

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS.

Docket Nos. 215-2001-CR-199 & 200

State of New Hampshire

v.

Robert Tulloch

ORDER AFTER HEARING ON LEGAL ISSUES

In April 2002, Robert Tulloch pled guilty to two counts of first-degree murder for his involvement in the January 2001 deaths of Half and Susanne Zantop. At the time of the offense, Mr. Tulloch was 17 years old. Under the RSA 630:1-A, III mandatory sentencing scheme, this court (*Smith, J.*) sentenced Mr. Tulloch to two concurrent life sentences without the possibility of parole. (Index #79.) In 2012, the U.S. Supreme Court held in *Miller v. Alabama* that the Eighth Amendment prohibits mandatory life-without-the-possibility-of-parole (LWOP) sentences for minors. 567 U.S. 460, 465 (2012). Accordingly, Mr. Tulloch is entitled to a resentencing hearing.

Now, as Mr. Tulloch anticipates his resentencing hearing, he moves this court to recognize that the New Hampshire Constitution prohibits all LWOP sentences for minors. (Index #134 at 1.) Alternatively, if this court decides that the New Hampshire Constitution allows such sentences, Mr. Tulloch moves this court to recognize that the New Hampshire Constitution requires a finding of permanent incorrigibility, the State to prove that finding beyond a reasonable doubt, and the State to prove beyond a reasonable doubt the facts the sentence is based on. (*Id.*) Finally, regardless of how this court resolves those constitutional questions, Mr. Tulloch further moves this court to consider the *Miller* factors in resentencing, including an offender's prison record as it

relates to the offender's capacity for change. (*Id.*) The State did not file a written objection. The American Civil Liberties Union of New Hampshire, along with several other organizations, filed an amicus brief in support of Mr. Tulloch. (Index #138.)

The court held a hearing on the matter on September 25, 2024. At the hearing, the parties disagreed over whether the New Hampshire Constitution allows LWOP for minors. However, the parties appeared to agree that if the New Hampshire Constitution does allow LWOP for minors, it requires a court to find permanent incorrigibility before imposing such a sentence. The parties disagreed over the burdens of proof for both the finding of permanent incorrigibility and the facts the sentence is based on. Finally, the parties agreed that the resentencing court must consider the *Miller* factors, including an offender's prison record as it relates to the offender's capacity for change.


Now, this court intends to transfer the disputed questions of law to the New Hampshire Supreme Court. *See* RSA 491:17. The court considers whether a "substantial basis exists for a difference of opinion on the question" or questions and, if so, whether "an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation" or "protect a party from substantial and irreparable injury," or whether an interlocutory appeal may "present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice." *Sup. Ct. R.* 9(1)(d).

In applying the provisions of Supreme Court Rule 9(1)(d) to the circumstances of a particular case, the superior court generally focuses on the novelty of the issue, the complexity of the issue, the consequences of the issue to the pending case, and the negative effect of the issue if not transferred. 5 Richard Weibusch, *New Hampshire Practice: Civil Practice and Procedure* §§ 60.16–17 (4th ed.) (explaining that generally only novel or significant issues will be reviewed on an interlocutory basis).

Upon careful consideration of the pleadings and the parties' arguments, the court concludes that the constitutional issues in this case are significant and complex and have not yet been addressed by the New Hampshire Supreme Court. The court also holds that there is a substantial basis for a difference of opinion regarding the constitutional issues, and that the resolution of the issues presented will clarify further proceedings for the parties. The court further concludes that an interlocutory transfer presents an opportunity to clarify an issue of general importance in the administration of justice. As Mr. Tulloch notes in his pleadings, "youth matters for purposes of meting out the law's most serious punishments." (Index #134 at 3 (quoting *Miller*, 567 U.S. at 483).)

The court DIRECTS the parties to file a proposed interlocutory transfer statement, including language for the proposed questions, by December 13, 2024. See *Sup. Ct. R. 9*.

SO ORDERED, this 22nd day of November 2024.



Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/25/2024