THE STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NO. 2013-0566

State of New Hampshire v. Michael Soto,
Hillsborough Superior Court—Northern District No. 08-cr-1235;

Robert Tulloch v. Richard Gerry, Warden;
Merrimack Superior Court No. 12-cv-849;

Robert Dingman v. Richard Gerry, Warden,
Merrimack Superior Court No. 13-cv-050; and

Eduardo Lopez, Jr. v. Richard Gerry, Warden,
Merrimack Superior Court No. 13-cv-085

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ON PETITION FOR ORIGINAL JURISDICTION UNDER RULE 11 FROM A DECISION OF THE MERRIMACK SUPERIOR COURT

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# AMICUS CURIAE BRIEF ON BEHALF OF:
# (i) THE NEW HAMPSHIRE CIVIL LIBERTIES UNION;
# (ii) NEW HAMPSHIRE LEGAL ASSISTANCE;
# (iii) DISABILITIES RIGHTS CENTER, INC.;
# (iv) THE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS;
# (v) CHILD AND FAMILY SERVICES OF NEW HAMPSHIRE;
# (vi) NEW HAMPSHIRE KIDS COUNT;
# (vii) THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS NEW HAMPSHIRE CHAPTER; AND
# (viii) FOUR PROFESSORS FROM THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW (IN THEIR INDIVIDUAL CAPACITIES ONLY)

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## QUESTIONS PRESENTED

1. Whether the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012)—which made clear that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" because "children are constitutionally different from adults for purposes of sentencing"—applies retroactively to those New Hampshire juveniles who were sentenced to mandatory life without parole prior to the issuance of the *Miller* decision.

2. Whether Part I, Article 33 of the New Hampshire Constitution should be interpreted to prohibit any sentence of life without the possibility of parole for a New Hampshire juvenile convicted of first-degree murder under RSA 630:1-a.

## TEXT OF RELEVANT AUTHORITY

N.H. Const. pt. I, art. 33:

No magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

N.H. Const. pt. I, art. 18:

All penalties ought to be proportioned to the nature of the offense …. The true design of all punishments being to reform, not to exterminate mankind.

U.S. Const. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

RSA 630:1-a, III, First-degree Murder:

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.

RSA 169-B:2, Delinquent Children, Definitions:

- Section IV, defining "delinquent" as "a person who has committed an offense before reaching the age of 17 years."

- Section VI, defining "minor" as "a person under the age of 17."

RSA 628:1, II, Immaturity:

…. [A] person 13 years of age or older may be held criminally responsible for the following offenses if the person's case is transferred to the superior court under the provisions of RSA 169-B:24 … (a)(1) First degree murder as defined in RSA 630:1-a ….

RSA 169-B:24, I, Transfer to Superior Court:

All cases before the court in which the offense complained of constitutes a felony or would amount to a felony in the case of an adult may be transferred to the superior court prior to hearing under RSA 169-B:16 as provided in this section. The court shall conduct a hearing on the question of transfer and shall consider, but not be limited to, the following criteria in determining whether a case should be transferred ….

## INTEREST OF THE AMICUS CURIAE

The amici and their interests are as follows:

The New Hampshire Civil Liberties Union: The New Hampshire Civil Liberties Union ("NHCLU") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, nonpartisan, public-interest organization with approximately 500,000 members (including over 3,000 New Hampshire members). The NHCLU and ACLU engage in litigation, by direct representation and as amicus curiae, to encourage the protection of rights guaranteed by the federal and state constitutions. In cases across the country, including before the United States Supreme Court, the ACLU has asserted that allowing children to be treated and punished as adults is contrary to the global consensus that children should not be held to the same standards of responsibility as adults. This work has included the submission of amicus briefs by the ACLU in *Roper v. Simmmons*, 543 U.S. 551 (2005) (holding that death penalty may not be

applied to juvenile offenders) and *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013) (holding that the discretionary imposition of a sentence of life imprisonment without the possibility of parole on juvenile homicide offenders violates the Massachusetts Declaration of Rights "because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders").

New Hampshire Legal Assistance: New Hampshire Legal Assistance ("NHLA") is a non-profit law firm that provides civil legal services to low income clients to address the legal problems that affect their daily survival and most basic needs. NHLA has a history of providing both individual representation and systemic advocacy to New Hampshire's poor and disadvantaged residents. Specifically, NHLA has played two key roles which inform its work as a co-amicus in this case. First, NHLA's Youth Law Project provides civil legal advocacy to youth in and at risk of involvement with the juvenile justice system. The NHLA Youth Law Project ensures that at-risk children and youth have access to the education and services they need to finish high school and to minimize their likelihood of lifelong criminal involvement. Life sentences without the possibility of parole deny these children the opportunity to rehabilitate from their mistakes and become productive adults. Second, for over three decades, NHLA has represented inmates (male and female) in efforts to improve conditions of confinement, facilities, programs, and services in New Hampshire's state prisons. That advocacy has given NHLA a detailed picture of the conditions of confinement that inmates face. Thus, NHLA has a unique perspective to serve as co-amicus for individuals seeking to avoid life sentences in those same prisons.

Disabilities Rights Center, Inc.: Since 1978, Disabilities Rights Center, Inc. ("DRC") has provided a full range of legal assistance to people with disabilities in New Hampshire, including

legal representation, regulatory and legislative advocacy, and education and training. Much of DRC's work relates to the application and interpretation of laws prohibiting discrimination against persons with disabilities and requiring the State of New Hampshire to provide appropriate and necessary services to such persons. Over the years, DRC has been involved in hundreds of cases in the court system representing youths, including those with mental and physical disabilities. In addition, DRC is part of a network of protection and advocacy systems ("P&A"s) located in all 50 States, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of people with disabilities in a variety of settings. Collectively, the P&A network is the nation's largest provider of such services for persons with disabilities. Given this breadth of experience, DRC is well placed to inform the Court of the substantive requirement and importance of considering mitigating factors in sentencing youth, including and with particular attention to mitigating factors related to emotional and behavioral health, and developmental or intellectual disabilities. Not only are these factors independently important mitigating factors for all people, but they are especially so for youth with disabilities, who are disproportionately overrepresented in New Hampshire's criminal justice system.

New Hampshire Association of Criminal Defense Lawyers: The New Hampshire Association of Criminal Defense Lawyers ("NHACDL") is the voluntary, professional organization of the criminal defense bar in New Hampshire. It has approximately 280 attorney members, including state court public defenders, federal defenders assigned to the District of New Hampshire, and close to 200 lawyers in private practice. Collectively, the membership practices in all ten counties, all eleven superior courts, all fourteen circuit courthouses, this

Court, and the federal courts in New Hampshire. NHACDL sponsors CLEs and training programs, provides mentors to new lawyers who ask for help, operates a listserv, and maintains an electronic resource library. NHACDL also takes public policy positions on issues of importance to the criminal justice system. Thus, when an appellate decision is likely to impact the procedural fairness of criminal adjudications, NHACDL will take a stand. The issues presented in this case are of direct concern to NHACDL, its members and their clients.

Child and Family Services of New Hampshire: Child and Family Services of New Hampshire ("CFS") is a private, nonprofit that works to advance the well-being of children and families through an array of social services that include, among other things, the following: child abuse prevention, intervention, and treatment; mental health counseling; home-based family strengthening and support; runaway and homeless youth services; family counseling; adolescent substance abuse treatment; in-school social work; early intervention for children with developmental concerns; after-school programs for adjudicated youth; and a child advocacy program that works at the legislative level to protect the best interests of children. A founding member of the Child Welfare League of America, CFS is the oldest social service organization in New Hampshire, having been founded in 1850. With 14 offices throughout New Hampshire and over 26 programs, CFS serves over 15,000 children and families annually. Consistent with its 164 years of experience providing social services to children and their families, CFS opposes the practice of permitting children to be charged and punished under adult standards.

New Hampshire Kids Count: Since its founding 25 years ago, New Hampshire Kids Count has been dedicated to improving the lives of all children by advocating for public initiatives that make a real difference in their lives. As the only independent multi-issue child advocacy organization in New Hampshire, Kids Count's allegiance is to children and children

only. Kids Count works to create system-wide change to make New Hampshire the best place to be a child by strengthening the state's government, businesses, communities, and families. Based on its history and experience, Kids Count believes that children require special protection and should not be held to the same standards of responsibility as adults.

The National Association of Social Workers and its New Hampshire Chapter: The National Association of Social Workers ("NASW") is the largest association of professional social workers in the U.S. with 135,000 members and 55 chapters. The New Hampshire Chapter has 669 members. NASW promulgates professional standards, conducts research, and develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW supports legislative and judicial action applying the principles of *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012) to prohibit the imposition of a life sentence without parole on minors. NASW also participated in an amicus brief to the U.S. Supreme Court in *Miller v. Alabama*, filed by the American Psychological Association and joined by several other professional mental health provider groups, which addresses the scientific research demonstrating the fundamental differences between juvenile and adult minds, as well as the fact that juveniles have greater immaturity, vulnerability, and changeability than adults. A copy of this amicus brief can be found at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-9646_petitioner_amcu_apa_etal.authcheckdam.pdf.

Four Professors from the University of New Hampshire School of Law (In Their Individual Capacities Only): The following are professors from the University of New Hampshire School of Law who submit this brief in their individual capacities (their affiliation with the University of New Hampshire School of Law is for identification purposes only): (i)

Albert E. Scherr, Professor of Law and Chair of the International Criminal Law and Justice Program; (ii) Erin Corcoran, Professor of Law; (iii) Keith Harrison, Professor Law; (iv) Leah A. Plunkett, Associate Professor of Legal Skills & Director of Academic Success (participating as an academic only, inactive member of the New Hampshire and Massachusetts bars). Their areas of expertise include: Criminal and Constitutional Law, Criminal Procedure, Administrative Law, and Education Law. Together, these professors bring decades of experience teaching, conducting legal research, and directing legal clinics. As legal academics, these amici have an interest in ensuring that our criminal laws are constitutional and comply with evolving standards of decency.

## STATEMENT OF THE CASE AND THE FACTS

Amici incorporate by reference the Statement of the Case and the Facts in the Petitioners' answering brief.

## SUMMARY OF THE ARGUMENT

In *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. Relying "not only on common sense—on what 'any parent knows'—but on science and social science as well," the Court recognized that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. Children are less culpable than adults, and they are more capable of rehabilitation as they mature. *Id.* "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," the Court held that automatically sentencing youth to life imprisonment without parole "poses too great a risk of disproportionate punishment." *Id.* at 2469.

*Miller* unquestionably invalidates New Hampshire's sentencing system with respect to juveniles charged and convicted of first-degree murder. This system automatically tries 17-year olds as adults, ***mandates*** upon conviction a life sentence without any eligibility for parole, and imposes a punishment equivalent to that which is imposed on adults. *See* 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."); RSA 169-B:2, IV (defining "delinquent" as "a person who has committed an offense before reaching the age of 17 years"); RSA 169-B:2, VI (defining "minor" as "a person under the age of 17"). Under this system, children between the ages of 13 and 16 who are certified as adults under RSA 169-B:24 are similarly subject to a ***mandatory*** life sentence without the possibility of parole immediately upon conviction of first degree murder. *See* RSA 628:1, II ("a person 13 years of age or older may be held criminally responsible for the following offenses if the person's case is transferred to the superior court under the provisions of RSA 169-B:24 … (a)(1) First degree murder as defined in RSA 630:1-a"). Each of the four (4) petitioners in this case, who were 17 years old at the time of their offenses, were convicted and sentenced under this unconstitutional system. They are serving mandatory sentences of life in prison without any possibility of parole—precisely the type of punishment that *Miller* ruled unconstitutional. The question for this Court is whether these four individuals must die in prison serving an unconstitutional sentence, forever denied "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See Miller*, 132 S. Ct. at 2469.

The answer is no. Under federal retroactivity principles, *Miller* applies to ***all*** juveniles who were given mandatory sentences of life in prison without parole. As a matter of federal law, the U.S. Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), requires that new constitutional rules be applied retroactively to cases on collateral review if they are "substantive"

or if they are "watershed" rules of criminal procedure. Here, *Miller* is a "substantive" rule because (1) it categorically places juveniles as a class beyond the power of the state to punish with sentences of mandatory life imprisonment without parole, thereby requiring states to expand the range of possible sentencing outcomes for juveniles, (2) it requires sentencing courts to consider the mitigating fact of youth before they may validly condemn a child to die in prison, thereby narrowing the factual circumstances under which juveniles may receive that sentence, and (3) it does not regulate the procedures that state courts must use in considering youth during sentencing.

To deny *Miller* retroactive effect would permit the dark irony that those who will suffer the longest under New Hampshire's unconstitutional sentencing scheme have the least hope for relief. It would deny the four petitioners any possibility of release from an irrevocable sentence that the U.S. Supreme Court has declared should be "uncommon" and "rare." *Miller*, 132 S. Ct. at 2469. Because *Miller* is retroactive, the mandatory sentence of life without parole imposed on the Petitioners violates their rights under the Eighth Amendment to the United States Constitution. Because Part I, Article 33 of the New Hampshire Constitution is at least as protective as the Eighth Amendment, it also goes without saying that Petitioners' mandatory sentences of life without parole violate Article 33.

Finally, though not fully briefed by the parties, amici ask this Court to take one step beyond *Miller* and find as a categorical matter that life without parole sentences for juveniles violate Article 33 of the New Hampshire Constitution. *See* N.H. Const. pt. I, art. 33 ("No magistrate, or court of law, shall demand excessive bail or sureties impose excessive fines, or inflict cruel or unusual punishments."). Such sentences should not just be "uncommon" in New Hampshire. They should be, and are, unconstitutional. Today, the United States is the only

country in the world where juvenile offenders are sentenced to life in prison without the possibility of parole. And New Hampshire is one of a fast shrinking group of states that still permits this cruel and strikingly unusual practice. Under Article 33, punishments may not be inflicted if they are either "cruel" or "unusual." As a matter of plain English, the disjunctive "or" is distinct from the conjunctive "and." And this linguistic distinction, without more, provides a basis for this Court to depart from analogous U.S. Supreme Court decisions interpreting the Eighth Amendment.

This Court would not be alone in reaching this conclusion. On December 24, 2013, the Massachusetts Supreme Judicial Court held in *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013), that, under Article XXVI of the Massachusetts Declaration of Rights, "the discretionary imposition of such a [life without parole] sentence on juvenile homicide offenders … is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." *Diatchenko*, 466 Mass. at 658-59. Article XXVI is identical to Article 33, and, accordingly, this Court can and should give great weight to this interpretation of the Massachusetts Constitution. *See, e. g., Opinion of the Justices (Tax Plan Referendum)*, 143 N.H. 429, 437 (1999). Consistent with this Court's long line of cases providing broader state constitutional protections, the text of Article 33, and global consensus on this issue, this Court should provide clear guidance to trial courts as they conduct *Miller* sentencing hearings that condemning juveniles to a lifetime of imprisonment without any possibility of parole is not only wrong, but unconstitutional.

## ARGUMENT

### I. *Miller v. Alabama* Should Be Applied Retroactively Because It Announced A New "Substantive" Rule.

In its landmark decision in the companion cases *Miller v. Alabama* and *Jackson v. Hobbs*, 567 U.S. __, 132 S. Ct. 2455 (2012), the United States Supreme Court held that imposing a sentence of mandatory life imprisonment without the possibility of parole on a juvenile constitutes cruel and unusual punishment under the Eighth Amendment. *Miller*, 132 S. Ct. at 2460; *see also* U.S. Const. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). The Court's ruling voided the state's authority under to RSA 630:1-a, III to prospectively impose this harshest of sentences on a juvenile who commits a homicide without meaningful consideration of more lenient sentencing alternatives and the essential, mitigating fact of youth. *Miller*, 132 S. Ct. at 2467, 2469. Put another way, under *Miller*, RSA 630:1-a, III is unconstitutional under the Eighth Amendment as applied to juveniles because it imposes a ***mandatory*** sentence of life imprisonment without parole for these defendants without permitting a court to consider youth as a mitigating factor.

Of course, since Part I, Article 33 of the New Hampshire Constitution—which states that "[n]o magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments"—is at least as broad as the Eighth Amendment, it goes without saying that, following *Miller*, a sentence of mandatory life imprisonment without the possibility of parole on a juvenile under RSA 630:1-a, III also violates Article 33. *See* N.H. Const. pt. I, art. 33; *see also State v. Addison*, No. 2008-945, 2013 N.H. LEXIS 122, at *355 (N.H. Nov. 6, 2013) (Article 33 is at least coextensive with the Eighth Amendment and assuming, without deciding, that Article 33 provides broader protections); *see also Diatchenko v.*

*District Attorney for Suffolk*, 466 Mass. 655, 667 1 N.E.3d 270 (Mass. 2013) ("[W]e conclude that this mandatory sentence violates both the Eighth Amendment prohibition on 'cruel and unusual punishment[],' *and the analogous provision of the Massachusetts Declaration of Rights set forth in art. 26*.") (emphasis added).

*Miller*'s categorical prohibition on sentencing juveniles as a class to mandatory life imprisonment without the possibility of parole is fully retroactive to cases on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989). *See State v. Tallard*, 149 N.H. 183, 185-186 (2003) (applying *Teague* in determining whether federal constitutional rule applies on collateral attack). As a threshold matter, because the U.S. Supreme Court granted relief in the companion case of *Jackson v. Hobbs*, a case on collateral (as opposed to direct) review, "evenhanded justice requires that [the rule in *Miller* and *Jackson*] be applied retroactively to all who are similarly situated." *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990) (quoting *Teague*, 489 U.S. at 300). Petitioners Michael Soto, Robert Tulloch, Robert Dingman, and Eduardo Lopez, Jr. are each similarly situated to Kuntrell Jackson in that their convictions became final before *Miller* was decided. Several other courts have acknowledged that faithful adherence to the principle of evenhanded justice demands applying the holding of *Miller* to all defendants who, like Mr. Jackson, challenge their sentence on collateral review.[1]

[1] The highest courts of Iowa, Massachusetts, Mississippi, Nebraska, Illinois, and Texas have all held that *Miller* is a substantive rule requiring retroactive application to cases on collateral review. *See State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013); *Jones v. State*, 122 So. 3d 698 (Miss. 2003); *State v. Mantich*, 287 Neb. 320, 342 (2013); *People v. Morfin*, 981 N.E.2d 1010 (Ill. App. 2012); *People v. Davis*, No. 115595, 2014 Ill. LEXIS 103 (Ill. Mar. 20, 2014); *Ex Parte Maxwell*, No. AP-76,964, 2014 Tex. Crim. App. LEXIS 264 (Tex. Ct. of Crim. App. Mar. 12, 2014). The First, Second, Third, Fourth, and Eighth Circuits have held that habeas applicants successfully made out a *prima facie* case that *Miller* is retroactive, and they have granted motions to file successive habeas corpus petitions raising *Miller* claims. *See In re Pendleton*, 732 F.3d 280, 282-83 (3d Cir. 2013) (per curium) ("After extensive briefing and oral argument, we conclude that Petitioners have made a prima facie showing that *Miller* is retroactive. In doing so, we join several of our sister courts of appeals."); *Wang v. United States*, No. 13-2426, 2013 U.S. App. LEXIS 20386 (2nd Cir. July 16, 2013) (granting motion to file a successive habeas corpus petition raising a *Miller* claim); *In re James*, No. 12-287, 2013 U.S. App. LEXIS 20382 (4th Cir. May 10, 2013) (same); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curiam) (same); *Evans-García v. United States*, 744 F.3d 235, 238 (1st Cir. 2014) ("We need not answer

Additionally, as discussed below, *Miller* is retroactive because it announced a new "substantive" rule of criminal law. *See Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Substantive sentencing rules automatically apply to cases on collateral review because they "necessarily carry a significant risk that a defendant … faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348 (2004) (quotations and citations omitted). Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Id.* (emphasis in original); *see also Shady Grove Orthopedic Associates, PA v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010) (rule regulates procedure where it "governs only the manner and means by which the litigants' rights are enforced" (quotations omitted)).

The rule in *Miller* is "substantive," and thus retroactive, for three reasons. First, by categorically prohibiting sentences of mandatory life imprisonment without parole for all juveniles, the decision expands the available sentencing outcomes for this class. Second, by requiring the individualized consideration of youth as a mitigating factor before a state may impose its harshest permissible sentence on a child, *Miller* narrows the factual circumstances under which the punishment can be imposed, limiting it to "rare" and "uncommon" cases where the child is beyond redemption. Third, *Miller* is completely silent regarding what procedures state courts must actually use in order to give fair consideration to youth during sentencing.

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[the question of whether *Miller* is retroactive] because the government has also conceded that *Miller* has been made retroactive, at least under the prima facie standard."). The Louisiana, Pennsylvania, and Minnesota Supreme Courts, as well as the Eleventh Circuit, have held that *Miller* is not retroactive. *See State v. Tate*, 130 So. 3d 829 (La. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1, 11 (Pa. 2013); *Chambers v. State*, 831 N.W.2d 311, 331 (Minn. 2013); *In re Morgan*, 713 F. 3d 1365 (11th Cir. 2013); *see also People v. Carp*, 828 N.W.2d 685, 711-14 (Mich. Ct. App. 2012) (*Miller* not retroactive, but case is under review before Michigan Supreme Court); *Geter v. State*, 115 So. 3d 375, 385 (Fla. Dist. Ct. App. 2012) (*Miller* not retroactive, but case is under review before Florida Supreme Court).

### A. *Miller* Is Substantive Because It Prohibits A Type Of Sentence For A Class Of Defendants, Thereby Requiring States To Expand The Range Of Possible Sentencing Outcomes.

The prototypical example of a substantive rule of criminal sentencing is one "prohibiting a certain category of punishment of a class of defendants because of their status or offense." *Graham v. Collins*, 506 U.S. 461, 477 (1993) (quotations and citations omitted). Under this formulation, *Miller* articulates a substantive rule. The Court in *Miller* prohibited a certain category of punishment—mandatory life imprisonment without the possibility of parole—for a class of offenders because of their status as juveniles. As a result of this new rule, New Hampshire must change its substantive law to allow for new sentencing outcomes.

#### 1. *Miller* bars the punishment of mandatory life without parole for juveniles as a class.

*Miller* unequivocally addresses the proper punishment for a "class of defendants because of their status." *Graham*, 506 U.S. at 477 (prohibiting life without parole sentences for non-homicide crimes committed by juveniles). The decision explicitly and repeatedly states that, because of the unique features of juveniles as a class, weighing the fact of youth is essential to determining whether a juvenile may receive life imprisonment without parole consistent with the Eighth Amendment.[2] *See, e.g.*, *Miller*, 132 S. Ct. at 2465 ("*Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."); *id.* at 2460 (striking down scheme of mandatory life without parole for juveniles in part because "[s]uch a scheme prevents those meting out punishment from considering a juvenile's lessened

[2] To carve out juveniles as a class for Eighth Amendment purposes, *Miller* drew extensively from the U.S. Supreme Court's holdings in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), which respectively placed absolute bars on sentencing juveniles to death for any crime and on sentencing juveniles to life imprisonment without the possibility of parole for non-homicide offenses. *Miller*, 132 S. Ct. at 2463-64. Both *Roper*—which, like *Jackson v. Hobbs*, was a state post-conviction case—and *Graham* are fully retroactive substantive rules. *See Loggins v. Thomas*, 654 F.3d. 1204, 1206 (11th Cir. 2011) (noting *Roper* applied retroactively to case on collateral review); *In re Sparks*, 657 F.3d. 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review).

culpability and greater capacity for change") (quotations omitted). Indeed, as the Superior Court (Smukler, J.) correctly held, *Miller* is a "substantive rule because it prohibits 'a sentencing scheme that mandates life in prison without possibility of parole,' *Miller*, 132 S. Ct. at 2469, … *for a class of defendants—juveniles* …." Superior Court Order, at State's Addendum 000014 (emphasis added).

The mandatory sentence barred in *Miller* constitutes a "category of punishment" for retroactivity purposes. The Court expressly held "that mandatory life without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" *Miller*, 132 S. Ct. at 2460; *cf. id.* at 2479 (Roberts, C.J. dissenting) ("The sentence at issue is statutorily mandated life-without-parole."). By its terms, "[t]he Eighth Amendment categorically prohibits the infliction of cruel and unusual *punishments*." *Penry*, 492 U.S. at 330 (emphasis added). Directly constraining the state's sovereign authority to punish is inherently substantive. *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("The Eighth Amendment stands to assure that the State's power to punish is exercised within the limits of civilized standards."). Applied to the U.S. Supreme Court's retroactivity jurisprudence, relief under the Eighth Amendment remedies "a significant risk that a defendant … faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 353.

The U.S. Supreme Court's treatment of mandatory sentences under the Eighth Amendment confirms that mandatory life imprisonment without parole is a category of punishment for retroactivity purposes. That Court has held that mandatory death sentences are cruel and unusual under the Eighth Amendment because they are uniquely punitive. *Woodson*, 428 U.S. at 293 (citing consensus of jurisdictions rejecting mandatory death sentences as

"unduly harsh and unworkably rigid"); *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (noting "unacceptable severity of the common-law rule of automatic death sentences"). In *Miller*, the Court relied heavily on these mandatory death penalty cases, ruling that because juvenile life without parole is "akin to the death penalty," mandatory life without parole for a juvenile is likewise cruel and unusual. *See Miller*, 132 S. Ct. at 2463-66. Significantly, the decisions striking down mandatory death penalty laws have uniformly been applied retroactively to cases on collateral review. *See Sumner v. Shuman*, 483 U.S. 66 (1987) (extending *Woodson* ban on mandatory death sentences to federal habeas corpus case); *McDougall v. Dixon*, 921 F.2d 518, 530-31 (4th Cir. 1990) (deciding merits of *Shuman* claim in federal habeas case). The fact that *Miller* announces the same type of categorical rule as those decisions striking down the mandatory death penalty counsels strongly in favor of retroactivity. *See Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) (observing that multiple holdings of the Court may logically dictate retroactivity where Court "hold[s] in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type").

The U.S. Supreme Court has also recognized that the mandatory nature of a life without parole sentence is an integral part of that sentence. *See Harmelin v. Michigan*, 501 U.S. 957, 994-55 (1991) (treating a mandatory sentence as type of penalty for Eighth Amendment purposes). In distinguishing *Harmelin*'s holding that the mandatory nature of a sentence does not render it cruel and unusual, the *Miller* Court reiterated "that a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct. at 2470. The *Miller* Court's treatment of *Harmelin* affirms *Miller*'s substantive effect of exempting juveniles as a class from the category of punishment known as mandatory life imprisonment without parole.

### 2. *Miller* requires states to expand sentencing outcomes to provide the possibility of release.

*Miller*'s invalidation of mandatory juvenile-life-without-parole sentences demonstrates its primary concern with the sentencing outcomes available for juveniles, as opposed to the procedural fairness of the sentencing hearing. Regardless of the specific procedures followed to convict or sentence a juvenile, states must allow at least one substantive sentencing outcome more lenient than life imprisonment without parole for all juveniles. *Miller* is thus firmly in the "substantive sphere." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (substantive constitutional decisions are those "barring certain government actions regardless of the fairness of the procedures used to implement them"). Indeed, as the Superior Court correctly held:

> …. *Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment. In this way, the *Miller* rule is substantive because it alters the range of outcomes of a criminal proceeding—or the punishments that may be imposed on juvenile homicide offenders …. After *Miller*, there is a range of new outcomes—discretionary sentences that can extend up to life without the possibility of parole but also include the more lenient alternatives.

*See* Superior Court Order, at State's Addendum 000012, 13 (internal quotations and citations omitted).

In opposing retroactive application of *Miller*, the State has argued that eliminating the "mandatory" element of a life-without-parole sentence is solely procedural since *Miller* "did not invalidate a punishment for a class of persons," but rather "set up a procedure for imposing life without parole in cases where the defendant is a juvenile." State's Br. at 13. What this argument obscures is that prohibiting a mandatory sentence, by definition, requires the state to enact different sentencing outcomes, not simply different sentencing procedures. Altering the potential outcomes of a given proceeding is a classic function of substantive rules. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996).

Comparing *Miller* to *Roper v. Simmons*, 543 U.S. 551 (2005), illustrates this principle. *Roper* undeniably announced a substantive rule that narrowed the range of permissible punishments for juveniles to exclude the death penalty. *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005) ("[T]he new rule announced in *Roper* is clearly substantive in nature and, therefore, applies retroactively."). *Miller*, by comparison, announced a substantive rule that requires states to expand the range of permissible punishments for juveniles to *always* include a sentence with the possibility of release. Logic simply cannot support the proposition that a constitutional rule narrowing the range of allowable punishments is substantive, but a constitutional rule expanding the range of punishments is not.[3]

The U.S. Supreme Court's recent decision in *Alleyne v. United States*, 570 U.S. __, 133 S. Ct. 2151 (2013), is also instructive on this point. Overruling prior precedent, the Court held that facts that increase the mandatory minimum sentence are elements of the offense, just as facts that increase the statutory maximum sentence are elements of the offense. Identical treatment as a matter of substantive law is necessary because "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the

[3] For this reason, the United States Government has conceded that the *Miller* rule is substantive. (*See Johnson v. United States*, Government's Response to Petitioner's Application, 8th Cir. Case No. 12-3744, filed Feb. 22, 2013, at 10-17.) As the Government explained in a brief it filed with the Eighth Circuit:

> *Miller* is not solely about the procedures that must be employed in considering the range of sentencing options. Rather, *Miller* changes the range of outcomes that a juvenile defendant faces for a homicide offense. A jurisdiction that mandates life without parole for juveniles convicted of homicide permits only one sentencing outcome. *Miller* invalidates such regimes and requires a range of outcomes that includes the possibility of a lesser sentence than life. That is a substantive change in the law, not solely a procedural one. The *Miller* rule does not "regulate only the manner of determining the defendant's culpability." *Summerlin*, 542 U.S. at 353. Instead, the *Miller* rule gives juvenile defendants the opportunity to obtain a different and more favorable outcome than was possible before *Miller*.

*Id*. at 13. The same reasoning was used by the Illinois Supreme Court in holding that *Miller* is substantive because it "mandates a sentencing range broader than that provided by statute," *People v. Davis*, No. 115595, 2014 Ill. LEXIS 103, at *24 (Ill. Mar. 20, 2014) (quoting *People v. Morfin*, 981 N.E.2d 1010, 1022 (Ill. App. 2012)), and by the Nebraska Supreme Court in holding that "the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile … demonstrates the rule announced in *Miller* is a substantive change in the law," *State v. Mantich*, 287 Neb. 320, 341 (2013).

punishment." *Alleyne*, 133 S. Ct. at 2158. *Miller* and *Roper* present a reciprocal scenario: lowering either the constitutionally permissible maximum (*Roper*) or minimum (*Miller*) for an offense "alter[s] the prescribed range of sentences to which a defendant is exposed," but in a manner that *mitigates* the punishment. Both types of decisions categorically cabin a state's traditional "substantive power to define crimes and prescribe punishments" for juveniles as a class. *Jones v. Thomas*, 491 U.S. 376, 381 (1989). Both types of decisions must therefore apply retroactively as new substantive rules.

### B. *Miller* Is Substantive Because It Requires Sentencing Courts To Consider The Mitigating Fact Of Youth, Thereby Narrowing The Factual Circumstances Under Which Juveniles May Be Punished With A Life-Without-Parole Sentence.

The means by which *Miller* achieves its categorical prohibition on sentencing juveniles to mandatory life imprisonment without parole also requires finding that the decision is substantive for retroactivity purposes. Specifically, the Court made consideration of the mitigating effects of youth a prerequisite to the imposition on a juvenile of life imprisonment without the possibility of parole. *Miller*, 132 S. Ct. at 2469 (holding that before state may sentence juvenile to life without parole "we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"). To borrow from the civil context, *Miller*'s individualized sentencing imperative alters the "rules of decision" and places a "substantive condition" on state sentencing in order to vindicate the federal right against cruel and unusual punishment. *Felder v. Casey*, 487 U.S. 131, 152 (1988) (classifying rules of decisions as substantive for federal preemption purposes); *see also Shady Grove Orthopedic Associates*, 559 U.S. at 407 (classifying rules of decision by which courts adjudicate rights as substantive under the *Erie* doctrine). The Court thus voided the sentencing schemes of twenty-nine (29) states (including New Hampshire) that unconstitutionally subjected

juveniles to automatic life imprisonment without parole, as those schemes did not allow for an individualized assessment of youth and its attendant traits and characteristics, such as culpability, capacity for change, susceptibility to peer pressure, and the environment in which the child was raised, and their impact on critical sentencing determinations. The Court also recognized that the mental and emotional development of youth be considered as factors in sentencing. *Miller*, 132 S. Ct. at 2467 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)).[4]

U.S. Supreme Court precedent establishes that new rules are substantive, and thus retroactive, when they narrow the factual circumstances under which a sentence may be imposed. *Summerlin*, 542 U.S. at 353. New rules of criminal law accomplish this narrowing function when they make consideration of certain facts necessary before a state may impose a particular sentence. In *Summerlin*, for example, the Court explained that one of its holdings would qualify as substantive if it made certain facts essential to imposing the death penalty, stating:

> This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former is a procedural holding; the latter would be substantive.

*Id*. at 354 (emphasis in original). The *Summerlin* Court held that its prior ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), that a jury rather than a judge must find beyond a reasonable doubt the existence of an aggravating factor necessary to the imposition of the death penalty, was procedural. State law already made certain aggravating factors essential to the death penalty, and *Ring* merely regulated "the procedural requirements the Constitution attaches to the trial" of

[4] Attention to disability-related mitigating factors for a youthful defendant are especially important, as youth involved in the justice system in New Hampshire have been found to be disproportionately children with disabilities, including children with mental illness, emotional disturbance, and intellectual or developmental disabilities. *See* Michael Skibbie, The University of New Hampshire, *Children with Disabilities in the New Hampshire Juvenile Justice System: A Report to the Division of Juvenile Justice Services Department of Health and Human Services, State of New Hampshire* (Apr. 2004), *available at* http://www.drcnh.org/ChildrenwDisabilities.pdf.

those factors. *Summerlin*, 542 U.S. at 354. By contrast, had the Court required the states to take into consideration new aggravating factors, its ruling would be substantive. *Id.*

Applying *Summerlin*, the *Miller* rule is substantive. Prior to *Miller*, New Hampshire's mandatory sentencing scheme for juveniles convicted of first-degree murder gave no consideration to the defendant's juvenile status. *Miller* now makes juvenile status essential to the sentencing scheme. It does so by requiring states like New Hampshire to consider juvenile status and its attendant circumstances before a minor may receive a sentence of life imprisonment without parole. *See Miller*, 132 S. Ct. at 2469; *cf. Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (imposing substantive requirement that finding of current mental illness or dangerousness was essential to authorizing involuntary commitment). Moreover, *Miller* explicitly states its narrowing intent. The decision requires sentencers not simply "to take into account how children are different," but also "how those differences *counsel against* irrevocably sentencing them to a lifetime in prison." *Id.* (emphasis added). *Miller* thus makes new mitigating facts essential to the punishment, limiting the circumstances under which a state may deny the possibility of release to a juvenile.

The *Miller* Court emphasized the narrowing effect of its ruling by declaring: "[G]iven all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*." *Miller*, 132 S. Ct. at 2469 (emphasis added); *see also id.* (noting that it is "'the *rare* juvenile offender whose crime reflects irreparable corruption'" (quoting *Roper*, 543 U.S. at 573) (emphasis added)). This numeric restriction is the very essence of a substantive rule. When a new rule of constitutional law decrees that a punishment

heretofore imposed on all may now be imposed on only a few, it is the substantive law of punishment—not just procedure—that has changed.

This substantive feature of the *Miller* rule is also reinforced by the U.S. Supreme Court's recent decision in *Alleyne v. United States*, 570 U.S. __, 133 S. Ct. 2151 (2013). As noted previously, *Alleyne* held that if a fact increases the mandatory minimum sentence, it must be considered an element of the offense. Recall also that *Summerlin* held that if a new rule made a certain fact essential to the death penalty, the holding would be substantive for retroactivity purposes. *Summerlin*, 542 U.S. at 354. Reading *Alleyne* and *Summerlin* together, *Miller* is substantive because it effectively makes adulthood an essential element of any offense that carries a "mandatory minimum" sentence of life without parole.[5] *Miller*'s conversion of age into an offense element is substantive in that defining the elements of an offense also defines what "primary, private individual conduct" the state may proscribe. *Teague*, 489 U.S. at 307.

### C. *Miller* Does Not Set Any New Requirements For The Procedures State Courts Must Adopt To Consider Juvenile Status.

There is still further confirmation that *Miller* sets forth a substantive rule and does not regulate procedure. Although *Miller* prohibits a state from exposing juveniles to life imprisonment without parole unless there is consideration of youth, it in no way addresses "the procedural requirements the Constitution attaches" to the consideration of youth. *See Summerlin*, 542 U.S. at 354. States remain free to determine "the manner and means" for the consideration of youth in accordance with *Miller*'s substantive rule of decision. *Shady Grove Orthopedic Associates*, 559 U.S. at 407 (quotations omitted); *see also Summerlin*, 542 U.S. at 351-52.

This Court therefore should not conflate the U.S. Supreme Court's statement in *dicta* that its decision "requires only that a sentencer follow a certain process," *Miller*, 132 S. Ct. at 2471,

[5] *See* Beth A. Colgan, Alleyne v. United States, *Age as an Element, and the Retroactivity of* Miller v. Alabama, 61 UCLA L. Rev. Disc. 262 (2013), *available at* http://www.uclalawreview.org/pdf/discourse/61-17.pdf.

with the question of whether *Miller* announced a substantive or procedural rule. The Court was not addressing whether its ruling was retroactive, but merely explaining why the Court's traditional exploration of national indicia against sentencing practices was not controlling for its Eighth Amendment analysis. *Id.*; *see also* Superior Court Order, at State's Addendum 000015 (correctly concluding that this statement by the U.S. Supreme Court "was addressing the government's argument that 'because many states impose mandatory life-without-parole sentences on juveniles, [the court] may not hold the practice unconstitutional'") (quoting *Miller*, 132 S. Ct. at 2470). Critically, this *dicta* does not account for the fact that although *Miller* does, in some sense, require a change in the sentencing process, it more importantly effects a monumental change in the *substance* of twenty-nine (29) states' laws. These states, including New Hampshire, are now required to expand the range of juvenile sentences to always include the possibility of release. They must also consider youth and its attendant circumstances as mitigating factors at sentencing, thus narrowing the factual circumstances in which juvenile defendants can receive the harshest possible sentence and ensuring that the sentence is uncommon and rare. *See also State v. Ragland*, 836 N.W.2d. 107, 115 (Iowa 2013) ("From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing."). *Miller*'s limit on state sovereign authority therefore has little to do with sentencing procedure and much more to do with sentencing outcomes. Further, reflexively grafting the Court's inapposite aside onto a retroactivity analysis would prove too much. Every new substantive rule potentially requires states to follow "a certain process" to enforce the new right. This simply expresses the necessary interplay between substances and process. *See*

*Guaranty Trust Co of New York v. York*, 326 U.S. 99, 109 (1945). Relying on the Court's "certain process" language here would eviscerate the very idea of substantive rules.

It is noteworthy that just after mentioning that its decision requires sentencers to follow "a certain process," the U.S. Supreme Court cites as support its substantive ruling in *Sumner v. Shuman*, 483 U.S. 66, which extended *Woodson* to a case on collateral review and is fully retroactive. In fact, *Woodson* and *Sumner* demonstrate why *Miller*, despite requiring states to follow "a certain process," announced a substantive rule. In the wake of *Woodson*, states maintained vastly different procedures for implementing the Court's substantive requirement of individualized sentencing in death penalty cases. *Compare Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas capital scheme of posing to sentencing jury three questions because nature of one question allowed defendant to submit any mitigating circumstances) *with Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida capital scheme of directing judge and advisory jury to consider enumerated mitigating circumstances). A contrast may therefore be drawn between, on the one hand, the Court's substantive rulings outlawing the mandatory death penalty and, on the other hand, the Court's rulings regulating the "manner and means" by which states implemented individualized capital sentencing schemes. While *Woodson* received full retroactive effect, the Court held that these latter cases setting forth *Woodson*-compliant processes were non-retroactive procedural rules. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406 (2004) (holding that the rule of *Mills v. Maryland*, 486 U.S. 367 (1988), that a capital sentencing scheme could not require jury to disregard mitigating element not found unanimously, was procedural); *Sawyer v. Smith*, 497 U.S. 227 (1990) (holding that the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a sentencer cannot be led to false belief that responsibility for imposing death rests elsewhere, was procedural). *Miller*, as was the case with *Woodson* and *Sumner*, recognized the

right to individualized sentencing for a class of defendants without dictating procedures for vindication of that right. Thus, *Miller* articulates a substantive rule.

## II. A Discretionary Sentence Of Life Imprisonment Without The Possibility Of Parole For A Juvenile Defendant Violates Part I, Article 33 Of The New Hampshire Constitution.

Under New Hampshire's current system, 17-year-old children charged with first-degree murder are automatically tried as adults, and children ages 13 to 16 can be charged with first-degree murder as adults in Superior Court if the criteria under RSA 169-B:24 is satisfied. *See* RSA 169-B:2, IV; RSA 169-B:2, VI; RSA 628:1, II. In New Hampshire, upon conviction of first-degree murder, these children are ***required*** to be sentenced to life imprisonment without eligibility for parole. *See* RSA 630:1-a, III. While *Miller* categorically struck down this regime mandating a sentence of life imprisonment for children convicted of first-degree murder, the *Miller* Court stopped short of categorically finding all juvenile-life-without-parole sentences unconstitutional. The Court observed that "given all that we have said in *Roper*, *Graham*, and *Miller* about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 132 S. Ct. at 2469. But the Court left open the possibility of this "uncommon" sentence in New Hampshire and elsewhere. Here, though not fully briefed by the parties,[6] amici urge this Court to take one step beyond *Miller* and find as a categorical matter that life without parole sentences for juveniles violate Part I, Article 33 of the New Hampshire Constitution.

[6] This argument was understandably not raised by the Petitioners because—given that the retroactivity of *Miller* is still an outstanding question—neither of the petitioners have received a *Miller* sentencing hearing and, therefore, have not received a sentence of life imprisonment without the possibility of parole pursuant to the trial court's newfound discretion under *Miller*. Assuming that *Miller* is retroactive, each of the petitioners are free to argue before the Superior Court on remand that such a sentence, even if issued pursuant to the trial court's newfound discretion, is unconstitutional under Part I, Article 33.

### A. Part I, Article 33 Of The New Hampshire Constitution Provides Greater Protections Than The Eighth Amendment.

Established in 1783, Part I, Article 33 of the New Hampshire Constitution states that "[n]o magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." N.H. Const. pt. I, art. 33. Article 33 provides greater protections than those provided by the Eighth Amendment.[7]

Such a conclusion is not unprecedented. This Court has long had a tradition of interpreting the New Hampshire Constitution as affording greater protection in various circumstances. *See Opinion of the Justices (Breath Test Samples)*, 160 N.H. 180, 186-87 (2010) (greater protection under New Hampshire Constitution than under Federal Due Process Clause); *State v. Veale*, 158 N.H. 632, 638-39 (2009) (greater protection under New Hampshire Constitution's due process guarantee than under U.S. Constitution in competency context); *State v. Beauchesne*, 151 N.H. 803, 812 (2005) (greater protection under New Hampshire Constitution than under Fourth Amendment); *State v. Fleetwood*, 149 N.H. 396, 405 (2003) (greater protection under New Hampshire Constitution in *Miranda* context); *State v. Roache*, 148 N.H. 45, 49 (2002) ("The relevant text of Part I, Article 15 is broader than the Fifth Amendment."); *State v. McLellan*, 146 N.H. 108, 115 (2001) (greater due process protections under New Hampshire Constitution); *State v. Ball*, 124 N.H. 226, 234-35 (1983) (construing Part I, Article 19 broader than the Fourth Amendment).

[7] This Court has not yet determined whether Article 33 affords greater protection than the Eighth Amendment, but has assumed, without deciding, that Article 33 is broader than the Eighth Amendment. *See Addison*, 2013 N.H. LEXIS 122, at *355 ("The defendant argues that because Article 33 prohibits punishments that are 'cruel or unusual,' we ought to interpret it as affording greater protection than the Eighth Amendment's prohibition against punishments that are 'cruel and unusual' …. We need not decide this issue because, even assuming Part I, Article 33 affords greater protection than does the Eighth Amendment, application of settled principles for construing our State Constitution leads us to reject the defendant's facial challenge under Part I, Article 33.").

The reason to invoke this tradition here is that the text of Article 33, itself, is broader than the Eighth Amendment. While the Eighth Amendment prohibits punishments that are "cruel *and* unusual," Article 33 of the New Hampshire Constitution prohibits punishments that are "cruel *or* unusual." Courts in multiple jurisdictions have attributed significance to Article 33's use of the disjunctive, as it indicates a prohibition on two types of punishments: those that are cruel and those that are unusual. The Eighth Amendment's use of the conjunctive indicates that it prohibits only one category of punishment: those that are cruel and unusual. *See People v. Carmony*, 127 Cal. App. 4th 1066, 1085 (Ct. App. 2005) (describing difference between "or" and "and" as "purposeful and substantive, rather than merely semantic"); *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000) ("used of the word 'or' instead of 'and' in the Clause indicates that the framers [of the Florida Constitution] intended that both alternatives (i.e. 'cruel' and 'unusual') were to be embraced individually and disjunctively within the Clause's proscription"); *State v. Mitchell*, 577 N.W.2d 481, 488, 490 (Minn. 1998) (describing difference in wording as "not trivial").[8] As a matter of plain English, as well as this Court's prior precedents,[9] there is no question that the disjunctive "or" is distinct from the conjunctive "and"; this distinction matters and must be given meaning. *See Hale v. Everett*, 53 N.H. 9, 125 (1868) ("In written constitutions, the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated.") (internal

[8] *But see State v. Kido*, 654 P.2d 1351, 1353 n.3 (Haw. Ct. App. 1982) (difference "appears to be only one of form and not of substance"); *Thomas v. State*, 634 A.2d 1, 10 n.5 (Md. 1993).

[9] *See, e.g.*, *In re Hoyt*, 143 N.H. 533, 536 (1999) ("The statute's use of the disjunctive term 'or' manifests an intent that either provision be available as a basis for license qualification."); *Unit Owners Ass'n of Summit Vista Lot 8 Condo. v. Miller*, 141 N.H. 39, 45 (1996) ("We find that the use of the disjunctive 'or' manifests a clear intent to award multiple damages for either knowing or willful acts."); *State v. Wong*, 125 N.H. 610, 618 (1984) ("The legislature's use of the disjunctive 'or' in the body of the negligent homicide statute to distinguish section I and section II of the statute, RSA 630:3, evinces a clear intent to require proof of either section I or section II of the statute in order to sustain a conviction of negligent homicide.").

quotations omitted).[10] And this linguistic distinction, without more, provides a basis for this Court to depart from analogous U.S. Supreme Court decisions interpreting the Eighth Amendment.

Given that the very text of Article 33 confers greater protection than the Eighth Amendment, this Court must then determine whether even a discretionary imposition of a lifetime sentence, without the possibility of parole, on juvenile offenders convicted of first-degree murder violates the New Hampshire Constitution. For at least the four reasons below, this Court should find that it does.[11]

**B. Life-Without-Parole Sentences For Juveniles Are "Unusual."**

The inquiry into the current state of the "evolving standards of decency that mark the progress of a maturing society" supports the conclusion that any sentence imposed on a juvenile of lifetime imprisonment without the possibility of parole is "unusual" and therefore violates Article 33. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (articulating evolving standard of decency test); *see also State v. Evans*, 127 N.H. 501, 504 (1985) (citing *Trop* standard as "useful backdrop for analysis" of New Hampshire's constitutional law claim); *Addison*, 2013 N.H. LEXIS 122, at *359 (stating that "we have never determined whether this ['evolving standards of decency'] inquiry [under *Trop*] is applicable to our State Constitution," but assuming, without deciding, that this analysis applies).

With respect to the appropriateness of such sentences, the world is no longer evolving. It has evolved. There is a "global consensus" that has condemned the practice of putting children

[10] Since the Federal Constitution, including much of the Bill of Rights, was modeled on the Massachusetts Constitution (which, itself, was a model for the New Hampshire Constitution)—*see, e.g.*, *Commonwealth v. Upton*, 476 N.E.2d 548, 555 (Mass. 1985)—we may infer that "or" was changed to "and" in the Eighth Amendment based on a conscious choice to require a greater showing before a punishment could be found unconstitutional at the federal level.

[11] Even if the Court does not find Article 33 to be more expansive than the Eighth Amendment, it must still find such a sentence unconstitutional, as it is both "cruel" *and* "unusual" as explained in more detail below.

in prison for the rest of their lives without any opportunity for parole. *See Graham*, 560 U.S. at 80 ("A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; *and only 2 of them, the United States and Israel, ever impose the punishment in practice*.") (emphasis added). Currently, the United States stands alone in permitting juvenile-life-without-parole sentences.[12] No person is known to be serving such a sentence anywhere in the world other than the United States. *See id.*; Connie De La Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 986-87 (2008).[13]

Even among states within the United States, there is a definite trend toward abolishing lifetime imprisonment for juveniles without the possibility of parole. At least 14 states and the District of Columbia have taken the lead. The District of Columbia and at least ten states—Alaska, Colorado, Kansas, Kentucky, Massachusetts, Montana, New Mexico, Oregon, Texas, and Wyoming—have banned the sentence of life imprisonment without parole for juveniles. Another four states—Maine, New York, Vermont, and West Virginia—have a *de facto* prohibition, with no juveniles serving life-without-parole sentences. *See* ACLU, *The Campaign for the Fair Sentencing of Youth* (Mar. 2014), *available at* https://www.aclu.org/sites/default/files/assets/jlwop_landscape_march_2014.pdf; University of

[12] Notwithstanding the U.S. Supreme Court's assessment of Israeli law in *Graham*, Israel has made it clear that, although it permits juveniles to be given life sentences, juveniles will be considered for parole in all instances. *See Sentencing our Children to Die in Prison*, *supra* at 1002-1004 ("The authors have received official clarification and commitment from the Israeli government that its laws allow for parole review of juvenile offenders serving life terms, even those sentenced for political or security crimes in the Occupied Territories, those children for which the authors were most concerned.").

[13] These sentences are contrary not just to international practice, but to international treaties and laws. For example, the U.N. Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, explicitly prohibits juvenile life without parole sentences. *See* U.N. Convention on the Rights of the Child, art. 37, 1577 U.N.T.S. 3 (Nov. 20, 1989). Similarly, the prohibition of these sentences has been recognized as an obligation of the International Covenant on Civil and Political Rights, which the United States ratified in 1992. *See* International Covenant on Civil and Political Rights, art. 14(4), 999 U.N.T.S. 17 (Dec. 19, 1966).

San Francisco School of Law, State-By-State Legal Resource Guide, http://www.usfca.edu/law/jlwop/resource_guide/ (updated through Nov. 28, 2012).

The trend away from juvenile-life-without-parole sentencing has been especially pronounced in the wake of the Supreme Court's 2012 *Miller* decision:

- In February 2013, the Governor of Wyoming signed legislation abolishing life-without-parole sentencing for children. *See* Wyo. Laws ch. 18 (H.B. 23) (2013); *see also* Wyo. Stat. § 6-2-101(b) (while permitting a sentence of "life imprisonment" for a defendant convicted of first degree murder who was under the age of eighteen (18) at the time of the offense, the statute excludes the sentence of life imprisonment *without parole* for such defendants).
- While Texas had abolished life-without-parole sentences for most children prior to *Miller*, it still remained a viable sentencing option for 17 year olds. In July 2013, Texas eliminated juvenile life-without-parole sentences as a punishment option for 17 year olds and replaced it with a mandatory minimum sentence of 40 years. Tex. Acts 2013, 83rd Leg., 2nd C.S., ch. 2 (S.B. 2); *see also* Tex. Penal Code § 12.31.
- Just three weeks after *Miller*, the Governor of Iowa commuted 38 such sentences.[14]
- In 2012, California, one of the states with the highest number of juveniles serving life-without-parole sentences, passed the Fair Sentencing of Youth Act, which retroactively provides re-sentencing and parole opportunities to nearly all of 300 defendants serving life without parole sentences that they received as children. *See* Cal. Legis. Serv. Ch. 828 (S.B. 9) (West 2012); *see also* Cal. Pen. Code § 1170(d).
- In 2012, North Carolina and Pennsylvania passed laws abolishing juvenile-life-without-parole sentencing in second-degree and felony murder cases. *See* N.C. Sess. Laws 148 (S.B. 635) (2012); Pa. Laws. 1655 (S.B. 850) (2012); *see also* 18 Pa. Cons. Stat. § 1102.1(c).

Especially in light of *Miller*, it is clear that an already "unusual" practice is quickly becoming more and more "unusual" even in the United States, the world's one outlier country.[15]

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[14] The Governor of Iowa commuted the sentences of all these individuals to 60 years imprisonment before eligibility for parole. *See* James Q. Lynch, et al., *The Gazette (Cedar Rapids)*, "Branstad Commutes Life Sentences For 38 Iowa Juvenile Murderers," July 16, 2012, *available at* http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/. This 60-year sentence was deemed the functional equivalent of a life sentence without the possibility of parole in violation of *Miller*'s requirement for an individualized sentencing hearing. *State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) ("[T]he unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time …. [W]e hold [that] *Miller* applies to sentences that are the functional equivalent of life without parole. The commuted sentence in this case is the functional equivalent of a life sentence without parole.").

[15] There is, of course, no "majority rule" requirement for a practice to be considered constitutionally "unusual" under either the New Hampshire or U.S. Constitution. *See, e.g., Graham*, 560 U.S. at 62 (holding life-without-

As explained in the brief submitted by amici National Association of Social Workers ("NASW"), the American Psychological Association, and other professional organizations to the U.S. Supreme Court in *Miller*, scientific research demonstrates the fundamental differences between juvenile and adult minds, as well as the fact that juveniles have greater immaturity, vulnerability, and changeability than adults.[16] This Court has also long recognized "the common-sense fact that a child does not possess the discretion and experience of an adult, and that special procedures are required to protect juveniles, who possess immature judgment." *State v. Benoit*, 126 N.H. 6, 11 (1985) (in case concerning 15-year old juvenile, concluding that juvenile had not voluntarily waived his *Miranda* rights when the police officer read the juvenile his rights, without explanation, from the police department's standard form used for adults). For example, "[i]n recognition that children often act imprudently and lack the capacity to understand the full consequences of their acts," *id.*, New Hampshire law provides for the following:

- Juveniles may disaffirm a contract upon reaching age of majority—18 years old. *See Porter v. Wilson*, 106 N.H. 270, 271 (1965). Indeed, generally, juveniles are not bound by their contracts. *Id.*; *see also* RSA 21:44 ("Notwithstanding any provision of law to the contrary, the words 'adult', 'majority', 'age of majority', 'full age or lawful age', and all other terms of referring to those persons who are to be considered adults, shall mean those persons who have attained the age of 18 years."); RSA 21-B:1;
- Juveniles under the age of 18 may not marry without parental and judicial consent. *See* RSA 457:5 to 7;
- Non-adults, including those under the age of 21, may not purchase alcoholic beverages. *See* RSA 175:1, I; *see also* RSA 179:10 ("Except as provided in RSA 179:23, any person under the age of 21 years who has in his or her possession any liquor or alcoholic beverage, or who is intoxicated by consumption of an alcoholic beverage, shall be guilty of a violation and shall be fined a minimum of $300.");

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parole sentence for non-homicide juvenile offenders is unconstitutionally "cruel and unusual" notwithstanding the fact that 39 states utilized the practice).

[16] Amicus Brief of the American Psychological Association, the National Association of Social Workers et al. in *Miller v. Alabama* (Jan. 2012), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-9646_petitioner_amcu_apa_etal.authcheckdam.pdf.

- Juveniles under the age of 18 are prohibited from purchasing, attempting to purchase, possessing, or using any tobacco product. *See* RSA 126-K:6;
- Juveniles under the age of 18 are, absent special circumstances, prohibited from "dropping out" of school. *See* RSA 193:1;
- Juveniles under the age of 18 are prohibited from voting. *See* N.H. Const. pt. I, art. 11 ("All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.");
- Juveniles under the age of 18 cannot sit on juries. *See* RSA 500-A:7-a, I;
- Courts must approve settlements made on behalf of minors. *See* RSA 464-A:42;
- Cities and towns may adopt curfews prohibiting persons under the age of 16 in public places or streets after nine o'clock unless accompanied by a parent or guardian. *See* RSA 31:43-c;
- Persons under the age of 16 may not donate blood. 16 year-old persons can only donate blood with parental consent, while those 17 years old and older need not provide such consent. *See* RSA 571-C:1; and
- Juveniles under the age of 18 may not attend bingo games. *See* RSA 287-E:7, III.

The recognition that children are not considered as responsible for their misbehavior as adults also influenced the very development of a separate juvenile court system in New Hampshire. As this Court has explained, "the legislature, in recognition of the inherent differences between children and adults, has provided for special treatment of juveniles under the juvenile justice statute." *Benoit*, 126 N.H. at 12; *see also* RSA ch. 169-B. Indeed, "[t]he juvenile justice system differs both in philosophy and procedure from the adult penal system, and this court has … reaffirmed that the purpose of the juvenile justice system is *not penal*, but *protective*." *Benoit*, 126 N.H. at 12 (emphasis in original). As explained by this Court:

> The primary purpose of the Legislature [in enacting RSA chapter 169-B] was to shield children under eighteen from the environment surrounding adult offenders and inherent in the ordinary criminal processes. As an incident to the accomplishment of this purpose, proceedings involving children under eighteen are so conducted as to prevent attachment of the "stigma of a criminal" by reason of conduct resulting from immature judgment.

*State v. Lemelin*, 101 N.H. 404, 406 (1958) (quoting *United States v. Fotto*, 103 F. Supp. 430, 431 (S.D.N.Y. 1952)); *see also In re Perham*, 104 N.H. 276, 276-77 (1962) (In the juvenile system, "the juvenile is not tried for a crime, not convicted of a crime, not deemed to be a

criminal, and no public record is made of his alleged offense. The determination to be made therein is not that of criminal guilt but of delinquency.").

### C. Life-Without-Parole Sentences For Juveniles Are "Cruel."

Juvenile life-without-parole sentences are also unconstitutionally "cruel." Article 33, like the Eighth Amendment, "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560. This is a "right" that "flows from the basic 'precept of justice that punishment for crime be graduated and proportioned' to both the offender and the offense." *Miller*, 132 S. Ct. at 2463 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). By definition, "excessive" sanctions are disproportionate and, therefore, unconstitutionally "cruel." *See Commonwealth v. O'Neal*, 339 N.E.2d 676, 679 (Mass. 1975) (interpreting Article XXVI of the Massachusetts Constitution, which is identical to Article 33, and concluding that "[i]t is only when the level of cruelty is disproportionate to the magnitude of the crime, and as a consequence does not serve the needs of society, that a court will find the punishment too cruel and, thus, 'cruel' within the meaning of art. 26"). As explained above, this penalty is out of keeping with contemporary standards of decency; indeed, as a practical matter, the penalty is unusual precisely because it is cruel.

Whether measured in absolute terms (number of years in prison) or relative terms (percentage of life spent in prison), life-without-parole sentences for juveniles are disproportionately harsh when compared to the same punishment for adults. Such sentences effectively sentence a juvenile to die in prison—a "death sentence without an execution date." William W. Berry, III, More Different than Life, Less Different than Death, 71 Ohio St. L. J. 1109, 1124 (2010). As the U.S. Supreme Court noted in *Graham*:

> Life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The state does not execute the offender

> sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

560 U.S. at 69. In the case of juveniles, these considerations are magnified. "[L]ife without parole is an especially harsh punishment for a juvenile." *Id.* at 50. A "juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* A "16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70. The application of life-without-parole sentences to children offends contemporary standards of decency in its unique and inherent capacity to inflict pain for 50, 60, 70 or even 80 years for each individual so sentenced. *See also* Paul Litton, *Symposium: Bombshell or Babystep? The Ramifications of* Miller v. Alabama *for Sentencing Law and Juvenile Crime Policy, Symposium Foreword*, 78 Mo. L. Rev. 1003, 1008 (2013) ("If juvenile LWOP is truly akin to death, justifying the invocation of the Court's capital jurisprudence, the [U.S. Supreme] Court will have to acknowledge that the 'foundational principle' of *Roper* prohibits juvenile LWOP, as well.").

Moreover, in the new post-*Miller* discretionary world, a juvenile-life-without-parole sentence will inevitably be applied in an arbitrary, capricious, and discriminatory manner. Post-*Miller*, *mandatory* juvenile lifetime without parole sentences are no longer an option. As a result, to the extent life sentences continue to be authorized for juveniles convicted of first-degree murder, courts or juries will necessarily be asked to determine, as a matter of discretion, if children convicted of that crime should be sentenced to life without parole or life with the possibility of parole. This decision to give children either a glimmer of hope or absolute and permanent hopelessness will in each and every case be made blind, without an adequate track record, and with inevitable inconsistency and unreliability. The age of the juvenile defendants

who will be subjected to the choice, and their immaturity, and amenability to growth and change, guaranty that the line between the uncommon few who receive life-without-parole sentences and the rest who do not, will be arbitrary and capricious, and, therefore, "cruel" under Article 33. As the U.S. Supreme Court states in *Roper*, 543 U.S. at 573:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption …. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation.

It is also critical to note that, historically in this country, juvenile life-without-parole sentences have been disproportionately meted out to persons of color, particularly African-American teenagers. It appears that African-American youth nationwide serve life-without-parole sentences "at a rate that is ten times higher than white youth (the rate for black youth is 6.6 as compared with .6 for white youth)." Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 39 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf (hereinafter AI/HRW, *Rest of Their Lives*) (publishing national and New Hampshire data as of 2005 before petitioner Michael Soto's conviction); *see also Sentencing our Children to Die in Prison*, *supra* at 993. Though African Americans comprise only 16% of the national youth population,[17] the available data reveals that African Americans make up 60% of all youth serving life-without-parole sentences. *See* AI/HRW, *Rest of Their Lives*, *supra*, at 39. In a study of youth arrested for murder in 25 states where there was available data, African Americans were found to be sentenced to juvenile life without parole at a rate that is 1.59 times higher than white youth. *See*

[17] Charles Puzzanchera & Benjamin Adams, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Juvenile Arrests 2009, Juvenile Offenders and Victims: National Report Series, 6 (Dec. 2011), *available at* www.ojjdp.gov/pubs/236477.pdf.

Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008* 6-7 (May 2008), *available at* http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf.[18]

New Hampshire is not immune from these trends. Like the rest of the country, the New Hampshire jail and prison system is defined by entrenched racial disparity. As of 2005, 2.29% of all African Americans in the United States were incarcerated, compared to 0.412% of all whites and 0.742% of all Hispanics. *See* Marc Mauer and Ryan S. King, *The Sentencing Project, Uneven Justice: State Rates of Incarceration By Race and Ethnicity* 4 (July 2007), *available at* http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf. The racial disparity in New Hampshire is worse. As of 2005, 2.66% of all African Americans in New Hampshire were incarcerated, compared to 0.289% of all whites and 1.063% of all Hispanics. *Id.* at 6. Looking at the data another way, while the national rate of incarceration for African Americans is 5.6 times that of whites, the New Hampshire rate of incarceration for African Americans is 9.2 times that of whites. *Id.* at 11. Of the 49 states (including the District of Columbia) where there is sufficient data, New Hampshire also has the sixth highest incarceration rate for Hispanics. *Id.* at 13.

Finally, and most fundamentally, the imposition of a lifetime sentence, without the possibility for parole, on a juvenile fails to take into account the many significant differences between children and adults. These differences, all of which are crucially important with regard to sentencing, include three especially relevant considerations identified by the U.S. Supreme

[18] Additionally, while 23.2% of juvenile arrests for murder involve an African-American suspected of killing a white person, 42.4% of juvenile-life-without-parole sentences are for an American-American convicted of this crime. White juvenile offenders with African-American victims are only about half as likely (3.6%) to receive a juvenile-life-without-parole sentence as their proportion of arrests for killing an African-American (6.4%). *See* The Sentencing Project, *Juvenile Life Without Parole: An Overview* 3, *available at* http://sentencingproject.org/doc/publications/jj_Juvenile%20Life%20Without%20Parole.pdf.

Court in both *Graham* and *Miller*: (i) children have a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking"; (ii) children are "more vulnerable ... to negative influences and outside pressures, including from their family and peers," as well as a lack of "control over their environment" and a lack of ability "to extricate themselves from horrific, crime-producing settings"; and (iii) children's characters are "not as well formed as an adult's," and their actions are "less likely to be evidence of irretrievable depravity." *Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68.

### D. Interpreting A Provision Of The Massachusetts Constitution That Is Identical To Part I, Article 33, The Massachusetts Supreme Judicial Court Has Held That Life-Without-Parole Sentences For Juveniles Are Unconstitutional.

Support for this conclusion also comes from the Massachusetts Supreme Judicial Court. On December 24, 2013, that Court held in *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013), that, under Article XXVI of the Massachusetts Declaration of Rights, "the discretionary imposition of … a sentence [of life in prison without the possibility of parole] on juvenile homicide offenders also violates art. 26 because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." *Id.* at 276, 285-86 (noting that life with parole was a suitable remedy for both federal and state constitutional claims). Critical here is the fact that Article XXVI in the Massachusetts Declaration of Rights—which reads, in part, that "[n]o magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments"—is identical to Article 33 of the New Hampshire Constitution. *See* Mass. Const. part 1, art. XXVI. Because of the shared historical roots of the New Hampshire Constitution and Massachusetts Constitutions, this Court has noted the persuasive value of decisions interpreting parallel provisions of the Massachusetts Constitution. *See, e. g., Opinion of the Justices (Tax Plan*

*Referendum)*, 143 N.H. 429, 437 (1999) ("Because much of the New Hampshire Constitution was taken from the Massachusetts Constitution, … this court gives weight to interpretations of relevant portions of the Massachusetts Constitution when interpreting similar New Hampshire provisions").

In reaching this conclusion, the *Diatchenko* Court made several observations that are relevant here:

- "Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an 'irretrievably depraved character,' *Roper*, 543 U.S. at 570, can never be made, with integrity, by the Commonwealth [of Massachusetts] at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted." *Diatchenko*, 466 Mass. at 669-670 (internal citations omitted).
- "The penological justifications for imposing life in prison without the possibility of parole—incapacitation, retribution, and deterrence—reflect the ideas that certain offenders should be imprisoned permanently because they have committed the most serious crimes, and they pose an ongoing and lasting danger to society. However, the distinctive attributes of juvenile offenders render such justifications suspect. More importantly, they cannot override the fundamental imperative of art. 26 that criminal punishment be proportionate to the offender and the offense." *Id.* at 670-71.
- "The unconstitutionality of this punishment arises not from the imposition of a sentence of life in prison, but from the absolute denial of any possibility of parole. Given the unique characteristics of juvenile offenders, they should be afforded, in appropriate circumstances, the opportunity to be considered for parole suitability." *Id.* at 671.

These conclusions apply with equal force under Article 33 of the New Hampshire Constitution.

### E. Part I, Article 18 Of The New Hampshire Constitution Supports The Finding That Life-Without-Parole Sentences For Juveniles Are Unconstitutional.

Part I, Article 18 of the New Hampshire Constitution, which highlights that the "true design of all punishments" is "to reform" and has no analogue under the United States Constitution also supports this conclusion, even if Article 18's principles are only advisory. *See*

*State v. Elbert*, 125 N.H. 1, 15 (1984) ("The strongest expressions of opinion have favored the advisory alternative."). In declaring that "[a]ll penalties ought to be proportioned to the nature of the offense" and that the "true design of all punishments [is] to reform," this provision "forbids only gross disproportionality between offense and penalty." *Id.* This "rehabilitation" constitutional value is especially salient when dealing with juvenile offenders who, as the U.S. Supreme Court has held, "have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *See Miller*, 132 S. Ct. at 2458, 2471. Article 18 articulates a principle, even if advisory, that these juveniles must be given the opportunity, at some point in their lives, to show that they are able to reenter society. Without such an opportunity, rehabilitation would be meaningless and, as explained above in Section II.C, such a lifetime sentence is, by definition, disproportionate.[19]

## CONCLUSION

For the foregoing reasons, this Court should hold that *Miller v. Alabama* is fully retroactive and, as a result, the mandatory sentence of life without parole imposed on Petitioners violated their rights under the Eighth Amendment to the United States Constitution and Part I, Article 33 of the New Hampshire Constitution. The judgment of the Superior Court should

[19] It is worth noting that the New Hampshire General Court is currently considering raising the age of minority for juvenile delinquency proceedings from 17 to 18 years of age. *See* http://www.gencourt.state.nh.us/legislation/2014/HB1624.pdf. This bill would reverse the 1995 decision of the New Hampshire General Court to lower the age of minority for juvenile delinquency proceedings from 18 to 17. However, even under this bill, a child between the ages of 13 and 17 could still be, after consideration by the trial court of the criteria set forth in RSA 169-B:2, tried as an adult for first-degree murder and, following a *Miller* sentencing hearing, receive a lifetime sentence of imprisonment without the possibility of parole. *See* RSA 628:1, II. Even if the General Court were inclined to ban such lifetime sentences for juveniles—which is not contemplated by the current legislation—the fate of juvenile homicide offenders should not be, as a constitutional matter, left to the vicissitudes of the legislative process. *State v. LaFrance*, 124 N.H. 171, 177 (1983) ("A function of the judicial branch is to adjudicate the rights of citizens who may assert that a legislative action is constitutionally void, either on its face or as applied to a particular set of facts. Although the legislature and the governor may enact laws in good faith, they may occasionally err.").

therefore be affirmed and the four cases at issue in this appeal should be remanded to the trial court for a new sentencing hearing.

However, this Court should also conclude that, following the sentencing hearing, the trial court cannot issue a sentence of life without parole under Article 33 of the New Hampshire Constitution. The world has recognized the cruelty of juvenile life-without-parole sentences, which is precisely the reason the sentence has been extinguished worldwide. By any measure, the challenged punishment does not comport with human dignity. It is degrading, unacceptable in contemporary society, and excessive. There are reasons why, as a community, we hurt deeper and mourn harder for the death of a child. Life-without-parole sentences functionally take the lives of children before they have had a chance to change and grow into responsible adults. This is why Article 33 mandates the abolition of such sentences in New Hampshire.

Respectfully Submitted,

On behalf of Amici:

NEW HAMPSHIRE CIVIL LIBERTIES UNION;
NEW HAMPSHIRE LEGAL ASSISTANCE;
DISABILITIES RIGHTS CENTER, INC.;
THE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS;
CHILD AND FAMILY SERVICES OF NEW HAMPSHIRE;
NEW HAMPSHIRE KIDS COUNT;
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; AND
FOUR PROFESSORS FROM THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW (IN THEIR INDIVIDUAL CAPACITIES ONLY)

By their attorneys,

*/s/ Gilles R. Bissonnette*

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae (i) New Hampshire Civil Liberties Union, (ii) New Hampshire Legal Assistance, (iii) Disabilities Rights Center, Inc., (iv) the New Hampshire Association of Criminal Defense Lawyers, (v) New Hampshire Child and Family Services, (vi) New Hampshire Kids Count, (vii) the National Association of Social Workers and its New Hampshire Chapter, and (viii) Four Professors from the University of New Hampshire School of Law (In Their Individual Capacities Only)* was served this 12th day of May, 2014 by first class mail, postage prepaid, and by electronic mail on counsel for the Petitioners—Andrew Schulman, Esq. (on behalf of Petitioner Michael Soto), Richard Guerriero, Esq. (on behalf of Petitioner Robert Tulloch), and Christopher Johnson, Esq. (on behalf of Petitioners Robert Dingman and Eduardo Lopez, Jr.)—and the State of New Hampshire (Elizabeth C. Woodcock, Esq.).

*/s/ Gilles R. Bissonnette*
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