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Adamcik v. State Appellant's Brief Dckt. 44358

IN THE SUPREME COURT OF THE STATE OF IDAHO

TOREY ADAMCIK, Petitioner/Appellant, vs. STATE OF IDAHO, Respondent.	)	Supreme Court No. 44358 Bannock County District Court Case No. CV-2013-3682

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE MITCHELL W. BROWN
District Judge

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II. STATEMENT OF THE CASE

A. *Introduction*

Torey Adamcik was sixteen years old when he was arrested for the first-degree murder of Cassie Stoddard and for conspiring to commit that murder with seventeen-year-old Brian Draper. He was found guilty after a trial and sentenced to a life sentence without possibility of parole on the murder charge.

Torey was represented at trial and sentencing by attorneys Bron Rammel, Aaron Thompson and Greg May. The State was represented by Bannock County Prosecuting Attorney Mark Hiedeman and Deputy Prosecuting Attorney Vic Pearson.

The conviction and sentence were affirmed on appeal, although two Justices dissented finding that there was insufficient evidence to show that Torey committed the murder as charged. The Court also rejected the argument that the fixed life sentence for a juvenile violated the prohibition against cruel and unusual punishment found in Article 1, § 6 of the Idaho Constitution. *State v. Adamcik*, 154 Idaho 445, 272 P.3d 417 (2012). Torey's petition for rehearing was denied on February 8, 2012. Four months later, the United States Supreme Court issued *Miller v. Alabama*, — U.S. —, 132 S. Ct. 2455 (2012).

B. *Post-Conviction Proceedings*

Torey filed a timely post-conviction. R 12. He raised claims of ineffective assistance of counsel because counsel failed to: 1) get important expert testimony before the jury; 2) move to suppress evidence, 3) move to exclude evidence of Torey's invocation of the right to counsel; and 4) communicate a favorable plea offer to him. Torey also alleged that the fixed life sentence

was cruel and unusual punishment in violation of the Eighth Amendment and Article 1, § 6 of the Idaho Constitution under *Miller v. Alabama*, *supra*. R 25-66.

The state filed an Answer. R 152. Both parties moved for summary disposition, at least in part. R 205, 257.

The court denied Torey's motion for partial summary disposition. It granted in part and denied in part the state's motion. R 365-409. In a separate memorandum decision, the court summarily dismissed Torey's Eighth Amendment claim. R 410-425. Torey filed a Motion for Reconsideration addressing some of the dismissed claims. R 436. That motion was denied. R 461.

C. *Post-Conviction Evidentiary Hearing*

The court held an evidentiary hearing. Afterwards, the court issued its Findings of Fact, Conclusions of Law and Memorandum Decision and Order on Post-Conviction denying all of the remaining claims. R 640.

D. *Motion to Reconsider Eighth Amendment Claim*

After the evidentiary hearing but before the court's decision, Torey filed a Second Motion for Reconsideration addressing the Eigth Amendment Claim. In the motion, Torey noted that "[y]esterday, the United States Supreme Court held [in *Montgomery v. Louisiana*, — U.S. ___, ___ S.Ct. ___ (2016)] that '*Miller* [*v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012),] announced a substantive rule that is retroactive to cases on collateral review.'" R 613. "Thus, it is now clear that *Miller* applies to Mr. Adamcik's case. In addition, the *Montgomery* Court also made it clear that *Miller* applies to all juvenile fixed life sentences, whether mandatory or discretionary." R 613-14.

After a hearing, the court denied the Second Motion to Reconsider finding that the trial court judge's findings and conclusions at the sentencing complied with the Eighth Amendment under both *Miller* and *Montgomery*. R 700.

A Judgment of Dismissal was filed. R 704. A timely Notice of Appeal was filed. R 706. A Judgment was then filed. R 718. A timely Amended Notice of Appeal was filed. R 718.

III. ISSUES PRESENTED ON APPEAL

A. Did the district court err in denying the ineffective assistance of counsel claim that the defense team's performance was deficient because it failed to move to suppress the evidence found on a computer seized without the authority of a warrant?

B. Did the district court err in finding Torey was not prejudiced by the deficient performance of the defense team which failed to get important expert testimony before the jury?

C. Did the district court err in finding that Torey was not prejudiced by the cumulative effect of the defense team's deficient performance?

D. Did the district court err in summarily dismissing the Eighth Amendment claim?

IV. ARGUMENT

A. *The District Court Erred in Denying the Ineffective Assistance of Counsel Claim That the Defense Team's Performance Was Deficient Because it Failed to Move to Suppress Evidence Found on a Computer Seized Without the Authority of a Warrant.*

1. Facts pertinent to issue.

On September 27, 2006, a Search Warrant was issued for Sean and Shannon Adamcik's home at 1598 Pointview Dr., Pocatello, Idaho. Petitioner's Exhibit B. Torey lived there with his parents, his older sister and his younger brother. The Search Warrant was executed and several items were seized, including a Computer Tower found in the basement TV room of the Adamcik

home. Petitioner's Exhibit D. However, the warrant does not authorize the seizure of computers. Petitioner's Exhibit B.

Two search warrants were issued on October 4, 2006, one authorizing the police to search the contents of the Tower Computer. R 683. The police searched the content of the computer and found explicit images.

Defense counsel filed a Request for Discovery prior to trial and were aware of the search warrants. According to Attorney Thompson, defense counsel did not file a motion to suppress the evidence seized during the execution of the September 27 search warrant nor did they move to suppress the evidence found during the October 4 search warrant because they did not identify a legal basis to do so. Had a legal basis been identified, the defense team would have filed a motion to suppress. Post-Conviction Transcripts ("PCT") pg. 106, ln. 15 - pg. 107, ln. 3.

During the trial, the state disclosed that it had recovered evidence from the computer. The prosecuting attorney informed defense counsel that "kiddie porn" photographs had been discovered and told defense counsel that he would introduce them at trial if the defense put on its planned character witnesses. PCT pg. 96, ln. 4 - pg. 97, ln. 1.

The defense team had planned to call several character witnesses during the trial. PCT pg. 94, ln. 22 - pg. 96, ln. 14. Part of the defense strategy was "to present witnesses that could speak to the good things about Torey." Mr. Thompson explained, "I think there was an overwhelming amount evidence that was all negative in nature and we wanted to take some steps to counteract that. We wanted to present and show that he definitely had good qualities." PCT pg. 94, ln. 7-12.

After the prosecutor revealed the existence of the explicit images, the defense team did

not move to suppress the evidence. Instead, defense counsel decided to forego the presentation of the character witnesses and decided to not call Torey as a witness. During the evidentiary hearing, Mr. Thompson suggested that the decision to forego character evidence was because the defense had "changed gears a little bit[.]" PCT pg. 112, ln. 11-13. However, at his deposition, he stated that the revelation of the explicit photographs "changed, I believe, the way that we decided that we were going to present the finality of the case." PCT pg. 142, ln. 18-22. Mr. Thompson continued, "We were extremely fearful that those facts could come in be presented to the jury and potentially torpedo the entire defense." PCT pg. 143, ln. 24 - pg. 144, ln. 3.

Likewise, Mr. Rammell testified in his deposition that once the defense team found out about the explicit images they made a decision to not put on certain character evidence out of a concern for opening the door to those images. PCT pg. 377, ln. 8-18. Shannon and Sean Adamcik testified that the decision to forego character evidence was made at a meeting at the law firm's office after the computer images were disclosed by the state. PCT pg. 155, ln. 15-25; pg. 194, ln. 15-21.

Barbara Adamcik was also at the meeting. She recalled:

> The attorneys were strongly supporting the idea of not bringing forth the character witnesses so to keep the pornography stuff out of the trial. And Sean and Shannon were really adamant that we needed to convince the jury and the judge that Torey was somehow a different person than Brian Draper.

PCT pg. 224, ln. 6-12.

Torey testified he was told about the explicit images and the decision to forego character evidence during a jail meeting with the defense team.

> Q. Did they talk to you about making any trial decisions as a basis of these nude images being turned over to them?

> A. They informed me that they weren't going to put on any character evidence. When I inquired about it, in so many words I got the answer that it was because of the images.

PCT pg. 416, ln. 10-16. The defense team also decided to not have Torey testify based on the same concerns. PCT pg. 412, ln. 4 - pg. 419, ln. 12.

2. Legal Standard

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Powell v. Alabama*, 287 U.S. 44, 73 (1932). Idaho law also guarantees a criminal defendant's right to effective counsel. Idaho Const. Art. I, § 13; I.C. § 19-852. Further, these rights apply to juveniles. *In re Gault*, 387 U.S. 1, 34 (1967).

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitutions, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong is shown if there is a reasonable probability that a different result would have been obtained in the case had the attorney acted properly. *Id*.

Claims of ineffective assistance of counsel due to the failure to move to suppress evidence, require the Court to consider three questions. First, would the motion to suppress have been granted? Second, even so, was the failure to move to suppress outside the boundaries of

reasonable trial strategy? Third, was the defendant prejudiced by trial counsel's deficient performance. *Wurdemann v. State*, No. 43384, --- Idaho ---, --- P.2d --- (February 28, 2017).

The post-conviction court found no deficient performance because the search warrant affidavit established probable cause to seize the computer and the magistrate intended to sign a search warrant permitting seizure of the computer. R 666-668. The court also found that Torey had not established prejudice from the loss of the character witnesses. R 672.

3. A motion to suppress the computer seized pursuant to the September 27 search warrant would have prevailed because the warrant did not authorize the seizure of computers.

The warrant did not authorize the seizure or search of any computers. Petitioner's Exhibit B. Thus, the seizure and later search of the computer exceeded the permissible scope of the search warrant.

While the Affidavit of Probable Cause sought permission to seize computers. The search warrant did not. It only permitted the police to "search for and seize all evidence including but not limited to bodily fluids, stains, hair fibers and other trace evidence as well as fingerprints and indicia of the crime[.]" Petitioner's Exhibit B. That being so, the seizure of the family computer was outside the permissible scope of the warrant.

At the evidentiary hearing Judge Box testified that he did not draft the search warrant. He issued the warrant as it was presented to him and he did not recall any specific discussion concerning computers. PCT pg. 215, ln. -8. When the state asked if he had noticed any difference between the request to search and what he expressly authorized to be searched, Judge Box testified, "I don't recall if I did then." PCT pg. 218, ln. 3. The Judge also testified that when he issues a search warrant he intends to give permission to search for the items listed and

does not intend to give permission to search for items not listed. PCT pg. 218, ln. 15-22.

The Fourth Amendment states that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the* place to be searched, and the person or *things to be seized*." (Emphasis added.) The purposes of the particularity requirement are to prevent general searches and to prevent the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization. 2 LaFave, Search & Seizure § 4.6(a) (5th ed.) "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 195 (1927). As stated by the Third Circuit:

> As the text of the Fourth Amendment itself denotes, a particular description is the touchstone of a warrant. U.S. Const. amend. IV. The requirement of a particular description *in writing* accomplishes three things. First, it memorializes precisely what search or seizure the issuing magistrate intended to permit. Second, it confines the discretion of the officers who are executing the warrant. Third, it informs the subject of the search what can be seized. For these reasons, although a warrant should be interpreted practically, it must be sufficiently definite and clear so that the magistrate, police, and search subjects can objectively ascertain its scope.

Doe v. Groody, 361 F.3d 232, 239 (3rd Cir. 2004) (internal citations and quotations omitted; emphasis in original). "The particularity requirement's objective is that those searches deemed necessary based on a probable cause determination by a magistrate should be as limited as possible." *State v. Weimer*, 133 Idaho 442, 448-49, 988 P.2d 216, 222-23 (Ct. App. 1999). Thus, if an item seized is outside those items permitted to be seized by the written text of the search warrant itself, the unwritten intent of the magistrate issuing the warrant has no legal

significance. *See State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985) (Seizure of calculator which was not listed as item to be seized on search warrant found to be outside scope of warrant) and *Weimer*, *supra* (where Court looks at words of warrant to determine whether it authorized the seizure of items taken during a search). The warrant here was limited by its written terms and since the seizure of the computer exceeded the written terms of the warrant the seizure (and subsequent search) of the computer was invalid.

The post-conviction court relied upon *State v. Bollingberg*, 674 N.W.2d 281 (N.D. 2004), but that case is distinguishable. The North Dakota Court looked at the totality of the language of the search warrant itself in order to understand the meaning of the command line of the warrant. It concluded that a search of the premises was authorized, even though not expressly listed, because "the second paragraph of the command portion of the warrant authorized seizure of computers and documents and that one would not likely find these things in outbuildings, vehicles, or curtilage. The district court stated an officer could reasonably assume, given the top portion of the search warrant and the second paragraph of the command, that premises was implied." *Id*.

Here, nothing in the text of the search warrant would lead the police officer to conclude that the seizure of computers was implied when the warrant only authorized a search for "bodily fluids, stains, hair fibers and other trace evidence as well as fingerprints and indicia of the crime[.]" While in *Bollingberg* the police would not normally find computers and documents in outbuildings, vehicles, or curtilage, the police here could find everything the warrant authorized seizing without searching or seizing the computer. Further, the computer could not contain the

items the search warrant specifically authorized a search for, *i.e.*, "bodily fluids, stains, hair fibers and other trace evidence as well as fingerprints[.]"

Moreover, in *Bollingberg*, the state presented evidence from the drafter of the search warrant that the word "premises" was inadvertently omitted when he created the warrant. Here, the state never called the author of the search warrant to testify.

Thus, the seizure of the computer exceeded the scope of the search warrant. And as the Court of Appeals has written, "when a search exceeds the scope permitted by a valid (or partially valid) search warrant . . . the property unlawfully seized will be suppressed." *State v. Bussard*, 114 Idaho 781, 787, 760 P.2d 1197, 1203 (Ct. App. 1988). A motion to suppress would have been granted and Torey has established the first of the three *Wurdemann* requirements.

4. Trial counsel did not have a strategic reason to not move to suppress

The second *Wurdemann* requirement was also proved. Defense counsel admitted that the only reason he did not move to suppress the evidence was because he could not see a legal basis to do so. He also testified that had he would have moved to suppress the evidence had he identified a basis to suppress it. PCT pg. 106, ln. 15 - pg. 107, ln. 7. Thus, it was not a strategic decision to fail to move to suppress and the failure to identify the fatal flaw in the warrant was below the standards of reasonable professional performance. *See, Wurdemann v. State, supra* (deficient performance for failing to move to suppress identification); *Carter v. State*, 108 Idaho 788, 795, 702 P.2d 826, 833 (1985) (Deficient performance found when trial counsel failed to object to the introduction of extremely damaging testimony obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).). In fact, the failure to suppress was totally inconsistent with the defense team's chosen trial strategy. Had the motion to suppress been made, defense counsel

could have proceeded with the planned trial strategy instead of having to abandon large portions of the defense case to avoid "opening the door" to the state's evidence.

5. Defense counsels' deficient performance was prejudicial.

Counsel's deficient performance prejudiced Torey because the failure to recognize a basis to suppress the computer evidence resulted in counsel failing to present the character evidence that was vital for the theory of the defense – that Torey was unlike Brian and that Brian, not Torey, murdered Cassie.

This defense was like a tipi composed of three posts.

First, Brian admitted on the videotape that he stabbed and killed Cassie. "I just stabbed her in the throat . . . I just killed Cassie." Trial Exhibit 89, pg. 1.

Second, the physical evidence was consistent with the theory of Brian, not Torey, as the killer. The evidence regarding the knives, the DNA evidence, and the blood evidence all was consistent with the theory.

Third, the anticipated character evidence and Torey's testimony would establish that Torey was a respectful, shy, non-violent, unaggressive follower - exactly the sort who could be led into Brian's plan without understanding that they were not pretending, and that Brian, not Torey, planned to and did commit an actual murder.

When defense counsel decided to eliminate the character evidence and Torey's testimony because they mistakenly thought that they could not suppress the computer evidence, one post was removed and the structure collapsed.

At the evidentiary hearing, Torey put on character evidence from ten character witnesses, all of whom were listed as defense witnesses at the trial. PCT pg. 93, ln. 22 - pg. 95, ln. 17.

Barbara Adamcik, Ph.D., a professor at I.S.U., a former high-level administrator there and Torey's grandmother, testified that Torey was respectful, not aggressive, shy, unsophisticated and a follower, not a leader. PCT pg. 231, ln. 20 - pg. 234, ln. 14. Torey's former teacher, Rusty Adamson, who works with at risk students, testified that she did not see in Torey any characteristics typically seen in-at risk children. PCT pg. 240, ln. 2-5. In her opinion, Torey was immature for his age, naive, very trusting, non-aggressive, a follower, and trustworthy. She also noted that Torey had an IEP with the special education department due to processing deficiencies. PCT pg. 237, ln. 20 - pg. 239, ln. 20.

Lacey Adamcik, Torey's older sister, who holds an M.S.W., testified that he was friendly, non-aggressive, caring, kind to animals, trustful, but immature and naive. PCT pg. 246, ln. 1 - pg. 249, ln. 19. Torey's aunts and uncles all testified to the same or similar traits; See Testimony of Joy Nelson, PCT pg. 252 - pg. 256 (immature, a follower, a peacemaker, honest, non-aggressive, respectful, gentle); Robert and Mary Nelson PCT pg. 257 - pg. 264 (respectful, a follower, shy, obedient, polite, trusting). Mary testified that Torey was kind and recalled that he had made a play list of songs for her daughter who had cancer. PCT pg. 264, ln. 1-8. David Nelson, a former Pocatello police officer, at-risk youth counselor, and Chief of Police for Cascade, Idaho, said Torey was polite and helpful, non-aggressive, but immature and naive for his age. PCT pg. 273 - pg. 278. Ann Adamcik testified to similar traits but also noted that Torey was a sensitive child. She related a story from a time when Torey's family was visiting her in California and they were all out at dinner. "And at one point he and his brother were goofing off a bit too much at the table. His mother snapped at him a bit. He reacted the way you would expect a sensitive child to react. He got a little quiet, maybe teared up a bit. It affected him

being reprimanded." PCT pg. 284, ln. 22 - pg. 285, ln. 5. After school, Torey would come to her house and watch over her young daughter. PCT pg. 283, ln. 21 - pg. 284, ln. 6.

Nathan Nelson, a younger cousin, testified that Torey was kind, peaceful, and empathic, and would try to help others who were in need. PCT pg. 265 - pg. 269. And David Luras testified that he and Torey had been friends since elementary school and he saw Torey nearly every day from the fifth grade until Torey was arrested. He described Torey as honest, kind, and trusting. PCT pg. 407 - pg. 409.

In addition, Torey would have testified that when he and Brian entered the house he believed they were going to frighten Cassie and the knives and masks were all part of that plan. PCT pg. 419, ln. 1- pg. 420, ln. 19. He had the Sloan knife and Brian had the Rambo knife. PCT pg. 422, ln. 16-19. Brian made some noise in an attempt to lure Cassie and Matt downstairs, but was unsuccessful. Torey then called the house and told Matt he was in a movie theater. Matt said his mom was coming to pick him up. Torey and Brian argued about whether they should leave. Eventually Torey "just gave in and waited with him. Brian wanted to stay." PCT pg. 421, ln. 1 - pg. 422, ln. 7.

After Matt was gone, he and Brian went upstairs. Torey became anxious and stopped. Brian told him to go into the living room, but he refused. Brian went ahead and Torey waited in the hallway. Cassie must have seen Brian because she screamed. Torey was scared and panicking. Brian returned to the hallway and told Torey to go into the living room because "she won't die." PCT pg. 423, ln. 1-19.

Torey could hear Cassie making a sound "like she was snoring." He went into the living room, turned on his keyring flashlight and knelt down to look at Cassie who was on the floor.

Brian stabbed her again. Torey dropped his knife and ran out of the house. PCT pg. 423, ln. 20 - pg. 424, ln. 3. Torey thought Brian was right behind him, but it actually took a couple of minutes for Brian to arrive at the car. PCT pg. 424, ln. 17-2.

When Brian got back to the car, Brian turned on the videorecorder and said:

Brian: . . . . just killed Cassie. We just left her house. This is not a fucking joke.

Torey: I'm shaking.

Brian: I stabbed her in the throat. I saw her lifeless body. It just disappeared, dude. *I just killed Cassie*. Oh, oh fuck. That felt like it wasn't even real. I mean it went by so fast.

Torey: Shut the fuck up. We gotta get our act straight.

Trial Exhibit 91 (emphasis added). Torey testified he made that last statement to try to gain some control over the situation and because he knew that he was in trouble even though Brian was the one who killed Cassie. PCT pg. 426, ln. 16-18. He was panicked and shocked and "just beside" himself. PCT pg. 426, ln. 3-4.

Torey's testimony is supported by the DNA evidence at trial. Testing showed some skin or saliva from Torey on one of the masks, but that mask did not have any of Cassie's DNA on it. The other mask had Cassie's blood on it. T pg. 1668, ln. 4 - pg. 1669, ln. 1. In addition, Cassie's blood was on Brian's shirt. T pg. 1167, ln. 14-20. A glove with Cassie's blood on it was linked to Brian because it was a soccer glove and Brian played soccer at the high school. Also, DNA was found in the glove. T pg. 2374, ln. 1-17. While Torey was excluded as a contributor of that DNA, Brian could not be excluded. T pg. 2680, ln. 22 - pg. 2681, ln. 4.

There were no fingerprints, fibers, blood or other sources of DNA which matched Torey. None of Torey's clothing or personal items had any of Cassie's DNA on them. T pg. 1667, ln. 1

- pg. 1670, ln. 11. While there was some DNA found in the fingernail clippings from Cassie, Torey was excluded as a contributor. T pg. 2674, ln. 14 - pg. 2675, ln. 21.

Torey's testimony that Brian killed Cassie with the serrated Rambo knife would have been corroborated by Dr. Leis' testimony that only the Rambo knife was used. T pg. 2632, ln. 19 - pg. 2633, ln. 3; pg. 2638, ln. 2-24. (And, as shown below, the testimony of Rudolf Riet, had it been presented at the trial, would have corroborated Dr. Leis's testimony that only one knife was used.) Mark Klinger, a former criminal investigator for the Idaho State Police, testified that based upon the pattern of blood drops at the house, he also believed there was only one knife used. T pg. 2718. In addition, Cassie's blood was found on the Rambo knife, but not on the smooth-bladed Sloan knife. T pg. 2373, ln. 23 - pg. 2374, ln. 17.

The state admitted during closing argument that it could not put a particular knife into Torey's hand:

> But who used which knife? We don't know who used that knife. Which knife did Brian Draper use? Which knife did Torey Adamcik use? We don't know[.]

T pg. 2811, ln. 20-24. And, even if the jury believed Dr. Garrison's testimony that there were two knives used, Torey's testimony that he dropped the Sloan knife, and ran out of the house ahead of Brian, who did not arrive at the car for another couple of minutes, would have caused the jury to conclude that Brian used both knives, inflicting additional wounds with the Sloan knife after Torey left.

The jury did not hear evidence that Torey was not the kind of person who would commit such a crime. It also did not hear Torey's testimony that Brian was the one who killed Cassie and that he ran out of the house horrified by what Brian had done. The defense case became two

dimensional when the jury could and should have heard all three dimensions. In light of the above, the evidence shows the defense team's performance was deficient when they failed to suppress or exclude the computer evidence and that Torey was prejudiced under *Strickland v. Washington*, *supra*. Relief should be granted for this reason alone.

B. *The District Court Erred in Finding Torey Was Not Prejudiced by the Deficient Performance of the Defense Team Which Failed to Get Important Expert Testimony Before the Jury.*

The post-conviction court found that defense counsels' performance was deficient in failing to get expert testimony admitted. R 659-660.

Prior to trial, defense counsel retained forensic investigator Rudolf Reit to testify. Attorney Rammell testified that he took the lead in preparing Mr. Reit's testimony for trial. PCT pg. 380, ln. 5-18. He planned to have Mr. Reit testify about the results of an experiment conducted with knives similar but not identical to the knives in evidence. The purpose of knife experiment was "to determine whether those knives could have been responsible for the trauma that was visualized during the autopsy." PCT pg. 342, ln. 15-21.

However, Mr. Reit's testimony was objected to and the objections were sustained for lack of foundation or for improper form. In particular, defense counsel attempted to introduce into evidence Trial Exhibits K-G, showing the results of Mr. Reit's experiments. T pg. 2524, ln. 4-5. The state objected because Mr. Reit did not use the actual knives found at the crime scene. T pg. 2524, ln. 8-19.

Mr. Reit testified at the evidentiary hearing that it was common practice to use the actual weapon for testing. "Normally we do testing with the weapon, not a similar weapon." In fact, he had never used a substitute weapon prior to Torey's case. PCT, pg. 246, ln. 15-25. He expressed

his concern to the defense team prior to the trial, saying, "these aren't the right weapons." He was told "we can't get the weapons that were actually involved." PCT pg. 369, ln. 5-15.

In response to the state's objection at trial, the court chastised defense counsel in front of the jury. The court said: "All right. Mr. Rammell, this is a court of law and articles being similar to one in evidence and tests being done on an article similar to one in evidence is not sufficient." T pg. 2524, ln. 20-24. The court continued, "The items in evidence could have been released for testing to your witness, as some were, but – I'm not going to allow this fellow to testify to – testify on tests run on knives he thinks were similar to one." T pg. 2525, ln. 4.

The court then lectured defense counsel in front of the jury as follows:

> THE COURT: Mr. Rammell, this is a homicide case. If you wanted the witness to examine evidence, you could have made a motion and it would have been granted.
>
> He could have examined the items that we had, not talked about something he thinks – I emphasize – that he thinks is similar.
>
> I mean, we're talking – we should be talking apples and apples here, but we're talking about items that were found at Black Rock, and then you want – and then you want – and then he comes in and says, well, he went out and bought some that looked like. Well, that's not good enough in my opinion. That's not good enough in a homicide case like this.

T pg. 2525, ln. 23 - pg. 2526, ln. 13.

Mr. Rammell then told the court, in front of the jury, that the prosecuting attorney or the police department would not grant him access to the exhibits when he asked, but admitted that he did not file a motion to gain access. T pg. 2526, ln. 19-23. The long-time elected Prosecuting Attorney, Mark Hiedeman, then told the court, in front of the jury, that what defense counsel said was not true and that his office had given defense counsel full access to the evidence. T pg. 2528, ln. 10-13. Mr. Hiedeman also said about Mr. Rammell's statement: "that's – that's a lie.

That is not true." T pg. 2528, ln. 10-14. Mr. Rammell replied: "No that's not a lie." The court then excused the jury. *Id*.

In fact, Mr. Rammell was incorrect in his assertions about the access to the knives. Prosecutor Vic Pearson told the Court that he did not deny the defense access to the knives, but said that it would have to get a court order because the state was going to introduce the knives as evidence in the Brian Draper trial. T pg. 2536, ln. 7-23. At the evidentiary hearing both Mr. Hiedeman and Mr. Pearson denied prohibiting access to the knives. PCT pg. 294, ln. 2 - pg. 300, ln. 5; see also PCT pg. 324, ln. 7-15 (calling the accusation "absolutely false"). Thus, defense counsel mistakenly and unreasonably believed that the state had denied it access to the evidence. Moreover, he took no steps to obtain access to the weapons by court order. As Judge McDermott noted, a motion for access to the weapons would have been granted.

The post-conviction court concluded trial counsel's performance was deficient under *Strickland*. R 659-60. However, it did not grant relief because it found that Torey was not prejudiced. R 660.

1. Torey was prejudiced because his attorneys lost credibility in the eyes of the jury.

While Mr. Rammell denied the charge of lying to the court, the jury no doubt deduced that he in the wrong because when it returned to the courtroom Mr. Rammell went on to a different topic and no action sanctioning the state was taken. The jury must have concluded from this Mr. Rammell lied.

But even before Mr. Rammell was embarrassed before the jury on that count, the court took him to the woodshed in front of the jury stating that his pretrial preparation of the witness was not adequate for a "court of law," especially in a "homicide case" and that the evidence

could "confuse and mislead" the jury. T pg. 2524, ln. 20 - pg. 16. The court told Mr. Rammell that all he needed to do in order to get the knives was to ask the Court: "If you wanted the witness to examine evidence, you could have made a motion and it would have been granted." T pg. 2525, ln. 23 - pg 2526, ln. 1. Tellingly, the court addressed Mr. Rammell formally, as if scolding a small child. This is a sharp contrast from Judge McDermott's normal friendly, informal, even folksy manner of addressing people. Compare, *Id* ("Mr. Rammell, this is a homicide case.") with T pg. 1400, ln. 4-9 (where the Court calls Mr. Pearson "Vic" and the court technicians "Bob" and "Gordy.") and PCT pg. 396, ln. 5 (addressing post-conviction counsel as "Dennis").

Mr. Rammell's lack of witness preparation led to a situation where the jury saw both the long-serving Judge and the elected Prosecuting Attorney castigate Mr. Rammell – calling him unprepared, unprofessional, and a liar. This onslaught of pointed criticism, from two highly respected individuals holding elected positions of authority, prejudiced the jury against Mr. Rammell, undermined his credibility with them and thereby prejudiced Torey.

Mr. Rammell agreed this confrontation prejudiced Torey. He described the scene in court as "a quite a painful process," referring in particular the comment Judge McDermott made in front of the jury "that this is a serious criminal case." PCT pg. 382, ln. 3-15. Mr. Rammell described Mr. Hiedeman's demeanor after calling him a liar as "a fighting demeanor." PCT pg. 382, ln. 16-25. Mr. Thompson recalled that Mr. Hiedeman was quite angry and that there was a heated argument between the two. PCT pg. 116, ln. 6-15. Mr. Hiedeman recalled that he was "upset" by the allegations made in front of the jury and that he got "a little hot under the collar." PCT pg. 299, ln. 17 - pg. 300, ln. 8. Mr. Hiedeman candidly admitted what he did was "not

appropriate. I was out of line and I should have maintained my composure until the jury was not in the room." PCT pg. 300, ln. 15-21.

When asked "what [e]ffect did this have on the jury?", Mr. Rammell answered:

> I think it was significant. Going back to the beginning of the case, clear back to voir dire, one of the things that was significant was that we had jury questionnaire. In the jury questionnaires, the people frequently commented how they were concerned that defense lawyers would do anything for a buck, basically. So that was a concern throughout the case.
>
> And so that's a pretty damaging, concerning conduct in light of potential jurors that think defense lawyers don't have the greatest credibility to begin with.
>
> Q. So you would say that credibility of the defense lawyers is extremely important to the defense?
>
> A. I think it's not just important, I think it's one of the most vital parts of the case.
>
> Q. Would it be your opinion that what happened in front of the jury hurt your credibility?
>
> A. Absolutely. No question in my mind about that.

PCT pg. 383, ln. 11 - pg. 384, ln. 6. Mr. Rammell felt that maintaining credibility was particularly important in Torey's case due to its sensational nature and the intensive public interest in it. PCT pg. 384, ln. 7-15. Mr. Thompson also believed that the argument damaged defense counsel's credibility with the jury. PCT pg. 118, ln. 9-19.

Torey suffered prejudice under *Strickland* due to this loss of credibility. There is a reasonable probability that had the jury not been told that defense counsel was unprepared, attempting to presenting misleading evidence and a liar that the jury would have evaluated the defense case more favorably and not have convicted Torey of First-Degree Murder. Relief should be granted under *Strickland*.

2. Torey was prejudiced because Mr. Reit's testimony was strong evidence that only one knife was used.

In addition to Torey being prejudiced by his defense team's loss of much needed credibility with the jury, the substantive evidence the jury did not hear would have made a difference in the trial such that there is a reasonable probability of a different result. As Mr. Thompson testified, the defense theory was "there was only one knife used for the actual act. And that was what our forensic pathologist was going to testify to. Mr. Reit's testimony and the exemplar knives and the testing he did was, I believe, support of that common theory." PCT pg. 120, ln. 1-7. (Likewise, Torey's testimony, had it been presented, would have been that Brian Draper inflicted all the stabs wounds.)

Dr. Edward Leis testified about Wound #1, the fatal wound. He concluded that the wound was caused by a serrated blade. Thus, it could not have been caused by the Sloan knife. Dr. Skoumal, who conducted the autopsy, testified that the cause of death was a knife wound to the trunk, T pg. 2149, ln. 1-10, and only fourteen of the thirty total wounds even had the *potential* to be fatal. T pg. 2084, ln. 14 - pg. 2113, ln. 24. (Dr. Skoumal's autopsy report identified wounds 1, 2, 5-12, 19-20, 22 and 29 as potentially fatal. Trial Exhibit 92.)

The jury, as instructed, needed to find that Torey actually inflicted a fatal wound: the Amended Information charged Torey with actually killing Cassie (Criminal Trial Record ["CR"] Vol. 3, pg. 719), but the state did not request an accomplice liability instruction and the court did not instruct the jury on accomplice liability. See CR Vol. 5, pg. 1085-1123. Thus, under the charge and jury instructions, the question of who actually killed Cassie by inflicting a fatal stab wound was central to the question of guilt or innocence.

However, Dr. Steven Skoumal, who did the autopsy, could not link any of the wounds to a particular knife. T pg. 2188, ln. 17-20. He was not even willing to "say it was a knife" that was used. T pg. 2122, ln. 1-3. Dr. Garrison, who did a post-autopsy examination, testified that wound #22 (a non-potentially fatal wound) was caused by a smooth-bladed knife, like the Sloan knife. T pg. 2211, pg. 8-24. He testified that a serrated blade caused potentially fatal wounds #2 and 21, and also caused potentially fatal wound #29. T pg. 2213, ln. 4 - pg. 2215, ln. 17; pg. 2216, ln. 19 - pg. 2217, ln. 20. Non-potentially fatal wound #15 was also caused by a smooth-edged blade, like the Sloan knife. T pg. 2220, ln. 6 - pg. 2222, ln. 21. Finally, the doctor testified that while he could not "unequivocally" tell whether wound #19 was caused by the serrated knife, there was evidence which suggested that it was. He testified:

> And as we look down here, again, we see some irregularities, but can we unequivocally call it? No. We can suspect it, but we cannot call it. And the reason we suspect it, too, is because of this marking here, which then would be consistent with the serrations on the actual blade.

T pg. 2219, ln. 7-14. There is no evidence to show wound #19 was caused by the Sloan knife as opposed to the serrated blade.

Regarding Wound #1, Dr. Garrison testified:

> Now if we take wound number "1" in the chest and wound number "1" is in the right side of the chest just above the right breast and if we look here we see a nice – little tail where the blade tip scratched as it went out.

T pg. 2219, l. 17-22. Here the doctor is referring to Slide #15 of his PowerPoint Presentation (Trial Exhibit 94). He goes on to say:

> We can see a nice sharp edge here, and we see – although this picture is somewhat out of focus, you can see it's fairly rounded here – and another impact injury. So we know that this knife went in up to where the hand was. It's an impact injury –

> this is the same photo – I mean the same wound taken at the same time at postmortem.
>
> Wound number "1" [Slide #16] and again we can see the sharp edge right here, and this is a slightly different angle. So I think you can appreciate the fact that there are no irregularities here. This is a smoothe [sic] edge.
>
> Next line – now, let's go into the chest itself [Slide #17] If we look at wound number "1" which we just looked at, we can see the blade as it came in here. This would be the dull edge of the blade. And some people might refer to this as – depending on what kind of knife we're talking about – some might call some of these knives double-edged blades simply because they have a sharp edge, but it's not a cutting edge.
>
> One must distinguish between a cutting edge and a sharp edge because they will give different characteristics.

T pg. 2219, ln. 17 - p. 2221, ln. 25. Both the Rambo knife (Trial Exhibit 74/Petitioner's Exhibit H) and the Sloan knife (Trial Exhibit 70/ Petitioner's Exhibit F and G) have a sharp-edge and a cutting-edge. The doctor did not identify any serration marks in Wound #1, which would be consistent with the Sloan knife, but not necessarily inconsistent with the serrated blade knife. Dr. Garrison also testified that it was his opinion "that there were at least two knives used, one of which was a nonserrated blade, and one of which was a serrated blade." T pg. 2225, ln. 11-19.

Mr. Reit testified at the evidentiary hearing that the tests conducted after the trial with the actual knives corroborated the defense theory that only one knife was used in the killing. He summarized his testimony as showing "that the wounds made by the Rambo knife could in part be similar to the wounds made by the tanto knife. And that the tanto wound could be totally accounted for by the Rambo knife, if the Rambo knife is not plunged all the way into the skin." PCT pg. 359, ln. 6-14. In particular, the tests using the Rambo knife did not necessarily show a clear serration cut. Mr. Reit observed that the notches on the knife "evidently have only abraded

the skin and not physically cut the skin." PCT pg. 358, ln. 20 - pg. 259, ln. 5. Mr. Reit's experiments corroborated Dr. Leis' testimony that the fatal wounds were caused by the Rambo knife, not the Sloan knife.

The trial evidence linked Brian Draper to the Rambo knife. Joe Locero, a witness called by the prosecution, testified that Torey drove him and Brian to buy the knives. On the way, Brian stopped to withdraw $40 from the bank. Torey only contributed $5. T pg. 2009, ln. 3-13. Brian gave the $45 to Joe and directed him as to which knives to buy. T pg. 2010, ln 21-24; pg. 2020, ln. 3-8. These included both the Rambo knife and the Sloan knife. T pg. 2011, ln. 12, pg. 2012, ln. 2. After they left the store, Brian was playing with the serrated knife. Joe said that both Torey and Brian were interested in the knife but Brian said, "I paid for that knife – I get to keep it." T pg. 2022, ln. 7 - pg. 2023, ln. 18. When Joe left the car, Brian was holding the knife. T pg. 2026, ln. 14-21.

Thus, Torey was prejudiced a second time by counsel's failure to obtain the knives for testing. The Court excluded important defense evidence when Mr. Rammell could have easily gotten the evidence admitted. He could have obtained the knives before trial and had Mr. Reit conduct the same tests. Mr. Reit's evidence about the knife marks would have corroborated Dr. Leis' testimony that Wound #1 was inflicted with the Rambo knife.

In addition, Mr. Reit's testimony would have explained that the absence of serrations did not mean the Sloan knife was used. The state conceded in rebuttal:

> So it's a baffling case to experts to decide how many knives were used, but the important thing is there are two wounds, "15" and "1," where it appears that the knife went up to the hilt. There is a hilt mark on one, and there is no serrations.

T pg. 2860 15-23. Mr. Reit's testimony that the tests showed that the Rambo knife did not necessarily leave a serration mark even when plunged to the hilt would have taken away the state's argument that Wound #15 must have been caused by the Sloan knife. (In any case, Wound #15 was in the thigh and was not a potentially fatal wound. T pg. 2222, ln. 1-15. Even if Torey had inflicted it with the Sloan knife, it did not cause Cassie's death.) As noted above, Dr. Leis' testimony showed that Wound #1 was actually caused by the Rambo knife.

If the jury found or even had a reasonable doubt about whether Wound #1 was inflicted by the Rambo knife, it would have acquitted Torey of the murder charge. It could not have found that he inflicted a fatal wound as all of them could be attributed to the Rambo knife. And as previously discussed, Torey would have testified that he did not intend to kill Cassie when he entered the house, that Brian, who was in possession of the Rambo knife, stabbed and killed Cassie and that he ran out of the house after dropping the Sloan knife. Thus, he would have been acquitted because he was neither the killer nor was he an accomplice to the murder because he never intended to kill Cassie.

In light of the above, Torey demonstrated both deficient performance and prejudice under *Strickland v. Washington*, *supra*. The post-conviction court erred in denying this claim. The denial should be reversed and Torey should be granted a new trial.

C. *The District Court Erred in Finding That Torey Was Not Prejudiced by the Cumulative Effect of the Defense Team's Deficient Performance.*

The post-conviction court found there was deficient performance in failing to present Mr. Reit's knife evidence and by failing to object to evidence that Torey invoked his right to counsel

at trial but that Torey did not suffer prejudice.[1] It also concluded that Torey was not prejudiced even assuming he could have gotten the computer evidence suppressed. And it concluded that the cumulative effect of all of the deficient performance still did not prejudice Torey. R 671-672.

In analyzing a claim of ineffective assistance of counsel, the Court should not look to each example of deficient performance and determine whether it was prejudicial. Instead, the Court should consider all the deficient performance and then determine whether the cumulative effect was prejudicial. *See Boman v. State,* 129 Idaho 520, 527, 927 P.2d 910, 917 (Ct. App. 1996) and *Reynolds v. State*, 126 Idaho 24, 32, 878 P.2d 198, 206 (Ct. App. 1994). As the Ninth Circuit has explained, "Separate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003).

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[1] On September 27, 2006, Torey was interviewed by the Idaho State Police and the Bannock County Sheriff at the Pocatello Police Department. Torey was read his *Miranda* rights by law enforcement. At approximately 1:19 of the interview, the police told Torey that he needed to tell them the truth; otherwise they wouldn't be able to help him and he "will be left out in the cold." Trial Exhibit 12. Torey then requested to speak to counsel. The interview stopped and Torey and his father were left alone in the interview room. Later, the police came back into the room and Torey's father asked Torey a question. Defense counsel moved to suppress the statement Torey made to his father. Defense counsel never moved to exclude Torey's invocation of the right to counsel. The defense motion was granted in part and denied in part, with the invocation of counsel being in the portion which was not suppressed. After the ruling, the defense team never moved for reconsideration. During the trial, the video recording of the entire sequence above, including Torey's invocation of the right to counsel after being *Mirandized*, was played to the jury. PCT pg. 91, ln. 5-13.

At the post-conviction evidentiary hearing, defense counsel Mr. Thompson testified that the motion to exclude the invocation of counsel "got lost in the shuffle." He continued: "I was focused on suppressing the entire video. I was somewhat pleased that we got it partially granted. I will openly admit that the Doyle argument should have been brought forward." PCT pg. 92, ln. 16-22.

Here, due to the deficient performance of the defense team, the jury heard: 1) that Torey elicited his right to counsel when he was arrested and 2) that defense counsel was incompetent, trying to mislead them, and a liar. And because of that deficient performance, the jury did not hear: 1) Mr. Reit's testimony that all of the wounds could have been caused by the Rambo knife, 2) the testimony of Torey's good character and 3) Torey's own testimony that he did not kill Cassie. If the unfavorable inadmissible evidence had been excluded and the favorable admissible evidence had been admitted, there is a reasonable probability that Torey would have been acquitted.

D. *The Court Erred in Denying the Eighth Amendment Claim.*

1. Facts pertinent to issue.

Torey was sentenced to fixed life on the murder count and a life sentence with 30 years fixed on the conspiracy count. R 641.

Torey alleged in his Petition that the sentencing court violated the Eighth Amendment and Article 1, § 6 of the Idaho Constitution in two ways. First, the court failed to take into account how children are different from adults and how those differences counsel against irrevocably sentencing a child to a lifetime in prison as required by *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012). Second, the fixed life sentence violates the Eighth Amendment and Article 1, § 6 of the Idaho Constitution because Torey is not one of those rare juveniles who is irreparably corrupt. In the alternative, he alleged that the fixed life sentence violates the Eighth Amendment and Article 1, § 6 of the Idaho Constitution because fixed life sentences for juveniles are categorically impermissible. R 48-66.

The following evidence was presented in the Presentence Investigation Report ("PSI"), Torey grew up in an intact family with his mother and father both in the home. Also in the home was an older sister and a younger brother. Neither parent reported Torey being a discipline problem. PSI 29-30.

Both parents and siblings wrote letters to the Court expressing their love for Torey and testified in support of Torey at sentencing. Likewise, many members of Torey's extended family, friends, and former teachers wrote letters of support for Torey. PSI 56-98.

Torey had no prior criminal history. His only contact with the criminal justice system was a juvenile diversion for a Curfew Violation which eventually resulted in a dismissal. PSI 28-29. He was incarcerated in the adult jail in Bannock County for nearly two years prior to sentencing. During that time he only had one write-up, that one occurring when another inmate passed him a note. PSI 29.

Torey received special education classes in school and was on an Individual Education Plan. He received average grades while at Pocatello High School and was on schedule to graduate with his class until he was arrested. Torey was not a discipline or behavior problem at school. While he had "numerous tardies," according to the PSI, he also only had one detention during high school. PSI 33. Torey at sentencing stated that he had never been given detention. T pg. 2888, ln. 12-16.

The PSI contained the a pre-trial psychological report from Kenneth P. Lindsey, Ph.D, a psychologist, about Torey. Dr. Lindsey found that Torey presented as rather immature for his age. Dr. Lindsey found that Torey has difficulty seeing things from the perspective of others, that Torey's insight into his difficulties was only fair and that Torey sometimes did not appear to fully

grasp the gravity of his legal situation and its potential outcome. Dr. Lindsey found that Torey was focused more on the here-and-now than long-term consequences. Dr. Lindsey also found that Torey's thought processes tend to be somewhat disorganized and that Torey had difficulty expressing his concerns in an organized fashion which may reflect an expressive language problem or mild executive dysfunction. Dr. Lindsey found that Torey was rather shy. Torey's test results from the MMPI-A showed depression and obsessive anxiety, but Dr. Lindsey did not make any DSM Axis II findings, such as narcissistic personality disorder. PSI 50-56.

The presentence investigator did not recommend a fixed life sentence. The recommendation was that Torey be sentenced to a period of incarceration at the Idaho State Correctional Facility to afford him the opportunity to attend programs of rehabilitation. PSI 38.

At sentencing, Dr. Mark Corgiat, Ph.D., a psychologist, testified that Torey was immature for his age. He testified that Torey demonstrated a pattern of neurocognitive difficulties that indicated less than age appropriate judgment, impulse control and complex problem solving abilities. T pg. 2904, ln. 20-25.

Dr. Corgiat testified that adolescent brains are not fully developed, particularly in the precortex area. T pg. 2905, ln. 2 - pg. 2910, ln. 6. Precortex brain development continues until the mid-to-late twenties. T pg. 2905, ln. 17-21. The average adolescent possesses less than adult abilities in planning, reasoning and judgment. He is less capable of autonomous choice-making, self-management, has poorer judgment, is more impulsive, has less capacity for regulating his emotions, and has a risk-taking propensity that can overcome whatever development he has for regulating judgment. T pg. 2905, ln. 22 - pg. 2906, ln. 6.

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Dr. Corgiat testified that the research on the topic unequivocally demonstrates that the adolescent brain does not function in the same way as the adult brain. T pg. 2907, ln. 15-18. At the same time, Torey functioned even below age appropriate levels. T pg. 2908, ln. 5-10. In particular, Torey's history of ADHD and his IEP at school were indicators of frontal lobe immaturity. T pg. 2908, ln. 11-23. Dr. Corgiat's opinion was that Torey was less mature that he would expect in a seventeen-year-old male with normal brain development. T pg. 2910, ln. 3-6.

According to Dr. Corgiat, Torey was a good candidate for rehabilitation because of his age and that Torey's amenability to education and training is better than someone with more advanced brain development. T pg. 2910, ln. 7 - pg. 2911, ln. 5. He also saw Torey as a very low risk to reoffend. T pg. 2913, ln. 2 - pg. 2914, ln. 11. Dr. Corgiat reached this conclusion based in part on Torey's current underdevelopment and consequent ability to make a greater change than someone fully developed. *Id*. Dr. Corgiat also based his opinion on the absence of a pathological drive or pathological desire to commit offenses. *Id*. Dr. Corgaint also testified that there was no evidence of sociopathy in Torey and that Torey does not have the personality pattern associated with violent crime. *Id*.

Catherine Murray, Torey's special education teacher, described him as very quiet, cooperative, respectful, and a model student. T pg. 2923 - pg. 2929.

Rusty Adamson, one of Torey's teachers, who also worked with at-risk kids, testified that Torey was kind, well-mannered, laid back and respectful, and did not show any signs of being an at-risk kid. T pg. 2930, ln. 21 - pg. 2936, ln. 4. Ms. Adamson also testified that Torey was very shy and not a leader. T pg. 2934, ln. 15-19.

At sentencing, the court acknowledged that Torey's brain was not yet fully developed due to his age and that his mental processing skills were below normal. T (Sentencing) pg. 55, ln. 20-25. The Court did not make further mention of those facts. Instead, the Court stated that teenaged killers should perhaps receive no mercy. T (Sentencing) pg. 56, ln. 24-25. It then imposed the fixed life sentence because of the aggravating nature of the offense stating there could be no mercy notwithstanding Torey's age. T (Sentencing) pg. 59, ln. 12-23.

At the Rule 35 motion, counsel reminded the Court about the testimony of Dr. Corgiat from the sentencing hearing. T pg. 3081, ln. 10-23. Further, additional neuropsychological testing showed Torey has frontal lobe deficits. T pg. 3082, ln. 1-12. Trial counsel also pointed to statistics showing juveniles that earn release from prison after twenty-five years of incarceration are statistically unlikely to commit a new crime of any type. Consequently, Torey was capable of rehabilitation as his brain had not yet fully matured. T pg. 3087, ln. 1-5.

The Court denied the Rule 35 motion. In doing so, it noted that it was not unmindful of Torey's youth or Dr. Corgiat's testimony, but stated that due to the nature of the conduct, Torey should be punished as severely as the law allows and that there is no justification or excuse that condones that type of conduct. T pg. 3110, ln. 19- pg. 3111, ln. 4.

On appeal, Torey argued that the fixed life sentence violated the prohibition against cruel and unusual punishments found in Article 1, § 6 of the Idaho Constitution. On September 13, 2011, the Court found that co-defendant Brian Draper's fixed-life sentence did not violate the state or federal constitutions. *State v. Draper*, 151 Idaho 576, 599, 261 P.3d 853, 876 (2011). On February 8, 2012, the Idaho Supreme Court affirmed the sentence imposed on Torey holding that it did not violate the state constitution. *State v. Adamcik*, 154 Idaho at 485, 272 P.3d at 457. The

remittitur in Torey's case was issued on February 16, 2012. On June 11, 2011, the United States Supreme Court decided *Miller v. Alabama*,___U.S.___, 132 S.Ct. 2455 (2012).

At the evidentiary hearing on the post-conviction petition, Torey presented the testimony of his character witnesses and his own testimony of the events. See *infra* at pages 12-14. Torey also apologized to the Stoddard family:

Q. Is there anything else you would like to say?

A. Yeah. I just want to apologize for everything that has happened to Cassie's family. And to everybody that's been involved indirectly or not. This has been something that I never wanted to have happen. Nothing good has come from this. I just wish that it would have been avoided in any way possible.

PCT pg. 445, ln. 16-22.

2. The sentencing court did not comply with procedure required by *Miller/Montgomery.*

The Supreme Court wrote in *Montgomery* that:

> *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Ibid*. The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ibid. Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Id.*, at —— (slip op., at 9). *Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " Id.*, at —— (slip op., at 17) (*quoting Roper*, 543 U.S., at 573). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at —— (slip op., at 17) (*quoting Roper, supra*, at 573), it rendered life without parole an unconstitutional penalty

> for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry*, 492 U.S., at 330.

Montgomery v. Louisiana, — U.S. —, 136 S. Ct. 718, 734 (2016) (internal quotation marks and citations omitted). The Court explained further:

> *Miller did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility*. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.

Id. (emphasis added); see also *id*. at 726 ("Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption.") (internal quotation marks omitted); *id*. at 736 ("*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.").

Miller is a sea change in Eighth Amendment law, especially as it was interpreted in Idaho. *Miller* overrules this Court's prior opinions in *State v. Windom*, 150 Idaho 873, 253 P.3d 310 (2011), *State v. Draper*, 151 Idaho 576, 599, 261 P.3d 853, 876 (2011), and *State v. Adamcik*, 152 Idaho 445, 487, 272 P.3d 417, 459 (2012) (all holding that the gravity of the crime itself, without consideration of whether the offense was the result of the transient nature of youth or whether it showed the juvenile was irreparably corrupt, could support the imposition of a fixed life sentence on a juvenile.) *Miller* placed a new ceiling on punishment for the vast majority of

juveniles. Absent a finding that a crime reflects a juvenile's "irreparable corruption," life without parole may not be imposed.

In Torey's criminal case all the sentencing court did was to mention Torey's youth. It did not consider the "distinctive attributes of youth," as required by *Miller*. Instead, the sentence was imposed because the Court thought that the crime of conviction required it, irrespective of Torey's individual characteristics. Judge McDermott said:

> This is – this is awful, awful situation, kids killing another kid. And it just – you were all 16 when this happened and you two are 17 and Cassie, of course, is dead. *Teenaged killers perhaps should receive no mercy. I don't know*.
>
> . . . .
>
> This is just awful. You two have – you've ruined your lives. You've taken Cassie's life from her family, and you are so young. That's what makes it so awful for me, to sentence two kids. That's what you are, you're kids. And – *but you've committed – both committed the ultimate offense in our society.*
>
> . . . .
>
> You both have been convicted of murder in the first degree, and it's clear to the Court and the evidence at the trials, Cassie was savagely stabbed many times. The horror, fright and pain she surely encountered before death was certainly immense. You disguised yourselves with masks in the darkness, which made it more frightening for her. You both were excited after the murder about the killing, and you both attempted to destroy the evidence initially. The killing was a barbarous cold-blooded horrific act.
>
> You both unequivocally changed the lives of the Stoddart family and your own families. If Cassie were able to speak today, I doubt very much that she would forgive either of you. You both have forfeited your privilege to live in a free society, and based upon all the evidence and all that I'll read, I'm convinced beyond a reasonable doubt that if you two, or either one of you, were released that you would kill again. I'm convinced of that beyond a reasonable doubt. I'm going to remand you both to the custody of the Bannock County Sheriff to be delivered by him to the authorities to the Idaho State Correctional Institute where you will each serve a life sentence that is fixed without the possibility of parole.

> I'm not unmindful of how young you fellows are, *but you commit a crime of this nature, and it's got to be – it's got to be known, not only by those who commit it, but to others in the community that the punishment will not – will not be so merciful. There's no mercy.* Guys, I'm sorry. Guys, like I said, you guys are kids, but I just feel like this is a just sentence given all the evidence that I had to look at. So I – I'm sorry. I hope you two can have some sort of life in the state correctional facility. At least it's more than Cassie has.

T (8/24/2007) pg. 56, ln. 21 - pg. 59, ln. 23 (emphasis added).

Judge McDermott's reasons for the sentence were further illustrated by his comments at Torey's Rule 35 motion.

> I took everything into consideration at sentencing. And I'm not unmindful of how young Torey is – and he was at the time he killed Cassie. I'm not unmindful of Dr. Corgait's testimony and all the other testimony we have had at the sentencing.
>
> *In our society, at least in my opinion, when someone engages in this type of conduct, they should be punished as severe as the law allows. There is no justification, no excuse that condones this kind of conduct.*
>
> Mr. Adamcik wore a mask, Cassie was alone in the dark, and when the knives were going in and out of her body, it just had to be horrible for her. *And I believe the sentence this Court imposed was a righteous sentence given the conduct*, and I don't think Mr. Adamcik should be ever released from prison. I'm going to deny your motion.

T pg. 3110, ln. 19 - pg. 311, ln. 12 (emphasis added).

The sentencing court did what the *Miller* Court said no one can: Impose a juvenile fixed life sentence based solely upon the facts of the offense. He simply did not undertake an analysis of "[e]verything [the United States Supreme Court] said in *Roper* and *Graham*" about youth, as required by *Miller*. *Id.*, 567 U.S. at ——, 132 S.Ct. at 2467.

The post-conviction court found that the sentencing court did consider Torey's youth, but none of the sentencing comments relied upon by the post-conviction court show the sentencing court gave any weight to the evidence regarding consideration to Torey's capacity to change.

First, while the court mentions Torey's immature brain development, it does not consider it as mitigation. *Miller*, however, requires the sentencer to recognize that fixed life sentences should be very rare because "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Montgomery*, 136 S. Ct., at 733 (internal quotation marks omitted). Then the sentencing court says that both Torey and Brian stabbed Cassie and that Brian showed excitement and pleasure at the murder. Those comments, however, do not show Torey is irredeemable. Indeed, the fact that the videotape shows Brian is excited and pleased about the murder while Torey is scared and upset shows that Torey is redeemable even if Brian is not. The fact that the boys "methodically and intelligently planned" the murder does not mean that Torey is irreparably corrupt. It is clear from the video that Brian is the leader of the two and *Miller* requires the courts to give mitigating weight to the fact that "children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id* (internal quotations omitted).

In addition, the sentencing court did not consider that Torey's character is not as well formed as an adult: that his traits are less fixed or that his actions less likely to be evidence of irretrievable depravity as *Miller* requires. *Id.* Even if it could be said that the sentencing court took "into account how children are different" it failed to consider "how those differences counsel against irrevocably sentencing them to a lifetime in prison," as required by *Miller*. *Montgomery*, 136 S.Ct., at 734.

It is clear that merely mentioning youth without giving it full mitigating effect is insufficient under *Miller*. The United States Supreme Court has vacated juvenile fixed life sentences and remanded for rehearing even in cases where the defendant's youth was considered at the original sentencing. *Montgomery*, 136 S. Ct. at 733–34 (stating that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole"). In *Mauricio v. California*, 133 S.Ct. 524 (2012), the Supreme Court granted certiorari, vacated the judgment and remanded (GVR) the decision of the state court. On remand following the Supreme Court's GVR decision, the California Attorney General acknowledged at oral argument that remand for a new sentencing hearing in light of the United States Supreme Court's opinion in *Miller* was appropriate, and the California Court of Appeal followed her lead, stating:

> *Miller* changed the focus of the sentencing decision; it "requires" trial courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller, supra*, 132 S. Ct 2455, 2469, fn. omitted.) The trial court here certainly was aware that it had discretion to impose a term of 25 years to life, rather than LWOP. But that discretion was exercised through the LWOP presumptive sentence filter of *People v. Ybarra, supra*, 166 Cal.App.4th 1069, 1089 and *People v. Guinn*, supra, 28 Cal.App.4th 1130, 1141-1142. We are in no position to say how *Miller* might have affected the trial court's decision; we remand in light of the Attorney General's acknowledgment that giving the trial court the opportunity in the first instance to sentence Mauricio in light of *Miller* is a reasonable path to follow. We express no opinion on whether *Miller* compels a particular sentence in this case.

People v. Mauricio, 2013 Cal. App. Unpub. LEXIS 3847 at *29-30. In *Adams v. Alabama*, — U.S. —, 136 S. Ct. 1796 (2016), Justice Sotomayor correctly noted that remand for reconsideration in light of *Montgomery* was necessary because the sentence was "a product of that pre-*Miller* era" and after *Miller*, "*youth is the dispositive consideration for 'all but the rarest of children.*'" 136 S.Ct. at 1800, (J. Sotomayor, concurring). While two justices dissented, it is

clear that the majority of the Court was concerned not with whether the fixed-life sentence was mandatory, but whether the sentencing court had fully considered the juvenile defendants' youth and attendant characteristics before imposing the harshest of all sentences available for children. *See also Tatum v. Arizona*, 2016 U.S. LEXIS 6492, *3, 26 (U.S. Oct. 31, 2016).

State courts are also remanding for new sentencing hearings even when youth was considered at the original sentencing. *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (holding that all juveniles serving life-without-parole sentences—whether mandatory or discretionary—were entitled to resentencing after *Miller*; noting that although some of the sentencing hearings under review "touch[ed] on the issues of youth," "none of them approach the sort of hearing envisioned by *Miller*"); *State v. Riley*, 110 A.3d 1205, 1217-18 (Conn. 2015) (remanding for resentencing because "the record does not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features"); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (remanding for resentencing even though "the trial court appears generally to have considered Appellant's age and perhaps some of its associated characteristics[.]"); *Luna v. State*, 387 P.3d 956, 963 (OK CR 2016) (Finding "*Miller* requires a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."); *State v. Simmons*, 99 So.3d 28, 28 (La. 2012) (per curiam) (internal quotation marks omitted) (remanding to the district court for reconsideration of the defendant's sentence of life imprisonment at hard labor without possibility of parole imposed in 1995 in light of *Miller* and requiring the court to make findings on the record); and *State v. Fletcher*, 112 So.3d 1031, 1036 (La. Ct. App. 2013) (finding that

while sentencing court considered some of the factors enumerated in *Miller*, the court's consideration lacked depth).

In *State v. Null*, 836 N.W.2d. 41, 75 (Iowa 2013), the Court wrote, "it is important to point out that the district court did not have the benefit of *Miller* or this opinion during sentencing. . . Now that we and the Supreme Court have provided clearer guidance on the considerations to be given in sentencing, the appropriate course is to vacate the sentence imposed on Null and remand the case to the district court."); *State v. Zuber*, — A.3d. —, 2017 WL 105004, at *17 (N.J. Jan. 11, 2017) (remanding *de facto* JLWOP sentence in light of *Miller*). *People v. Nieto*, 52 N.E.3d 442 (Ill. App. 2016) (same).

The sentencing hearing here did not comply with the procedure set out in *Miller*/*Montgomery*. The sentence should be vacated and the matter remanded for a new sentencing hearing.

3. Torey presented a prima facie case that the sentence violates the Eighth Amendment because he is not one of those rare juveniles who is irreparably corrupt.

Even if the sentencing court had followed the required procedure under *Miller*, the sentence violates Torey's substantive right to a sentence with a opportunity for parole because there is no evidence to support a finding that he is irreparably corrupt. As the Supreme Court noted: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." (Internal quotation marks omitted.) *Montgomery*, 136 S.Ct. at 734 (*quoting Miller*, 132 S.Ct. at 2469, *quoting Roper*, 543 U.S. at 573); *see also Montgomery*, 136 S.Ct. at 734 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.) (observing that "even

when the procedures that *Miller* demands are provided the constitutional requirement is not necessarily satisfied"). "Consequently, *Montgomery* indicates that not even an exercise of discretion will preclude a *Miller* challenge." *People v. Nieto*, 52 N.E.3d at 453.

Here, the post-conviction court found that the sentencing court made a finding of irreparable corruption, even though it did not use those words.

> However, the sentencing judge, who is in the best position to weigh the evidence, observe the witnesses and determine the credibility and what weight to attach to it, made the determination that he was "convinced beyond a reasonable doubt that if you two, or either one of you, were released that you will kill again." Without using the phrase coined by the Supreme Court in *Montgomery* and its forerunners of "irreparably corrupt", this finding by Judge McDermott can only be construed as being the equivalent of "irreparably corrupt."

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However, a finding of irreparable corruption only *permits* the sentencing court to impose a JLWOP sentence and then only *after* it has considered and given effect to all the mitigating factors of youth. It does not require such a sentence. And as demonstrated above, the sentencing court made that statement without first giving full mitigating effect to the *Miller* factors, so it is not the finding of irreparable corruption contemplated by the *Miller* Court. More important, there is no evidence in the record to support the sentencing judge's determination that Torey would "beyond a reasonable doubt" kill again. The state presented absolutely no evidence that Torey could not be rehabilitated. In particular, there was no expert testimony to contradict the defense experts who testified that Torey can be rehabilitated. He comes from an intact home and has a good support system. He had no prior criminal history and no prior history of violence. The psychological testing done for sentencing showed that "there was no evidence of sociopathy in his testing at all." T pg. 2913, ln. 18-19. Dr. Corgaint's opinion was that "Torey is immature

for his age. He demonstrates a pattern of neurocognitive defects . . . that indicates less than age appropriate things like judgment, impulse control, complex problem solving, et cetera." T pg. 2904, ln. 20 - pg. 2905, ln. 1. The doctor further stated:

> His tests, without a doubt, show that he deviates from normal function. What we would expect sixteen, seventeen-year-olds boys to do is evidenced in all his test data. He moves in a downward direction, so he is less than age appropriate.

T pg. 2908, ln. 5-10. The doctor also said, "So based on all that, it is my opinion that Torey is intellectually less mature than we would expect a seventeen-year-old male to be with normal brain development." T pg. 2910, ln. 3-6. Still, he believed Torey to be a good candidate for rehabilitation.

> We have a seventeen year old who has neurological development that is not appropriate for his age. So that means that if we put him in adult situations, the probability that he would be able to function efficiently is poor.
> But, on the other hand, we have that open door. We have a brain that isn't developed, and we have a brain that actually is at – developmental stage – younger than seventeen. So his amenability to education and training is better than it would be if he were at age seventeen level or if he was, obviously, older.

Tr pg. 2910, ln. 15 - pg. 2911, ln. 5.

In addition, there was the evidence of good character presented by family, friends, and teachers at the sentencing hearing as well as the additional character witnesses presented at the evidentiary hearing. Finally, Torey described his participation in the events and apologized to the Stoddard family for Cassie's death. The sentencing court's conclusion that Torey will kill again is simply not supported by any evidence in the record, let alone the proof beyond a reasonable doubt the court referenced. The evidence is so lacking that one can only conclude that the sentencing court was intentionally engaging in hyperbole and did not mean the statement to be taken literally, especially as there was no legal reason at the time of sentencing to made such a

finding.

In light of all the above, this Court should reverse the summary dismissal of Torey's Eighth Amendment Claim. It should remand with instructions to vacate the sentence and set the matter for a resentencing. At a minimum it should vacate the summary dismissal and remand for an evidentiary hearing where Torey can present further evidence showing the fixed-life sentence violates the Eighth Amendment, such as evidence of good conduct while in prison, increased maturity, and positive steps toward rehabilitation. Taking the evidence before the Court in the light most favorable to him, as the Court must at this stage, Torey has made a *prima facie* showing that he is not eligible for a fixed life sentence because he can be rehabilitated and is not irreparably corrupt. *See State v. Valencia*, 386 P.3d 392, 396 (Az. 2016) ("Healer and Valencia are entitled to evidentiary hearings on their Rule 32.1(g) petitions because they have made colorable claims for relief based on *Miller*. [Citations omitted.] At these hearings, they will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity.") Summary disposition of this aspect of the *Miller* claim was erroneous and should be vacated.

V. CONCLUSION

The post-conviction court erred in dismissing parts of and then denying Torey's claim of ineffective assistance of counsel. The petition should be granted, the convictions vacated, and the matter remanded for a new trial. Alternatively, a new sentencing should be ordered or the *Miller* claim should be set for an evidentiary hearing.

Respectfully submitted this 7th day of March, 2017.

/s/ Dennis Benjamin
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 7th day of March, 2017.

/s/Dennis Benjamin
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