratch on

Defendant's neck, Mr. James took Defendant to the emergency room, alleging Defendant was assaulted by his mother. (Tp 260). The matter was investigated by Mecklenburg County Department of Social Services (DSS). DSS determined that this was not an assault or abuse. It was found to be "inappropriate discipline." DSS determined that there was no need for on-going service. (Tpp 252-253).

In 2005, Defendant attempted to harm his mother by putting Clorox in her salad dressing. (Tpp 260, 270-271). He also threatened to kill his mother by slicing her throat from behind. (Tp 279). On 13 March 2005, a juvenile petition was filed. (Tpp 265 -268). After this incident, Mrs. James sought to find placement for Defendant outside of her home. (Tpp 213-215).

Dr. Robert Custrini, a clinical psychologist, had previously worked with Defendant in 2005 for four months. (Tp 305). He sought to interview Defendant in preparation for the sentencing hearing. However, Defendant refused to talk to Dr. Custrini about the facts and circumstances of his case. (Tp 335). As a result, Dr. Custrini was unable to learn anything about Defendant's thought processes or mental state at the time of the murder. Dr. Custrini did provide testimony pertaining to adolescent brain development compared to adults. (Tpp 301-322). He indicated that people develop at different rates. Therefore, there is not a set age of maturation completion. (Tp 314). He testified that "we do not

yet possess the ability to reliably distinguish between the offenses that are a function of mature development and those that are a reflection of true sociopathy." (Tp 334). He agreed that Defendant's behavior could be sociopathy, or it could be regular adolescent development. (Tp 323).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT N.C. GEN. STAT. § 15A-1340.19 ET SEQ. PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE AND DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Miller held that a mandatory sentence of life without parole for juveniles convicted of first-degree murder violates the Eighth Amendment's prohibition on cruel and unusual punishments. Miller v. Alabama, 567 U.S. 460, 470, 183 L. Ed. 2d 408, 418 (2012). However, it does not render life without parole for all juvenile offenders unconstitutional. It does not "categorically bar a penalty for a class of offenders or type of crime" as the Court did in Roper v. Louisiana, 428 U.S. 325, 161 L .Ed. 2d 1 (2005) or Graham v. Florida, 560 U.S. 48, 64 L. Ed. 2d 825 (2010). Instead, Miller mandates that the "sentencer follow a certain process--considering an offender's youth and attendant characteristics – before imposing a particular penalty." Miller, 567 U.S. at 483, 183 L. Ed. 2d at 425.

The procedures and factors of N.C. Gen. Stat. § 15A-1340.19 et seq. mirror those of Miller and provides the type of individualized sentencing Miller

authorizes. Therefore, the Court of Appeals correctly stated that "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 as "(l)ife without parole as the starting point in the analysis does not guarantee it will be the norm." State v. James, ___ N.C. App. ___, ___, 786 S.E.2d 73, 80 (2016).

A. Differences between children and adults require that a juvenile is given a sentencing hearing where the attributes of youth are considered before that juvenile is sentenced to life without parole.

Where a juvenile defendant is convicted of first-degree murder, the sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Miller, 567 U.S. at 489, 183 L. Ed. 2d at 430. Mitigating circumstances, such as those articulated by Miller, encompass features that distinguish juveniles from adults, thereby enabling the sentencer to distinguish between the juvenile whose crime "reflects transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Miller, 567 U.S. at 477-79, 183 L. Ed. 2d at 422-24; see also State v. Montgomery, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 621 (2016) (sentencer considers a juvenile defendant's "youth and its attendant characteristics [ ] as sentencing factors [which are] necessary to separate those juveniles who may be sentenced to life without parole from those who may not").

Juxtaposed with these youthful characteristics, the sentencer must also consider "the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him." Miller, 567 U.S. at 477, 183 L. Ed. 2d at 423. Conformity with the sentencing requirements Miller espouses ensures that a juvenile defendant receives the "individualized sentencing determination required by the Eighth Amendment." Penry v. Lynaugh, 492 U.S. 302, 316, 106 L. Ed. 2d 256, 276 (1989).

"[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class" because of his status. Montgomery, 577 U.S. ___, ___, 193 L. Ed. 2d at 621. Such was the case in Atkins v. Virginia, 536 U.S. 304, 317, 153 L. Ed. 2d 335 (2002), where procedures were put into place to determine which intellectually disabled defendant fell within the range of the intellectually disabled offenders who could not be executed. See also N.C. Gen. Stat. § 15A-2005 (2017). It is the intellectually disabled defendant who must prove he fits within that protected status. In Miller, the same type of "narrowing" occurred with juvenile defendants.

Miller established that life without parole is an unconstitutional penalty for "a class of defendants because of their status [as], juvenile offenders whose

crimes reflect the transient immaturity of youth." Montgomery, 577 U.S. ___, ___, 193 L. Ed. 2d at 609. When a juvenile defendant seeks the status of a juvenile, whose crimes reflected only transient immaturity, he must show that he fits in that protected status of juvenile offenders. It is the status of the defendant which must be considered and there is no presumption in favor of life with parole or life without parole. However, if the courts were to assume such a presumption Miller, as is reinforced by Montgomery, would necessitate that such a presumption would favor life without parole.

The requirements of the Miller sentencing hearing are codified in N.C. Gen. Stat. § 15A-1340.19 et seq. "The hearing does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Montgomery, 577 U.S. ___, ___, 193 L. Ed. 2d at 735. N.C. Gen. Stat. § 15A-1340.19 et seq. provides the guidance to the sentencing courts, which complies with Miller. Assisting the court in determining whether the juvenile offender has shown he falls within the status of one whose crime reflects transient immaturity, or the rare juvenile offender whose crime reflects irreparable corruption.

Defendant has identified states such as Louisiana (State v. Huntley, 118 So.3d 95 (La. Ct. App 2013)), Oklahoma (Luna v. State, 387 P.3d 956 (Okla Crim. App. 2016)), and Georgia (Veal v. State, 784 S.E.2d 403 (Ga 2016)), where

Miller was perceived narrowly, as only having a procedural with no real need to consider the distinctive attributes of youth. North Carolina's state legislature did not interpret Miller so narrowly. Our statute makes it clear that the General Assembly realized that Miller required an individualized sentence for juvenile defendants, requiring a sentencing procedure in which the attendant characteristics of youth are highlighted and thereby. Enabling the sentencing judge to distinguishing between the juvenile that falls within the protected status of one whose crime reflects a transient immaturity or irreparable corruption. Miller, 567 U.S. at 479, 183 L. Ed. 2d. at 424.

B. North Carolina's sentencing scheme does not operate with a presumption in favor of life without parole, but even if it did it would not be unconstitutional.

The most important purpose of courts in "construing a statute is to give effect to legislative intent." State v. Beck, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). But "[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009)(citation omitted). Additionally statutes which pertain to the same subject are interpreted "in pari materia," establishing one law, to ensure that each statutory provision is given full meaning and purpose. State v. Godbey,

___N.C.___, ___ ,792 S.E.2d 820, 827 (2016). The language of N.C. Gen. Stat. § 15A-1340.19 et seq. is unambiguous. Contrary to Defendant's assertion, neither § 15A-1340.19C(a) separately nor § 15A-1340.19A et seq. creates a presumption in favor of life without parole.

However, in finding there is a presumption in favor of life without parole, the Court of Appeals points to the use of "instead of" in N.C. Gen. Stat. § 15A-1340.19C(a). However, in so doing, the Court of Appeals does not find the use of "instead of" to be ambiguous. Indicating, "that 'instead of,' considered alone, does not show there is a presumption in favor of life without parole." James, ___ N.C. ___ , ___, 786 S.E.2d at 79. The Court of Appeals additionally acknowledged that this wording 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." Id. (emphasis added). Since there is no ambiguity in the language "instead of" it should be given its plain and definite meaning and is therefore used merely to distinguish between the sentencing options of life without parole and life with parole. See James, __ N.C. at __, 786 S.E.2d at 79.

A plain reading of N.C. Gen. Stat. § 15A-1340.19A et seq. sets out the

considerations the court is to weigh in order to reach its sentencing decision. The Act plainly sets out the mitigating factors, including a catchall, and mandates their consideration by the court. N.C. Gen. Stat. § 15A-1340.19(B)(c)(1-9). The court's sentencing decision is binary, life with parole or life without parole. Id. § 15A-1340.19C(a). The court's findings and decision must be reduced to writing, detailing the presence or absence of the mitigating factors in support of its decision. Id.

Rather than giving the words their plain meaning, the Court of Appeals and Defendant makes an assumption that the unambiguous language N.C. Gen. Stat. § 15A-1340.19 et seq. combined with the lack of a requirement to present aggravating factors establishes a presumption in favor of life without parole. However, this requires reading more into the statute than is actually there. At the same time reading more into the Miller holding than is there.

Defendant argues that aggravating factors are necessary to ensure there was a narrowing of the number of juveniles who would receive life with parole. Therefore, defendant maintains that N.C. Gen. Stat. § 15A-1340.19 et seq. lack of a requirement for aggravating factors creates a presumption in favor of life without parole. However, the Miller decision provided such narrowing. This is the type of narrowing the Court has done in previously in cases such as Atkins (requiring a procedure to determine whether a particular individual with an

intellectual disability "fall[s] within the range of [intellectually disabled] offenders about whom there is a national consensus" that execution is impermissible). See Montgomery, __ U.S. at __, 193 L. Ed. 2d at 621. Having narrowed the number of juvenile defendants that can receive life without parole, it is incumbent on the juvenile defendant to show that he falls within the status of juveniles entitled to the protected category of "juveniles whose crimes represent the transient immaturity of youth." Montgomery, __ U.S. at __, 193 L. Ed. 2d at 621. Consequently, aggravating factors are not necessary to narrow the group of juvenile defendants who can receive life without parole.

Additionally, the Miller Court was unquestionably aware of Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and their progeny. Four years after Miller, although in dicta, Montgomery provided additional guidance on the procedural application of Miller, yet the Court did not take that opportunity to instruct States that there was a need to present aggravating factors. If in fact the Court thought that the mandate of Miller could be better achieved by requiring States to present aggravating factors at sentencing, they were in a position to do so.

However, it is more likely that the use of aggravating factors would have been more harmful to Miller's intent. When courts in North Carolina must consider mitigating and aggravating factors, the State bears the burden of

proving an aggravating factor exists, and the offender bears the burden of proving that mitigating factor exists. See N.C. Gen. Stat. § 15A-1340.16. Allowing the State to present potentially damaging aggravating factors would lessen the possibility that "sentencing juveniles to this harshest possible penalty will be uncommon." Miller, 567 U.S. at ___, 183 L. Ed. 2d at 424. Since the sentencing court is not required to weigh mitigating circumstances against aggravating circumstances, it ensures a greater likelihood that life without parole would be reserved for the "rarest juvenile." Montgomery, ___ U.S. at ___, 193 L. Ed. 2d at 620.

Montgomery did not alter the Miller holding. But rather, gave Miller retroactive effect and reinforced its mandate. In compliance with Miller, N.C. Gen. Stat. § 15A-1340.19C(a) provides that the Court "shall consider any mitigating factors," "all the circumstances of the offense," and "the particular circumstances of the defendant" in order to determine whether defendant should be sentenced to life with parole or life without parole.

Miller's mandate to consider mitigating factors, with no mention of aggravating factors when determining a juvenile defendant's status, does not create a presumption in favor of life without parole in Miller. Neither Defendant nor the Court of Appeals suggests that it does. As such N.C. Gen. Stat. § 15A-1340.19A et seq., which mirrors Miller, also does not create a presumption

in favor of life without parole because aggravating factors are not required.

C. The Court of Appeals was correct in determining that a presumption in favor of life with parole is constitutional.

Defendant maintains that the Court of Appeals opinion is based upon a misapprehension of Montgomery and Miller. Defendant is incorrect. Although Miller announced a new substantive rule, it encompassed a procedural component. It is this procedural apparatus that enables a juvenile defendant to show that he falls within Miller's new protected category. Montgomery, __ U.S. at __, 193 L. Ed. 2d at 620. Some states may have perceived Miller as only requiring a procedural component with an option of life with parole or life without parole and thereby failed to provide the juvenile defendant with the necessary Miller hearing that would take into account the defendant's youth and its "attendant characteristics." North Carolina is not such a state.

The Court of Appeals correctly found, upon reviewing N.C. Gen. Stat. § 15A-1340.19A et seq., that the sentencing guidelines comply with Miller's mandate: requiring "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).'" James, 786 S.E.2d 73, 79-80 (citing Miller, 567 U.S. at ___, 183 L. Ed. 2d at 424). For the reasons herein stated, the Court of Appeals was correct when it declined to hold "that presumption [in favor of life without parole] 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." James, 786 S.E.2d at 79.

D. Conclusion

For the reasons herein stated and articulated by the Court of Appeals, the court was correct in holding "it is not inappropriate, much less unconstitutional for the sentencing analysis in N.C. Gen. Stat. § 15A-1340.19A to begin with a sentence of life without parole." James, 786 S.E.2d at 8.

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

The Miller holding that a sentencer must consider "the mitigating qualities of youth" before sentencing a juvenile to life without parole was reaffirmed in Montgomery. To that end, Miller provided guidelines to assist in implementing its holding. As Montgomery verified, "Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." Montgomery, 577 U.S. at ___, 193 L. Ed. 2d at 620. Miller also determined the method the sentencer must follow in these sentencing hearings, mandating "only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics." Id. at ___, 193 L. Ed. 2d at 621. This is the precise method and procedure that is set

out in N.C. Gen. Stat. § 15A-1340.19B.

A. N.C. Gen. Stat. § 15A-1340.19A et seq. contains sufficiently definite criteria to have power over the court's exercise of discretion and therefore is not unconstitutionally vague.

A statute is unconstitutionally vague if it fails to provide explicit standards for those who apply the law. Rhyne v. K-mart Corp., 358 N.C. 160 186, 594 S.E.2d 1, 19 (2004). Where a statute does not clearly state or describe its exact nature and scope, it is void for vagueness under the Due Process Clause. See Grayned v. City of Rockford, 408 U.S. 104, 33 L. Ed. 2d 222, 227 (1972). Mere differences of opinion as to the statute's applicability, however, are not sufficient to render it unconstitutionally vague. Id. at 187, 594 S.E.2d at 19.

When determining the constitutionality of a statute, a court begins with the presumption that it is constitutional and "must be so held unless it is in conflict with some constitutional provision of the State or Federal Constitutions." State v. Green, 502 S.E.2d 819, 823-824, 348 N.C. 588, 596 (1988), cert. denied, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). Where a statute is "susceptible to two interpretations – one constitutional and one unconstitutional – the Court should adopt the interpretation resulting in a finding of constitutionality." Id.

Constitutional requirements of due process are met when the statute's language prescribes boundaries sufficiently distinct for judges to interpret and administer uniformly. Miller provided such boundaries, which are encompassed

in N.C. Gen. Stat. § 15A-1340.19A et seq. In accordance with Miller, N.C. Gen. Stat. § 15A-1340.19A et seq. requires the trial court to find the absence or presence of mitigating factors considering them in conjunction with "the circumstances of the offense and the particular circumstances of the defendant." N.C. Gen. Stat. § 15A-1340.19C(a). The sentencer must specify, in writing, the factors it relied upon in reaching its decision. Id. This is a "further safeguard of meaningful appellate review to ensure [juvenile sentences] are not imposed capriciously or in a freakish manner." McKoy v. North Carolina, 494 U.S. 433, 469-470, 110 S. Ct. 1227, 1247 (1990).

Miller identified the mitigating qualities of youth which ought to inform the sentencing decision, but which were necessarily overlooked under a mandatory sentencing scheme. Id. at 2468, 183 L. Ed. 2d at 423. In line with Miller, N.C. Gen. Stat. § 15A-1340.19A et seq. requires the trial court to find the absence or presence of mitigating factors and weigh them against "the circumstances of the offense and the particular circumstances of the defendant." N.C. Gen. Stat. § 15A-1340.19C(a). This is the type of weighing and balancing which the trial court does under the Structured Sentencing Act, in order to determine whether to depart from the presumptive range of a sentence. The task of weighing and balancing mitigating factors, the circumstances of the offense, and the particular circumstances of the defendant, is a procedural

process employed by the trial court judge as part of the normal function of their position. It is a method that trial courts regularly implement. This is certainly a fact that was not lost on the General Assembly.

Defendant's continued assertion that aggravating factors are needed to guide the sentencer in narrowing which juvenile defendant will receive life without parole is unfounded. As previously state in claim I, aggravating factors are not necessary to insure a such narrowing where that has already been establish by the Miller holding. Indeed the Court has taken such action of narrowing in previous cases, such as Atkins. See Montgomery, 577 U.S. at___, 193 L. Ed. 2d at 621. Montgomery, where the Court had the opportunity, they still chose not to require aggravating factors. In fact, for the reasons previously stated, the use of aggravating factors would have been more harmful to Miller's, assertion that sentencing juveniles to life without parole would be uncommon. Miller, 567 U.S.___ at ___, 183 L. Ed. 2d at 424.

Defendant also argues that the lack of aggravating factors places no burden on the State to support the higher sentence of life without parole. However, where Miller found that life without parole is unconstitutional for some juvenile defendants because of their status, the burden is placed on the juvenile defendant to show that he falls this newly created protected category of "juveniles whose crimes represent the transient immaturity of youth."

Montgomery, __ U.S. at __, 193 L. Ed. 2d at 621.

Defendant also argues that mitigating factor may be used to justify the higher sentence of life without parole, an issue defendant incorrectly alleges occurred in his case. It is clear from the court's written order that it considered not only the mitigating factors but also "circumstances of the offense and the particular circumstances" of the Defendant. See Defendant Appendix p. 9, ¶34. Nonetheless, one aspect of most sentencing guidelines is the discretionary ability of the sentencing court. However, for the reasons previously stated, N.C. Gen. Stat. § 15A-1340.19A et seq. contains sufficiently definite criteria to have power over the court's exercise of discretion, including a written finding of facts which is a further safeguard of meaningful appellate review. See N.C. Gen. Stat. § 15A-1340.19C(a); McKoy, 494 U.S. at 469-470, 108 L. Ed. 2d at 395.

Next, Montgomery affirms that there is no requirement in Miller that the sentencing courts make a finding of fact regarding a child's incorrigibility. Nor is it necessary to a determination of the juvenile defendant's status. The Court seeks to "avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." Montgomery, 136 S. Ct. 718, 735. Therefore, as long as the mandate of Miller is complied with, each state determines the level of procedures they seek to implement.

B. Conclusion

For the reasons articulated herein and by the Court of Appeals, the Court of Appeals was correct in hold that, "[a]lthough N.C. Gen. Stat. § 15A-1340.19C(a) simply directs the court to 'consider' mitigating factors, when viewed in light of the circumstances surrounding enactment, that is through the lens of Miller, we hold N.C. Gen. Stat. § 15A-1340.19A et seq. is not unconstitutionally vague and will not lead to arbitrary sentencing decisions. The discretion of the sentencing court is guided by Miller and the mitigating factors provided in N.C. Gen. Stat. § 15A-1340.19B(c)." James, __ N.C. App. at ___, 786 S.E.2d at 82.

III. THE COURT OF APPEALS CORRECTLY HELD THAT APPLICATION OF THE NEW SENTENCING LAWS DID NOT VIOLATE PROHIBITIONS AGAINST EX POST FACTO LAWS.

Defendant argues the Court of Appeals erred by holding that application of the new sentencing laws to him did not violate the constitutional prohibitions against ex post facto laws. Defendant is incorrect.

"The constitutions of both the United States and North Carolina prohibit the enactment of ex post facto laws." Jones v. Keller, 364 N.C. 249, 259, 698 S.E.2d 49, 57 (2010), cert. denied, 563 U.S. 960, 179 L. Ed. 2d 935 (2011); see U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. And the ex post facto provisions of both constitutions "are evaluated under the same definition." State

v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002), cert. denied, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003).

It has "long been recognized . . . that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41, 111 L. Ed. 2d 30, 38 (1990). Indeed, an ex post facto law is one "'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" Id. at 42, 111 L. Ed. 2d at 38 (quoting Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)) (emphases in original). The purpose of the ex post facto prohibition is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29, 67 L. Ed. 2d 17, 23 (1981).

Defendant quotes dicta in Landgraf v. USI Film Prods., 511 U.S. 244, 266, 128 L. Ed. 2d 229, 253 (1994), for the proposition that "the Ex Post Facto Clause flatly prohibits retroactive application of penal legislation." Besides the fact that this statement was not necessary to the holding in the case, the Court in Landgraf made clear that the question is "whether the new provision attaches new legal consequences to events completed before its enactment." Id. at 270, 128 L. Ed. 2d at 255 (emphasis added). And the Court in another case echoed the statement in Landgraf but reiterated that these new legal consequences are

unconstitutional only if they "disadvantage the offender affected . . . by altering the definition of criminal conduct or increasing punishment for the crime." Lynce v. Mathis, 519 U.S. 433, 441, 137 L. Ed. 2d 63, 72 (1997) (quotation marks and citation omitted).

In this case, the new sentencing scheme provided the same legal consequence of life imprisonment without parole as the sentencing statute at the time of the murder provided and a new legal consequence of life imprisonment with parole, but neither of these consequences disadvantages defendant. Therefore, application of the new sentencing statutes does not amount to an ex post facto violation.

A. No ex post facto violation occurs if a new statute imposes the same or lesser punishment as the statute in effect at the time of the crime even if the original statute is found unconstitutional.

The United States Supreme Court has held that a sentencing statute enacted after commission of a crime is not ex post facto if the sentencing statute in effect at the time of the crime had the same or greater punishment regardless of that statute later being found unconstitutional. Courts in other jurisdictions have recognized this rule in finding new sentencing schemes enacted after Miller to be constitutional.

1. The holding in Dobbert v. Florida controls.

The petitioner in Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 344 (1977),

unsuccessfully argued his death sentence resulted from an unconstitutional ex post facto law. He contended he could not be sentenced to death because "there was no valid death penalty statute in effect in Florida" at the time he committed his offense. Id. at 287, 53 L. Ed. 2d at 353.

Although the death penalty statute in effect at the time the petitioner in Dobbert committed his offense was later found unconstitutional, the Supreme Court rejected his argument that he could not be sentenced to death under a new death penalty statute in effect at the time of trial. Calling the petitioner's contention a "sophistic argument [that] mocks the substance of the Ex Post Facto Clause," the Court stated that "[w]hether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated . . . the degree of punishment which the legislature wished to impose upon murderers" and thereby "provided fair warning as to the degree of culpability which the State ascribed to the act of murder." Id. at 297, 53 L. Ed. 2d at 358-59. Noting that when a statute is determined to be unconstitutional "'[t]he actual existence of [the] statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored,'" the Court held there was no ex post facto violation because "the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder." Id. at 298, 53 L. Ed. 2d at 359

(quoting Chicot County Dist. v. Baxter State Bank, 308 U.S. 317, 374, 84 L. Ed. 329, 332-33 (1940)).

Defendant attempts to distinguish Dobbert on the grounds that the statutory changes in Dobbert were procedural while the changes here were substantive. Contrary to his contentions, the Court held the changes in the law in Dobbert were not ex post facto on two independent bases: (1) "that the changes [were] procedural"; and (2) that the changes were "on the whole ameliorative." Id. at 292 & n.6, 53 L. Ed. 2d at 355 & n.6.

The ex post facto issue here is the same as the second ex post facto issue raised in Dobbert and rejected: does the lack of a constitutionally-valid penalty at the time of offense mean a newly-enacted, equivalent penalty cannot be imposed? Id. at 297, 53 L. Ed. 2d at 358-59. The answer to this question here, just as in Dobbert, is no.

2. Other state courts have relied on Dobbert to find no ex post facto violations in cases like the present case.

The Nebraska Supreme Court considered the effect of Miller on a juvenile defendant's sentences of life imprisonment without parole in State v. Castaneda, 842 N.W.2d 740 (Neb. 2014). Nebraska argued on appeal that the defendant's "current sentences of life imprisonment without the possibility of parole should be vacated and the cause remanded for resentencing in light of the sentencing factors discussed in Miller." Id. at 756. The defendant, however, contended "that

he should be sentenced for second degree murder, a Class IB felony, because it is the most serious degree of homicide for which he may be prosecuted and thus provides the sentencing court with the individualized sentencing options required by Graham and Miller." Id. at 756-57 (quotation marks omitted).

In rejecting the defendant's argument, the Nebraska Supreme Court ruled that "Dobbert makes it clear that the effect of Miller on Nebraska law is not a factor in the ex post facto analysis of whether a later-enacted statute increases punishment for a crime." Id. at 761. Instead, the court said, the question was whether the possible range of sentences provided for in the new statute was greater than the possible range of sentences the defendant was subject to at the time he committed the crime. Id. The court "observe[d] that this is consistent with the underlying purpose of the Ex Post Facto Clause: to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Id. at 762. The court held there was no ex post facto violation because the possible range of sentences under the new statute, forty years to life imprisonment, was not greater than the original possible sentence of life imprisonment. Id.

In Commonwealth v. Brooker, 103 A.3d 325, 343 (Pa. Super. Ct. 2014), appeal denied, 118 A.3d 1107 (Pa. 2015), the defendant argued that "'no constitutional statutory sentence existed for him[]' at the time he committed

[his] offense" and he therefore should have been sentenced for the "most serious lesser included offense, which in this case was third-degree murder." The Pennsylvania Superior Court,[1] relying upon Dobbert, stated that "the very existence of the old statute requiring life without parole, put Appellant on notice that the Commonwealth would seek to impose a sentence of life imprisonment without the possibility of parole for the crime of murder in the first degree." Id. The court further stated that "[t]he fact that the old statute . . . would later be declared constitutionally void as applied to him on Eighth Amendment grounds is of no moment" and that "[b]ecause [the old statute] provided [the defendant] with fair notice and warning that he would receive life without the possibility of parole, he cannot complain of a retroactive application of a 35-year mandatory minimum[.]" Id.

Under the new sentencing statutes, a juvenile convicted of first degree murder in North Carolina can be sentenced to life imprisonment with parole or life imprisonment without parole. Following a sentencing hearing, defendant here received a sentence that was not a greater punishment than annexed to the crime at the time it was committed. As in Castaneda, the possible range of sentences now available – life imprisonment with or without parole – is not

[1]The Pennsylvania Superior Court is one of the state's two intermediate appellate courts. http://www.pacourts.us/courts/superior-court/.

greater than the possible range of sentences available at the time of the murder – life imprisonment without parole. As in Brooker, the old statute – although later found to be unconstitutional – provided defendant fair warning that he could be sentenced to life imprisonment without parole.

B. The lack of a savings clause in the original sentencing statute does not render the new sentencing statutes unconstitutional.

Defendant contends the lack of a savings clause in the original sentencing statute renders the new sentencing statutes unconstitutional. Defendant misinterprets various death penalty cases decided during the 1970s.

When discretionary death penalty schemes were found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972), the North Carolina General Assembly modified N.C. Gen. Stat. § 14-17 to provide for a mandatory death sentence for first degree murder. State v. Davis, 290 N.C. 511, 547, 227 S.E.2d 97, 119 (1976). Anticipating the possibility that the mandatory scheme also could be ruled unconstitutional, the legislature added a savings clause to the new statute providing that upon such a ruling the punishment for the offense would be life imprisonment. Id. at 547-48, 227 S.E.2d at 119.

When Louisiana's mandatory death sentence scheme was invalidated in the 1970s, the Louisiana Supreme Court considered the appropriate punishment in the absence of a valid sentence for first degree murder. After considering

imposition of a sentence of life imprisonment – which was not available under the statute in effect at the time of the murder – the court decided to instead impose the more severe sentence for second degree murder of "imprisonment at hard labor for life without eligibility of parole, probation or suspension of sentence for a period of twenty years." State v. Jenkins, 340 So. 2d 157, 179 (La. 1976); see also State v. Roberts, 340 So. 2d 263, 263 (La. 1976) (per curiam) (relying on Jenkins to reach the same result).

The absence of a savings clause in this case is of no import. The savings clause implemented by the General Assembly after Furman was only intended to serve during the interim between any ruling of unconstitutionality and legislative modification. See Davis, 290 N.C. at 548, 227 S.E.2d at 119 (noting that the General Assembly included the savings clause "to eliminate any possibility that, because of the action of the Supreme Court, the punishment for which it had mandated the death penalty would be left in limbo between sessions"). In the present case, the statute was modified soon after Miller and therefore was in place when sentencing was to occur; no savings clause was needed.

In Jenkins, the court imposed the most severe sentence available because it was more severe than the punishment of life imprisonment doled out when previous versions of the sentencing scheme had been invalidated. That the court

even considered life imprisonment for first degree murder when it was not available indicates that the holding in Jenkins means little.

C. Other decisions are either distinguishable or support the State's position.

Cases from other jurisdictions are distinguishable from the present case or otherwise support the State's position. Indeed, there simply are no cases that support defendant's position.

1. United States v. Under Seal is distinguishable.

This case differs significantly from United States v. Under Seal, 819 F.3d 715 (4th Cir. 2016). The court in that case rejected the government's argument that unconstitutional portions of a statute could be severed so the remaining constitutional portions could be applied, noting that since Miller had been decided "[s]ome state legislatures have . . . enacted statutes aimed at rectifying their problematic sentencing provisions" but further noting that "Congress, however, has taken no action to alleviate the sentencing conundrum now existing" in the statute. Id. at 721. In the present case, the General Assembly had amended the sentencing provisions before defendant was sentenced – thereby presenting a different question than the one presented in Under Seal.

Even if Under Seal could be read to automatically prohibit sentencing under a statute enacted after commission of the offense, it is axiomatic that the ruling has no precedential value in our state courts. See State v. McDowell, 310

N.C. 61, 74, 310 S.E.2d 301, 310 (1984) ("[A] state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command.") Instead, the holding in Dobbert by the United States Supreme Court – as discussed above – does apply. And as shown above, that decision renders the new sentencing scheme constitutional.

2. The implementation of a new sentencing scheme prior to sentencing in this case makes a difference.

Considering one of the consolidated cases remanded in Miller, the Arkansas Supreme Court in Jackson v. Norris, 426 S.W.3d 906 (Ark. 2013), held that unconstitutional portions of the capital murder statute in place when Jackson committed his crime could be severed. The portion of the statute providing that capital murder is a Class Y felony survived, and the court ruled upon remand that Jackson could be sentenced to "not less than ten years and not more than forty years, or life." Id. at 910-11.

The Massachusetts Supreme Court in Commonwealth v. Brown, 1 N.E.3d 259 (Mass. 2013), considered the effect of Miller on sentencing in its state in light of its own holding that all life-without-parole sentences for juveniles, whether mandatory or discretionary, were unconstitutional under the state Constitution. As in Jackson, the court severed portions of the state's murder

statute and held that the trial court properly sentenced the juvenile to life imprisonment with the possibility of parole after fifteen years.

In Texas, a defendant appealed after his mandatory sentence of life imprisonment without parole was vacated and he was resentenced to life imprisonment with parole pursuant to a statute enacted after commission of his offense.[2] Henry v. State, No. 05-14-00197-CR, 2015 Tex. App. LEXIS 7151 (Tex. App. July 10, 2015) (unpublished), disc. rev. denied, PD-1006-15, 2015 Tex. Crim. App. LEXIS (Tex. Crim. App. Oct. 14, 2015). He contended there was "no punishment applicable to him" because the punishment authorized at the time he committed his offense was "void ab initio." Id. at *6-7. The Texas Court of Appeals rejected the argument that application of the new punishment statute violated the Ex Post Facto Clause and violated appellant's right to due process, finding that the new sentence "did not inflict greater punishment than the law attached to the criminal offense when [he] committed it" and that he had "fair warning." Id. at *14, 18.

Similarly, the Alabama Supreme Court in Ex Parte Henderson, 144 So. 3d

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[2]The law enacting the new sentencing scheme in Texas contained language similar to that in our new sentencing scheme, making the new law applicable "to a criminal action pending, on appeal, or commenced on or after the effective date of this Act, regardless of whether the criminal action is based on an offense committed before, on, or after that date[.]" Henry, 2015 Tex. App. LEXIS 7151, at *13.

1262 (Ala. 2013), considered whether capital-murder indictments against two juveniles should be dismissed in the wake of Miller and Roper v. Simmons, 543 U.S. 551, 161 L. Ed. 2d 1 (2005). While acknowledging that the only statutorily-prescribed options of death or mandatory life imprisonment without parole were no longer available, the court held that the juveniles nevertheless could be sentenced to life with parole because they had "actual notice" that life imprisonment without parole was the "ceiling" and life imprisonment with the possibility of parole was the "floor." Id. at 1281; see also Miller v. State, 148 So. 3d 78 (Ala. Crim. App. 2013) (reaching the same result following remand of the original Miller case).

Unlike Arkansas or Massachusetts, North Carolina implemented a new sentencing scheme soon after Miller was decided. See Jackson, 426 S.W.2d at 908 (stating that Arkansas law has "no provisions in the capital murder statute for a lesser sentence for persons under the age of eighteen"); Brown, 1 N.E.3d at 265 (noting that the Commonwealth's argument "would have sentencing judges creating an entirely new penalty scheme ad hoc"). As a result, this case is distinguishable from Jackson and Brown.

This case is much more like Henry in that a new statute was in place when defendant was sentenced. And as in Henderson, defendant here had actual notice that life imprisonment with parole was a possible sentence based on

Miller. As in Henry and Henderson, this Court should find there was no constitutional infirmity in sentencing defendant to life imprisonment without parole under the new sentencing statutes.

In summary, defendant did not receive a sentence greater than the one annexed to his offense when it was committed. He had fair warning that the General Assembly considered life imprisonment without parole to be an appropriate sentence for first degree murder. As a result, there was no ex post facto violation committed when defendant was sentenced under the new sentencing scheme to life imprisonment without parole. The Court of Appeals did not err.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the Court of Appeals.

Electronically submitted this the 14th day of July, 2017.

JOSH STEIN

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In accord with North Carolina Rule of Appellate Procedure 33(b), I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon the DEFENDANT by electronically mailing the same in PDF format to his counsel of record, using the following electronic address:

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This the 14th day of July, 2017.

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