No. 442PA20 DISTRICT 12

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

)

v. ) From Cumberland County

 )

JAMES RYAN KELLIHER )

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**DEFENDANT-APPELLEE’S NEW BRIEF**

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**DEFENDANT-APPELLEE’S NEW BRIEF**

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**ISSUES PRESENTED**

I. Whether sentencing a 17-year-old to fifty years in prison before eligibility for parole violates the United States Constitution?

II. Whether North Carolina’s Constitution provides independent protection against cruel sentences?

**STATEMENT OF FACTS**

 At age 17, James Kelliher and two other young men robbed a drug dealer named Eric Carpenter. During the robbery both Eric Carpenter and his girlfriend Kelsea Helton were shot and killed. Both of them were 19 years old. Kelsea was pregnant. (Tpp 25-26) The crimes took place in August 2001. (Tp 5)

The case was to be tried capitally. On March 1, 2004, Mr. Kelliher pled guilty to two counts of murder along with robbery and conspiracy charges. The only term of the plea was that the district attorney would exercise his discretion and declare the murder cases noncapital.[[1]](#footnote-2) (Rpp 8-13) The trial court imposed two consecutive sentences of life without parole, along with term-of-years sentences for the other charges. The latter were run concurrently to the life sentences and have now expired. (Rpp 16-23)

Mr. Kelliher was not required by the terms of his plea to testify against his codefendants, but after he pled guilty, Mr. Kelliher testified at two separate trials against codefendant Joshua Ballard.[[2]](#footnote-3) (Rpp 10-13; Tpp 5-9)

***Resentencing***

In 2013, Mr. Kelliher filed a Motion for Appropriate Relief alleging his sentences of life without parole were unconstitutional under *Miller v. Alabama*. The trial court ruled *Miller* was not retroactive and denied the claim. The Court of Appeals ultimately reversed and ordered a new sentencing hearing under *Miller.*

The new sentencing hearing was held December 13, 2018, before the Honorable Carl R. Fox. The prosecution presented a summary of the crime facts based on testimony at Ballard’s trials: Mr. Kelliher was a drug addict and drank alcohol heavily at the time of these offenses. He was breaking into cars and stores, stealing, and robbing people to support his drug use. (Tpp 10-11) Ballard asked Mr. Kelliher to help him rob Eric Carpenter, who was known to sell drugs and have a large amount of cash. Ballard said they would likely have to kill Carpenter to avoid being identified. Mr. Kelliher agreed to provide a weapon for the robbery. (Tpp 11-14)

Ballard made several calls back and forth with Carpenter, arranging an ostensible drug deal. Ballard, Mr. Kelliher, and a third man – Jerome Branch[[3]](#footnote-4) – met Carpenter behind an abandoned store. A patrol officer was in the area, so Carpenter drove to his apartment and the three others followed in their truck. Carpenter’s girlfriend Kelsea was there. They went inside, sat down and began the drug deal, then Ballard pulled out the gun. Ballard took Carpenter and Kelsea to the kitchen and made them get on their knees facing the wall. Mr. Kelliher was in the living room gathering drugs when he heard two shots and saw two flashes.[[4]](#footnote-5) He and Ballard ran out to the truck and left. (Tpp 15-18)

After reciting the crime facts, the prosecution called the fathers of both victims, who testified about the grief of losing their children. (Tpp 25-41) The State did not call any other witnesses.

The defense offered a letter from former Assistant District Attorney Calvin Collier, who prosecuted these crimes. Collier wrote that Mr. Kelliher twice testified against Ballard and that in Collier’s opinion, “James Kelliher testified truthfully in both trials.” (Tpp 91-92; Defendant’s Exhibit 4) The defense introduced excerpts of that testimony, in which Mr. Kelliher said he did not shoot either of the victims, and that he thought it was “just hype” when Ballard said they would have to kill the dealer afterward. (Tpp 93-95)

 The defense presented mitigating evidence from Mr. Kelliher’s childhood. He had a “difficult” relationship with his father, who was physically abusive. Mr. Kelliher dropped out of school after the ninth grade. Achievement tests he took at age 17 showed he functioned at a sixth grade level. Mr. Kelliher began using drugs and alcohol at age 13. By age 17 he reported being “under the influence all day” from substances including ecstasy, acid, psilocybin, cocaine, marijuana and alcohol. (Tpp 45-47) Mr. Kelliher has a history of three suicide attempts: an attempted overdose at age 10; another on the night after the murder; and a third at age 18 while awaiting trial. (Defendant’s Exhibit 1)

 The defense introduced Mr. Kelliher’s prison records. He had only two infractions from his admission in 2004 until the hearing in 2018 – both for being in an unauthorized location. (Tp 97) The records showed Mr. Kelliher was diagnosed with PTSD in prison due to nightmares and persistent thoughts related to these shootings. (Tpp 47, 51) A psychologist for the defense conducted multiple tests relevant to future dangerousness, and concluded Mr. Kelliher “had a low risk of future violence.” He testified that the Department of Public Safety had made the same determination. (Tp 53)

 The psychologist testified to Mr. Kelliher’s efforts to better himself in prison. He had no “negative behaviors” since being incarcerated. He earned his GED, taught himself Spanish, and took college courses. At the time of the resentencing hearing he was working on a bachelor’s degree in ministry. (Tpp 45-46, 54)

 Dr. Seth Bible, director of prison programs at Southeastern Baptist Theological Seminary, testified about a program Mr. Kelliher participated in. The seminary developed this program to train prisoners to serve their fellow offenders as “field ministers.” Participants might end up as peer mentors or working in hospice or with juveniles. Mr. Kelliher was one of 26 students selected from a field of 1300, based on interviews, essays and references. The seminary sought people who had a “desire to see the culture of the prison system changed.” Mr. Kelliher was chosen because he demonstrated in his interview and his writing a clear vision of his own goals which matched the goals of the program. Mr. Kelliher was earning As and Bs, had taken on leadership roles, and volunteered for additional programs. (Tpp 58-71)

 The student resource coordinator for the field ministry program also testified. She was a writing instructor at the prison, and Mr. Kelliher was chosen for an internship to help in the writing center. He worked with other students, giving feedback, tutoring and guidance. He went beyond what she requested, for example helping Spanish-speaking students; helping students others might not associate with due to the nature of their offenses; and writing English grammar guides for other students. She testified Mr. Kelliher demonstrated leadership and integrity. (Tpp 74-80)

 The defense submitted documents showing that Mr. Kelliher had completed his GED, obtained a paralegal certificate, and completed his associates degree. Records showed Mr. Kelliher also took Bible correspondence courses; completed training involving companion dogs; took courses in anger management, coping, and alcohol and drug dependence after-care; and became an inmate treatment assistant. (Tp 99) Counsel read an excerpt from a letter congratulating Mr. Kelliher on his completion of the treatment assistant training program:

You have shown a sincere desire to work toward your stated goals of intending to help other men to avoid the misery you have experienced as a result of your drug addiction and to give back some of what you found in recovery. You have exhibited the ability to speak and write effectively about these things. But more importantly you model them daily in your conduct. After speaking with you we are convinced of your continued commitment to serve us in this program.

(Tpp 97-98)

Pastor Todd Rappe testified he had been visiting Mr. Kelliher once a week for 17 years. He began at the request of Mr. Kelliher’s parents, but the relationship deepened over the years. At the visits, he and Mr. Kelliher hold a small religious service and often discuss theology. Pastor Rappe testified he is grateful to Mr. Kelliher, and that Mr. Kelliher in fact consoles him. (Tpp 83-89) When asked if he saw something in Mr. Kelliher that is redeemable, the Pastor said, “Oh, good grief, yes, of course.” (Tp 89)

 ***Sentencing arguments and trial court’s findings***

In its sentencing argument, the State sought life without parole; or, in the alternative, two consecutive sentences of life with parole. The State did not contest the mitigating evidence presented at the hearing. It focused solely on the offense. (Tp 108) Defense counsel argued it was established that Mr. Kelliher was not the shooter. Defense counsel further argued for concurrent life-with-parole sentences, based on the significant mitigation and evidence of rehabilitation. (Tpp 116-21)

The trial court gave lengthy commentary, noting the case involved “really sad facts” and was “just a tragedy” and noting that when young men get together, if one has a terrible idea the others seem unable to avoid joining in. (Tpp 123-24) The court made detailed findings about the offense and about the mitigating evidence, then ultimately concluded:

1. The mitigating factors and other factors and circumstances present outweigh all of the circumstances of the offense.

2. The Defendant is neither incorrigible nor irredeemable.

The trial court then imposed sentences of life with parole for each of the two murder charges, and ordered the sentences to run consecutively. (Rp 43) Mr. Kelliher appealed.

***Court of Appeals***

Chief Judge McGee authored the unanimous 44-page opinion below, deciding that 50 years in prison prior to parole eligibility for a redeemable 17-year-old offender violates both the federal and state constitutions.

**ARGUMENT**

James Kelliher had a troubled childhood that led to drug use and multiple suicide attempts. As a teenager, he participated in a robbery in which two people were killed. His culpability is reduced by his childhood trauma, and by the recognized youth factors. He has since demonstrated exceptional rehabilitation and maturity, incurring only two minor infractions in 20 years, taking multiple college courses, studying theology, and helping and mentoring other inmates.

This Court is not asked whether Mr. Kelliher should be punished; he has already been punished severely.[[5]](#footnote-6) This Court instead is asked whether Mr. Kelliher should ever have a chance to live outside prison. The humane, moral and constitutional answer is yes. Holding Mr. Kelliher in prison for life is cruel, and it advances no reasonable policy or governmental interest. Instead, it elevates retribution as the principal driver of criminal justice policy. Mr. Kelliher asks this Court for a chance at release after 25 years.

 *Standard of review*

 This Court reviews a Court of Appeals opinion to determine whether it contains any error of law. *State v. Brooks,* 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994).

**I. SENTENCING A 17-YEAR-OLD TO FIFTY YEARS IN PRISON BEFORE ELIGIBILITY FOR PAROLE VIOLATES THE UNITED STATES CONSTITUTION.**

The State argues that *Miller* does not apply to this case. (State’s Brief at 12) The State further contends there is no constitutional protection against *de facto* life sentences; and that, alternatively, Mr. Kelliher’s sentences are constitutional because he might be released and spend “some time” outside prison before he dies. (State’s Brief at 47) Mr. Kelliher asks this Court to reject the State’s arguments and hold that his consecutive sentences, which delay his parole eligibility until at least age 67, violate the Eighth Amendment.

**A. The Eighth Amendment requires a meaningful opportunity for life outside prison for redeemable juvenile offenders.**

 The Eighth Amendment applies to every sentence. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Robinson v. California*, 370 U.S. 660 (1962)). Determining whether punishment is disproportionate under the Eighth Amendment is a moral question. *Graham v. Florida,* 560 U.S. 48, 59 (2010) (the “standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment”) (internal citations omitted). In Eighth Amendment analysis, children are “constitutionally different” and “less deserving of the most severe punishments.” *Miller v. Alabama,* 567 U.S. 460, 471 (2012). Because of their unique developmental characteristics – impulsivity, susceptibility to outside influences, limited ability to control their environments, and ability to change – “juvenile offenders cannot with reliability be classified among the worst offenders.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005). The key is that children are capable of change: “*Miller*’s central intuition” is that it is too speculative to determine how a person will turn out based on his actions prior to age 18. *Montgomery v. Louisiana,* 193 L.Ed.2d 599, 622 (2016).

For these reasons, the Eighth Amendment requires a “meaningful opportunity to obtain release based on demonstrated rehabilitation and maturity” for all offenders under 18, save for homicide offenders who are irredeemable. *Miller,* 567 U.S. at 479 (quoting *Graham*); *Montgomery,* 193 L.Ed.2d at 623; *State v. James,* 371 N.C. 77, 93, 813 S.E.2d 195, 206-07 (2018) (recounting that *Miller* and *Montgomery* held “a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect ‘irreparable corruption’”).

Writing for the panel below, Chief Judge McGee synthesized the holdings in *Roper, Graham*, *Miller*, and *Montgomery*, and correctly held that (1) the Eighth Amendment applies to *de facto* life sentences; (2) *de facto* life sentences include those where an offender has a possibility of release before death; and (3) *Miller* applies regardless of the number of crimes committed. (Slip op at 28-30, 34-35) (slip opinion attached as an appendix)

1. *Miller* applies to juveniles sentenced to life without parole or its equivalent.

The panel correctly concluded that *de facto* life without parole sentences are cognizable and barred under the Eighth Amendment when imposed on redeemable juveniles. The panel acknowledged the “factual reality” that a sentence not called “life without parole” can still be its equivalent.[[6]](#footnote-7) It reasoned “*Graham* was not barring a terminology – ‘life without parole’ – but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release.” (Slip op at 28-29) (quoting *State v. Moore*, 76 N.E.3d 1127, 1139-40 (Ohio 2016)).

The State abandons common sense by contending that *Graham*, *Miller*, and *Montgomery* “have no application” to Mr. Kelliher’s case, especially in taking the literal position that *Miller* applies only to a sentence denominated life without parole.

2. *De facto* life sentences include those where a juvenile has the possibility of release before his death.

 The panel correctly determined the Eighth Amendment applies to juvenile offenders with lengthy sentences, including sentences allowing a possibility of release before death. It noted, citing *Graham,* that the imposition of life sentences on children is inequitably harsh compared to the imposition on adults. It discussed that *Graham*’s reasoning about the qualities of youth applies equally to *de facto* life sentences. And it discussed that the standard penological justifications for extreme sentences fade when the offender is a child. (Slip op at 30-31)

The Eighth Amendment requires the “meaningful opportunity for life outside prison” described in *Graham* (560 U.S. at 75) and the “hope for some *years* of life outside prison walls” described in *Montgomery* (193 L.Ed.2d at 623) (emphasis added). As the panel noted, most states agree that *de facto* life sentences violate the Eighth Amendment. (Slip op at 34, n. 17) This Court has not directly addressed the question of *de facto* life, but has held that a juvenile offender’s capacity for change must be considered in sentencing (*State v. Young*, 369 N.C. 118, 121, 794 S.E.2d 274, 277 (2016)); and that there exists a “foundational concern that at some point during the minor offender’s term of imprisonment, a reviewing body will consider the possibility that he or she has matured.” *Id.*,369 N.C. at 125, 794 S.E.2d at 279.

The difficulty is in determining where the line should be drawn. Confronting this difficulty, the panel below concluded that release around retirement age is too late to provide a fair opportunity to participate in society. It held release at such age precludes a qualitative rejoining of society, including the chance to contribute in the workforce and raise a family. (Slip op at 39-40) The Supreme Court has not offered specific guidance on how to decide what constitutes a “life” sentence. The panel reviewed other states’ approaches and found agreement that roughly 50 years before release constituted a *de facto* life sentence. (Slip op at 38-39) *See* *Carter v. State*, 192 A.3d 695, 729 (Md. 2018) (“Many decisions that attempt to identify when a specific term of years without eligibility for parole crosses the line into a life sentence for purposes of the Eighth Amendment appear to cluster under the 50-year mark.”). Such opinions consider both the quality and quantity of life after an offender’s release. *See* *State v. Moore*, 76 N.E.3d 1127, 1137 (Ohio 2016) (“The intent [of *Graham* and *Miller*] was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society.”); *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018) (“Confinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates; *Graham* requires more than the mere act of release, but rather ‘a sufficient period to achieve reintegration as a productive and respected member of the citizenry’”); *Casiano v. Comm’r of Correction*, 115 A.3d 1031, 1046 (Conn. 2015) (“Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left.”). Connecticut put it plainly: the Supreme Court “viewed the concept of ‘life’ in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for ‘life’ if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.” *Id.,* 115 A.3d at 1047.

The State disagrees with the panel’s characterization of *de facto* life rulings in other jurisdictions. (State’s Brief at 32) Mr. Kelliher will not rehash the numerous opinions and categorizations. In the end, whether other jurisdictions’ decisions on this issue form a majority, a minority, or something in between, North Carolina must make its own decision. The right decision is to allow juvenile offenders a meaningful opportunity for release before most of their life has passed by.

This Court should uphold the panel’s reasoned approach. To hold otherwise would fail to account for the realities of living outside prison as an adult for the first time. Those of us who have lived lives of freedom and privilege until age 67 are situated in a different world than those incarcerated before reaching adulthood. Generally, we hope and even expect there will be quality life to come after age 67; but that is not true for everyone, and certainly not for people imprisoned for 50-plus years. In Mr. Kelliher’s particular case, given his heavy drug and alcohol use as a child and his decades in prison, he may not live to age 67 or much beyond.[[7]](#footnote-8) With 50-year parole eligibility, his odds of being released before his death, or living any significant time after release, are poor.

Releasing a child offender only shortly before his death is cruel and misguided, because it “focuses on exacting maximum punishment and retribution,” which “runs counter to the reasoning employed in *Graham*[.]” Adele Cummings & Stacie Nelson Colling, *There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-*Graham *Sentences*, 18 U.C. Davis J. Juv. L. & Pol’y 267, 287-88 (2014). A meaningful opportunity for release does not mean the chance “to leave prison in order to die[.]” *Moore*, 76 N.E.3d at 1137. The State’s position that a chance at “some time” outside prison is enough (State’s Brief at 47) is cruel, and it runs counter to the Supreme Court’s teachings.

3. *Miller* applies regardless of the number of crimes committed.

The panel correctly found it unreasonable to conclude *Graham* or *Miller* were limited to situations where only one offense was committed. The panel specifically noted the defendant in *Graham* and the joined defendant in *Miller* were each convicted of multiple offenses. (Slip op at 34-35)

It further noted the majority of jurisdictions “favor recognition of aggregated sentences as de facto LWOP punishments subject to *Graham*, *Miller*, and *Montgomery*.” (Slip op at 34) (collecting cases). The panel emphasized that “[t]he applicability and scope of protection found in the Eighth Amendment under [*Graham* and *Miller*] turned on the identity of the defendant, not on the crimes perpetrated.” (Slip op at 35) The panel, quoting *Miller*, held: “‘none of what [*Graham*] said about children … is crime-specific. Those features are evident in the same way, and to the same degree, when … a botched robbery turns into a killing.’ So *Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile[.]” (Slip op at 35-36) In sum, the panel found the diminished moral culpability of young offenders allows them a chance at release, regardless of the offenses. (Slip op at 37) (quoting *Moore*, 76 N.E.3d at 1142) (“Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability.”) This Court should find likewise.

4. The State’s arguments are unavailing.

The State claims “chaos” has been created by state courts deciding how to treat *de facto* life cases, and that the existence of this chaos requires this Court to adopt the State’s position that *de facto* life sentences are not cognizable until the United States Supreme Court says so. (State’s Brief at 22-24, 41) To be sure, jurisdictions have come up with varying approaches on how to treat these sentences. The Supreme Court will either allow the variations to continue or will eventually weigh in. In the meantime, state courts must apply the law as best they can, attempting to discern the correct outcome from the law that currently exists: “State courts are no less obligated to protect and no less capable of protecting a defendant’s federal constitutional rights than are federal courts.” *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984).[[8]](#footnote-9)

The panel below correctly applied *Miller*, *Graham*, and *Montgomery* to the *de facto* life problem and reached a reasoned result justified by the language in Supreme Court precedent.

The State also contends that *Jones v. Mississippi*, 209 L.Ed.2d 390 (2021), precludes the result reached by the panel below. The State cites *Jones* for the proposition that *Miller* and *Montgomery* were limited to their explicit holdings. (State’s Brief at 22) The State acknowledges *Jones* did not address the issue in this case. Indeed, *Jones*’ specific holding – that State courts need not make a fact finding of irreparable corruption before imposing an LWOP sentence – has no applicability to Mr. Kelliher’s case, because the sentencing court already found he was redeemable and imposed life with parole (Rp 43), and the State has not challenged that finding.

Further, the State’s argument is inconsistent. On one hand it argues that *Jones’* explicit holding does not apply but this Court should follow *Jones*’ language. On the other hand it argues this Court is limited to the explicit holdings and should not otherwise follow the language of *Miller* or *Graham.*

*Jones* is a narrow opinion discussing the procedural question whether a specific finding of fact is required as part of a State’s sentencing scheme. *Miller* and *Graham*, on the other hand, were broad opinions setting categorical, substantive limits on how juvenile offenders in the United States can be sentenced. In its decision on *de facto* life sentences, the Iowa Supreme Court succinctly summarized how the Supreme Court built upon its own precedent: “The notion that the reasoning of *Roper* was limited to the death penalty case was proven wrong in *Graham*, and the notion that *Graham’s* reasoning was limited to nonhomicide cases was proven wrong in *Miller*. Further, the Supreme Court in *Miller* specifically declared that what it said about juveniles in *Roper*, *Graham*, and *Miller* is not ‘crime-specific.’” *State v. Null*, 836 N.W.2d 41, 67 (Iowa 2013).

This Court should use the language in *Roper*, *Graham*, and *Miller* in analyzing Mr. Kelliher’s sentences. Indeed, this Court has already found *Miller* and *Graham* mean what they say in terms of substantive limits on punishing juvenile homicide offenders. In *Young*, this Court stated that *Miller* and *Graham* “set limits on the power of the States to impose a sentence of life imprisonment without the possibility of parole on defendants who committed crimes before the age of eighteen.” 369 N.C. at 121, 794 S.E.2d at 277. And in *James*, it held that our trial courts, in sentencing juvenile homicide offenders, must “comply with *Miller*’s directive that sentences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule, with the ‘harshest prison sentence’ to be reserved for ‘the rare juvenile offender whose crime reflects irreparable corruption, rather than ‘unfortunate yet transient immaturity.’” *James*, 371 N.C. at 95, 813 S.E.2d at 208.

In sum, this Court must make the moral determination, based on evolving standards of decency, whether a sentence for a young offender is cruel. This Court should uphold the careful reasoning of the panel below and find that multiple consecutive sentences resulting in a lengthy term of years are the equivalent of life without parole. The possibility of release after 50 years does not provide a meaningful opportunity for life outside prison, and therefore is cruel under the Eighth Amendment.

**B. This Court should set a maximum term of 25 years after which redeemable juvenile offenders must be eligible for parole.**

The panel determined there were two options available to Mr. Kelliher under our sentencing statute – a life sentence with parole eligibility after either 25 or 50 years – and that 25 years was the only constitutional option. (Slip op at 44) This Court should uphold the panel decision because parole eligibility after 25 years is consistent with precedent of the Supreme Court; North Carolina precedent and statutes; national model legislation; the majority of other states; standard penological goals as applied to youth offenders; and the humane treatment of children. Twenty-five years of incarceration, with only a possibility of parole afterward, is a sufficiently severe sentence for any child offender.

1. Eligibility after no more than 25 years is consistent with United States Supreme Court reasoning.

*Graham* and *Miller* say that, regardless of the offenses committed, the focus of constitutional sentencing must be on the child offender. If a child offender is found redeemable, the sentencing court’s mandate is to provide that child with hope, in the form of an opportunity for release at a time when he can still experience life outside prison.

The full circumstances of this case show Mr. Kelliher has reduced culpability and is mature and rehabilitated. At the time of the offenses, Mr. Kelliher was a floundering teenaged drug addict. His suicide attempt at age 10 shows something was severely wrong in his childhood. The fact that he was abusing drugs and alcohol to the extent of stealing to support his habit at a young age also indicates something was severely wrong. These factors especially reduce Mr. Kelliher’s culpability, even beyond the average immaturity for anyone under 18.

Mr. Kelliher’s level of participation also reduces his culpability. The State believed he was not the shooter. And while Mr. Kelliher may have been aware on some level of the risk that Eric Carpenter would be harmed, Mr. Kelliher did not have the ability to fully appreciate this risk. Further, Mr. Kelliher had no reason to expect that Carpenter’s pregnant girlfriend would be present during the drug deal.[[9]](#footnote-10)

The factors in this case are sadly typical of so much juvenile crime – thoughtless, substance-fueled, peer-led. The multiple victims make the case even more tragic. But considering the offender and the offense, the full circumstances show Mr. Kelliher is redeemable. In his 20 years in prison, Mr. Kelliher’s efforts at rehabilitation have been exceptional, and he has shown sincere remorse. Mr. Kelliher gave a statement at the close of the hearing:

I think about Eric, Kelsea, and the child every day wondering who they might be today; the memories that they made, their brotherly love, the raising – the joy of raising their son and the pride felt in his accomplishment. … I failed to do anything resembling the right thing. … The depth of my sorrow and regret cannot … alter the finality … nor … alleviate the past pain that their absence has caused. … Daily I strive to change, to make the right decisions, to promote positive pro social actions in others . ... I wish more than anything that I could somehow do something to change the events from August 7, 2001.

(Tpp 100-01) Mr. Kelliher’s actions, described above and found by the resentencing court, back up his words. He is not only rehabilitated, he is helping to rehabilitate others, even while living in the very challenging environment of adult prison. He has demonstrated accountability and maturity.

The reasoning of *Graham* and *Miller* should be applied to this case, and that reasoning clearly points to release sooner than age 67.

2. Eligibility after no more than 25 years is consistent with our precedent and statutes.

Like the Supreme Court, this Court has explicitly held juveniles have reduced culpability: “‘less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.’” *Young,* 369 N.C. at 120, 794 S.E.2d at 276 (quoting [*Thompson v. Oklahoma*, 487 U.S. 815, 835](https://advance.lexis.com/document/?pdmfid=1000516&crid=1447030f-08e3-45ce-a26a-ece4928cad06&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5MFG-0TS1-F04H-J0HS-00000-00&pddocid=urn%3AcontentItem%3A5MFG-0TS1-F04H-J0HS-00000-00&pdcontentcomponentid=9113&pdshepid=urn%3AcontentItem%3A5MGP-J441-J9X6-H07K-00000-00&pdteaserkey=sr0&ecomp=r89tk&earg=sr0&prid=b44ee464-e0f0-4082-ad70-869dcdf9bc5a) (1988)). *Young* held the State must “provide a sufficiently meaningful opportunity to reduce the severity of the sentence to constitute something less than life imprisonment without the possibility of parole” for juvenile offenders. 369 N.C. at 126, 794 S.E.2d at 279. This language supports a chance for release after 25 years.

Our *Miller*-fix statute also supports a chance for release after 25 years. It explicitly provides for parole review after 25 years for juvenile offenders convicted of one or more felony-murder counts, and for those redeemable offenders convicted of a single count of premeditated murder. N.C.G.S. §§ 15A-1340.19A, -1340.19B(a)(1). A bill now pending in the General Assembly[[10]](#footnote-11) would allow parole review for juvenile offenders after 15, 20, or 25 years, depending on the most serious offense committed.

While the current statute is silent on how to sentence multiple counts of premeditated murder, it is a logical and constitutional inference that the General Assembly considers 25-year parole eligibility for all combinations of offenses committed by redeemable juveniles sufficient to meet penological goals. This interpretation of the statute provides a constitutional sentence for Mr. Kelliher. (See slip op at 41-44) Courts are required to interpret statutes in a constitutional manner whenever possible. *James*, 371 N.C. at 87, 813 S.E.2d at 203; *Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985). Adopting the opposite interpretation – that consecutive life sentences *are* permitted in this context – would clearly result in an unconstitutional sentence when multiple sentences exceed a full life term.[[11]](#footnote-12) Likewise for consecutive term-of-year sentences totaling more years than a natural life. The only logically consistent interpretation is that redeemable juvenile offenders must be eligible for parole after 25 years regardless of the number of offenses.

Using the single most severe sentence for calculating parole eligibility is also consistent with our juvenile sentencing statutes. Generally, any offender under juvenile jurisdiction is released on or before age 21. N.C.G.S. §§ 7B-1601; 7B-2513. And juvenile sentencing courts must consolidate all sentences. N.C.G.S. § 7B-2508(h). The General Assembly recognizes that juveniles should be sentenced less severely.

3. Eligibility after no more than 25 years is consistent with national model legislation and the majority of other states.

The Model Penal Code, revised in 2017, recommends that for offenders under age 18, “No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses.” Model Penal Code: Sentencing § 6.11A(g) (Am. Law. Inst., Proposed Final Draft 2017, Approved May 2017).[[12]](#footnote-13) The phrase “any offense or combination of offenses” succinctly captures what the Constitution requires in sentencing redeemable youthful offenders – a chance for release regardless of the crimes committed. States have adopted similar provisions. Iowa’s highest court reviewed statutes from multiple states and noted many of them “allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration.” *Null*, 836 N.W.2d at 72 n.8 (collecting statutes). Virginia now provides parole eligibility after 20 years for every offender under 18 for “a single felony offense or multiple felony offenses”. H.B. 35, 2020 Session (Va. 2020).[[13]](#footnote-14) *See also* Ark. Code Ann. § 5-4-104 (parole eligibility after 30 years for offenders under 18 convicted of murder); W. Va. Code § 61-11-23 (parole eligibility after 15 years for “any combination of sentences”). The trend in sentencing juveniles, even for the most severe offenses, is toward the chance for earlier release.

4. Eligibility after no more than 25 years is consistent with standard penological goals for youth offenders.

Parole eligibility after no more than 25 years meets penological goals while reflecting current science and the evolving societal view that children should not be punished for life. The panel here correctly held that “the categorical prohibition [against LWOP sentences] is principally focused on the offender, not on the crime or crimes committed.” (Slip op at 36) Other state courts deciding this issue have likewise found the reduced culpability of the juvenile offender is the key factor. *See* *Moore*, 76 N.E.3d at 1142 (“Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability.”) (emphasis in original); *State v. Zuber*, 152 A.3d 197, 213 (N.J. 2017) (holding “the force and logic of *Miller*’s concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases.”)

Protecting society from future crime is a valid goal, but it should be employed rationally. It is well-established that aggression and anti-social tendencies wane as young men age. “For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.” *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). A recent longitudinal study of juvenile offenders, the Pathways to Desistance study, showed that “consistent with other studies – the vast majority of serious juvenile offenders desisted from antisocial activity by the time they were in their early twenties.” Steinberg, et al, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, OJJDP Juvenile Justice Bulletin, March 2015, p 7.[[14]](#footnote-15)

Imposing excessive sentences to prevent future crime is overinclusive and unfair, especially where the State has the power to deny parole. If individuals remain dangerous, there is no reason to think they will be released. Using overly harsh sentences as a means of preventing the minority who remain dangerous from being released is unnecessarily cruel to the “vast majority” who are redeemable.[[15]](#footnote-16)

Further, the State is not the guarantor of a crime-free citizenry. We have already decided, by way of the Eighth Amendment, that we will not lock people up for life even though some individuals might commit a crime if released. Our system accepts the risk of recidivism. Adults in North Carolina who have committed intentional, malicious murder (and who we have stated are *more* culpable than teenagers) are afforded a definite release date if convicted of second-degree murder. In 2019[[16]](#footnote-17) for example, North Carolina admitted 265 new offenders whose most serious offense was second-degree murder, and 277 whose most serious offense was first-degree murder.[[17]](#footnote-18) Thus, approximately half of adult murderers from that year have defined release dates. A 30-year-old murderer with no record who received the minimum presumptive sentence of 144 months (12 years) could be released at age 42. N.C.G.S. §§ 14-17; 15A-1340.17(c).

Offenders of all types complete their sentences and are released every day. According to NCDPS data, in 2019, there were 24,752 prison exits.[[18]](#footnote-19) The bulk were from lower level offenses, but there were 17 exits from Class B offenses; 104 exits from Class B1, 311 from Class B2, and 1,260 from Class C. Thus, the State routinely determines that serving a predefined sentence is sufficient punishment. Viewed in this context, *potential* release around age 42 for a juvenile offender whose culpability is reduced is a reasonable and constitutionally appropriate punishment.

Retribution is the penological justification that seems to give trial courts trouble in these serious juvenile cases.[[19]](#footnote-20) The State here invokes retribution in its Brief. The State highlights the testimony of the parents of the two victims in great detail. (State’s Brief at 7-9) The State notes in its conclusion that, because the victims lost their lives, it is reasonable to keep Mr. Kelliher incarcerated until old age so long as he has “some time” outside prison. (State’s Brief at 47) Though the State never explicitly argues that juvenile homicide offenders should suffer for the bulk of their lives, the ‘eye-for-an-eye’ implication is clear.

*Graham*, quoting *Roper,* held that “the case for retribution is not as strong with a minor as with an adult.” 543 U.S. at 571. *Graham* further noted that the “case becomes even weaker with respect to a juvenile who did not commit homicide.” *Id.*  Mr. Kelliher was a minor, lessening his culpability and the need for retribution; and he did not personally commit homicide, lessening the need for retribution further. Mr. Kelliher understands the pain he caused, and will suffer from this understanding regardless of where he is housed. There is nothing he can do to change what happened. As Justice Sotomayor wrote in her dissent in *Jones:* “Of course, nothing can repair the damage [the defendants’] crimes caused. *But that is not the question*.” 209 L.Ed.2d at 430 (emphasis added). The question is whether a mature, rehabilitated juvenile offender should be allowed a chance at life outside prison after serving a severe, lengthy prison term. *Miller* and *Graham* have already answered yes.

Finally, severely punishing offenders will not necessarily help victims’ families. The trial court recognized this in its commentary at sentencing, noting that the loss of a child to violence is a “big and bitter pill to swallow” that some may never get over; and that even watching the execution of the perpetrator “still doesn’t fill that hole in your soul left by the premature departure of your loved ones.” (Tp 126) Programs that help victims’ families exist. We do not have to choose between helping families and helping young offenders, who are often victims themselves.[[20]](#footnote-21) The moral response is to try to help both. North Carolina should not cling so tightly to retribution that we lose perspective on, or forswear altogether, the other penological goals and societal interests involved.

5. Eligibility after no more than 25 years is consistent with humane treatment of children.

The causes of crime committed by children and adolescents are complex. Most child offenders, including Mr. Kelliher, experienced trauma in their early lives. (*See* slip op at 43, noting Mr. Kelliher’s “profoundly troubled childhood.”)[[21]](#footnote-22) It is immoral to severely punish children damaged by abuse when they have no control over the circumstances in which they are raised.

6. The State’s arguments are unavailing.

The State fears sentencing relief for more juvenile offenders, and it warns there will be no discretion in sentencing regardless of a juvenile’s offense and characteristics. (State’s Brief at 45-46) (this decision will “trickle down” and “result in our entire sentencing scheme being completely upended”). These fears are inappropriate: if sentencing relief is constitutionally required, then it should be awarded, regardless of how many people might be affected or how much time might be required. If our sentencing scheme must be “turned upside down” to ensure its constitutionality, then so be it. “[D]ire warnings are just that, and not a license for us to disregard the law.” *McGirt v. Oklahoma,* 207 L.Ed.2d 985, 1015 (2020).

The State’s argument that everyone will be treated the same regardless of background or offense(s) is unpersuasive for several reasons. First, the same can be said for most other homicide sentences. The death penalty and life without parole are absolute sentences. They allow no discretion by the sentencing court. Second, prosecutors will continue to have discretion in bringing lesser charges and offering pleas to lesser terms of years.[[22]](#footnote-23) Third, there may be future legislation (*see* footnote 10 above) providing for earlier parole eligibility in some situations. Fourth, and perhaps most important, all offenders sentenced to life with parole eligibility after 25 years will not be released after the same amount of time. The discretion as to when and whether to release them is simply moved to a more appropriate time – after an offender has grown up and the parole commission can assess his maturity, rehabilitative efforts, behavior, psychological wellness, release plan and other factors.

 In sum, allowing the possibility of parole after 25 years is not radical relief; it is reasonable, constitutional relief. Mr. Kelliher’s consecutive life sentences are disproportionate and unconstitutionally harsh and excessive. There is no cause to overturn the panel’s decision, nor to deny any other child the relief afforded to Mr. Kelliher – a chance for redemption and release.

**II. NORTH CAROLINA’S CONSTITUTION PROVIDES INDEPENDENT PROTECTION AGAINST CRUEL SENTENCES.**

Article I, Section 27 of the North Carolina Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” Regardless of this Court’s ruling under the Eighth Amendment, juvenile offenders are separately protected under the North Carolina Constitution. This Court should hold that it is cruel or unusual to require James Kelliher to spend more than 25 years in prison before becoming eligible for parole.

Federal case law on federal protections does not control how this Court interprets our own Constitution. *See generally, Horton v. Gulledge*, 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970); *Henry v. Edmisten*, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986). It is the “state judiciary that has the responsibility to protect the state constitutional rights of the citizens ….” *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). North Carolina is thus free to “develop[] a body of state constitutional law for the benefit of its people that is independent of federal control.” [[23]](#footnote-24) Harry C. Martin*, The State as a “Font of Individual Liberties”: North Carolina Accepts the Challenge*, 70 N.C. L. Rev. 1749, 1757 (1992).

Our Constitution provides for protection from cruel ‘or’ unusual punishment, as opposed to protection from cruel ‘and’ unusual punishment under the Eighth Amendment. Justice Martin specifically addressed the differences in the federal and state constitutions in the punishment context:

The disjunctive term ‘or’ in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment. It therefore follows that if the Cruel and Unusual Punishment clause of the federal Constitution requires states to provide adequate medical care for state inmates, the Cruel or Unusual Punishment clause of the North Carolina Constitution imposes at least this same duty, if not a greater duty.

*Id.* at 1755. *Cf. State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016) (because text of Article I Section 20 does not call for broader protection than the Fourth Amendment, the analysis under federal and state constitutions is identical).

Other states with similar constitutional provisions have recognized the significance of the textual difference. *See, e.g., People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (state constitution prohibiting cruel or unusual punishment provides broader protection than Eighth Amendment); *State v. Bassett*, 394 P.3d 430, 445 (Wash. Ct. App. 2017), *aff’d*., 428 P.3d 343 (Wash. 2018) (banning LWOP altogether for juveniles after determining Washington’s “cruel punishment” clause provided greater protection than its federal counterpart); *Diatchenko v. DA*, 1 N.E.3d 270, 283 (Mass. 2013) (finding in its state constitution’s “cruel or unusual punishments” provision “greater protections” of the rights of the accused than under corresponding federal provisions).

After *Miller*, the Supreme Court of Iowa – whose state constitution prohibits “cruel and unusual punishment” – nonetheless concluded the state constitution provided broader protection than its federal counterpart: “[W]e follow the federal analytical framework in deciding this case, but ultimately use our judgment in giving meaning to our prohibition against cruel and unusual punishment in reaching our conclusion.” *State v. Lyle*, 854 N.W.2d 378, 384 (Iowa 2014). The court then held its state constitution prohibited mandatory minimum sentences for any juvenile offender. *Id*. at 400. The court considered the “rapidly evolving” law regarding mandatory sentencing for juveniles. *Id*. at 387. It recognized that, despite most of the nation (at that time) allowing mandatory minimum sentences, change had to begin somewhere: “The evolution of society that gives rise to change over time necessarily occurs in the presence of an existing consensus, as history has repeatedly shown.” *Id*. It held that its own state constitution provided a legal basis for change: “Iowans have generally enjoyed a greater degree of liberty and equality because we do not rely on a national consensus regarding fundamental rights without also examining any new understanding.” *Id*.

This Court has stated that, despite the differences in language between the United States and North Carolina Constitutions, North Carolina “historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.” *See, e.g., State v. Green,* 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998). This language leaves an opening for broader protection under the North Carolina Constitution. *Green* did not hold that proportionality analysis under the United States and North Carolina Constitutions would always yield the same result. *Id.* at 603-04*,* 502 S.E.2d at 828. And the *Green* opinion is 23 years old. *Green* itself recognized courts must consider “evolving standards of decency” when determining the morality of a punishment. *Id.*

While trends at the time of *Green* were toward more severe punishment for young offenders, trends are now clearly toward leniency for young offenders. Since *Green* our General Assembly passed the *Miller*-fix statute; passed Raise-the-Age legislation keeping more young offenders in juvenile court, and as noted above currently has pending legislation that would allow even earlier parole eligibility for juveniles with lengthy sentences. National trends are likewise moving toward more leniency for young offenders.[[24]](#footnote-25)

 This Court recently recognized that it “‘give[s] our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.’” *Tully v. City of Wilmington*, 370 N.C. 527, 533, 810 S.E.2d 208, 214 (2018) (quoting *Corum*, 330 N.C. at 783, 413 S.E.2d at 290). No segment of our population is more deserving of a broad interpretation of the State constitutional protection against cruel or unusual punishments than children. *See, In re Stumbo,* 357 N.C. 279, 294, 582 S.E.2d 255, 265 (2003) (“There is ‘no more worthy object of the public’s concern’ than ‘protecting children’”) (quoting *Wyman v. James*, 400 U.S. 309 (1971); *Sharp v. Sharp (In re Ferrell)*, 124 N.C. App. 357, 363, 477 S.E.2d 258, 261 (1996) (“Our laws make clear that protecting the welfare of children is of such overriding importance that our courts must be readily accessible when the potential for harm exists.”).

This Court can use North Carolina’s Constitution to treat children humanely, and to care for the least among us. This Court can provide hope for James Kelliher, even while upholding his severe punishment of 25 years in prison before parole eligibility. To do otherwise, under all the circumstances, is cruel under N.C. Const. art. I, § 27.

 **CONCLUSION**

Under both the federal and state constitutions, Mr. Kelliher asks this Court to uphold the Court of Appeals decision below and to remand for the imposition of a sentence allowing parole eligibility after 25 years. Mr. Kelliher can work, pay taxes, and care for his aging parents rather than languish in prison into old age at State expense.  He asks this Court for a second chance.

Respectfully submitted this 21st day of June, 2021.

Electronically submitted

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**CERTIFICATE OF SERVICE**

I certify that I have this day mailed the foregoing Brief by electronic mail in PDF format to counsel of record at the following address:

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 This 21st day of June, 2021.

 Electronically submitted

 Kathryn L. VandenBerg

No. 442PA20 DISTRICT 12

SUPREME COURT OF NORTH CAROLINA

\* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*

STATE OF NORTH CAROLINA )

)

v. ) From Cumberland County

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JAMES RYAN KELLIHER )

\* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*

**APPENDIX**

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*State v. James Ryan Kelliher*,

 COA 19-530, 26 October 2020, slip opinion App. 1-44

1. Exactly one year later, the United States Supreme Court declared the death penalty unconstitutional for offenders under age 18. *Roper v. Simmons*, 543 U.S. 551 (March 1, 2005)

 [↑](#footnote-ref-2)
2. Ballard was initially convicted of both murders. His direct appeal resulted in a new trial, and he was subsequently acquitted. (Tpp 5-6) [↑](#footnote-ref-3)
3. The prosecutor stated Branch did not enter the house and was not charged. (Tp 10) It appears, however, that he was convicted for accessory after the fact and conspiracy to rob. *See* NCDPS website, inmate # 0850694. [↑](#footnote-ref-4)
4. The prosecutor also described testimony from some younger girls Mr. Kelliher and Ballard spoke to on the night of the shootings. One of those girls testified in Ballard’s trial that he told her he shot Carpenter and then Mr. Kelliher shot Kelsea. Another of the girls testified that she asked Mr. Kelliher what happened and he cried and told her he had killed three people. (Tpp 18-19) Despite the prosecutor’s recitation of this testimony, the trial court here found that Mr. Kelliher’s prior testimony was that he was not the shooter. The trial court did not credit or address the testimony of the two girls. (Rp 43) The State did not contest the fact findings on appeal. [↑](#footnote-ref-5)
5. Mr. Kelliher has spent all of his adult life – from age 17 to 37 – in prison. If this appeal succeeds, he will not be eligible for release until age 42, and he has no guarantee of ever being released. Mr. Kelliher asks this Court to guard against casually finding 25 years to be insufficiently severe, and to truly contemplate what it would be like to lose one’s freedom and to live in prison for two and a half decades beginning at age 17. [↑](#footnote-ref-6)
6. Another decision since *Kelliher* agrees: *Williams v. State*, 476 P.3d 805, 820 (Kan. Ct. App. 2020) (“[O]ne could not reasonably argue that a sentence fixed for a term of 100 years provides a meaningful opportunity for release, even though it is not characterized as a sentence of life without parole.”). [↑](#footnote-ref-7)
7. *See,* *Casiano*, 115 A.3d at 1046; *Contreras*, 411 P.3d at 450; Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes*, 139 PEDIATRICS 1, 2 (2017); Nick Straley, *Miller’s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L. Rev. 963, 986 n.142 (2014); Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* (2013). [↑](#footnote-ref-8)
8. *See., e.g*., *State v. Young*, which addressed whether *Miller* applied to life sentences covered by N.C.G.S. § 15A-1380.5. That statute, now repealed, permitted certain offenders with life sentences to apply to a superior court judge for review. The judge could recommend commutation to the Governor. This Court applied language in *Graham*, which stated that clemency did not supply a sufficiently meaningful opportunity for release; and applied language in *Miller*, which stated that life without parole is prohibited for redeemable offenders. The Court concluded the two opinions together led to the result that 15A-1380.5’s opportunity for clemency did not convert the LWOP sentence into life with the possibility of parole. 369 N.C. at 124-26, 794 S.E.2d at 279. Neither *Miller* nor *Graham* addressed the exact problem before the Court; but applying their principles allowed a reasoned result.

 [↑](#footnote-ref-9)
9. The resentencing court found that Mr. Kelliher “had been told by [Ballard] that [Ballard] was going to have to kill the victim**s** because they would know his face and recognize his phone.” (Finding No. 1) Similarly, the court referred to Mr. Kelliher’s knowledge that Ballard “intended to kill the victim**s**.” (Finding No. 2) (emphasis added) (Rp 41) On the contrary, even the prosecutor’s version was that Ballard’s plan was to meet the dealer alone behind an abandoned store. (Tp 13) Mr. Kelliher challenges these findings as unsupported, as there was no evidence of advance indication that Ms. Helton would be present. [↑](#footnote-ref-10)
10. House Bill 424, available at: <https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H424v1.pdf> [↑](#footnote-ref-11)
11. In other words, three life sentences would not allow parole eligibility until after age 92; four life sentences after age 117, etc. [↑](#footnote-ref-12)
12. The full 2017 Code with commentary is available at <http://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017>.

 [↑](#footnote-ref-13)
13. <http://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB35&201+sum+HB35>. [↑](#footnote-ref-14)
14. Available at: <https://www.pathwaysstudy.pitt.edu/documents/Psychosocial%20maturity%20and%20Desistance%20from%20Crime%20in%20a%20Sample%20of%20Serious%20Juvenile%20Offenders.pdf> [↑](#footnote-ref-15)
15. Such sentences are not only cruel, but also absurdly expensive. “Housing juveniles for a life sentence requires decades of public expenditures. Nationally, it costs $34,135 per year to house an average prisoner. This cost roughly doubles when that prisoner is over 50. Therefore, a 50-year sentence for a 16-year old will cost approximately $2.25 million.” The Sentencing Project, *Juvenile Life Without Parole: An Overview*, at <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [↑](#footnote-ref-16)
16. The year 2020 was not used because of potential pandemic skewing. [↑](#footnote-ref-17)
17. The Division of Prisons data is publicly-available, and one can generate a variety of queries here: <https://webapps.doc.state.nc.us/apps/asqExt/ASQ>. [↑](#footnote-ref-18)
18. Exits can be for any reason, including completion of sentence, new trial, or death. [↑](#footnote-ref-19)
19. Including Judge Fox, who sentenced Mr. Kelliher. *See* Tp 126 [↑](#footnote-ref-20)
20. *See* Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 Cardozo L. Rev. 2313, 2314-15 (2013). [↑](#footnote-ref-21)
21. *See* Brief of Amicus Curiae by Disability Rights NC, discussing Adverse Childhood Experiences (ACEs). *See also* Chief Justice Newby’s initiative on addressing the impact of ACEs on children in our court system. At: <https://www.nccourts.gov/news/tag/press-release/chief-justice-newby-announces-task-force-on-aces-informed-courts>. [↑](#footnote-ref-22)
22. There is a serious caveat related to discretionary charging and sentencing decisions; namely, the danger of arbitrary results based on race, income, or other inappropriate factors. *See*, Brief of Amicus Curiae by Emancipate NC on behalf of Darrell Anderson, filed in companion case No. 23A21. [↑](#footnote-ref-23)
23. Martin cited as examples that: (1) the good-faith exception to the exclusionary rule under the Fourth Amendment was explicitly rejected under the North Carolina Constitution (*State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988)); and (2) the N.C. Constitutional provisions prohibiting discrimination in jury selection provided a separate basis for relief (*State v. Cofield,* 320 N.C. 297, 357 S.E.2d 622 (1987)). [↑](#footnote-ref-24)
24. *See* <https://www.ap.org/explore/locked-up-for-life/50-states>; <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [↑](#footnote-ref-25)