STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket Nos. 215-2001-CR-199 & 200

State of New Hampshire

v.

Robert Tulloch

ORDER ON LEGAL ISSUES

In April 2002, the defendant, Robert Tulloch, pleaded guilty to two counts of first-degree murder pertaining to his involvement in the January 2001 homicides of Half and Susanne Zantop. At the time, the defendant was 17 years of age. Under the mandatory sentencing scheme set forth in RSA 630:1 A, III, this court (*Smith*, J.) sentenced the defendant to two concurrent life sentences without the possibility of parole. (Index #79.) In 2012, the United States Supreme Court held in *Miller v. Alabama* that the Eighth Amendment prohibits mandatory life-without-the-possibility-of-parole (LWOP) sentences for minors. 567 U.S. 460, 465 (2012).

Procedural Background

After *Miller*, this court reopened the defendant's case for resentencing. Proceedings paused until 2014, when the New Hampshire Supreme Court confirmed that *Miller* applied retroactively to defendants already serving their sentences. *See Petition of State*, 166 N.H. 659 (2014). Since then, the defendant and the State have prepared for resentencing in fits and starts via a series of assented-to motions to continue and to extend deadlines. In 2018, in advance of a resentencing hearing then scheduled for April 2019, the defendant moved this court to declare unconstitutional

LWOP for minors. (Index #102.) The State objected. (Index #105.) Because both parties repeatedly sought to continue the resentencing, this court never held a hearing or issued an order on the defendant's 2018 motion.

As the defendant anticipates his resentencing hearing, he again moves this court to recognize that the New Hampshire Constitution prohibits LWOP for minors. (Index #134 at 1.) Alternatively, if the New Hampshire Constitution allows such sentences, the defendant moves this court to recognize that the New Hampshire Constitution requires the court to find permanent incorrigibility and the State to prove that finding beyond a reasonable doubt. As a further alternative, if the New Hampshire Constitution allows LWOP for minors and does not require finding permanent incorrigibility, the defendant moves the court to recognize that the New Hampshire Constitution requires the State to prove beyond a reasonable doubt the facts on which the sentence is based. (*Id.*) Finally, regardless of how this court resolves those constitutional questions, the defendant also moves the court to recognize that sentencing courts must consider the *Miller* factors in resentencing, including a defendant's prison record as it relates to his or her capacity for change. (*Id.*) The State did not file a written objection. The American Civil Liberties Union of New Hampshire, along with several other organizations, filed an amicus brief in support of the defendant. (Index #138.) The court held a hearing on the matter on September 25, 2024.

After the hearing, the court elected to request an interlocutory transfer to the New Hampshire Supreme Court for rulings as to these issues and directed the parties to file proposed interlocutory transfer statements. (Index #145.) The State moved to reconsider (Index #147), which the court denied. (Index #150.) The defendant filed a proposed transfer statement. (Index #151.) The State did not file a proposed statement.

On February 5, 2025, the court sent the interlocutory transfer request to the supreme court. (Index #152.) On April 11, 2025, the supreme court declined the interlocutory transfer and directed this court to rule upon the legal issues. *State v. Tulloch*, No. 2025-0069 (N.H. Apr. 11, 2025). (*See also* Index #152.) For the following reasons, the court concludes that Part I, Article 33 of the New Hampshire Constitution prohibits LWOP for minors as "cruel or unusual." The court **GRANTS** the defendant's motion with respect to this issue and affirms his alternative legal arguments. (*See* Index #134.)

Legal Background

I. United States Supreme Court decisions on LWOP for minors

Since the defendant's 2002 sentencing, the legal landscape has shifted dramatically toward an approach that accounts for a defendant's youth and reserves the most serious punishments for adult defendants only. This shift began in 2005, when the United States Supreme Court held in *Roper v. Simmons* that the Eighth Amendment prohibits the death penalty for minors. 543 U.S. 551 (2005). Next, in 2010, the Court held in *Graham v. Florida* that the Eighth Amendment also prohibits mandatory[1] LWOP sentences for minors who committed non-homicide crimes. 560 U.S. 48 (2010).

Then, in 2012, the Court expanded on *Roper* and *Graham* in *Miller v. Alabama*. In *Miller,* the Court held that the Eighth Amendment prohibits mandatory LWOP sentences for all minors, regardless of the crime. 567 U.S. at 465. The Court stopped

[1] The court notes the difference between mandatory and discretionary LWOP sentences. A mandatory LWOP sentence is one imposed under a statute that specifically prohibits the possibility of parole. *See, e.g.*, RSA 630:1-A, III ("A person convicted of a murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time."). A discretionary LWOP sentence is one imposed under a statute that allows for life sentences but does not prohibit the possibility of parole. The judge may use his or her sentencing discretion to decide whether to allow for the possibility of parole. *See, e.g.*, RSA 630:1-b ("Murder in the second degree shall be punishable by imprisonment for life or for such term as the court may order.")

short of holding all LWOP sentences for minors unconstitutional, leaving open the possibility of discretionary LWOP sentences for minors based on individualized consideration. *Id.* at 478–79. *Miller* reaffirmed that the Eighth Amendment requires that a punishment be proportionate "to both the offender and the offense." *Id.* at 469.

Miller addressed the "offender" aspect of proportionality, relying on the principle from *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing" due to their "diminished culpability and greater prospects for reform." *Id.* at 471. In all three cases, the Court considered psychology, neuroscience, and social science to reach the conclusion that courts must sentence minors differently from how they sentence adults. *Id.* at 471–72. *Miller* further justified expanding *Roper* and *Graham* by reaffirming that the Court considers proportionality "less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." *Id.* at 469–70.

Two later Supreme Court cases clarified *Miller's* scope. In 2016, the Court held in *Montgomery v. Louisiana* that *Miller* applies retroactively, *i.e.*, to defendants sentenced before 2012. 577 U.S. 190, 206 (2016). Then, in 2021, the Court held in *Jones v. Mississippi* that while *Miller* and *Montgomery* require a sentencing court to consider a defendant's youth before imposing a discretionary LWOP sentence on a minor, the court need not find "permanent incorrigibility." 593 U.S. 98, 104–05 (2021). Furthermore, a sentencing court does not need to provide an on-the-record explanation of how it took youth into account. *Id.* at 114.

II. Other jurisdictions' approaches to LWOP for minors

The United States of America is the only country in the world that allows LWOP for minors. (Index #138 at 13.) Within the United States, 28 states and the District of

Columbia have banned LWOP for minors. Another five states allow LWOP for minors but have no one serving such a sentence. (Index #134 at 7 (citing *States that Ban Life without Parole for Children*, Campaign for the Fair Sentencing of Youth (2023), https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/).)[2] Of the jurisdictions that banned LWOP for minors, Massachusetts, Iowa, and Washington did so through court action. *See Diatchenko v. District Attorney*, 1 N.E.3d 270 (Mass. 2013); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2014); *State v. Bassett*, 428 P.3d 343 (Wash. 2018). Presumably, the other 25 states and the District of Columbia acted through legislation.

Among the Northeast states, Vermont, Massachusetts, Connecticut, New Jersey, Delaware, and Maryland have banned LWOP for minors. Maine, Rhode Island, and New York allow LWOP for minors but have no one serving such a sentence. New Hampshire is one of 17 states nationally and the only Northeast state aside from Pennsylvania in which anyone is serving a discretionary LWOP sentence for a crime committed as a minor. (*See* Index #134 at 7.)

Of the 22 states that do allow LWOP for minors, states vary on (a) whether a court must find permanent incorrigibility before imposing LWOP for minors; (b) whether a presumption exists against LWOP for minors, and if so, which party carries the burden of proof; (c) whether certain non-LWOP sentences constitute *de facto*

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[2] The defendant cites facts from The Campaign for the Fair Sentencing of Youth in his motion. (*See* Index #134 at 7.) The State did not dispute these facts in writing or at the September 25, 2024 hearing or otherwise object to the court's considering this information. In the State's objection to the defendant's 2018 motion, it relied on a similar resource from The Sentencing Project. (*See* Index #105 at 11 (citing URL that now links to https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/).) Because the State does not object to the court's considering the Campaign for the Fair Sentencing of Youth information and previously relied on similar Sentencing Project information, the court adopts these facts as undisputed.

life sentences; (d) whether *Miller* applies to discretionary LWOP sentences for minors; and (e) which types of homicide qualify for LWOP for minors. (*Id.*)

III. *Miller's* implications for New Hampshire

At the time of the 2012 *Miller* decision, five New Hampshire defendants were serving mandatory LWOP sentences for crimes committed as minors: Robert Tulloch, Steven Spader, Eduardo Lopez, Robert Dingman, and Michael Soto. All five individuals were 17 years old at the time of their crimes, all were convicted of first-degree murder, and all were sentenced under RSA 630:1-A, III. *Petition of State*, 166 N.H. 659, 662 (2014). Courts have completed resentencing for Mr. Spader, Mr. Lopez, Mr. Dingman, and Mr. Soto:

- In 2013, Steven Spader was resentenced to life without the possibility of parole. He refused to attend the hearing or authorize his attorneys to seek a lesser sentence. *State v. Steven Spader*, No. 216-2010-CR-240, Index #184 (Apr. 26, 2013) (*Abramson*, J.).
- In 2018, Eduardo Lopez was resentenced to 45 years to life and will be eligible for parole at age 62. *State v. Eduardo Lopez, Jr.*, No. 226-1993-CR-621, Index #82 (Jan. 30, 2018) (*Smukler*, J.), *aff'd*, *State v. Lopez*, 174 N.H. 201 (2021).
- In 2018, Robert Dingman was resentenced to 40 years to life and will be eligible for parole at age 57. *State v. Robert Dingman*, No. 219-1996-CR-611, Index #340 (Dec. 3, 2018) (*Nadeau*, J.), *aff'd*, *State v. Dingman*, 2021 WL 1549778 (N.H. Apr. 20, 2021).
- In 2019, Michael Soto was resentenced to 25 years to life and will be eligible for parole at age 42. *State v. Michael Soto*, No. 216-2008-CR-1235, Index #168 (Feb. 26, 2019) (*Smukler*, J.).

Both Mr. Lopez and Mr. Dingman challenged their new sentences as *de facto* life sentences in violation of the Eighth Amendment. In each case, the New Hampshire Supreme Court upheld the trial court's conclusion that the sentence was not a *de facto* life sentence. *Lopez*, 174 N.H. at 203; *Dingman*, 2021 WL 1549778, at *1. Mr. Soto has not waged any constitutional challenges to his new sentence.

Analysis

Having considered the procedural history of the defendant's case and the relevant legal background, the court turns to the defendant's legal questions:

I. Does Part I, Article 33 of the New Hampshire Constitution categorically prohibit LWOP for minors?
II. If the New Hampshire Constitution allows LWOP for minors, must the sentencing court find the defendant to be permanently incorrigible before imposing a such a sentence?
III. If the court must find permanent incorrigibility, does the New Hampshire Constitution require that the State prove permanent incorrigibility beyond a reasonable doubt?
IV. If the New Hampshire Constitution allows LWOP for minors, and regardless of whether it requires a court to find permanent incorrigibility, does the New Hampshire Constitution require that the State prove beyond a reasonable doubt the facts on which the court bases such a sentence?
V. Regardless of how the court resolves these constitutional questions, must a resentencing court consider the "*Miller* factors," including a defendant's prison record as it relates to his or her capacity for change?

The court notes that the State did not file responses to the defendant's motion. The State did file an objection to the defendant's 2018 motion; however, only the Part I, Article 33 section of that filing relates to the defendant's 2024 motion, as all other aspects of his 2024 legal arguments are new or revised. (*See* Index #105 at 9–11.) Thus, the court relies largely on the State's oral argument at the September 25, 2024, hearing to understand the State's position and analyze its legal arguments.

I. Does Part I, Article 33 of the New Hampshire Constitution categorically prohibit LWOP for minors?

The defendant contends that Part I, Article 33 of the New Hampshire Constitution prohibits LWOP for minors as "cruel or unusual." The defendant asserts that his request is narrow: the result would be simply that a defendant sentenced for a crime committed as a minor must always receive the opportunity for a parole hearing.

Under this reading of the law, trial courts could continue to sentence minors to incarceration for life, as long as the sentence provides for the possibility of parole. Likewise, the parole board could continue to deny parole, including to defendants sentenced as minors. The parties agree that the defendant's request does not force this court to overrule existing New Hampshire Supreme Court precedent or to issue a ruling that conflicts with other superior court decisions. Beyond *Petition of State*, *Dingman*, and *Lopez*, the New Hampshire Supreme Court has never addressed LWOP for minors. Likewise, this issue has never been raised previously in a superior court proceeding, as neither Mr. Spader, Mr. Lopez, Mr. Dingman, nor Mr. Soto raised any constitutional challenges at their resentencing hearings.

The defendant advances four primary arguments in support of his request: (a) the United States Supreme Court has consistently recognized that minors are different from adults for the purposes of sentencing; (b) the New Hampshire Constitution is generally more protective than the United States Constitution; (c) Part I, Article 33 of the New Hampshire Constitution has a different meaning than the Eighth Amendment of the United States Constitution based on its distinct language, and LWOP for minors is both cruel and unusual; and (d) the Massachusetts Supreme Judicial Court (SJC) held LWOP for minors unconstitutional based on identical constitutional language.

a. The United States Supreme Court's approach to sentencing defendants who were minors at the time of their crimes

The defendant asserts that *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones* reflect changed attitudes over time regarding how our society understands minor defendants. This changed understanding, the defendant contends, largely stems from the now widely accepted science about adolescent brain development. The Supreme

Court adopted that science in this line of cases, noting both the limitations of adolescent brains as well as the fact that brain development continues past adolescence into a person's twenties. *See Miller*, 567 U.S. at 471–72 (explaining *Roper* and *Graham*'s reliance on scientific findings). As a result, the Court recognizes that because of minors' immaturity and underdeveloped sense of responsibility, they are simultaneously less culpable for the harms they cause and more susceptible to rehabilitation. The defendant notes that in addition to the Supreme Court's acceptance of modern brain development science, no state supreme court has denied the science.

The State does not dispute the brain development science or the role it has come to play in the Supreme Court's reasoning. The State agrees with the defendant that minors must receive extra due process protections compared to adults. However, the State contends that the protections in place through New Hampshire's juvenile justice system and certification process suffice to meet the State's obligations under the state and federal constitutions. The State further contends that *Jones* is a "hard stop" to the *Roper-Graham-Miller-Montgomery* line of cases and shows the Supreme Court's intent to leave any further restrictions on LWOP for minors up to state legislatures.

The defendant's understanding of the *Roper-Graham-Miller-Montgomery* line of cases is consistent with the reasoning in the cases themselves as well as with the interpretation of these cases by other state supreme courts. Likewise, the State accurately describes *Jones* as a "hard stop" on federal constitutional protections, leaving further action to the states. *See Jones*, 593 U.S. at 120–21 (listing examples of further restrictions states may impose on LWOP for minors). However, the State incorrectly reads into *Jones* the conclusion that further action must be legislative. Nowhere in its majority opinion—but rather only in Justice Thomas's concurrence—does the *Jones*

court discuss the wisdom of legislative versus judicial action. *See id.* at 128 (*Thomas*, J., concurring). Moreover, Justice Thomas's concurrence in *Jones* relies exclusively on his *Miller* dissent. *See id.*

In sum, the parties seem to agree—or at least do not disagree—on the meaning and relevance of *Roper*, *Graham*, *Miller*, and *Montgomery*. The State disputes only whether and to what extent *Jones* invites judicial, as opposed to legislative, action. However, a plain reading of the majority opinion makes clear that the Court expresses no intent for legislative versus judicial action. *See id.* at 120–21 ("[O]ur holding today does not preclude the States from imposing additional sentencing limits . . . ."). Thus, while not dispositive on the issue of whether the New Hampshire Constitution prohibits LWOP for minors, the court agrees with the defendant that the United States Supreme Court consistently recognizes that minors differ from adults for the purposes of sentencing and leaves the door open for courts to act on that principle.

b. The New Hampshire and United States Constitutions

The defendant next argues that because the New Hampshire Constitution protects individual rights to a greater extent than the United States Constitution, expanding the rights of minor defendants with respect to sentencing and punishment would be consistent with New Hampshire law. The parties agree that the New Hampshire Constitution is often more protective than the United States Constitution but disagree over whether (1) the New Hampshire Constitution expands rights outside of the privacy context and (2) whether expanded rights extend to judicial action in addition to traditional state (*i.e.*, executive) action.

The defendant highlights several examples of expanded individual rights: *Canelo*'s rejection of the good-faith exception to the exclusionary rule; *Goss*'s

heightened expectation of privacy in residential garbage; *Gullick*'s requirement that the State must prove a *Miranda* waiver beyond a reasonable doubt; and *In re Jeffrey C.*'s holding entitling minors facing adult jail time to a jury trial. Beyond these examples, the defendant provides a longer list of New Hampshire cases that expand Fourth, Fifth, Sixth, and Fourteenth Amendment rights. (Index #134 at 12–14.)

The State agrees with the defendant's basic premise that the New Hampshire Constitution is more protective than the United States Constitution. However, the State contends that New Hampshire's expanded protections exist only in certain areas. The State asserts that the expanded protections are limited to rights implicating state action, and, more specifically, government intrusion on privacy. The State distinguishes government intrusion on privacy from the judicial activity of sentencing, arguing that the court should not consider the defendant's generalizations about expanded protections. The State further argues that the fact that the legislature affirmatively created the juvenile certification process cuts against finding that any expanded protections apply to LWOP for minors. Finally, the State urges the court to approach sentencing not under new constitutional protections but rather under the five *Miller* factors alongside the established sentencing goals of deterrence, punishment, and rehabilitation.

Turning to the first question, the State argues that New Hampshire's expanded protections are limited to government intrusion in the search and seizure context, while the defendant contends that expanded protections encompass a broader array of rights. Indeed, many of the expanded protection cases—and many of the most well-known cases, like *Goss*—are specific to Fourth Amendment protections against search and seizure. *See* 150 N.H. 46 (2003).

However, the universe of expanded protections in New Hampshire law is not limited to privacy rights and is far broader than the State makes it out to be. The New Hampshire Constitution, for instance, also expands Fourteenth Amendment due process rights related to burdens of proof and prosecutorial standards. (*See* Index #134 at 12–14 (listing cases).) Moreover, and germane to the instant discussion, the New Hampshire Constitution also expands the Fifth Amendment right against self-incrimination (including heightened protections for minors), and the Sixth Amendment rights to counsel and jury trials (again including heightened protections for minors). (*See id.*) In sum, while the State correctly asserts that the New Hampshire Constitution expands protections against search and seizure, a more complete assessment reveals expanded rights in nearly every aspect of criminal law and procedure.

Second, the State argues that the New Hampshire Constitution's expanded protections relate only to the type of state action implicated in government intrusion on privacy (*i.e.*, police and other executive branch actors) but not to the judicial activity of sentencing. The court concludes that because New Hampshire's expanded rights include those to counsel, jury trials, and due process, in addition to the right against self-incrimination, New Hampshire's expanded protections limit the discretion of both executive and judicial actors. For example, *In re Jeffrey C.* limits judicial power by requiring a jury trial for minors facing incarceration in an adult jail. 146 N.H. 722 (2001). Likewise, *State v. Kousounadis* limits a judge's discretion with respect to jury instructions. 159 N.H. 413 (2009).

Based on those cases and others that expand individual rights in and around the courtroom, the New Hampshire Constitution's expanded protections likely do limit judicial power in addition to executive power. A central purpose of American

constitutions is to define and limit the power of all three branches of government, including the judicial branch. New Hampshire's constitution is no different. *See* N.H. CONST. pt. I, art. 37. Thus, while not dispositive of the issue of whether the New Hampshire Constitution prohibits LWOP for minors, the court finds persuasive the defendant's argument that the New Hampshire Constitution is generally more protective than the United States Constitution, including with respect to judicial action and rights outside of the privacy context.

c. Part I, Article 33's distinct language and whether LWOP for minors is cruel and/or unusual

The defendant further argues that the New Hampshire Constitution's prohibition against "cruel or unusual" punishment means that Article 33 must be more protective than the Eighth Amendment. The defendant contends that where the Eighth Amendment prohibits punishment only where it is both cruel and unusual, Article 33 expands that class of prohibited punishments to ban those that are cruel but not unusual or unusual but not cruel. The defendant cites to many New Hampshire cases interpreting the conjunction "or" and cases from other states interpreting identical "cruel or unusual" clauses, along with common sense, to argue that Article 33 bans more types of punishment than does the Eighth Amendment.

The defendant contends that LWOP for minors is both cruel and unusual. He asserts that LWOP for minors is unusual not only because most states now ban LWOP for minors, but also because a clear trend exists toward abolishing such sentences. The defendant argues that LWOP for minors is cruel because it holds minors to the same standard as adults with no consideration that minors do not have an adult capacity to understand fully their actions or the consequences of those actions. The defendant

further argues that LWOP for minors is cruel because it does not account for the fact that minors are not yet fully formed into the persons they will someday become. The defendant contends that New Hampshire law generally reflects a cultural understanding that, due to their immaturity, the law cannot hold minors to an adult standard, and that sentencing law should be no different. For instance, New Hampshire law prohibits minors from voting, marrying, serving on juries, entering into contracts, playing bingo, dropping out of school and purchasing tobacco and alcohol. The defendant further contends that the entire juvenile justice system reflects the same principle.

The State responds that "and" versus "or" is a "distinction without a difference." (Hearing at 9:36.) The State argues that under *State v. Addison*, the court must interpret the New Hampshire Constitution through an originalist lens to determine that LWOP for minors is not cruel or unusual. *See* 165 N.H. 381, 565–66 (2013). The State asserts that at the time the framers wrote Article 33 in 1784, society approved of the death penalty and criminal laws applied equally to minors and adults. The State further asserts that because LWOP is a lesser sentence than the death penalty, the framers would not have considered LWOP cruel or unusual. Therefore, the State concludes, because LWOP for minors would not have been cruel or unusual by 1784 standards, such a sentence is not cruel or unusual measured by contemporary standards. The defendant does not dispute this reading of *Addison* but responds that even the current United States Supreme Court, which generally subscribes to originalism, has never considered colonial-era standards to decide whether certain punishments for minors are cruel and unusual. Rather, the Supreme Court has adopted modern brain development science to determine why and how sentencing must account for immaturity.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Part I, Article 33 of the New Hampshire Constitution provides that "[n]o Magistrate, or Court of Law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." The New Hampshire Supreme Court has never decided the significance of "or" in the context of the phrase "cruel or unusual" or whether Article 33 generally affords broader protection against punishment than the Eighth Amendment does. However, the Court has held that Article 33 does provide at least as much protection as the Eighth Amendment against excessive fines. *State v. Enderson*, 148 N.H. 252, 259 (2002).

First, the court considers whether "or" has a broader meaning than "and." The court finds it reasonable to assume that the framers, as well-educated citizens familiar with the Eighth Amendment, intentionally chose "or" instead of "and" when crafting Article 33. New Hampshire cases strongly support the defendant's position that "or" must be broader than "and." *See, e.g., Appeal of Niadni, Inc.*, 166 N.H. 256, 261 (2014) (interpreting "or" to mean that either of the two alternatives suffices). Further, other states with an identical "cruel or unusual" provision have interpreted "or" as conferring broader protections than the Eighth Amendment. *See, e.g., State v. Kelliher*, 873 S.E.2d 366, 382–83 (N.C. 2022); *People v. Carmony*, 127 Cal. App. 4th 1066, 1085 (2005); *People v. Bullock*, 485 N.W.2d 866, 872–73 (Mich. 1992). *But see Thomas v. State*, 634 A.2d 1, 10 n.5 (Md. Ct. App. 1993) (holding that "unusual" does not add anything to "cruel;" does not interpret "or"); *State v. Kido*, 654 P.2d 1351, 1353 n.3 (Haw. Ct. App. 1982) (determining no distinction between "or" and "and" where delegates to state constitutional convention explicitly intended state to follow federal Eighth Amendment

precedent). The State characterizes "and" versus "or" as a "distinction without a difference" but cites no case law or dictionary definition in support of its assertion. As such, the court is unpersuaded by the State's characterization of the issue. Thus, the court concludes that based on the broader meaning of "or," Article 33 must prohibit more punishment than the Eighth Amendment.

Next, the court considers whether courts should interpret Article 33 based on 1784 or contemporary standards. *State v. Addison* requires a court "to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in light of the surrounding circumstances." 165 N.H. at 565–66. The *Addison* court concluded that because the government in 1784 mandated the death penalty for many crimes and the New Hampshire constitution references capital punishment several times, the framers could not have considered the death penalty to be "cruel or unusual." *Id.* at 566.

Although courts must read the New Hampshire Constitution according to the framers' intent, the United States Supreme Court held in *Trop v. Dulles* that courts must evaluate Eighth Amendment claims according to the "evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958). The Supreme Court affirmed the "evolving standards of decency" rule in *Roper*, *Graham*, and *Miller*, thus making it a central consideration for any Eighth Amendment challenge to punishment for minors. 543 U.S. at 560–61; 560 U.S. at 58; 567 U.S. at 469. The *Addison* court noted that the New Hampshire Supreme Court has never decided whether the "evolving standards of decency" rule applies to Article 33 and declined to decide either way, concluding that even modern standards of decency would support the death penalty. 165 N.H. at 576. While the "evolving standards" rule remains unadopted, New

Hampshire courts use Eighth Amendment decisions as a "useful backdrop" to analyze equivalent rights under New Hampshire law. *State v. Evans*, 127 N.H. 501, 504, (1985).

Here, the court adopts the "evolving standards" rule for several reasons. First, New Hampshire courts use Eighth Amendment decisions to inform their understanding of Articles 18 and 33. *See, e.g., Evans*, 127 N.H. at 504. Second, the New Hampshire Supreme Court has never declined to apply an Eighth Amendment decision to Articles 18 or 33. Without a compelling reason to deviate from that tradition, the court declines to do so here. Third, the "evolving standards" rule comports with the New Hampshire's history of adjusting punishment based on contemporary standards. In 1784, New Hampshire required its courts to sentence citizens to death for robbery, burglary, rape, arson and other crimes. *See Addison*, 165 N.H. at 566. At some point, society no longer tolerated such punishment for these crimes and revised the law according to modern standards. Finally, New Hampshire's trend over time toward affording minors greater protections and process suggests that the judiciary already applies modern standards of decency in cases involving minors. *See, e.g., In re Jeffrey C.*, 146 N.H. 722 (2001) (requiring a jury trial for minors facing time in an adult jail).

Having decided that contemporary standards are the appropriate framework under which to assess whether punishment is cruel or unusual, the court next considers whether LWOP for minors is "cruel" and/or "unusual." Neither the United States Supreme Court nor the New Hampshire Supreme Court have precisely defined either of those terms. *See Avery v. Powell*, 695 F. Supp. 632, 635 (D.N.H. 1988) ("the United States Supreme Court has not crafted a specific definition of what constitutes cruel and unusual punishment").

The court determines that LWOP for minors is "cruel" because it effectively sentences a juvenile to death in prison, and the severity of the punishment increases with the youth of the defendant. *See Cruel, Oxford English Dictionary* (1989) (defining "cruel" as "causing or characterized by great suffering; extremely painful or distressing"). At a time when the death penalty was still legal, the New Hampshire Supreme Court described LWOP as the next "most severe punishment that may be imposed in this State." *State v. McLellan*, 146 N.H. 108, 114 (2001). *See also Miller*, 567 U.S. at 474 (stating that LWOP sentences "share some characteristics with death sentences that are shared by no other sentences") (quoting *Graham*, 560 U.S. at 69). Further, a minor sentenced to LWOP "will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Id.* (quoting *Graham*, 560 U.S. at 70). Given that New Hampshire abolished the death penalty, the court doubts the constitutionality of the next-most-severe sentence as applied to minors. Thus, the court finds LWOP for minors cruel within the meaning of Article 33.

The court is further persuaded that LWOP for minors is "unusual" because it is an uncommon sentence in New Hampshire and an increasingly uncommon sentence regionally and nationally. *See Unusual, Oxford English Dictionary* (1989) (defining "unusual" as "uncommon; exceptional"). To the court's knowledge, out of New Hampshire's 2,000+ inmates, only Steven Spader and the defendant currently serve LWOP sentences for crimes committed as minors. *See Prisoner Population*, New Hampshire Department of Corrections (2020), https://www.corrections.nh.gov/about-us/history/prisoner-population. As noted earlier in this order, New Hampshire is one of 17 states nationally and the only Northeast state aside from Pennsylvania in which

defendants serve LWOP sentences for crimes committed as minors. (*See* Index #134 at 7). Thus, the court finds LWOP for minors unusual within the meaning of Article 33.

Because the court has determined that the New Hampshire Constitution bars any sentence that is cruel or unusual, either of the findings above suffice to support the conclusion that LWOP for minors is unconstitutional. However, because the court finds that the sentence is both cruel and unusual, the sentence is unconstitutional regardless of whether the court applies an "or" or an "and" standard. Thus, the court concludes that Part I, Article 33 of the New Hampshire Constitution prohibits LWOP for minors.

d. The Massachusetts Declaration of Rights and *Diatchenko*

Finally, the defendant contends that the decision of the Massachusetts SJC in *Diatchenko* banning LWOP for minors should inform this court's conclusion. The defendant cites the identical "cruel or unusual" clause in the Massachusetts Declaration Rights and the SJC's reasoning that preserving the possibility of LWOP for minors "flies in the face" of the United States Supreme Court's conclusions about minors and their brain development. The defendant further asserts that the New Hampshire Supreme Court considers persuasive Massachusetts decisions that interpret parallel constitutional provisions. The State responds that Massachusetts is not New Hampshire, and the Massachusetts Declaration of Rights is not the New Hampshire Constitution. The State further argues that when the Massachusetts SJC banned LWOP for young adults under 21 in its subsequent *Mattis* decision, the SJC rendered its earlier *Diatchenko* decision less credible.

New Hampshire courts consider other courts' interpretations of comparable state constitutional provisions "most persuasive when the language of the constitutional provision at issue is similar to the wording in our constitution." *State v. Mack*, 173 N.H.

793, 802 (2020). Because New Hampshire shares its early history with Massachusetts and modeled much of its constitution on the Massachusetts Declaration of Rights, New Hampshire courts will "give weight to the interpretation given that provision by the Supreme Judicial Court" when interpreting nearly identical provisions. *Id.* The court is unpersuaded by the State's attempts to distinguish New Hampshire from Massachusetts in this context, because the State seems to base its argument more on a cultural suspicion of our southern neighbor than any articulable legal reason that New Hampshire courts should ignore Massachusetts constitutional law.

In *Diatchenko v. District Attorney*, the SJC held that LWOP for minors violates the prohibition in Article 26 of the Massachusetts Declaration of Rights on "cruel or unusual punishments." 1 N.E.3d at 276. *Diatchenko* largely affirmed the reasoning of the *Roper-Graham-Miller* line of cases before extending it to discretionary LWOP for minors. When the *Diatchenko* court forges beyond *Miller*, it does so by focusing on *Miller's* mandate that a punishment should be "graduated and proportioned to both the offender and the offense" and Article 26's proportionality requirement. 1 N.E.3d at 283 (quoting *Miller*, 567 U.S. at 469). The SJC concludes that LWOP for minors is disproportionate not with respect to the offense of first-degree murder—which the law widely regards as the most heinous crime—but rather with respect to the offender. *Id.*

To reach this conclusion, the SJC reasons that because a person's brain never fully develops by 18—a premise accepted by the United States Supreme Court in *Roper-Graham-Miller*—it is simply impossible to know whether a minor is beyond redemption at the time they committed their crime. *Id.* at 283–84. Thus, to the extent that *Miller* suggests that the State must prove a minor defendant's "irreparable corruption" at an individualized sentencing hearing before imposing LWOP (although *Jones* held later

held otherwise), the SJC concludes that such a finding "can never be made [] with integrity." *Id.* at 284. The SJC further reasons that the reality that minors will continue to grow and change over time weakens the sentencing justifications for LWOP—namely, the need to incapacitate those who "pose an ongoing and lasting danger to society." *Id.* The SJC implies that minor defendants may be changed people when their brains finish developing, and those more mature adults may no longer pose the same danger to society that they did at age 17. *Id.* at 284–85.

Here, New Hampshire's Article 33 and Massachusetts's Article 26 identically prohibit "cruel or unusual" punishment. Accordingly, the court finds the *Diatchenko* decision persuasive, *see Mack*, 173 N.H. at 802, and the SJC's reasoning sound. Simply put, *Miller*, the science *Miller* adopts, and the common sense of anyone who has ever been or known a teenager, all instruct that it is impossible to know the true character of someone whose brain is still developing. Therefore, where a juvenile defendant's character is still in flux, it is impossible to determine whether an LWOP sentence is proportional to such defendant's character. This impossibility renders LWOP for minors unworkable and unconstitutional. The fact that the Massachusetts SJC recently extended its prohibition on LWOP to 18-, 19-, and 20-year-old adults in *Commonwealth v. Mattis* does not undermine the court's credibility, as the State suggests; if anything, *Mattis* lends further weight to the science and logic behind *Diatchenko*. *See generally* 224 N.E.3d 410 (2024). Thus, *Diatchenko* further persuades the court that New Hampshire's identical "cruel or unusual provision" prohibits LWOP for minors.

II. If the New Hampshire Constitution allows LWOP for minors, must the sentencing court find the defendant to be permanently incorrigible before imposing a such a sentence?

Although the court concludes that the New Hampshire Constitution prohibits LWOP for minors, it nonetheless considers the defendant's alternate arguments. The defendant argues that if the New Hampshire Constitution allows LWOP for minors, Article 33 requires a sentencing court to find permanent incorrigibility before imposing such a sentence. (Index #134 at 21.) He contends that without a finding of incorrigibility, LWOP for minors is "cruel." (*Id.* at 22.) Such a requirement would expand upon federal protections because the United States Supreme Court held in *Jones* that the Eighth Amendment does not require a court to find permanent incorrigibility. 593 U.S. at 104–05. But while *Jones* stops short of requiring any factual finding under the United States Constitution, it explicitly leaves the door open for states to require extra factual findings. *Id.* at 120.

The defendant points to the North Carolina Supreme Court's decision in *State v. Kelliher*, in which that court interpreted North Carolina's identical "cruel or unusual" clause. 873 S.E.2d 366 (N.C. 2022). The *Kelliher* court held that sentencing a minor to LWOP is "cruel within the meaning of article I, section 27 of the North Carolina Constitution . . . unless the trial court expressly finds that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated." *Id.* at 387. The defendant asks this court to follow *Kelliher*'s holding that LWOP for minors without a finding of incorrigibility is "cruel."

Here, much of the *Kelliher* court's reasoning persuades the court that Article 33 requires sentencing courts to find permanent incorrigibility. First, Article I, Section 27 of the North Carolina Constitution mirrors Article 33 in that it prohibits "cruel or

unusual" punishments. Second, both states' supreme courts have interpreted these provisions as more protective than the Eighth Amendment. *See Kelliher*, 873 S.E.2d at 369–71; *Enderson*, 148 N.H. at 259. Third, both the North Carolina and New Hampshire constitutions provide that a central purpose of punishment is to "reform" the defendant. *Compare* N.H. CONST. pt. I, art. 18 *with* N.C. CONST. art XI, § 2. The *Kelliher* court reasons that the context of the reform provision must inform a court's reading of the "cruel or unusual" provision; that is, any punishment that unjustly forecloses the opportunity for reform is necessarily cruel. 873 S.E.2d at 386–87. Given these similarities between the New Hampshire and North Carolina constitutions, *see Mack*, 173 N.H. at 802, and the ways these similar provisions distinguish these constitutions from the federal constitution, the court finds *Kelliher* persuasive. Thus, assuming that the New Hampshire Constitution allows LWOP for minors, the court concludes that imposing such a sentence could only be constitutional upon a finding of permanent incorrigibility.

Although not precisely on point with respect to finding permanent incorrigibility, the *Diatchenko* court's reasoning that LWOP for minors is irreconcilable with developing brains applies here, too. *See* 1 N.E.3d at 283–85. For the same reasons LWOP for minors may be unconstitutionally disproportionate with respect to the offender, so too may be a finding of permanent incorrigibility. Because minors are immature—with immaturity's attendant capacity for growth—any finding that a minor is permanently incorrigible is necessarily "questionable." *Graham*, 560 U.S. at 72–73. In other words, "incorrigibility is inconsistent with youth." *Id.* at 73. If sentencing courts cannot make reliable findings about permanent incorrigibility, Article 33 may preclude

LWOP for minors entirely, even where a minor may be, in fact, permanently incorrigible.

One way around the impossibility of determining permanent incorrigibility while a defendant's brain is still developing would be to wait until brain development is complete. However, delaying a finding of incorrigibility for several years may violate the defendant's due process rights. *See Perez v. Warden*, No. 19-CV-372-JD, 2021 WL 3038649, at *2 (D.N.H. July 19, 2021) ("Exorbitant delay in imposing a sentence after a defendant's conviction can violate a defendant's due process rights.") Another option would be for a sentencing court to retain jurisdiction to reconsider sentencing until the defendant's brain is fully developed. *See State v. Sweet*, 879 N.W.2d 811 (Iowa 2014) (*Cady*, J., concurring) (suggesting that courts retain jurisdiction until the end of brain development). Thus, assuming the New Hampshire Constitution allows LWOP sentences for minors, the court concludes that the constitution requires sentencing courts to find permanent incorrigibility and to do so in a way that accounts for the defendant's ongoing brain development and due process rights.

III. If the court must find permanent incorrigibility, does the New Hampshire Constitution require that the State prove permanent incorrigibility beyond a reasonable doubt?

Next, the defendant argues that if sentencing courts must find permanent incorrigibility to impose LWOP for minors, Part I, Article 15's due process guarantee requires the State to prove permanent incorrigibility by proof beyond a reasonable doubt. (Index #134 at 22.) The State does not dispute that LWOP for minors requires substantial due process. The State focuses instead on the lack of precedent for the burden of proof beyond a reasonable doubt. The State objects to this burden because, although the State often must meet special burdens to prove aggravating factors and

sentence enhancements, this burden would make sentencing minors to LWOP unlike any other sentencing hearing. The defendant responds that sentencing a minor to LWOP should be unlike any other sentencing hearing. The defendant argues that because a of minor's status, the State must have a heavy burden of proof; further, *Miller* may require an elevated burden because "children are constitutionally different from adults for purposes of sentencing." *See* 567 U.S. at 471. Finally, the State asserts that Judge Nadeau denied a similar argument in Robert Dingman's resentencing process.

Part I, Article 15 of the New Hampshire Constitution guarantees that no citizen "shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Where individuals have an interest at stake that entitles them to due process, courts consider three factors to determine what process is due: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens brought about by additional procedural requirements." *Doe v. State*, 167 N.H. 382, 414 (2015).

Here, the liberty interest implicated by LWOP is the most substantial private interest possible short of a death sentence. *See McLellan*, 146 N.H. at 114. Further, a minor's interest is larger than that of anyone else serving a LWOP sentence. *See Miller*, 567 U.S. at 474. The court assumes for the sake of analysis a 75-year life expectancy, which may be generous in the prison context. *See Lopez*, 174 N.H. at 209 (upholding trial court's discretion to consider general life expectancy data instead of prison-specific data). If a court sentences a 17-year-old to life, that sentence implicates 58 years' worth

of the minor defendant's liberty interest. In contrast, if a court sentences a 50-year-old to life, that sentence implicates only 25 years of the adult defendant's liberty interest; moreover, that 50-year-old has already enjoyed much of what adult life has to offer.

Turning to the second factor, the risk of erroneous deprivation is high because *Miller* guarantees only one resentencing hearing. Should the defendant, lawyer, or court misstep, the defendant may not have an opportunity to correct the error. Further, the younger the defendant, the higher the risk of erroneous deprivation because of "the great difficulty of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *See Miller*, 567 U.S. at 479–80.

Finally, the relatively minor government interests at stake weigh in favor of increased due process. The overarching government interests in any sentence include rehabilitation, deterrence, and punishment. *State v. Benner*, 172 N.H. 194, 188 (2019). However, a life sentence with the possibility of parole affords the State the same ability to advance those interests. Inmates have no right to parole, and parole hearings allow the parole board an extraordinary amount of discretion. *See Baker v. Cunningham*, 128 N.H. 374, 381 (1986) (explaining that parole hearings are not subject to typical due process requirements). The parole board can consider factors unrelated to a defendant's rehabilitation, such as the crime's nature and seriousness, to deny parole to even exemplary inmates. *See N.H. Parole Bd. R.* ¶ 301. Thus, because the State can achieve its sentencing interests through a life sentence with the possibility of parole, its interest in maintaining LWOP for minors is minimal.

Moving to the administrative and fiscal aspects of the government's interest, an LWOP sentencing hearing comes only after the State has already expended substantial

government resources to achieve a conviction. The State would have further expended resources to prepare to argue for a life sentence, regardless of the burden that applies to the sentencing facts. Thus, the additional administrative and fiscal resources required to meet a higher burden of proof would be relatively minor. Finally, the magnitude of the government's interest is further diminished by the fact that cases involving LWOP for minors are few and far between, occurring only once every several years. Therefore, given the defendant's substantial interest, the high risk of erroneous deprivation, and relatively minor government interest, LWOP for minors requires more due process than any other sentence. *See Doe*, 167 N.H. at 414.

Having determined that LWOP for minors requires substantial due process protections, the court next considers the appropriate burden of proof.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."

State v. Lavoie, 155 N.H. 477, 482 (2007) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). The State routinely must meet three different burdens in criminal cases: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. Generally, the State must prove sentencing facts by the preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997).

Because LWOP for minors requires the highest level of due process, the court determines that proof beyond a reasonable doubt is the correct burden. The court agrees with the defendant that LWOP for minors should be unlike any other sentencing proceeding. The court is unpersuaded by the State's argument that applying such a

burden would be unprecedented. The fact that courts may not have afforded adequate due process in the past does not support maintaining the status quo in the face of a changing legal landscape.

After *Miller*, at least two states established particular burdens of proof with respect to irreparable corruption and permanent incorrigibility. The Arizona Supreme Court held that minors subject to LWOP could receive a sentence with the possibility of parole where they proved by the preponderance of evidence that their crimes reflected transient immaturity and not irreparable corruption. *State v. Valencia*, 386 P.3d 392 (Ariz. 2016), *abrogated* by *State ex rel. Mitchell v. Cooper*, 535 P.3d 3 (Ariz. 2023) The Pennsylvania Supreme Court held that *Miller* required the state to prove permanent incorrigibility by proof beyond a reasonable doubt. *Commonwealth v. Batts*, 163 A.3d 410, 416 (Pa. 2017), *abrogated by Jones*, 593 U.S. 98. However, because those cases relied only on the Eighth Amendment and not on state constitutional provisions, *Jones* abrogated those holdings. Although *Jones* applies as equally to New Hampshire as it does to Arizona and Pennsylvania, the defendant raises his challenge under the New Hampshire Constitution only and not the Eighth Amendment. As such, and unlike these other states' cases, *Jones* does not foreclose the possibility that the New Hampshire Constitution may require a higher burden of proof.

The burden to prove permanent incorrigibility beyond a reasonable doubt aligns with how New Hampshire dealt with sentencing in the death penalty context. There, RSA 630:5, the capital murder statute, required the State to prove aggravating factors beyond a reasonable doubt to the jury. The court also considers that the requirement to prove those factors to a jury afforded capital murder defendants more due process than if the State had to prove the factors only to a judge, as in typical sentencing hearings.

Consistent with the fact that LWOP for minors is the most severe punishment possible short of a death sentence, it makes sense that New Hampshire courts should mandate slightly less, but almost as much, due process as what the courts afforded capital murder defendants.

Finally, the court cannot assess the State's argument about Judge Nadeau's decision in Robert Dingman's case without more specificity from the State. In that case, the parties and court have filed around 140 documents since the court reopened it for resentencing. The court cannot determine which hearing and order the State wants the court to consider. *See State v. Robert Dingman*, No. 219-1996-CR-611. In sum, if the New Hampshire Constitution allows LWOP for minors but requires a finding of permanent incorrigibility, it also requires the State to prove permanent incorrigibility by proof beyond a reasonable doubt.

IV. If the New Hampshire Constitution allows LWOP for minors, and regardless of whether it requires a court to find permanent incorrigibility, does the New Hampshire Constitution require that the State prove beyond a reasonable doubt the facts on which the court bases such a sentence?

The court understands the defendant's "sentencing facts" argument as an alternative argument to his alternative argument—that is, this argument would apply only if the court determined that the New Hampshire Constitution allows LWOP for minors but does not require finding permanent incorrigibility. Although the court has determined earlier in this order that if the New Hampshire Constitution allowed LWOP for minors, it would also require finding permanent incorrigibility, the court nonetheless considers the defendant's "sentencing facts" question.

The parties' arguments on this issue are largely the same as their arguments about finding permanent incorrigibility beyond a reasonable doubt. The defendant reiterates his due process argument. (Index #134 at 25.) He also clarifies that "sentencing facts" refers not to the facts of the crime, which would have already been established beyond a reasonable doubt, but rather to facts specific to sentencing (*e.g.*, facts about a defendant's background, circumstances, and mental health that are otherwise irrelevant to the crime). The defendant further analogizes to *McLellan*. There, the New Hampshire Supreme Court held that Article 15 requires proof beyond a reasonable doubt of prior convictions used to enhance a sexual assault sentence to LWOP. *McLellan*, 146 N.H. at 115.

Here, *McLellan* is highly persuasive. The *McLellan* court undertook a similar due process analysis as conducted above for the defendant's case to determine that the highest burden of proof must apply. *See id.* at 113–15. *McLellan* is different from the defendant's case in that it layered a new burden of proof atop an existing statutory sentencing scheme, whereas the defendant seeks to define a burden for a contested sentencing scheme. However, *McLellan* and the question of LWOP for minors both implicate Article 15 due process, LWOP, sentence "enhancement," and burdens of proof. In sum, New Hampshire's robust due process protections, prior death penalty sentencing law, and existing AFSA sentencing law all suggest that, if LWOP for minors was constitutionally permissible, the New Hampshire Constitution would still require the State to prove sentencing facts beyond a reasonable doubt for a court sentence a minor to LWOP.

V. Regardless of how the court resolves these constitutional questions, must a resentencing court consider the "*Miller* factors," including a defendant's prison record as it relates to his or her capacity for change?

Finally, the defendant argues that regardless of how this court resolves the constitutional issues, sentencing courts must consider the "*Miller* factors"—that is, the defendant's "diminished culpability and heightened capacity for change" due to his or her youth. (Index #134 at 27 (quoting *Miller*, 567 U.S. at 479.) The State agrees with the defendant that it must consider these factors, including a defendant's post-conviction conduct in prison as it relates to his or her capacity for change. (Hearing at 9:38, 10:19–20.) Thus, because parties agree on this point, the court considers this issue moot.

Conclusion

In sum, the court concludes that Part I, Article 33 of the New Hampshire Constitution prohibits LWOP for minors. LWOP for minors is "cruel" within the meaning of Article 33 due to the sentence's outsized impact on minors and the impossibility of accurately determining a defendant's character while his or her brain is still developing. Further, LWOP for minors is "unusual" because only two New Hampshire defendants currently serve such sentences, New Hampshire is the only New England state and one of only 17 states nationwide where any defendants are serving such sentences, and the unequivocal trend amongst other jurisdictions is to ban or place additional restrictions on LWOP for minors. Therefore, the court **GRANTS** the defendant's motion to recognize that the New Hampshire Constitution prohibits LWOP for minors. (*See* Index #134.)

Alternatively, if the New Hampshire Constitution does allow LWOP for minors, the court further concludes that Part I, Articles 15 and 33 require the State to prove

permanent incorrigibility by proof beyond a reasonable doubt. If the New Hampshire Constitution allows LWOP for minors but does not require a finding of permanent incorrigibility, then Article 15 and analogous sentencing law require the State to prove the facts the sentence is based on beyond a reasonable doubt. Finally, the parties agree that the court must consider the "*Miller* factors" and a defendant's post-conviction conduct in prison.

The court will schedule a resentencing hearing and conduct it according to this order.

SO ORDERED, this 31st day of July 2025.

Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 07/31/2025