IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1035

Filed: 5 November 2019

Camden County, No. 15CRS50149

STATE OF NORTH CAROLINA

v.

KAMANI AMES, Defendant.

Appeal by Defendant from judgment entered 19 January 2018 by Judge Jerry R. Tillett in Camden County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant.

BROOK, Judge.

Kamani Ames ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of first-degree murder. On appeal, Defendant challenges his sentence of life without the possibility of parole. Defendant argues that the trial court applied the incorrect legal standard in sentencing him to the harshest punishment possible for a crime he committed as a juvenile. We agree. We therefore vacate the trial court's judgment and remand the case for re-sentencing.

I. Factual and Procedural Background

A. Background Facts

On 27 September 2015, 18-year-old Nahcier Brunson shot and killed 17-year-old Unique Graham in Camden Causeway Park. The only witness was Defendant, then 17 years old.

Graham and Brunson and Defendant knew one another through Defendant's sister. Graham and Defendant's sister were dating at the time of the shooting. Their relationship had caused friction between Graham and Defendant; both parties had pressed criminal charges against each other that were subsequently dismissed. At the same time, Brunson was "dating [and] messing around" with Defendant's sister. Brunson and Defendant were new acquaintances, having only known each other for approximately two weeks at the time of the shooting.

B. The Murder, Investigation, and Trial

The evidence at trial tended to show that Defendant went to law enforcement the day after the shooting, 28 September 2015. He stated that he had discussed robbing a drug dealer with Brunson and Graham. However, while acknowledging that he was present when Brunson shot and killed Graham, he claimed he played no part in the shooting. Police then arrested Defendant for being an accessory after the fact. After his arrest, Defendant claimed he was not actually present at the shooting.

While interviewing Defendant, police executed a search warrant of his house. There they found a gun, which Defendant admitted was used in the murder. Police then placed Defendant under arrest for first-degree murder.

When confronted by police, Brunson initially claimed that he played no role in the killing. Within the next two days, however, he accepted full responsibility, indicating that he had acted alone in killing Graham. After his arrest, Brunson said the same in a letter to Defendant's trial lawyer and in an interview with a local news channel.[1]

At the trial, however, Brunson testified that Defendant had orchestrated the killing. More particularly, Brunson testified that on the evening of 27 September 2015 Defendant drove him to Camden Causeway Park. Once at the park, Defendant and Brunson both walked down the wooden walkway. According to Brunson's trial testimony, Defendant then called Graham and asked him to participate in a robbery with them. Graham agreed. Defendant asked Brunson who should hold the gun on the way to pick up Graham; believing this to be a question about who would be armed during the robbery, Brunson volunteered to do so and put Defendant's gun in his waistband. After picking Graham up, the three youths returned to the walkway at Camden Causeway Park to smoke marijuana. After Brunson and Defendant finished smoking marijuana, Brunson testified that Defendant "fell back" as they walked down the walkway. Defendant then "indicated" for Brunson to shoot Graham by tapping Brunson and making his hand into the shape of a gun. Brunson testified

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[1] Brunson ultimately pleaded guilty to first-degree murder.

that he looked at Defendant twice to see if "he was for real[,]" and then he shot and killed Graham.

At trial, the State also introduced "kites," or jail letters, between Defendant and Brunson written while both were incarcerated and awaiting trial. One found in Defendant's cell read in part:

> I [Defendant] was told that if he does tell the court people that I was honestly had nothing to do with the murder and that he [Brunson] kidnapped me, then that will help me out a lot and they just drop the charges against me . . . . If they do drop the charges against me, then I still got to fight to get the murder charges dropped, but what he would have to tell them is I had nothing to do with it and he made me drive him back[.]

This communication came after Brunson told police he alone was responsible for the murder and gave a news interview stating the same, but before his letter to Defendant's trial counsel accepting full responsibility.

A fellow inmate also testified that Defendant confessed to him that "he planned the murder."

Defendant was convicted of first-degree murder by a jury on 19 January 2018.

C. The Sentencing Hearing

In the same court session, the trial court conducted a brief sentencing hearing. Defense counsel called one witness, Defendant's mother. She testified that Defendant grew up in a household plagued by domestic violence and was exposed to violence visited upon her by both his father and stepfather. She further testified Defendant

played football and ran track in high school while also maintaining good grades. Finally, she testified that Defendant completed high school and earned his high school diploma while incarcerated awaiting trial.

Defense counsel argued that a sentence of life without parole was inappropriate based on this evidence. Defendant had no prior criminal record, was not the shooter, and there was a "strong likelihood that [Defendant would] benefit from rehabilitation and confinement." Counsel contended confinement had not "stop[ped] [Defendant] from moving on with parts of his life[,]" referencing his completion of his high school education while in jail.

The State asked for a sentence of life without the possibility of parole. The State argued Defendant "manipulated" the shooter, Brunson, and that Defendant had "manifest[ed] an effort to, in some respects, obstruct justice." Finally, the State contended Defendant had not "show[n] a second of remorse" for the period leading up to and during trial. The State presented no evidence at sentencing.

In an oral order, the trial court sentenced Defendant to life without the possibility of parole. The court's oral order was as follows:

> At this juncture, the Court has considered the arguments made. The Court's considered the factors of mitigation that are possible under Chapter 15A-1340.19B, together with those that have been argued by defense counsel and the State.
>
> The Court finds that the defendant did have no record at the time – no prior criminal record at the time of this

offense. The Court finds that he was 17 at the time of the offense. The Court finds that the defendant has demonstrated that he did have an ability to appreciate the risk and consequences of his conduct in that he engaged at various times throughout the process and the process of investigation with schemes to cover his conduct or deter others from providing information that would be detrimental to him.

In addition, the Court finds that there is no evidence of immaturity that would be countenanced under what the Court interprets the intentions of this statute, which has a narrow application to a person who is convicted of first degree murder who, at the time, had not attained the age of 18. Limited to that general class of persons, the Court finds there is no evidence of immaturity that would not otherwise be applicable to all those within that class.

The Court finds that there is no evidence of mental illness or impairment. There's no evidence of any familial or peer pressure exerted upon the defendant relative to the commission of this offense.

The Court does find that the defendant had an intellectual capacity that was not impaired and may have been, in fact, above average in that the defendant had been transferred or made arrangements to be transferred to a different high school other than his original county, was participating in sports and was making As, Bs, and Cs.

The Court finds that there is no evidence before the Court at this juncture of the likelihood that the defendant would benefit from rehabilitation and confinement other than that of other class of persons who may be incarcerated or may be incarcerated for the offense of first degree murder.

The Court finds that the mitigating factors that have been found, that is of no record and the age, are outweighed by the other evidence in this case of the nature of the offense and the manner in which it was committed, specifically

> that of involving another person who the Court concludes was manipulated by the defendant; also taking advantage of a position of what may have been trust or confidence in that the victim was — a scheme was concocted to lure the victim to ride with the defendant under a ruse and under a scheme which ultimately resulted in his vulnerability and his death.
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> The Court concludes that life without parole is the appropriate sentence.

Prior to trial, the State had offered Defendant a plea deal that would have resulted in him serving 16 to 30 years in prison. He rejected this proposed plea deal.

II. Analysis

Defendant argues on appeal that the trial court sentenced him based on the incorrect legal standard in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. In assessing this argument, we review the governing federal and state jurisprudence on the punishment of juvenile offenders. These cases compel the conclusion that the trial court applied the incorrect legal standard and also improperly compared the juvenile Defendant to adult offenders – errors the approach advocated in the dissent would perpetuate. Thus, we vacate the trial court's judgment and remand for re-sentencing consistent with this opinion.

A. Standard of Review

Findings of fact by a trial court are reviewed to determine if they are supported by competent evidence. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008), *pet. for discretionary rev. allowed by* ___ N.C. ___, ___, 828 S.E.2d 21, 22

(2019). "The trial court's weighing of mitigating factors" pertaining to the sentencing of juveniles convicted of first-degree murder subject to punishments including life without the possibility of parole "is reviewed for an abuse of discretion." *State v. Sims*, ___ N.C. ___, ___, 818 S.E.2d 401, 406 (2018) (citation omitted). Questions and conclusions of law, however, are reviewable *de novo*. *Williams* at 632, 669 S.E.2d at 294. Under *de novo* review, we "consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *Id.* at 632-33, 669 S.E.2d at 294 (citation omitted).

B. United States Supreme Court Case Law on the Punishment of Juvenile Offenders

The jurisprudence pertaining to the punishment of juvenile defendants has undergone a sea change in the last generation. We briefly review the key cases central to this shift as well as their key lessons below.

In 2005, the United States Supreme Court held that the imposition of the death penalty on a juvenile offender violates the Eighth Amendment's ban on cruel and unusual punishments. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005). This path-marking decision held that "[t]hree general differences between juveniles under 18 and adults" counsel against finding a juvenile defendant "among the worst offender[s]" subject to the harshest penalties. *Id.* at 569, 125 S. Ct. at 1195. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.

These qualities often result in impetuous and ill-considered actions and decisions." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 2668-69, 125 L. Ed.2d 290, 305 (1993)). Second, "juveniles have less control, or less experience with control, over their own environment." *Roper* at 569, 125 S. Ct. at 1195 ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting[.]") (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Third, science and common sense make plain that "the character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195. Their transitory personality traits mean that "a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*, 125 S. Ct. at 1195-96; *Thompson v. Oklahoma*, 487 U.S. 815, 837, 108 S. Ct. 2687, 2699, 101 L. Ed.2d 702, 719 (1988) (noting a "teenager's capacity for growth").

These differences, in turn, undermine the penological justifications for subjecting juveniles to the harshest punishments. "[T]he case for retribution is not as strong with a minor as with an adult" as their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196. Further, the remote "likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight" to harsh

penalties undercuts their deterrent effect. *Id.* at 572, 125 S. Ct. at 1196 (quoting *Thompson*, 487 U.S. at 837, 108 S. Ct. at 2700).

Five years later, the United States Supreme Court held that a sentence of life without the possibility of parole for juvenile offenders in non-homicide cases violates the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034, 176 L. Ed.2d 825, 850 (2010). In reiterating that juveniles' "lessened culpability" make them "less deserving of the most severe punishments[,]" the Court again pointed to "developments in psychology and brain science" that "continue to show fundamental differences between juvenile and adult minds" in the "parts of the brain involved in behavior control." *Id.* at 68, 130 S. Ct. at 2026. The Court also noted that life without the possibility of parole as a penalty is the "second most severe penalty permitted by law[,]" sharing "some characteristics with death sentences that are shared by no other sentences." *Id.* at 69, 130 S. Ct. at 2027 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed.2d 836, 869 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). This overlap includes the "denial of hope" rendering "good behavior and character improvement . . . immaterial[.]" *Graham*, 560 U.S. at 71, 130 S. Ct. at 2027 (internal marks and citation omitted). Bringing together these two threads, the Court noted, "[l]ife without parole is an especially harsh punishment for a juvenile[,]" as a "16-year-old

and a 75-year-old" each sentenced thus "receive the same punishment in name only." *Graham*, 560 U.S. at 70, 130 S. Ct. at 2028.

And two years later, the United States Supreme Court held that "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" in homicide cases violates the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 2469, 183 L. Ed.2d 407, 424 (2012). It so held because such mandatory regimes preclude consideration of an offender's age and "family and home environment" as well as potential mitigating factors pertaining to the homicide, such as the fact that the offender "might have been . . . convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with . . . prosecutors (including on a plea agreement)[,]" and, finally, "the possibility of rehabilitation[.]" *Id.* at 477-78, 132 S. Ct. at 2468.

Most recently, in *Montgomery v. Louisiana*, ___ U.S. ___, ____, 136 S. Ct. 718, 734, 193 L. Ed.2d 599, 620 (2016), the Supreme Court concluded that *Miller*'s prohibition on mandatory life without the possibility of parole for juveniles constituted a new substantive rule of constitutional law and, as such, applied retroactively. "Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for

a class of defendants because of their status[,]" a hallmark of a substantive rule of constitutional law. *Id.* (internal marks and citation omitted).

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Four overarching points from this line of cases are worth highlighting.

First, each case builds on the foundation "that children are constitutionally different from adults for purposes of sentencing." *Id.* at ___, 136 S. Ct. at 733 (internal marks and citation omitted).

Second, the developments in United States Supreme Court case law demand a long and deep look at each juvenile defendant. *Roper* noted that the distinguishing characteristics of youth render suspect any conclusion that a juvenile's crime is "evidence of *irretrievably* depraved character." 543 U.S. at 570, 125 S. Ct. at 1195 (emphasis added). In that same vein, *Graham* spoke in terms of *incorrigibility*. *See* 560 U.S. at 72-73, 130 S. Ct. at 2029 (emphasis added); *Montgomery*, ___ U.S. at ____, 136 S. Ct. at 734 (speaking of "*permanent* incorrigibility") (emphasis added). *Miller* spoke of "*irreparable* corruption." 567 U.S. at 479-80, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197) (emphasis added). *Montgomery* indicated life without the possibility of parole was justified only where "rehabilitation is *impossible*[.]" ___ U.S. at ____, 136 S. Ct. at 733 (emphasis added). "Permanent means forever. Irreparable means beyond improvement." *State v. Williams*, ___ N.C. App. ___, ___, 820 S.E.2d 521, 526 (2018) (quoting *Sims*, ___ N.C. App. at ___, 818

S.E.2d at 413 (Stroud, J., concurring) (internal quotations omitted)). And, of course, irretrievable means “cannot be retrieved[,]” VIII *The Oxford English Dictionary* 100 (2nd ed. 1989), incorrigible means “[i]ncapable of being corrected or amended[,]” *id.* at 825, and impossible means “[n]ot possible[,]” *id.* at 732. In other words, the focus is on whether “in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties—he will likely still remain incorrigible or corrupt, just as he was as a teenager[.]” *Williams*, ___ N.C. App. at ___, 820 S.E.2d at 526 (quoting *Sims*, ___ N.C. at ___, 818 S.E.2d at 413 (Stroud, J., concurring)).

Third, none of these teachings “about children . . . is crime-specific.” *Miller*, 567 U.S. at 473, 132 S. Ct. at 2465. Indeed, this line of cases dwells on the danger in focusing the sentencing inquiry on the nature of the offense. *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197 (“An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course[.]”); *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021 (highlighting the “essential principle that, under the Eighth Amendment, the State must respect the human attributes [such as potential for rehabilitation] even of those who have committed serious crimes”); *Miller*, 567 U.S. at 472, 132 S. Ct. at 2465 (“[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”). This recognizes the obvious: “almost all of the cases” subjecting

juveniles to the harshest penalties "arose from heinous and shocking crimes[.]" *State v. May*, 255 N.C. App. 119, 130, 804 S.E.2d 584, 591 (2017) (Stroud, J., concurring); *see Roper*, 543 U.S. at 600, 125 S. Ct. at 1213 (O'Connor, J., dissenting) ("Christopher Simmons' murder of Shirley Cook was premeditated, wanton, and cruel in the extreme."); *Roper*, 543 U.S. at 619, 125 S. Ct. at 1223 (Scalia, J., dissenting) (citing examples of "individuals under 18 . . . involve[d] [in] truly monstrous acts"); *Graham*, 560 U.S. at 112, 130 S. Ct. at 2051 (Thomas, J., dissenting) (recounting vicious stabbing and rape in arguing for retaining possibility of juvenile life without the possibility of parole for non-homicide offenses); *Miller*, 567 U.S. at 513, 132 S. Ct. at 2489 (Alito, J., dissenting) (noting "brutality and evident depravity" in case at issue); *Mongtomery*, ___ U.S. at ___, 136 S. Ct. at 744 (Scalia, J., dissenting) (underlining facts involved "17-year-old who murdered an innocent sheriff's deputy"). Making the facts of these awful crimes the lodestar in sentencing will result in "life imprisonment without the possibility of parole [becoming] the rule and not the exception." *May*, 255 N.C. App. at 130, 804 S.E.2d at 591 (Stroud, J., concurring).

But a key teaching of these cases is that sentences of life without the possibility of parole for juvenile offenders "will be uncommon." *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *see Montgomery*, ___ U.S. at ___, 136 S. Ct. at 736 (sentencing juvenile to life without the possibility of parole only appropriate in "exceptional circumstances"); *State v. James*, 371 N.C. 77, 93, 813 S.E.2d 195, 207 (2018) ("[T]he imposition of a

sentence of life imprisonment without the possibility of parole upon a juvenile [will] be a rare event."). This is the case in spite of the fact that differentiating "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption . . . is difficult even for expert psychologists[.]" *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197. Indeed, this reality "counsel[s] against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480, 132 S. Ct. at 2469.

C. Developments in North Carolina Law Since *Miller*

Our General Assembly responded to this sea change by replacing the statutory regime that had automatically sentenced juveniles tried and convicted as adults for homicide offenses to life without the possibility of parole, N.C. Gen. Stat. § 14-17 (2010), with one that requires trial courts to conduct hearings to determine whether juvenile defendants convicted of first-degree murder not based on felony murder "should be sentenced to life imprisonment without parole . . . or a lesser sentence of life imprisonment with parole[,]" N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2017). The juvenile defendant may submit mitigating circumstances during this hearing, including the following:

> (1) Age at the time of the offense[;]
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> (2) Immaturity[;]
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> (3) Ability to appreciate the risks and consequences of the conduct[;]

> (4) Intellectual capacity[;]
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> (5) Prior record[;]
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> (6) Mental health[;]
>
> (7) Familial or peer pressure exerted upon the defendant[;]
>
> (8) Likelihood that the defendant would benefit from rehabilitation in confinement[;] [and]
>
> (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2017).

In *James*, 371 N.C. at 99, 813 S.E.2d at 211, our Supreme Court held this new statutory regime constitutional. Central to its holding was a rejection of the notion that the new regime created a presumption in favor of life without the possibility of parole. *See id.* at 92-93, 813 S.E.2d at 207 ("[A] statutory sentencing scheme embodying a presumption in favor of a sentence of life imprisonment without the possibility of parole for a juvenile . . . would be, at an absolute minimum, in considerable tension with the General Assembly's expressed intent to . . . compl[y] with *Miller* and with the expressed intent of the United States Supreme Court that . . . the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile be a rare event."). Instead of applying such a presumption, trial courts conducting these sentencing hearings should consider how the facts of a particular controversy interact with both the statutorily enumerated mitigating factors and the "substantive standard enunciated in *Miller*." *Id.* at 89, 813 S.E.2d at

204 (citation omitted). And, given that "*Miller* and its progeny indicate[d] that life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals," *id.* at 96-97, 813 S.E.2d at 209, a trial court need not "adopt and credit such mitigating evidence" to impose a sentence of life with the possibility of parole, *id.* at 91, 813 S.E.2d at 206.

Most recently, our Court held it was necessary to find a juvenile irreparably corrupt before sentencing him or her to life without the possibility of parole. *Williams*, ___ N.C. App. at ___, 820 S.E.2d at 526. The trial court in *Williams* made "an explicit finding contrary" to concluding the defendant was irreparably corrupt. *Id.* Accordingly, we vacated the defendant's sentence of life without the possibility of parole and remanded the case for resentencing "to two consecutive terms of life imprisonment with the possibility of parole." *Id.*[2]

III. Defendant's Sentencing Hearing

After the jury convicted Defendant of first-degree murder, the trial court conducted a brief hearing to consider whether to sentence him to life imprisonment

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[2] The dissent questions the reasoning of *Williams* and, given that it has been stayed and will be reviewed by our Supreme Court, its precedential value. *State v. Ames*, *infra* at ___ (Dillon, J., dissenting). There is a strong argument that it remains binding precedent, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, *a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court*.") (emphasis added), and the dissent does not cite any authority that supports its assertion to the contrary. *State v. Ames*, *infra* at ___ (Dillon, J., dissenting). But, even *if Williams* were not binding, the trial court's deviation from *Roper*, *Graham*, *Miller*, *Montgomery*, and *James* is plain. *Infra* section III.

with or without the possibility of parole. The trial court ultimately sentenced Defendant to life imprisonment without the possibility of parole.

As noted above, our Supreme Court has held that trial courts must comply with "the substantive standard enunciated in *Miller*" when deciding whether to sentence a juvenile to life without the possibility of parole. *James*, 371 N.C. at 89, 813 S.E.2d at 204. The lodestar of *Miller* is that life without the possibility of parole "should be reserved for the rare juvenile offender whose crime reflects irreparable corruption rather than being imposed upon the juvenile offender whose crime reflects unfortunate yet transient immaturity." *Id.* at 92, 813 S.E.2d at 206 (internal marks omitted). This focal point is informed by the fact that "children are constitutionally different from adults for the purposes of sentencing." *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 733. It is "misguided to equate the failings of a minor with those of an adult," in part, because "a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195-96.

Defendant argues that the trial court sentenced him based on the incorrect legal standard in violation of the Eighth Amendment. Specifically, Defendant asserts that the trial court's brief oral order not only fails to apply the standard articulated in *Miller* but also transgresses the teaching that juveniles are constitutionally different from adults. As the State conceded at oral argument – and is well settled in our case law – these are both questions of constitutional law and thus reviewed *de*

novo. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (citation omitted). For the following reasons, we agree with Defendant.

A. Incorrect Legal Standard

The crux of the trial court's oral order sentencing Defendant to life without the possibility of parole is "that the mitigating factors that have been found, that is of no record and the age, are outweighed by the other evidence in this case of the offense and the manner in which it was committed[.]"

This approach finds no support in the case law. The consideration of whether the Defendant is the rare, "irreparabl[y] corrupt[]" youth is, at a minimum, opaque in the trial court's balancing test. *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197). The trial court did not examine whether the Defendant is "the *rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible* and life without parole is justified[,]" *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 733, and the dissent explicitly rejects this analysis, which is required. *Ames*, *infra* at ___ (criticizing the majority for "getting ahead of the United States Supreme Court" by quoting and considering in its analysis the above language from the United States Supreme Court) (Dillon, J., dissenting).[3]

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[3] The dissent's critique of our opinion's (and, by extension, the governing case law's) consideration of whether a juvenile is beyond rehabilitation merely resurrects an already rejected argument. *Compare Montgomery*. ___ U.S. ___, 136 S. Ct. at 744 (Scalia, J., dissenting) (Scalia, J., dissenting) (criticizing the "'incorrigibility' *requirement* that the Court imposes today" as "impossible in practice" to apply) (emphasis added), *with Ames*, *infra* at ___ ("I do not believe that any judge has

In place of the prescribed inquiry, the nature of the offense becomes the lodestar, despite the fact that the case law warns against such a focus repeatedly in the context of juvenile sentencing. *Supra* section II.B. Focusing the assessment in this fashion made Defendant's sentence far more likely. Were it to hold sway, this approach would make life imprisonment without the possibility of parole "the rule and not the exception[,]" *May*, 255 N.C. App. at 130, 804 S.E.2d at 591 (Stroud, J., concurring), a result flatly inconsistent with precedent. *James*, 371 N.C. at 95, 813 S.E.2d at 208 ("[S]entences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule[.]").

Nothing in the statutory sentencing regime runs contrary to this precedent, nor could it given its origin. *See id.* at 92, 813 S.E.2d at 206 ("[T]he legislation in which the relevant statutory provisions appear is captioned [a]n act to amend the state sentencing laws to comply with the . . . decision in *Miller v. Alabama*[.]") (internal marks omitted). While the regime permits a defendant to bring forward mitigating evidence, this is not obligatory. N.C. Gen. Stat. 15A-1340-19B(c) (2017) ("The defendant or the defendant's counsel *may* submit mitigating circumstances to the court[.]") (emphasis added). The statute "does not compel the conclusion that persuading the sentencing court to adopt and credit . . . mitigating evidence is necessary in order to preclude the imposition" of life without the possibility of parole,

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the ability to look into the soul of a juvenile and declare that it would be 'impossible' for that juvenile to ever be rehabilitated.").

James, 371 N.C. at 91, 813 S.E.2d at 206, a conclusion at odds with the trial court's balancing test and the dissent's endorsement thereof.

Simply put, nothing in the case law or our statutes supports the test the trial court employed and the dissent defends.

B. Improper Comparison of Defendant to Adult Offenders

The trial court also found "that there is no evidence before the Court at this juncture of the likelihood that Defendant would benefit from rehabilitation and confinement other than that of other class of persons who may be incarcerated or may be incarcerated for the offense of first degree murder." Though not a model of clarity, the trial court unmistakably compared Defendant to the entire universe of individuals incarcerated for first-degree murder. The State conceded as much at oral argument and its obvious implication: this universe includes adults. The dissent finds no flaw in this approach. *Ames*, *infra* at ___ (Dillon, J., dissenting) ("I believe it is totally appropriate for Judge Tillett to compare Defendant to adult murderers in determining whether he should treat Defendant's crime as one reflecting transient immaturity.").

But comparing Defendant and his capacity for rehabilitation to adult offenders transgresses the central tenet of the juvenile sentencing case law. *See Miller*, 567 U.S. at 481, 132 S. Ct. at 2470 ("[C]hildren are different[.]"); *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195-96 ("[A] greater possibility exists that a minor's character deficiencies will be reformed.").

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While the dissent rightly notes that the trial court made reference to each of the statutorily enumerated mitigating factors in its brief oral order, *Ames*, *infra* at ___ (Dillon, J., dissenting), it then considered them through a lens bearing little to no relationship with "the substantive standard enunciated in *Miller*[,]" *James*, 371 N.C. at 89, 813 S.E.2d at 204. *Roper*, *Graham*, *Miller*, and *Montgomery* establish no mere boxes to check before a child is sentenced to a punishment the United States Supreme Court has analogized to death. Recent developments in the law demand a long and deep inquiry into whether a juvenile defendant is beyond rehabilitation before this harshest penalty is imposed, a demand the trial court did not meet and the dissent would elide.

IV. Remedy

Having determined that the trial court erred as a matter of law both in its apprehension and application of the correct legal standard and, more particularly, by comparing the Defendant juvenile to adult offenders, we now turn to the appropriate remedy. Defendant urges us to enter a sentence of life with the possibility of parole, pointing to *Williams* in support of its position. We must decline to do so, however, as *Williams* is not on all fours with the current controversy and, as a general rule, sentencing is a task for the trial court. *See Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337, 1342 (1949) (underlining that trial court judge's

"task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.").

Whereas in *Williams* the trial court made a factual finding categorically at odds with a sentence of life without the possibility of parole, *see* ___ N.C. App. at ___, 820 S.E.2d at 526, the errors requiring reversal here pertain to the legal standard applied. Put another way, there is no factual finding in the trial court's order categorically at odds with a life without the possibility of parole sentence.[4]

To be clear: we do not mean to suggest that the trial court merely took the wrong path to the right destination. The trial court found two statutory mitigating factors, one of which, Defendant's age, is a "mitigating factor of great weight[.]" *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S. Ct. 869, 877, 71 L. Ed.2d 1, 12 (1982). Defense counsel argued that Defendant's intelligence and continued educational engagement while incarcerated was a mitigating factor, inasmuch as it showed he was not beyond rehabilitation; however, this evidence seems curiously to have counted, if anything, against Defendant during sentencing. In fact, the mitigation

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[4] Defendant alleges that the trial court's finding that "that there is no evidence before the Court at this juncture of the likelihood that Defendant would benefit from rehabilitation" precludes a sentence of life without the possibility of parole. Defendant reads this as the trial court stating Defendant's prognosis for rehabilitation is uncertain, the finding that led our Court in *Williams* to directly enter a sentence of life with the possibility of parole. *Williams*, ___ N.C. App. at ___, 820 S.E.2d at 526. The State reads the same as merely connoting an (arguably dubious) absence of evidence on point. Both interpretations strike us as plausible, which counsels caution in fashioning a remedy. It is enough for us to simply reiterate that the Defendant need not persuade "the sentencing court to adopt and credit . . . mitigating evidence" for a sentence of life with the possibility of parole to be imposed, and the standard when assessing his prospects for rehabilitation is whether he is "irreparabl[y] corrupt[][.]" *James*, 371 N.C. at 91, 813 S.E.2d at 206.

case put on by Defendant's counsel at sentencing, which included evidence of Defendant's youth, Defendant having been raised in a violent home environment, the fact that Defendant did not shoot Graham, his rejection of a far less punitive plea proposal, and his potential for rehabilitation, seemingly implicated every factor *Miller* identified as counseling *against* sentencing a juvenile to life without the possibility of parole. 567 U.S. at 477-78, 132 S. Ct. at 2468 (noting age, "family and home environment[,]" "the extent of [Defendant's] participation in the . . . homicide offense[,]" "inability to deal with . . . prosecutors (including on a plea agreement)[,]" and the "possibility of rehabilitation[,]" as factors worthy of consideration in sentencing).

V. Conclusion

For the foregoing reasons, we vacate the trial court's judgment and remand for re-sentencing consistent with this opinion.

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Judge Tillett is the sentencing judge in this case. He has the authority to choose whether to sentence Defendant, upon his conviction for first degree murder, to life without the possibility of parole ("LWOP") or some lesser sentence, so long as his sentence is not contrary to the Eighth Amendment or our General Statutes.

Here, I conclude that Judge Tillett's sentence of LWOP does not violate the Eighth Amendment, for the reasons explained in Section I, below.

Further, I conclude that Judge Tillett did not err in sentencing Defendant to LWOP in accordance with our General Statutes, for the reasons explained in Section II, below.

Accordingly, I conclude that Judge Tillett properly exercised his discretion as the sentencing judge in this case. Therefore, I respectfully dissent.

I. Judge Tillett's Order Does Not Violate the Eighth Amendment

LWOP is "the second most severe [punishment] known to the law[.]" *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991). But as a LWOP sentence is markedly different than a death sentence, *Furman v. Georgia*, 408 U.S. 238, 286 (1972), a LWOP sentence is constitutionally permissible for *adult* offenders even for many non-violent crimes, such as simply possessing a large amount of cocaine, *Harmelin*, 501 U.S. at 996, and may be imposed on adult offenders even without ever considering mitigating factors or the "particularized circumstances of the crime and of the criminal." *Id.* at 962.

However, where the defendant is a *juvenile* offender, the United States Supreme Court, as reiterated by our Supreme Court, has determined that the Eighth Amendment is more restrictive on the ability to impose a LWOP sentence. Specifically, a sentencing judge may impose a LWOP sentence on a juvenile offender only in homicide cases *and* only on " 'the rare juvenile offender *whose crime* reflects irreparable corruption,' rather than 'unfortunate yet transient immaturity.' " *State v. James*, 371 N.C. 77, 95, 813 S.E.2d 195, 208 (2018) (quoting *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012)) (emphasis added).

Certainly, every homicide is horrific. But when committed by a juvenile, it is the duty of the sentencing judge to determine whether the defendant's horrific act was borne out of transient immaturity; for example, was prompted by peer pressure.

In the present case, I conclude that Judge Tillett properly considered Defendant's crime in essentially determining that it did not reflect transient immaturity but rather irreparable corruption. Specifically, Judge Tillett noted how Defendant was not influenced by peer or familial pressure, but rather was the ringleader, manipulating an unwitting accomplice to participate in the murder. Judge Tillett noted how Defendant concocted an elaborate scheme to lure his victim into a vulnerable situation and how, after the murder, Defendant orchestrated an elaborate cover-up of the crime. Judge Tillett found that Defendant was intelligent,

that he showed no signs of "immaturity," "mental illness or impairment," and that Defendant was able "to appreciate the risk and consequences of his" actions.

The majority, however, suggests that the proper test under the Eighth Amendment goes further than merely determining whether *the crime* reflects irreparable corruption. Specifically, the majority suggests that a LWOP sentence may not be imposed unless the sentencing judge is able to determine that the juvenile *himself* is irreparably incorrigible, that is, the judge is able to determine that it is "impossible" for the juvenile to ever be rehabilitated.

In a case cited by the majority, another panel of our Court last year, in a case currently at our Supreme Court, made this same error, getting ahead of the United States Supreme Court. *State v. Williams*, ___ N.C. App. ___, ___, 820 S.E.2d 521, 526 (2018). Specifically, the *Williams* panel held that a LWOP sentence may not be imposed on a juvenile offender unless the sentencing judge makes a "threshold determination" that the defendant, himself, is "irreparably corrupt[.]" *Id.* We are not bound by *Williams* at this point, as our Supreme Court granted the State's motion to stay that opinion, based on the effect that the opinion could have on other cases. *State v. Williams*, 371 N.C. 572, 818 S.E.2d 639 (2018); *see also State v. Williams*, ___ N.C. App. ___, ___, 828 S.E.2d 21, 22 (2019) (allowing the State's petition "for Writ of Supersedeas of the judgment of the Court of Appeals").

While the United States Supreme Court has made a lot of statements suggesting that a LWOP sentence should be extremely rare and should be for the worst of juvenile offenders, that Court has *held* that a LWOP sentence for a juvenile offender is constitutionally permissible if the sentencing judge merely determines that "the crime" itself was one which "reflects" irreparable corruption. *Miller*, 567 U.S. at 479-80. In *Montgomery*, the most recent seminal case on this issue, that Court clearly stated that "*Miller's* substantive holding [was] that life without parole is an excessive sentence for children *whose crimes* reflect transient immaturity," *Montgomery v. Louisiana*, ___ U.S. ___, ___, 136 S. Ct. 718, 735 (2016) (emphasis added), and that the Court was now requiring that a sentencing judge considering a LWOP sentence must conduct a hearing to determine whether the juvenile offender's *crime* reflected transient immaturity, *id.*

Requiring that a sentencing judge must be convinced that the defendant *himself* is incapable of rehabilitation, as suggested by the majority and by our panel in *Williams*, would effectively eliminate LWOP sentences in all cases involving juvenile offenders. I do not believe any sentencing judge, more or less any human being, can ever say that a juvenile offender is beyond moral redemption. I do not believe that any judge has the ability to look into the soul of a juvenile and declare that it would be "impossible" for that juvenile to ever be rehabilitated. Indeed, the Fourth Circuit Court of Appeals has recognized this reality in a case decided just last

year, a case that is headed to the United States Supreme Court this term. *See Mathena v. Malvo*, ___ U.S. ___, 139 S. Ct. 1317, 2019 U.S. LEXIS 1905 (2019) (granting *certiorari*). That case involves Lee Boyd Malvo, one of the D.C. snipers who was a juvenile at the time of his 2002 killing spree, and who received a sentence of LWOP prior to *Miller* and *Montgomery* being decided. The Fourth Circuit Court affirmed an order granting Mr. Malvo a *Miller* hearing to determine if *his crime* indeed reflected irreparable corruption rather than transient immaturity. *Malvo v. Mathena*, 893 F.3d 265, 277 (4th Cir. 2018). The Fourth Circuit concluded its opinion by recognizing that no judge, though, could predict how Mr. Malvo *himself* will turn out, stating that "who knows but God how [Mr. Malvo] will bear the future." *Id.* In any event, it may be that in reconsidering the issue, the Supreme Court will again reinterpret the Eighth Amendment by determining that all LWOP sentences for juvenile offenders are unconstitutional. Who knows? But it is not for us to apply a new test which would essentially make that decision for that Court.

I recognize that our General Assembly has provided that a sentencing judge is to consider the "[l]ikelihood that the defendant would benefit from rehabilitation in confinement." N.C. Gen. Stat. § 15A-1340.19B(c)(8) (2018). While this is an important factor, it is only one of a number of statutory mitigating factors to be considered and weighed by the sentencing judge. It is not an absolute requirement under the statute, much less the Eighth Amendment as interpreted by the United

States Supreme Court, that the sentencing judge must absolutely determine that a juvenile offender could never benefit from rehabilitation as a prerequisite of imposing a LWOP sentence. The statute only requires that the sentencing judge consider any evidence that a juvenile offender might benefit when considering the appropriate sentence.

II. Judge Tillett Made Sufficient Findings Under Section 15A-1340.19B

Our General Assembly allows a juvenile offender convicted of first degree murder, not involving felony murder, to introduce evidence concerning eight specific mitigating factors and "any other mitigating factor" when deciding whether to impose a LWOP sentence. N.C. Gen. Stat. § 15A-1340.19B(c). In a holding affirmed by our Supreme Court, our Court held that a sentencing judge *must* make findings as to each of the enumerated factors. *State v. James*, 247 N.C. App. 350, 364-66, 786 S.E.2d 73, 82-84 (2016), *affirmed in part and modified in part*, *State v. James*, 371 N.C. 77, 813 S.E.2d 195 (2018).

In the present case, Judge Tillett properly considered each of the statutory factors listed in Section 15A-1340.19B. He determined that two were applicable, but that the others were inapplicable. Specifically, Judge Tillett found that there was no evidence that Defendant was immature. Judge Tillett found that Defendant had the ability to appreciate the risks and consequences of his conduct; that he had a strong, above-average intellectual capacity that was not impaired; that he had no mental

health issues; that his crime was not influenced by any familial or peer pressure; and that there was no evidence that Defendant would benefit from rehabilitation any more than anyone else convicted of first degree murder. Judge Tillett did find that Defendant's age and the lack of a prior record were mitigating factors.

Judge Tillett, as the sentencing judge, considered the two mitigating factors that he found and how they interplayed with his determination regarding the crime itself, and concluded that a sentence of LWOP was appropriate in this particular case. It may be that other judges would have given Defendant a lesser sentence. But our job is simply to determine if Judge Tillett exceeded his authority or failed to apply the law correctly. I conclude that he did not.

The majority takes issue with Judge Tillett's finding concerning the statutory mitigating factor regarding whether there is a "[l]ikelihood that the defendant would benefit from rehabilitation[.]" N.C. Gen. Stat. § 15A-1340.19B(c)(8). Specifically, the majority takes issue that Judge Tillett improperly compared Defendant with *adult* murderers, rather than other juvenile murderers. I disagree.

I believe it is totally appropriate for Judge Tillett to compare Defendant to adult murderers in determining whether he should treat Defendant's crime as one reflecting transient immaturity. But assuming Judge Tillett was required to compare Defendant's likelihood of rehabilitation to other *juvenile* murderers, his findings essentially do this anyway. That is, it is a given that a juvenile murderer is presumed

to have a greater likelihood of rehabilitation than an adult murderer. But in finding that the likelihood of Defendant's rehabilitation *was equal to* the likelihood of an adult murderer, it logically follows that Judge Tillett was necessarily determining that Defendant's likelihood at rehabilitation *was less than* that of a juvenile murderer.

The majority also takes issue that Judge Tillett did not consider the statutory mitigating factors "through the lens" of the "substantive standard enunciated in *Miller*," as required by our Supreme Court in *James*, 371 N.C. at 83, 89, 813 S.E.2d at 201, 204. But, again, this "substantive standard enunciated in *Miller*" is to determine whether "[*the] crime*[] reflect[s] transient immaturity." *See Montgomery*, 136 S. Ct. at 735 (describing "*Miller's* substantive holding [to be] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"). And Judge Tillett did just that. He viewed the two mitigating factors that he found present, i.e., Defendant's age and lack of prior record, through the lens of the crime that Defendant committed. Judge Tillett did not consider the factors through the lens of the brutality of the crime, as all homicides are brutal. Rather, he appropriately considered them through the lens of how Defendant's crime *did not reflect* transient immaturity.

For these reasons, I would uphold Judge Tillett's sentencing of Defendant to LWOP.