NO. 267PA21 **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Cumberland**
	)	
FRANCISCO TIRADO	**)**	

****

NEW BRIEF FOR THE STATE
Appellee

****

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<u>NEW BRIEF FOR THE STATE</u>
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<u>ISSUES PRESENTED</u>

I. WHETHER THE COURT OF APPEALS ERRED BY FAILING TO CONSIDER DEFENDANT'S CHALLENGE UNDER ARTICLE I, § 27 OF THE NORTH CAROLINA CONSTITUTION.

II. WHETHER DEFENDANT'S RESENTENCING COMPLIED WITH THIS COURT'S DECISION IN *STATE V. KELLIHER*, 381 N.C. 558 (2022).

STATEMENT OF THE CASE

More than two decades ago, Defendant was indicted for a multitude of crimes that included the murders of Susan Moore and Tracy Lambert and the attempted murder of Debra Cheeseborough. As brief background, during the night of 16 through 17 August 1998, Defendant, a member of the Crips gang in Fayetteville, North Carolina, participated in two gang-initiated "missions," wherein Defendant and other gang members targeted, trapped, and abducted the victims, robbed them of their belongings and vehicles using weapons, and then drove the victims around, trapped in the trunks of their vehicles, before finally removing them from the trunks, surrounding them, and shooting them. Moore and Lambert both died as a result of the gunshot wounds they sustained. Cheeseborough sustained nine gunshot wounds—including to her sides, back, chest, right leg, eyelid, and thumb—but feigned death until the gang members left. Cheeseborough lived through the night and a passerby found her, still conscious, on the ground the next morning. She ultimately survived the ordeal.[1]

On 4 January 1999, Defendant was charged with two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous

[1] This Court described in greater detail the circumstances of the crimes in its opinion on direct appeal. *State v. Tirado*, 358 N.C. 551, 560-62 (2004).

weapon, conspiracy to commit first-degree kidnapping, and conspiracy to commit first-degree murder, all involving the crimes he committed against Moore and Lambert. (R pp. 15-20) On 25 January 1999, Defendant was also charged with attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and robbery with a dangerous weapon, for the crimes he committed against Cheeseborough. (R pp. 21-22) Defendant was seventeen years, four months, and ten days old at the time of the crimes. (R pp. 3-14)

Defendant was tried capitally during the 7 February 2000 Criminal Session of the Superior Court, Cumberland County, before the Honorable William C. Gore, Jr., Superior Court Judge Presiding. (R pp. 15-22, 31-37) On 3 April 2000, at the conclusion of the capital trial, the jury found Defendant guilty of all charges and recommended sentences of death for the first-degree murder convictions. (R pp. 51, 65) The trial court sentenced Defendant to death in accordance with the jury's recommendation and also imposed consecutive terms of imprisonment for each of Defendant's twelve other felony convictions. (R pp. 68-95) Defendant appealed in this Court. (R p. 102)

On 13 August 2004, this Court affirmed Defendant's convictions but vacated his death sentences and remanded the case for a new capital sentencing hearing because the trial court failed to poll the jury to ensure that each

individual juror agreed with the recommendation of death. *State v. Tirado*, 358 N.C. 551, 585 (2004). While the case was back on remand, the United States Supreme Court ruled that the imposition of capital punishment on an offender who was under the age of eighteen at the time of his crimes violates the Eighth Amendment of the United States Constitution. *See Roper v. Simmons*, 543 U.S. 551, 560 (2005). Consequently, on 13 September 2007, the trial court resentenced Defendant, imposing two consecutive, mandatory sentences of life without parole for his first-degree murder convictions. (R pp. 129-133)

Several years later in 2012, the United States Supreme held in *Miller v. Alabama*, 567 U.S. 460, 465 (2012), that the mandatory imposition of life-without-parole sentences for persons under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel-and-unusual punishments. In 2016, Defendant filed a motion for appropriate relief (MAR), alleging that, in light of *Miller*, his mandatory life-without-parole sentences were unconstitutional under the Eighth Amendment of the United States Constitution and Article I, Section 27 of the North Carolina Constitution. (R pp. 134-47) Defendant acknowledged in his MAR that, whether raised under the state or federal Constitutions, the same analysis applied to his constitutional claims. (R p. 140 n.3)

In August 2019, in compliance with *Miller*, the trial court held a resentencing hearing under North Carolina's post-*Miller* juvenile sentencing statute, N.C.G.S. § 15A-1340.19A *et seq*. After the hearing, having considered all of the circumstances of the offense and the particular circumstances of Defendant, including evidence regarding all relevant statutory mitigating factors, the trial court concluded that Defendant should again be sentenced to life without parole for each of his first-degree murder convictions. (16 March 2020 Order, attached) Defendant appealed.

On 15 June 2021, the Court of Appeals affirmed Defendant's life-without-parole sentences in an unpublished opinion. *State v. Tirado*, No. COA20-213, 2021 WL 2425893, at *7 (N.C. App. 2021). The Court of Appeals explicitly addressed, and rejected, each of the four arguments Defendant advanced in his brief. Specifically, the court held that (1) the trial court's findings of fact were supported by competent evidence, *id.* at *4; (2) the trial court properly considered and weighed the evidence concerning the statutory mitigating factors in Section 15A-1340.19B(c), *id.* at *5; (3) Defendant's life-without-parole sentences were constitutional under the Eighth Amendment of the United States Constitution and Article I, Section 27 of the North Carolina Constitution, notwithstanding the U.S. Supreme Court's decision in *Jones v. Mississippi*, 593 U.S. 98 (2021), because the sentencing judge had the opportunity to consider

Defendant's youth and the discretion to impose a lesser punishment, *id*. at *6; and (4) the trial court applied the correct legal standard from Section 15A-1340.19C(a) and adhered to binding precedent in reaching its sentencing decision, *id*. at *7.

On 29 June 2021, Defendant filed in the Court of Appeals a "Motion to Stay the Mandate and Withdraw the Opinion, or, in the alternative, for En Banc Consideration." (*See* Docket Entries 12, 13, and 14 in No. COA20-213) On 1 July 2021, the Court of Appeals denied Defendant's motion to withdraw the opinion. (*Id.*) That same day, the Court of Appeals temporarily stayed issuance of its mandate pending resolution of Defendant's motion for *en banc* rehearing. (*Id.*) Finally, on 15 July 2021, the Court of Appeals denied Defendant's motion for *en banc* rehearing and dissolved the temporary stay. (*Id.*)

On 28 July 2021, Defendant filed a notice of appeal in this Court based on a substantial constitutional question, along with a petition for discretionary review (PDR) of the Court of Appeals' opinion. In his petition for discretionary review, Defendant offered two proposed issues for briefing:

> I. Whether the Court of Appeals erred in determining that *Jones v. Mississippi* eliminates the ability of a juvenile to seek review of an as-applied constitutional challenge to their sentence of life without parole, effectively eliminating appellate review of juvenile LWOP sentences?

II. Whether the Court of Appeals erred by failing to consider Mr. Tirado's challenge under Article I, § 27 of the North Carolina Constitution?

(Def's PDR, 28 July 2021, pp. 29-30)

On 23 June 2022, Defendant moved to amend his petition for discretionary review to submit additional authorities—this Court's recent opinions in *State v. Kelliher*, 381 N.C. 558 (2022) and *State v. Conner*, 381 N.C. 643 (2022)—and to request the alternative relief of remanding the case to the Court of Appeals for reconsideration of Defendant's constitutional claims in light of the opinions in *Kelliher* and *Conner*. (Def's Motion to Amend, 23 June 2022, pp. 1-2)

On 30 August 2023, this Court dismissed Defendant's notice of appeal based on a constitutional question, allowed him to amend his petition for discretionary review, denied review of Defendant's first proposed issue, and granted review of the second proposed issue. (30 August 2023 Order, No. 267P21) This Court also directed the parties to address in their briefing "the issue of whether defendant's resentencing complied with the Court's decision in *State v. Kelliher*, 381 N.C. 558 (2022)." (*Id.*)

ARGUMENT

The State first respectfully notes that some of the arguments advanced on pages twenty-one through twenty-seven of Defendant's new brief are not

properly before this Court. In his petition for discretionary review, Defendant presented two proposed issues for appeal:

I. Whether the Court of Appeals erred in determining that *Jones v. Mississippi* eliminates the ability of a juvenile to seek review of an as-applied constitutional challenge to their sentence of life without parole, effectively eliminating appellate review of juvenile LWOP sentences?

II. Whether the Court of Appeals erred by failing to consider Mr. Tirado's challenge under Article I, § 27 of the North Carolina Constitution?

Under proposed Issue I, Defendant argued that the Court of Appeals improperly "refus[ed] to consider [his] as-applied Eighth Amendment challenge" and "misappli[ed] [the United States Supreme Court's opinion in] *Jones*." (Def's PDR p. 22, *see also* pp. 22-25) Under proposed Issue II, Defendant argued that the Court of Appeals "failed to consider . . . his claim that his sentence was unconstitutional under the more protective North Carolina Constitution." (Def's PDR p. 28, *see also* pp. 25-28)

In its 30 August 2023 order granting review, this Court denied Defendant's request for discretionary review of Issue I (the as-applied question) but granted review of Issue II: "Whether the Court of Appeals erred by failing to consider Mr. Tirado's challenge under Article I, § 27 of the North Carolina Constitution." Nevertheless, in his new brief on appeal, Defendant devotes substantial time discussing the same "as-applied" arguments that he made in

the portion of his petition for discretionary review that was devoted to Issue I. (Def's Br. pp. 21-27) (30 August 2023 Order "[T]he petition for discretionary review is denied as to the first proposed issue . . . .") Defendant's arguments regarding the Court of Appeals' interpretation of *Jones* and his as-applied constitutional arguments are not properly before this Court. *See* N.C. R. App. P. 16(a) ("[R]eview in the Supreme Court is limited to consideration of the issues state in . . . the petition for discretionary review . . . unless further limited by the Supreme Court[.]").

To the extent Defendant continues to argue in pages twenty-one through twenty-seven of his brief on appeal that the Court of Appeals erred by misinterpreting *Jones* and failing to address a separate as-applied constitutional challenge (Issue I in the PDR), these questions are not properly before the Court and should not be addressed further because this Court has already denied review of these issues.

I. THE COURT OF APPEALS DID NOT ERR BY FAILING SEPARATELY TO CONSIDER DEFENDANT'S SENTENCING CHALLENGE UNDER ARTICLE I, § 27 OF THE NORTH CAROLINA CONSTITUTION.

Pursuant to Issue II in Defendant's petition for discretionary review, Defendant argued that the Court of Appeals erred by failing to consider his constitutional challenge to his sentences imposed during resentencing

separately under Article I, Section 27 of the North Carolina Constitution, because our state Constitution provides "broader protections" than its federal counterpart. (Def's PDR pp. 25-28) This argument is misplaced for two reasons.

First, in his brief in the Court of Appeals, the entirety of Defendant's purported challenge to his sentences pursuant to Article I, Section 27 of the North Carolina Constitution was contained in the argument heading and one sentence in his brief. (Def's COA Br. p. 36) Defendant offered no argument, analysis, or citation to authority, regarding why the state Constitution should be analyzed differently than the federal Constitution. The entirety of Defendant's discussion on the topic was as follows: "Additionally, North Carolina's constitutional protection in Article I, Section 27 provides even broader protection, prohibiting cruel or unusual punishment." (Def's COA Br. p. 36) Defendant did not engage in any independent analysis of his state constitutional claim, separate or apart from his cruel-and-unusual punishment claim under the Eighth Amendment. A distinct constitutional claim under Article I, Section 27 should be deemed abandoned under these circumstances. *See* N.C. R. App. P. 28(b)(6) ("Issues . . . in support of which no reason or argument is stated, will be taken as abandoned.") and ("The body of the argument . . . shall contain citations of the authorities upon which the appellant relies.").

Second, in its opinion, the Court of Appeals rejected Defendant's argument that "the imposition of his consecutive LWOP sentences violates the Eighth and Fourteenth Amendments of the United States Constitution *and Article I, Section 27 of the North Carolina Constitution*[.]" *Tirado*, 2021 WL 2425893, at *6 (emphasis added). Consequently, the Court of Appeals *did* acknowledge and rule on Defendant's state constitutional challenge. Although it did so in a summary fashion, nothing more was required under North Carolina law at that time the Court of Appeals issued its opinion.

For decades before the Court of Appeals issued its opinion in this case on 15 June 2021, claims of cruel and/or unusual punishment were analyzed the same under both the United States Constitution and the North Carolina Constitution. *See, e.g., State v. Green*, 348 N.C. 588, 603 (1998) (citing *State v. Bronson*, 333 N.C. 67 (1992); *State v. Rogers*, 323 N.C. 658 (1989); *State v. Peek*, 313 N.C. 266 (1985); *State v. Higginbottom*, 312 N.C. 760 (1985); *State v. Fulcher*, 294 N.C. 503 (1978)). This Court had previously maintained that the sentencing limitations imposed under the cruel-or-unusual punishment clause in Article I, Section 27 were not stricter than those imposed under the cruel-and-unusual punishment clause of the Eighth Amendment, despite the slight difference in the language contained in the constitutional provisions. *See Green*, 348 N.C. at 603 & n.1 (no "compelling reason" exists to conclude that use of the

disjunctive term "or" in the state Constitution provides broader protection than its federal counterpart). *Compare* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted." (emphasis added)), *with* N.C. Const. art. I, § 27 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel *or* unusual punishments inflicted." (emphasis added)).

On 17 June 2022, in *Kelliher*, 381 N.C. at 584, this Court disavowed this approach and held that "article I, section 27 of the North Carolina Constitution need not be interpreted in lockstep with the Eighth Amendment." Nonetheless, at the time the Court of Appeals issued its opinion in this case in 2021, it adopted the approach to interpreting Article I, Section 27 of the North Carolina Constitution that this Court had used for decades and interpreted the protections afforded by the Eighth Amendment and Article I, Section 27 as being the same. *See Dunn v. Pate*, 334 N.C. 115, 118 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decision until otherwise ordered by the Supreme Court." (quotation marks and citations omitted)). Accordingly, the Court of Appeals did not err by failing to address any argument Defendant advanced before that court, nor did the court err because it followed the binding decisions of this Court in place it at the time. For these reasons, Defendant is

not entitled to a remand requiring the Court of Appeals to address a distinct constitutional challenge under Article I, Section 27 of the North Carolina Constitution.

II. DEFENDANT'S RESENTENCING COMPLIED WITH STATE AND FEDERAL CONSTITUTIONAL AND STATUTORY STANDARDS, AND HIS SENTENCES SHOULD BE AFFIRMED.

A. This Court's opinion in *State v. Kelliher,* 381 N.C. 558 (2022).

In its 30 August 2023 order granting discretionary review, this Court directed the parties to address whether "defendant's resentencing complied with this Court's decision in *State v. Kelliher*, 381 N.C. 558 (2022)," in the first instance. In *Kelliher*, the defendant was seventeen years old when, in 2004, he shot two other teenagers in the back of the head, one of whom was pregnant, to facilitate his theft of drugs and money. *Id.* at 561. He subsequently pleaded guilty to two counts of first-degree, premeditated murder and received mandatory, life-without-parole sentences for each of his first-degree murder convictions. *Id.* at 562. After the United States Supreme Court issued its opinion in *Miller v. Alabama*, 567 U.S. 460, 465 (2012), the defendant obtained a resentencing hearing. In its resentencing order, the trial court expressly found that the defendant was "neither incorrigible nor irredeemable." *Kelliher*, 381 N.C. at 564. However, because the case involved a double homicide, the trial

court was unwilling to impose *concurrent* sentences. *Id.* The trial court thus resentenced Kelliher to two consecutive sentences of life *with* parole for his first-degree murder convictions. *Id.* Under these sentences, the defendant would become eligible for parole after fifty years in prison. *Id.*

On appeal after resentencing, this Court considered for the first time whether the imposition of a lengthy term-of-years sentence upon an offender who was under the age of eighteen at the time of his crimes violated the Eighth Amendment of the United States Constitution and Article I, Section 27 of the North Carolina Constitution. *Id.* at 560. In a divided opinion, this Court held that the defendant's consecutive life-with-parole sentences violated the prohibitions against cruel and/or unusual punishment imposed by both the state and federal Constitutions. Addressing first the defendant's federal constitutional claim, the *Kelliher* Court held that (1) constitutional challenges to lengthy term-of-years sentences, which the Court characterized as "de facto life without parole," were cognizable under the Eighth Amendment and (2) the defendant's sentences, which required fifty years' imprisonment before parole eligibility, violated the federal prohibition against cruel and unusual punishment because the defendant would not have a meaningful opportunity for release. *Id.* at 578.

The *Kelliher* Court then went on to separately analyze the defendant's constitutional claim under the North Carolina Constitution's prohibition against "cruel or unusual punishment." *Kelliher*, 381 N.C. at 578-79. The Court in *Kelliher* relied on the textual differences between the state and federal Constitutions ("cruel *or* unusual" versus "cruel *and* unusual" punishment), *id.* at 579, to conclude that the state Constitution provides distinct and broader protections than its federal counterpart. *Id.* at 580.

The Court in *Kelliher* cited the evolving standards of decency in society and declared that it would exercise its independent judgment to hold that sentencing a juvenile offender convicted of murder but who had been determined to be neither incorrigible nor irredeemable to life without parole was cruel within the meaning of Article I, Section 27 of the North Carolina Constitution. *Kelliher*, 381 N.C. at 582-86. The Court held: "We conclude that in light of the provisions of the North Carolina Constitution not found in the United States Constitution, sentencing a juvenile who is neither incorrigible nor irredeemable to life without parole is cruel within the meaning of article I, section 27." *Id.* at 585.

The Court in *Kelliher* next acknowledged, however, that the defendant was not technically sentenced to life without parole; thus, the Court explained that it would recognize his sentence as one of *de facto* life without parole under

the state Constitution. *Id.* at 587. The Court ruled that any sentence that deprived a juvenile offender of a "genuine opportunity for release" was "in effect if not in name," a sentence of life without parole under Article I, Section 27 of the North Carolina Constitution. *Id.* at 588.

Next, the Court further held that, before imposing a sentence of life without parole on a juvenile homicide offender, a sentencing court must make certain express findings:

> To summarize, we hold that sentencing a juvenile who can be rehabilitated to life without parole is cruel within the meaning of Article I, Section 27 of the North Carolina Constitution. . . . *Thus, unless the trial court expressly finds that a juvenile homicide offender is one of those "exceedingly rare" juveniles who cannot be rehabilitated, he or she cannot be sentenced to life without parole.*

Id. at 586-87 (emphasis added).

With this statement, the Court in *Kelliher* established a bright-line rule that any sentence or combination of sentences requiring a juvenile homicide offender to serve more than forty years in prison before becoming parole eligible is constitutionally impermissible under Article I, Section 27 of the North Carolina Constitution unless the sentencing court specifically finds that the defendant is irredeemable. *Id.* at 590-91. Because the trial court in *Kelliher* expressly found that the defendant was "neither incorrigible nor irredeemable," *see id*. at 587, the Court concluded that his sentence of fifty years in prison prior

to parole eligibility violated Article I, Section 27 of the North Carolina Constitution. *Id.* at 591.

In this case, Defendant was not sentenced to a lengthy term-of-years sentence for his two convictions of first-degree murder, but rather received two consecutive sentences of life without parole. Accordingly, the analysis in *Kelliher* concerning *de facto* life sentences and what constitutes a meaningful opportunity for release under either the Eighth Amendment or Article I, Section 27, does not apply to this case. Rather, the requirement from *Kelliher* that is relevant in this case is the Court's statement that a trial court, before imposing a life-without-parole sentence, must make certain express findings: "[U]nless the trial court expressly finds that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated, he or she cannot be sentenced to life without parole." *Kelliher*, 381 N.C. at 587.

B. Defendant's resentencing complied with *Kelliher*.

Defendant's resentencing complied with the express-finding requirement set forth in *Kelliher*. The trial court made numerous factual findings confirming that Defendant is "one of those 'exceedingly rare' juveniles who cannot be rehabilitated." *Kelliher*, 381 N.C. at 587.

To start, in its written sentencing order, the sentencing court twice acknowledged that life-without-parole sentences should be reserved for the "rarest of juvenile offenders," and "the rarest of children." (Order, p. 1, ¶¶ 6-7)

The trial court then expressly found that "[D]efendant is unable to benefit from rehabilitation" and that Defendant offered no evidence to demonstrate his "actual rehabilitation" in confinement. Specifically, relevant to the "rehabilitation in confinement" mitigating factor in Section 15A-1340.19B(c), the sentencing court found the following:

> 10. Likelihood that defendant would benefit from rehabilitation in confinement. The Court carefully considered the likelihood the defendant would benefit from rehabilitation in confinement, including evidence that the Defendant obtained his GED, held jobs, and took a few classes while incarcerated, and Dr. Harbin's testimonies at trial, the capital sentencing proceeding, and this hearing, and his 1998 and 2019 reports. The Court also considered the Defendant's history of being unable to rehabilitate after participating in several rehabilitative programs, including a detention center, Three Springs therapeutic treatment, Dorothea Dix, Dobbs Training School, and Borden Heights Group Home, before committing the offenses. The Court also considered the Defendant's background of training in disciplined martial arts from age 8 or 9 until the time of the murders. The Court considered the Defendant's disciplinary record while incarcerated, which included 28 infractions, such disobeying orders, assault on staff, profane language, misuse of medication, selling medicine, theft, weapon possession, threats, escape, possession of a dead animal, gang involvement, fighting, bribery, unauthorized leaving of job. The latest infractions on 14 June 2019 were for involvement with a gang and assault on a person with a weapon. The Court finds, based on the Defendant's history of escalating criminal behavior and violence that has persisted into adulthood, on Dr. Harbin's

> opinion that the Defendant presents a medium risk of future violence, on the Defendant's history of being unable to rehabilitate despite being offered several programs and opportunities to do so, among other things, that the ***Defendant is unable to benefit from rehabilitation.*** The Court has thoughtfully considered this factor and finds that it carries no mitigating weight in this case.
>
> 11. Considering *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), to be instructive on this factor, the Court notes that the defendant in *Montgomery*, having "spent each day of the past 46 years knowing he was condemned to die in prison," submitted information to the Court that "discussed . . . his evolution from a troubled, misguided youth to a model member of the prison community"; claimed that "he helped establish an inmate boxing team, of which he later became a trainer and coach"; "allege[d] that he has contributed his time and labor to the prison's silkscreen department and that he str[o]ve[ ] to offer advice and serve as a role model to other inmates." *Id.* at 736, 197 L. Ed. 2d at 622. ***The Defendant here has offered no similar claims to demonstrate his actual rehabilitation in the approximately twenty years since he has been incarcerated, or any persuasive evidence to that effect, or any that shows he has any capacity for rehabilitation.*** To the contrary, defendant has made some statements while he was incarcerated that he wants to escape, become a terrorist, and kill military personnel.

(Order, pp. 8-9, ¶¶10-11) (second and third emphases added)

After making these findings of fact, the trial court expressly concluded as a matter of law that the "mitigating circumstances attendant to the Defendant's youth did not . . . show any prospect of reform," and that "the Defendant's crimes did not reflect unfortunate yet transient immaturity but rather reflected 'irreparable corruption.' " In full, the trial court concluded:

> 1. The Court concludes that the mitigating factors of youth found—that is chronological age [any others]—carry little mitigating weight in this case based on a careful consideration of all the evidence presented that the Court deems relevant to sentencing. ***Any mitigating circumstances attendant to the Defendant's youth did not in this case lessen his culpability or show any prospect for reform***, as compared with if the Defendant had committed these crimes eight months later, when he reached the age of adult criminal responsibility.
>
> 2. The Court concludes after considering "all the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors" of Defendant's youth, both submitted and not submitted but considered, that ***the Defendant's crimes did not reflect "unfortunate yet transient immaturity" but rather reflected "irreparable corruption."***
>
> 3. The Court therefore concludes based on the totality of the circumstances surrounding the crimes, the Defendant's instrumental role in these murders, the Defendant's history, the Defendant's conduct, the Defendant's current danger to society, and the substantial lack of persuasive mitigation evidence presented, and in the exercise of its discretion, that the Defendant should be sentenced to life without parole for both first-degree premeditated murder convictions in this case.

(Order, pp. 10-11, ¶¶ 1-3) (emphasis added)

The sentencing court thus explicitly concluded that Defendant's crimes were not the result of unfortunate yet transient immaturity but rather reflected irreparable corruption. (Order, p. 10, ¶ 2) The sentencing court reached this conclusion based on the totality of the evidence presented at the resentencing hearing, including evidence that Defendant was an active participant in the murders; he watched and encouraged his co-defendant to

shoot Cheeseborough in the head after she fell to the ground having sustained six previous gunshot wounds; he held a knife to Moore's throat while a co-defendant shot Lambert in the head as she pleaded for her life; he personally shot Moore in the back of the head, execution style; he lacked remorse for his crimes; he exhibited an escalating pattern of violent and criminal behavior persisting into adulthood; he had numerous infractions while incarcerated, the most recent of which involved gang activity and assault using a weapon; his own expert witness determined that he was a psychopath; he was still a danger to society after more than two decades of incarceration; and he made statements while incarcerated that he wanted to escape, become a terrorist, and kill military personnel. (Order, pp. 6-9)

Together, these findings amply satisfy the requirement set forth in *Kelliher*. To be sure, the trial court did not use the precise words used by this Court in its opinion in *Kelliher*, 381 N.C. at 587 (stating that a sentencing court must expressly find the defendant was one of those " 'exceedingly rare' juveniles who cannot be rehabilitated[.]"). But nothing in *Kelliher* suggests that a trial court's finding of incorrigibility can satisfy Article I, Section 27 of the North Carolina Constitution only if it uses the same "magic words" the Court used in that opinion. Placing such a demand on the sentencing court here would be particularly unreasonable, given that at the time the court

entered its sentencing order on 16 March 2020, it was operating without the benefit of this Court's opinion *Kelliher* and could not have conceivably anticipated what precise language this Court would use in its opinion. Under these circumstances, the trial court's decision to impose consecutive sentences of life without parole fully complies with all state and federal constitutional and statutory requirements.

Panels of the court of appeals, moreover, have not understood *Kelliher* to require lower courts to use any special wording in making their findings regarding a juvenile defendant's incorrigibility. In *State v. Golphin*, the trial court found that "Defendant's crimes demonstrate[d] his permanent incorrigibility." ___ N.C. App. ___, No. COA22-713, 2024 WL 436970 (2024) (issued 6 February 2024). Nevertheless, despite the fact that this finding did not mirror word-for-word the Court's phrasing in *Kelliher*, the court of appeals held that the trial court had complied with *Kelliher*. *Id.* at *13. So too in *State v. Borlase*, ___ N.C. App. ___, No. COA22-985, 2024 WL 13338 (2024) (issued 2 January 2024). There, the trial court found that the defendant's "crimes and other [behavior] demonstrate a condition of irreparable corruption and permanent incorrigibility without the possibility of rehabilitation." *Id.* at *4. Again, although this phrasing was slightly different from the wording used in

Kelliher, the court of appeals held that the trial court had clearly complied with that precedent.[2] *Id.* at *6.

The same result should obtain here. The lower court may not have used the exact phrasing from *Kelliher*, but its finding that Defendant cannot be rehabilitated was nevertheless clear. Because the trial court explicitly found pursuant to the mitigating factor in Section 15A-1340.19B(c)(8) that Defendant was "unable to benefit from rehabilitation" and that he had not demonstrated "actual rehabilitation" in confinement, *Kelliher* has been satisfied, and Defendant's resentencing complied with both the state and federal Constitutions. (Order, pp. 8-9, ¶¶10-11)

CONCLUSION

The State respectfully asks this Court to affirm Defendant's sentences of life without parole.

[2] The *Borlase* court expressed some uncertainty as to whether this Court's statements in *Kelliher* requiring an express finding of incorrigibility were dicta. 2024 WL 13338, at *6. To the extent there may be confusion among the lower courts regarding *Kelliher*'s express-finding requirement, the State would urge the Court to clarify its holding.

Electronically submitted this the 19th day of February 2024.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
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Special Deputy Attorney General

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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 electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Ms. Kellie Mannette
Email: mannette@tfblawyers.com

Electronically submitted this the 19th day of February 2024.

Electronically Submitted
Heidi M. Williams
Special Deputy Attorney General

NO. 267PA21 **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Cumberland**
	)	
FRANCISCO TIRADO	**)**	

****

APPENDIX

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Index

Order (16 March 2020, *Miller* Resentencing) 1-11

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER 98CRS34831

FILED
2020 MAR 16 A 8:47
CUMBERLAND COUNTY, C.S.C.

STATE OF NORTH CAROLINA

v.

ORDER

Francisco Edgar Tirado,
Defendant

THIS MATTER COMING BEFORE THE UNDERSIGNED COURT ON August 28 through August 30, 2019, for resentencing pursuant to Miller v. Alabama, 567 U.S. 460 (2012), and its progeny.

1. The matter is before the Court for resentencing of the Defendant pursuant to Miller v. Alabama, 567 U.S. 460 (2012).
2. The Court held this evidentiary hearing pursuant to Miller and other applicable case law, and followed the process enunciated in North Carolina General Statute 15A-1340.19A, –B, –C (2017) for sentencing juvenile offenders subject to life imprisonment without the possibility of parole ("LWOP").
3. The Court followed a process that carefully considered the Defendant's youth and its attendant mitigating characteristics, as were identified in Miller and listed in Section 15A-1340.19(B)(c).
4. The Court has reviewed each case and authority tendered by the parties, including Miller and Montgomery v. Louisiana, 136 S.Ct. 718 (2016).
5. The Court acknowledges that juveniles are constitutionally different from adults for sentencing purposes. Miller, 567 U.S. at 471. This is primarily because juveniles, when compared to adults, generally have "diminished culpability and greater prospects for reform." Id.
6. The Court recognizes that the punishment of LWOP for defendants who were juveniles at the time of the crime is meant to be reserved for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Montgomery, 136 S.Ct. at 726.
7. The Court also recognizes that LWOP is disproportionate for "the vast majority" of juvenile offenders and only appropriate for "the rarest of children." Montgomery, 136 S.Ct. at 726, 734.
8. The Court considered all matters presented by the parties.
9. The Court invited the Defendant to submit any and all mitigating circumstances to the Court, including mitigating circumstances attendant to his youth.
10. The Court tried to imagine other mitigating factors that might apply to the Defendant.
11. The Court considered various things about the Defendant's youth, lack of maturity, impulsivity, vulnerability to peer pressure, level of participation in the crimes, the circumstances of the crimes, lack of well-formed character showing irretrievable

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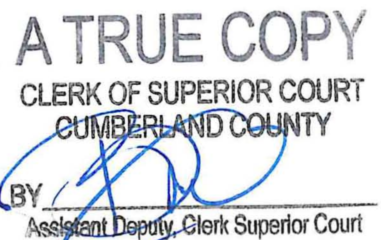
depravity, and the likelihood that the Defendant has and would benefit from rehabilitation and confinement.

12. The Court makes the following findings from the evidence it deems credible.
13. The Court finds the following facts at least by a preponderance of the evidence.

After considering the record, and hearing evidence and argument from the State and Defendant, the Court makes the following FINDINGS OF FACT:

PROCEDURAL HISTORY

1. In March and April of 2000, in the above-captioned case number, the Defendant was tried before a jury for fourteen violent crimes, including two counts of first-degree premeditated murder, arising from the kidnappings, armed robberies, and shooting deaths of Susan Moore and Tracy Lambert, as well as the kidnapping, armed robbery, and attempted shooting death of Debra Cheeseborough.
2. All of the charges had offense dates of 17 August 1998.
3. The Defendant's date of birth is 7 April 1981, which means he was 17 years, four months, and ten days old at the time of the offenses.
4. On 3 April 2000, the Defendant was convicted by a jury of two counts of first-degree premeditated murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, one count of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree kidnapping, and one count of conspiracy to commit robbery with a dangerous weapon, arising from the kidnappings, armed robberies, and shooting deaths of Ms. Moore and Ms. Lambert. He was also convicted by the jury of attempted first-degree murder, conspiracy to commit first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and robbery with a dangerous weapon, arising from the kidnapping, armed robbery, and attempted shooting death of Ms. Cheeseborough.
5. At the capital sentencing hearing, mitigating factors that related to the Defendant's age and immaturity were submitted to the jury for consideration. The jury found the following mitigating factors [perhaps list them]. The jury also found the following aggravating factors [perhaps list].
6. After the capital sentencing hearing, the jury unanimously returned recommendations of two death sentences for the first-degree premeditated murders of Ms. Moore and Ms. Lambert.
7. On 3 April 2000, the Defendant received two consecutive death sentences for his murder convictions. The trial court also imposed twelve consecutive sentences for his remaining convictions. The Defendant appealed to our Supreme Court.
8. By opinion filed 13 August 2004, our Supreme Court found no error in the guilt-innocence phase of trial, vacated the death sentences, and remanded for capital resentencing. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515 (2004).



9. On 13 September 2007, pursuant to Roper v. Simmons, 543 U.S. 551 (2005), the Defendant was resentenced for the first-degree murders of Ms. Moore and Ms. Lambert to two consecutive sentences LWOP.
10. On July 20, 2018, the undersigned court ordered this defendant be resentenced pursuant to Miller v. Alabama.

MILLER RESENTENCING PROCEDURE

1. This matter is before the Court for an evidentiary hearing to determine the appropriate sentences for the Defendant's two first-degree murder convictions.
2. The Court held this evidentiary hearing pursuant to Section 15A-1340-19A, – D (2017), and in light of the substantive legal standard enunciated in Miller that "sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity." State v. James, ___ N.C. ___, ___, 813 S.E.2d 195, 207 (2018).
3. The Defendant was present in court during the entire hearing.
4. The State was represented by Assistant District Attorney Rob Thompson.
5. The Defendant was represented by Carl Ivarsson.
6. This was an evidentiary hearing held in the absence of any jury.
7. The Court had an opportunity to observe each and every witness and determine the weight and credibility to give each witness's testimony.
8. Both sides were permitted to put on evidence, and each side was given the opportunity to cross-examine any witness offered by the opposing side.
9. The Court allowed each side to put on any evidence it wished to present.
10. The Court did not refuse to hear any evidence offered by either party.
11. The Court considered all evidence presented at the evidentiary hearing.
12. The Court heard testimony from the following witnesses for the Defendant:
    a. Thomas Harbin, PhD.
    b. Janet McCalister
    c. Anthony Utt
    d. Sheldon Sutton
    e. Chubasco Reaves
    f. The Defendant
13. The Court heard testimony from the following witnesses for the State:
    a. Mike Casey
    b. Debra Cheeseborough
14. The Court received into evidence several exhibits from the Defendant, including:
    a. Dr. Harbin's 2000 report
    b. Dr. Harbin's 2019 report
    c. Sentencing testimony/7 witnesses
    d. Sentencing testimony/4 witnesses
    e. Sentencing testimony/2 witnesses
    f. Sentencing closing arguments
    g. Issue and recommendations forms

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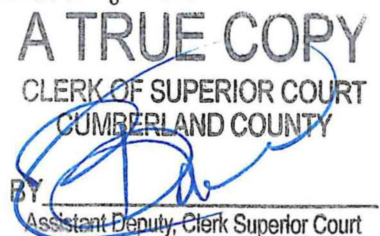
h. Judgments
i. Timeline
j. Dr. Harbin's report
k. Defendant's DOC notes
l. Three Springs discharge
m. Letter/photos Edgar Tirado
n. Defendant's school records
o. N.C. Dept. of Public Safety records
p. Defendant's prison records
q. Defendant's' juvenile records
r. Trial sentencing exhibits

15. In addition to the verbatim trial and sentencing transcripts, the Court reviewed each case and authority tendered by the parties, including Miller and Montgomery, and other relevant authority decided after Miller including James; N.C.G.S. §§ 15A-1340.19A–D (governing sentencing for minors subject to LWOP), including carefully considering each mitigating circumstance of youth from Miller listed in N.C.G.S. § 15A-1340.19B(c); and the entire case file.
16. The Court gave each party a full opportunity to present evidence as to any matter that could be relevant to the sentencing, any evidence that could have probative value to the Defendant's sentencing pursuant to N.C.G.S. § 15A-1340.19B(b).
17. Both sides were permitted to argue regarding the sentence the Court should impose, and the Defendant was given last argument pursuant to N.C.G.S. § 15A-1340.19B(d).
18. The Court based its sentencing decision "solely upon a consideration of 'the circumstances of the offense' 'the particular circumstances of the defendant,' and 'any mitigating factors,' N.C.G.S. § 15A-1340.19C(a), . . . in light of the United States Supreme Court's statements in Miller and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity." James, ___ N.C. at ___, 813 S.E.2d at 207.

CIRCUMSTANCES OF THE OFFENSE

The Court has carefully considered the evidence presented at the resentencing hearing, the transcript of the original trial and capital sentencing proceeding, and the recitation of facts by our Supreme Court in State v. Tirado, 358 N.C. 551, 599 S.E.2d 515 (2004). The Court adopts the facts of the murders as stated in Tirado, and makes the following additional findings of fact about the circumstances of the offenses, which the Court finds relevant to the sentencing decision in this case.

1. The murders in this case were brutal. The Court finds instructive the trial and sentencing jury's finding beyond a reasonable doubt that the murders were "especially heinous, atrocious, or cruel" pursuant to N.C.G.S. § 15A-2000(e)(9).

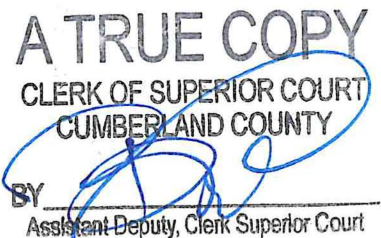


2. The Defendant was an active participant in the events surrounding the conviction involving the murders and all other crimes associated with this incident.
3. The Defendant was present at the Fort Bragg crime scene when the first victim, Debra Cheeseborough, was taken from the trunk.
4. The Defendant was one of the people, along with multiple co-defendants, that surrounded the victim.
5. The Defendant watched as the co-defendant shot the victim at least seven times, once as she was standing and the rest as she lay on the ground.
6. The Defendant told the co-defendant who shot the victim "shoot her in the head." The victim was then shot a final time. The Defendant freely admitted this conduct in open Court during this hearing.
7. The Defendant was present during the Linden crime scene when the second and third victims, Susan Moore and Tracy Lambert, were removed from the trunk of the car.
8. Ms. Lambert pled for her life just before she was shot and killed by a co-defendant.
9. The Defendant held a knife to Ms. Moore's throat while she watched her friend be executed in a pea field.
10. After being cut, Ms. Moore stated to the Defendant that she would rather be shot than die by knife.
11. The Defendant then personally shot Ms. Moore in the head, execution style.
12. The Defendant freely admitted his participation in the murders in open Court during this hearing. More specifically, he testified that his co-defendant, Eric Queen, kept dropping his gun on the ground and that he did not like sand in his gun. The Defendant therefore picked up his gun and shot Ms. Moore in her temple.

CIRCUMSTANCES OF THE DEFENDANT

The Court has carefully read the original trial and capital sentencing transcripts, in addition to all evidence presented by the State and the Defendant in considering "the particular circumstances of the defendant." N.C.G.S. § 15A-1340.19C. Specifically, the Court has reviewed and considered the following documentation presented by the Defendant and admitted into evidence.

1. The trial transcript testimonies of Alice Tirado, Rusty Callahan, Roosevelt Robinson, Edgar Tirado, Janet Jones, Geraldine Hird, and Richard Hall.
2. The sentencing transcript testimonies of Jerry Coker, Tyanna Towsend, Elvin McNeill, and Dr. Thomas Harbin.
3. The trial transcript testimony of Dr. Thomas Harbin.
4. A statement from Alice Tirado, the Defendant's mother, that was read to the jury.
5. The transcript of the closing argument for the defense at the sentencing hearing.
6. The issues and recommendation forms for Tracy Lambert and Susan Moore.
7. A timeline mitigation report prepared by mitigation investigator Toni Elliot.
8. Dr. Harbin's 2019 report.



9. The Defendant's Department of Corrections psychiatric and psychological notes.
10. A discharge summary from Three Springs from 1996 when the Defendant was 15 years old.
11. Letters and photographs about the Defendant's father, dated 12 December 1999.
12. The Defendant's Cumberland County School records.
13. Prison psychological and psychiatric records.
14. The Defendant's prison records.
15. The Defendant's Cumberland County juvenile court records.
16. The Defendant's sentencing exhibits from the original sentencing hearing.

Based on this evidence, the Court notes the following:

1. Alice Tirado's statement shows she had a bad drinking problem and abusive boyfriends. She admits she failed to give proper emotional support, supervision, and financial support for the Defendant.
2. Beginning in the mid-90's, the Defendant had several brushes with the juvenile system as an undisciplined runaway, on probation for fraud and larceny, stealing cigarettes and candy and felony breaking or entering. The Court sent him to training school.
3. Different resources were provided for the Defendant, including the detention center, Three Springs therapeutic treatment, Dorothea Dix, Dobbs Training School. He had assaulted and threatened staff members.
4. The Defendant was also sent to the Borden Heights Group Home and Fayetteville Mental Health Center.

The Court makes the following findings of fact about the particular circumstances of the Defendant:

1. The Defendant is highly articulate and intelligent.
2. The Defendant has not been a model prisoner while in prison; his prison record indicates that he has committed or been found responsible for well over twenty infractions since he has been in prison.
3. The Defendant, while attempting to express remorse during the hearing, has not demonstrated remorse based on his actions, his statement, and his demeanor here in Court.
4. The Defendant had a juvenile record that exhibits a pattern of escalation of disruptive activity, disobedient behavior and criminal activity.
5. The Defendant is still a danger to society.

MITIGATING FACTORS OF YOUTH

The Court, having carefully considered the original trial and capital sentencing transcripts, in addition to the evidence presented at this Miller resentencing hearing, makes the following findings on the absence or presence of each statutory mitigating factor of youth, or Miller factor, listed in Section 15A-1340.19B(c):

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1. Chronological age. The Defendant was seventeen years, four months, and ten days old at the time of the murders. The Court finds the Defendant's chronological age is a mitigating factor. However, the Court assigns this factor little weight because at the time of the offense, Defendant was only eight months away from the age of criminal adult responsibility.
2. Considering *Miller v. Alabama* to be instructive as to this factor, the Court notes that the two defendants in *Miller*, Jackson and Miller, were fourteen years old at the time they committed the murders for which they were convicted. The Court therefore finds that Defendant Tirado's age does not carry significant mitigating weight in this case.
3. Immaturity. The Court has considered the Defendant's immaturity and finds it is not significantly mitigating based on all the evidence. The Court notes that any juvenile by definition is going to be immature, but finds based on the evidence presented that there was no evidence presented of any specific immaturity particular to the Defendant that mitigated the culpability of his conduct in this case. Rather the Court finds that the Defendant was more mature and criminally sophisticated than juveniles of his age. The Court finds this factor does not carry significant mitigating weight.
4. Ability to appreciate the risks of conduct. The Court has considered the Defendant's ability to appreciate the risk of his conduct and does not find this to be significant in light of the two separate kidnappings, robberies, and shootings of the victims. The Defendant was an active participant in the crime against the first victim, Cheeseborough, and later the same night participated in the crimes against victims Lambert and Moore. The Defendant also hid evidence and attempted to escape detection for these crimes, and testified at the resentencing hearing that the plan was to bury Lambert and Moore after murdering them, which shows a heightened ability to appreciate the risks of conduct. The Court finds this factor does not carry significant mitigating weight.
5. Intellectual capacity. The Court does not find this to be a mitigating factor based on the fact that the Defendant was and is highly intelligent, particularly in light of the Defendant being articulate and his satisfactory grades in Three Springs. He tested with Dr. Harbin as having an average I.Q. The Court finds this factor does not carry significant mitigating weight.
6. Prior record. The Court has reviewed the Defendant's extensive record with the juvenile justice system beginning in the mid-1990s, through juvenile records and other evidence presented. The Court finds this factor does not carry significant mitigating weight.
7. Mental health. The Court has reviewed, among other medical records, Dr. Harbin's 1999 and 2019 psychological reports, and considered his testimony at the original trial and at the resentencing hearing. The Court finds that the Defendant has a history of mental health issues, but does not find the Defendant's mental health reduced the culpability of his conduct in this case. Dr. Harbin opined that defendant is an angry and rebellious person with little appreciation for rules or authority. He meets the criteria for PTSD, bipolar disorder, panic disorder, and antisocial personality disorder. The Defendant is

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emotional, volatile, and prone to acting out aggressively. He is unable to form trusting, intimate relationships and has little ability to empathize with others. He tends to manipulate others for his own gain without regard to their rights, wishes, or desires. Antisocial behavior and bipolar disorder are some variables that are predictive of future violence. At the time of his original report, Dr. Harbin determined that the Defendant qualified as a psychopath. The Court finds this factor does not carry significant mitigating weight.

8. Familial or peer pressure exerted upon the Defendant. The Court considered the Defendant's familial upbringing and his peers based on the evidence presented, and the extent to which he may have been pressured into committing these crimes. The Court finds that the Defendant's father abandoned him at age three, and that his mother suffered from drug and alcohol addiction, and that the Defendant witnessed domestic violence and was physically abused by his Mother's boyfriends. The Court does not find the Defendant's familial upbringing, although unfortunate, to have exerted any pressure on the Defendant to commit these crimes. As for peer pressure, the Court finds that although these murders were committed by a gang of nine or more people, including this Defendant, the Defendant voluntarily participated in the gang and in the conduct of the gang, and the Defendant played a pivotal role in the conduct of the gang. The Defendant had an opportunity to not participate in these activities and actually encouraged the attempted murder of victim Cheeseborough, instructing another gang member to shoot her in the head; encouraged the murder of victim Lambert; and, without instruction or pressure from the gang, fatally shot Ms. Moore in the head.

9. The Court finds that the evidence in this case clearly demonstrated that the Defendant played an instrumental part in all of the crimes and conduct surrounding and including the two murders, and the Defendant performed numerous acts of his own free will that aided, encouraged and assisted others to complete these crimes and that he hid evidence in these crimes and attempted to escape detection for these crimes, his role was integral to these crimes, he was an active participant in these crimes, and had direct contact with victims Cheeseborough, Lambert and Moore, and played an instrumental role in these murders. The Court finds this factor does not carry significant mitigating weight.

10. Likelihood that defendant would benefit from rehabilitation in confinement. The Court carefully considered the likelihood the defendant would benefit from rehabilitation in confinement, including evidence that the Defendant obtained his GED, held jobs, and took a few classes while incarcerated, and Dr. Harbin's testimonies at trial, the capital sentencing proceeding, and this hearing, and his 1998 and 2019 reports. The Court also considered the Defendant's history of being unable to rehabilitate after participating in several rehabilitative programs, including a detention center, Three Springs therapeutic treatment, Dorothea Dix, Dobbs Training School, and Borden Heights Group Home, before committing the offenses. The Court also considered the Defendant's background of training in disciplined martial arts from age 8 or 9 until the time of the murders. The Court considered the Defendant's disciplinary record while

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incarcerated, which included 28 infractions, such disobeying orders, assault on staff, profane language, misuse of medication, selling medicine, theft, weapon possession, threats, escape, possession of a dead animal, gang involvement, fighting, bribery, unauthorized leaving of job. The latest infractions on 14 June 2019 were for involvement with a gang and assault on a person with a weapon. The Court finds, based on the Defendant's history of escalating criminal behavior and violence that has persisted into adulthood, on Dr. Harbin's opinion that the Defendant presents a medium risk of future violence, on the Defendant's history of being unable to rehabilitate despite being offered several programs and opportunities to do so, among other things, that the Defendant is unable to benefit from rehabilitation. The Court has thoughtfully considered this factor and finds that it carries no mitigating weight in this case.

11. Considering Montgomery v. Louisiana, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), to be instructive on this factor, the Court notes that the defendant in Montgomery, having "spent each day of the past 46 years knowing he was condemned to die in prison," submitted information to the Court that "discussed . . . his evolution from a troubled, misguided youth to a model member of the prison community"; claimed that "he helped establish an inmate boxing team, of which he later became a trainer and coach"; "allege[d] that he has contributed his time and labor to the prison's silkscreen department and that he str[o]ve[ ] to offer advice and serve as a role model to other inmates." Id. at 736, 197 L. Ed. 2d at 622. The Defendant here has offered no similar claims to demonstrate his actual rehabilitation in the approximately twenty years since he has been incarcerated, or any persuasive evidence to that effect, or any that shows he has any capacity for rehabilitation. To the contrary, defendant has made some statements while he was incarcerated that he wants to escape, become a terrorist, and kill military personnel.

RELEVANT LEGAL STANDARD

The Court has carefully considered the authorities presented to it, including Miller and its progeny. The Court has also carefully considered our Supreme Court's decision in James, and our Court of Appeals' decisions interpreting and applying Miller.

1. The Court, in selecting between the available sentencing alternatives, based its decision "solely upon a consideration of 'the circumstances of the offense' 'the particular circumstances of the defendant,' and 'any mitigating factors,' N.C.G.S. § 15A-1340.19C(a), . . . in light of the United States Supreme Court's statements in Miller and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity." State v. James, ___ N.C. ___, ___, 813 S.E.2d 195, 207 (2018).
2. Per Miller, the Court has taken "into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison," Miller, 567 U.S. at 479-80, 132 S.Ct. at 2469, 183 L.Ed.2d at 424,

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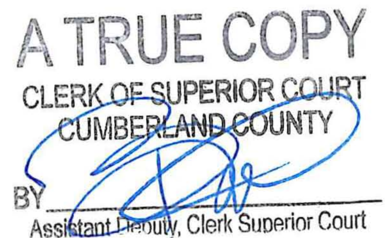
with these differences including "chronological age and its hallmark features," such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; "the family and home environment that surrounds" the juvenile; "the circumstances of the homicide offense" committed by the juvenile, "including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; and any "incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," while preventing a court from "disregard[ing] the possibility of rehabilitation even when the circumstances most suggest it," id. at 477-78, 132 S.Ct. at 2468, 183 L.Ed.2d at 422-23.

3. The Court has considered the Defendant's youth at this hearing, his youth and age at the time of the crimes, immaturity, his ability to appreciate the risk and consequences of his conduct, his intellectual capacity, prior juvenile record, mental health record, peer pressure exerted upon him, and the likelihood that he would benefit from rehabilitation in confinement, as instructed by Section 15A-1340.19B(c), Miller, and its progeny.
4. The Court has also considered all the facts of the crime that the Defendant was convicted of, the circumstances of his trial, the likelihood that he has and would continue to benefit from rehabilitation in confinement and all of the mitigating factors that the original trial court submitted to the jury at the Defendant's sentencing hearing upon his conviction of first degree murder and all mitigating factors presented to the Court by way of evidence or arguments at this hearing on behalf of the Defendant.
5. The Court has considered all the relevant facts and circumstances in light of the substantive standard enunciated in Miller that sentences of LWOP should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity.

Therefore, based on these FINDINGS OF FACT, guided by the RELEVANT LEGAL STANDARD enunciated in Miller, the Undersigned Court makes the following CONCLUSIONS OF LAW:

1. The Court concludes that the mitigating factors of youth found—that is chronological age [any others]—carry little mitigating weight in this case based on a careful consideration of all the evidence presented that the Court deems relevant to sentencing. Any mitigating circumstance attendant to the Defendant's youth did not in this case lessen his culpability or show any prospect for reform, as compared with if the Defendant had committed these crimes eight months later, when he reached the age of adult criminal responsibility.
2. The Court concludes, after considering "all the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors" of the Defendant's youth, both submitted and not submitted but considered, that the Defendant's crimes did not reflect "unfortunate yet transient immaturity" but rather reflected "irreparable corruption."



3. The Court therefore concludes, based on the totality of the circumstances surrounding the crime, the Defendant's instrumental role in these murders, the Defendant's history, the Defendant's conduct, the Defendant's current danger to society, and the substantial lack of persuasive mitigation evidence presented, and in the exercise of its discretion, that the Defendant should be sentenced to life without parole for both first-degree premediated murder convictions in this case.

Wherefore, BASED ON THESE FINDINGS OF FACTS, INCLUDING THE ABSENCE OR PRESENCE OF EACH MITIGATING FACTOR OF YOUTH, AND THESE CONCLUSIONS OF LAW, GUIDED BY THE SUBSTANTIVE LEGAL STANDARD ENUNCIATED IN MILLER, THE UNDERSIGNED COURT HEREBY ORDERS:

The Defendant should receive sentences in these two convictions of first-degree premeditated murder of LIFE WITHOUT THE POSSIBILITY OF PAROLE, to run consecutively, and all other crimes not before this court shall run at the expiration of the second murder sentence, all consecutive as originally imposed and, therefore, remain undisturbed.

THIS THE 9TH DAY OF March, 2020.

James Floyd Ammons, Jr.
SUPERIOR COURT JUDGE

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CUMBERLAND COUNTY
BY
Assistant Deputy, Clerk Superior Court