UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs, All
Idaho Supreme Court Records & Briefs

7-19-2017

Adamcik v. State Appellant's Reply Brief Dckt. 44358

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Adamcik v. State Appellant's Reply Brief Dckt. 44358" (2017). *Idaho Supreme Court Records & Briefs, All*. 6654.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6654

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

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

REPLY 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

Dennis Benjamin, ISB No. 4199
NEVIN, BENJAMIN, McKAY
& BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

ATTORNEYS FOR APPELLANT

Office of the Attorney General
John C. McKinney, Deputy
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4534

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

I. Table of Authorities ii

II. Argument in Reply 1

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 Outside the Authority of the Warrant 1

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 4

C. The District Court Erred in Finding That Torey Was Not Prejudiced by the Cumulative Effect of the Defense Team's Deficient Performance 7

D. The Court Erred in Summarily Dismissing the Eighth Amendment Claim 8

1. *Johnson* is distinguishable because the sentencer here did not comply with the procedural requirements of *Miller*. 8

2. *Johnson* is also distinguishable because Torey has made a prima facie claim of a substantive Eighth Amendment violation in his pleadings. 13

III. Conclusion 18

I. TABLE OF AUTHORITIES

FEDERAL CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 15, 17

Groh v. Ramirez, 540 U.S. 551 (2004) 1

Miller v. Alabama, —U.S. —, 132 S. Ct. 2455 (2012) .... passim

Montgomery v. Louisiana, —U.S. —, 136 S. Ct. 718 (2016) .... passim

Strickland v. Washington, 466 U.S. 688 (1984) 2, 4, 5, 7

United States v. 500 Delaware St., 949 F. Supp. 166 (W.D.N.Y. 1996) 2

STATE CASES

Johnson v. State, —Idaho —, —P.3d —, 2017 Ida. LEXIS 131, 2017 WL. 1967808
(May 12, 2017) 8, 11, 12, 13, 14

Pizzuto v. State, 146 Idaho 720, 202 P.3d 642 (2008) 17

State v. Adamcik, 152 Idaho 445, 272 P.3d 417 (2012), *citing, State v. Windom*, 150 Idaho
873, 253 P.3d 310 (2011) 15

State v. Bussard, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988) 1

State v. Fisher, —Idaho —, —P.3d —, 2017 Ida. LEXIS 232 (July 17, 2017) 12

State v. Holman, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985) 1

State v. Plowman, 602 P.2d 286 (Ore. App. 1979) 1

State v. Valencia, 386 P.3d 392 (Az. 2016) 18

State v. Weimer, 133 Idaho 442, 988 P.2d 216 (Ct. App. 1999) 1

Wheeler v. State, —Idaho —, —P.3d —., 2017 Ida. LEXIS 188, 2017 WL. 2666138 (June 21,
2017) 14, 17

Windom v. State, —Idaho —, —P.3d —, 2017 Ida. LEXIS 208 (June 10, 2017*)* 11, 12, 13

II. ARGUMENT IN REPLY

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 Outside the Authority of the Warrant.*

The state first incorporates "the district court's analysis and decision" on this issue. State's Brief, pg. 20. Torey has already set forth why that decision is in error in the Opening Brief and no reply is required.

The state next argues that the search warrant "shows an obvious scrivener's error." *Id.* But, even if true, that observation is meaningless because the Fourth Amendment requires that a search warrant specifically list the items which may be seized: "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*." (Capitalization in original; emphasis added.) "The fact that the application adequately described the 'things to be seized' does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents" unless those documents are properly incorporated by the warrant itself. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). *See, State v. Bussard*, 114 Idaho 781, 787, 760 P.2d 1197, 1203 (Ct. App. 1988) ("when a search exceeds the scope permitted by a valid (or partially valid) search warrant . . . the property unlawfully seized will be suppressed"); *State v. Weimer*, 133 Idaho 442, 448-49, 988 P.2d 216, 222-23 (Ct. App. 1999) (where Court looks at words of warrant to determine whether it authorized the seizure of items taken during a search); *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). *See also*, *State v. Plowman*, 602 P.2d 286, 288 (Ore. App. 1979) (rejecting

invitation to "carve a 'scrivener's omission' exception" into statutory particularity requirement). The state's reliance on *United States v. 500 Delaware St.*, 949 F. Supp. 166, 171 (W.D.N.Y. 1996), is misplaced. That case is inconsistent with Supreme Court and Idaho case law.

In light of the above, trial counsel rendered deficient performance in failing to move to suppress the evidence under *Strickland v. Washington*, 466 U.S. 688 (1984).[1] As explained below, Torey suffered *Strickland* prejudice.

With regard to prejudice, the state argues that Torey and his character witnesses "would have been impeached . . . with the many comments by [him] that were recorded on the Black Rock Canyon videotape." State's Brief, pg. 23. Of course, the state had an opportunity to do so at the post-conviction evidentiary hearing but failed to do so. So its bare assertion of what "would have been" rings hollow in light of what the record actually shows. If it could have impeached the character witnesses or Torey it should have done so. The fact it didn't even try shows it couldn't. Further, the Black Rock video was admitted at the trial. Thus, the character evidence about Torey's kind, gentle and generous behavior during the rest of his life could only have helped the defense case by diminishing the effect of the video. Indeed, that was the purpose of the character witnesses: to inform the jury that there was much more to Torey Adamcik than what was portrayed in the video. As defense counsel explained, "I think there was an overwhelming amount of evidence that was all negative in nature and we wanted to take some

---

[1] While the post-conviction court stated that it found the evidence relating to "violence and slasher/horror movies" to be more prejudicial than the explicit images, State's Brief, pg. 16 n. 5, that was not the concern of the defense team at the trial. The prosecuting attorney informed defense counsel that it would introduce evidence of the "kiddie porn" if the defense put on its planned character witnesses. PCT pg. 96, ln. 4 - pg. 97, ln. 1. No mention was made of the other items. In any case, the motion to suppress would have applied to all the evidence found on the computer.

steps to counteract that. We wanted to present and show that he definitely had good qualities." PCT pg. 94, ln. 7-12.

In addition to decreasing the prejudicial effect of the video – the most compelling piece of state's evidence – there is a reasonable probability that the jury would have then believed Torey's testimony that he did not stab Cassie, that he left the house, and Brian Draper then completed the murder. The jury would have believed Torey's testimony because it was corroborated by the testimony of Dr. Leis and Mr. Reit that only one knife was used. And, of course, Brian could have used both of the knives as Torey left the Sloan knife behind. PCP T pg. 348, ln. 2-3.[2] Torey's testimony that he didn't stab Cassie was confirmed by Brian Draper's videotaped confession that he was the murderer: "*I* stabbed her in the throat, and I saw her lifeless body. It just disappeared. Dude, *I just killed Cassie*!" State's Trial Exhibit 89 (transcript) (emphasis added). Brian's confession to being the killer is undoubtedly true. All the physical evidence is consistent with Brian, not Torey, doing the stabbing. The evidence regarding the knives, the DNA evidence, and the blood evidence all was consistent with the theory.[3]

---

[2] The state admitted during closing argument that it could not put a particular knife into Torey's hand: "Which knife did Brian Draper use? Which knife did Torey Adamcik use? We don't know[.]" T pg. 2811, ln. 20-24. Brian, of course, could have used both knives.

[3] Torey's mask did not have any of Cassie's DNA on it, while Brian's mask had Cassie's blood on it. T pg. 1668, ln. 4 - pg. 1669, ln. 1. Cassie's blood was also on Brian's shirt. T pg. 1167, ln. 14-20. A soccer glove also had Cassie's blood on it. Brian played soccer at the high school. The DNA found in the glove was not Torey's but could be Brian's. 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.

The state's assertion that Torey's testimony "does nothing to show that . . . the result of trial would have been different," State's Brief, pg. 25, is mistaken. First, it is legally mistaken because Torey only needs to show a reasonable probability of a different result, not that he would have been acquitted. *Strickland*, 466 U.S., at 694. Second, it is factually erroneous because the video, even taken literally, does not show that Torey committed the murder; it shows a conspiracy to do so and some attempts to cover up the murder that Brian expressly and repeatedly confessed to committing. Third, the jury did not hear evidence of Torey's good character and it did not hear Torey's testimony that he ran out of the Stoddard house when he realized what Brian had done. If the jury had heard all the defense evidence, there is a reasonable probability it would have only convicted Torey on the conspiracy charge, at worst.[4]

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 state argues that part of the prejudice caused by defense counsel's deficient performance is not *Strickland* prejudice because "the prosecutor's and trial judge's comments to Adamcik's trial team during the failed attempt to present Mr. Reit as an expert witness . . . bear little, if any, causal relationship to the actual deficient performance of his counsel alleged in the post-conviction petition and found by the district court – the failure to obtain the two knives for testing." State's Brief, pg. 27-28. That argument is dead wrong. The *only* reason the trial court and prosecutor made those comments was because the defense failed to obtain the knives for

[4] Recall that the court's instructions required the jury to find "the defendant Torey Adamcik killed Cassie Stoddard." CR V, pg. 935. No accomplice liability instruction was given. Torey would have been acquitted of the murder charge even if the jury found he was an accomplice.

testing. In fact, there is a "but for" relationship between the deficient performance and that aspect of the *Strickland* prejudice. If the two knives had been tested, the evidence would have been admissible and admitted without objection. The jury would never have heard the judge berate and hector the defense team for its incompetence and it never would have heard the prosecutor angrily call the defense team liars. Thus, the prejudice was proximately caused by the deficiency.

The court's instruction that it would not intend to "indicate any opinion concerning the evidence" in the case, R Vol. V, pg. 1087, did not cure the prejudice. First, it did not even apply to Mr. Reit's proffered testimony, which was not admitted. Further, it still permitted the jury to consider the judge's comments about the competency of the defense attorneys. And while the jury was instructed that in determining the facts it may consider only the evidence admitted at trial, *id.,* there is no doubt that the jury's evaluation of the evidence presented was colored by its conclusion about which team of lawyers was competent and honest. When the jury drew conclusions about contested facts, it was more likely to conclude the state's evidence was reliable and trustworthy because the members of the defense team were bumblers and liars. Thus, the jury would have followed the court's instruction that it base its decision of the evidence while at the same time be influenced by the behavior of the Judge and prosecutors. The prejudice results because the jury was less likely to believe the defense evidence than the state's evidence. The prejudicial comments were not evidence but they undermined the jury's confidence in the defense team and influenced the jury to believe the state's evidence rather than the defense evidence.

Next the state argues that Mr. Reit's testimony would not have corroborated Dr. Leis's testimony that only one knife was used. In doing so, the state comes up with a new argument:

that Dr. Leis's testimony was self-contradictory, *i.e.*, that his testimony that the knife that caused wound #1 went into Cassie's chest to the hilt and showed no sign of serrations contradicted his later testimony that wound #1 was caused by a serrated knife. State's Brief, pg. 33. This argument could not have rebutted Mr. Reit's testimony because it was never made at the trial. The state, in closing argument, did not talk about Dr. Leis's testimony. Instead, it admitted it could not prove which knife was used by which defendant, but went on to suggest that Torey likely used the serrated blade. It noted that Torey listed a "survival knife" in his notebook (State's Exhibit 84), while the sheath for the Sloan knife was found at Brian's home. T Vol 3, pg. 2812, ln. 12 - pg. 2813, ln. 8.[5] In rebuttal argument, the state conceded that "Dr. Leis is a credible witness." T Vol 3, pg. 2860, ln. 1. It then repeated Dr. Garrison's observation that there was a hilt mark on wound #1 but no serrations, T Vol 3, pg. 2860, ln. 15-10, without discussing Dr. Leis's explanation for the absence of serrations on wound #1.[6] In light of that, the state's new theory regarding wound #1 would not have diminished the impact of Mr. Reit's testimony at the criminal trial because the state never argued it to the jury.[7] Consequently, Mr. Reit's testimony, had it been presented, would have had its desired effect: to corroborate Dr. Leis's

---

[5] To the contrary, Joe Locero testified that Brian Draper possessed and claimed ownership of the Rambo knife, saying that "I paid for that knife – I get to keep it." T pg. 2022, ln. 7 - pg. 2023, ln. 18; T pg. 2026, ln. 14-21.

[6] Wound #15 was also caused by a smooth-edged blade, like the Sloan knife, but was not a potentially fatal wound. T pg. 2220, ln. 6 - pg. 2222, ln. 21. As instructed, the jury could not have convicted Torey of killing Cassie Stoddard even if the jury found he inflicted this wound.

[7] The state summarized the evidence about wound #1 thus: "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.

testimony and tip the balance in his favor in the battle of the experts.

Second, the state's theory is speculative and was untested at either the trial or at the evidentiary hearing. It is telling that the state did not recall Dr. Garrison at the trial in order to rebut Dr. Leis's testimony.

Finally, the state's argument does not make sense. Dr. Leis testified the absence of the serration marks is explained by the presence of such marks on Cassie's hand, i.e., that the "knife went through her hand and into her chest," leaving serration marks on the hand. T 2651, 4-7. The fact that there is a hilt mark on one side of the wound does not mean both sides of the blade completely entered the chest, as assumed by the state. The other hilt mark is on the hand, instead of the chest. Tr. Vol. III, pg. 2613, ln.2 - pg. 2615, ln. 10 (Referring to photographs #12-13 in Defense Trial Exhibit DD).

Torey was prejudiced in two ways by counsel's failure to obtain the knives for testing. First, the failure undermined the credibility of the defense team in the eyes of the jury and colored its evaluation of the defense evidence. Second, it resulted in important defense evidence being withheld from the jury. Torey has demonstrated both deficient performance and prejudice under *Strickland v. Washington*, *supra*. The post-conviction court erred in denying this claim.

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

The state asserts that Torey has not shown the cumulative effect of the deficient performance was prejudicial under *Strickland*. It does not make any further argument in support of that assertion and therefore no reply is needed.

D. ***The Court Erred in Summarily Dismissing the Eighth Amendment Claim.***

The state devotes a scant three paragraphs to this issue, the first merely incorporating "the district court's decisions that are relevant on this issue." State's Brief, pg. 36. Torey, however, has already explained in detail why the district court's decisions were incorrect. Opening Brief pg. 27-41. Mere incorparation of the district court's decisions does not address Torey's specific arguments and no reply is needed.

Next, the state claims that the district court's decisions are consistent with *Johnson v. State,* — Idaho —, — P.3d —, 2017 Ida. LEXIS 131, 2017 WL 1967808 (May 12, 2017). *Johnson* "explained that '*Miller* and *Montgomery* [. . .] require that the sentencing court weighs the juvenile offender's youth and characteristics against the nature of the crime to determine whether the crime was one that 'reflected the transient immaturity' of youth." State's Brief, pg. 37. The state, however, ignores the fact that – unlike in *Johnson* – the sentencing court didn't do what *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718 (2016), require.

1. *Johnson* is distinguishable because the sentencer here did not comply with the procedural requirements of *Miller*.

As set forth in the Opening Brief, the sentencing court did not consider the "distinctive attributes of youth," as required by *Miller*. To the contrary, it frankly admitted it was not going to impose a term sentence, even though it recognized Torey was young, because of the nature of the offense. T (8/24/2007) pg. 59, ln 17 ("There's no mercy."). And, while that was permissible under Idaho law before *Miller*, that is now prohibited by the Eighth Amendment.

Miller "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." *Montgomery v. Louisiana*, 136 S. Ct., at 734 quoting *Miller,* 132 S. Ct., at 2465. While the sentencer generally acknowledged Torey's youth, it failed to properly consider the constitutional implications of that fact. Under *Miller*, the sentencing court must start from the premise that "children are constitutionally different from adults for purposes of sentencing." 132 S. Ct., at 2464. The sentencing court did not start from this premise. To the contrary, it questioned the very premise of *Miller* when it mused that, "Teenaged killers perhaps should receive no mercy. I don't know." T (8/24/2007) pg. 56, ln. 24-25.

Under *Miller*, the sentencing court must both recognize and give mitigating effect to these differences. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. *Miller*, 567 U.S., at 471. Here, the sentencing court did not consider Torey's diminished culpability and greater prospects for reform. It did not consider Torey's "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." It did not consider that Torey was "more vulnerable to negative influences and outside pressures," including from peers (in this case Brian Draper, the ringleader). The sentencing court did not consider that Torey's youth caused him to "lack the ability to extricate [himself] from horrific, crime-producing settings." And the sentencing court did not consider that Torey's character is not as "well formed" as an adult's; thus his traits are "less fixed" and his actions less likely to be

"evidence of irretrievable depravity." All these considerations are now required by *Miller.* 132 S. Ct., at 2464.

While *Miller* recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juvenile offenders, 132 S. Ct. 2455, 2465, the sentencing court did not. In particular, the sentencing court selected the JLWOP sentence in order to inflict the maximum amount of punishment, stating that "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 type of conduct . . .the sentence this Court imposed was a righteous sentence given the conduct, and I don't believe Mr. Adamcik should be ever released from prison." T Vol. VI, pg. 3110, ln. 25 - pg. 3111, ln. 11. This directly contravenes *Miller* which instructs that "the case for retribution is not as strong with a minor as with an adult," *Ibid.*

While *Miller* holds that "the deterrence rationale likewise does not suffice, since "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment" 132 S. Ct., at 2465, the sentencing court said the fixed life sentence had to be imposed for deterrence. It said when "you commit a crime of this nature . . . 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." T (8/24/2007) pg. 59, ln. 13-17. Again, the sentencing court did the opposite of what *Miller* requires.

Further, the sentencing court said it was basing the sentence in part on Torey's perceived future dangerous. This is contrary to *Miller*'s instruction that "the need for incapacitation is

lessened . . . because ordinary adolescent development diminishes the likelihood that a juvenile offender "forever will be a danger to society." 132 S. Ct., at 2465, *quoting Graham*, 560 U.S., at 72. (As previously argued, there is insufficient evidence in the record to support the finding that Torey would be a future danger. To the contrary, all the psychological evidence presented showed he had great potential for rehabilitation. Tr pg. 2910, ln. 15 - pg. 2911, ln. 5.)

In sum, "*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." *Montgomery v. Louisiana*, 136 S. Ct., at 733 (internal quotation marks omitted; emphasis added). Here, however, the sentencing court acknowledged Torey's youth but did not take into account how Torey was different from an adult offender because of his youth. Nor did it consider how Torey's youth counseled against imposing the fixed life sentence. Thus, unlike *Johnson,* the substantive requirements of *Miller/Montgomery* that the sentencing court consider the distinctive attributes of youth and how those "differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller v. Alabama,* 567 U.S. at 480.

Since the state's brief was filed, this Court has issued *Windom v. State*, — Idaho —, — P.3d —, 2017 Ida. LEXIS 208 (June 10, 2017). The Court wrote that "[a]lthough the district court stated that it considered Windom's 'relative youth' as a mitigating factor, '*Miller* . . . 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.'" *Windom v. State*, 2017 Ida. LEXIS 208, *18-19;

quoting Miller, 136 S.Ct. at 734.[8] The Court distinguished *Windom* from *Johnson,* noting that "[i]n *Johnson*, we upheld a juvenile's pre-*Miller* sentence of life without parole for the murder of her parents because evidence later required by *Miller* had been admitted during the sentencing hearing *and considered by the trial court* before it imposed a sentence of fixed life." *Windom v. State*, 2017 Ida. LEXIS 208, *21 (emphasis added). In *Johnson*, "the trial court spent considerable time discussing the reasons why it was imposing life without parole and explicitly noted that it had heard and considered the evidence presented on Johnson's youth. The trial court's sentencing colloquy was approximately forty-four pages and makes specific reference to having considered the testimony about Johnson's youth." *Johnson v. State*, — Idaho — , — P.3d —, 2017 Ida. LEXIS 131, 2017 WL 1967808 (May 12, 2017). Here, as shown above, the sentencing court relied upon reasons – retribution, deterrence and future dangerousness – that the *Miller* court specifically says should not be given great weight when imposing a fixed life sentence upon a juvenile. Thus, the sentencing court did not consider the distinctive qualities of youth as required by *Miller*. Moreover, unlike the 44 page sentencing colloquy in *Johnson*, here the sentencing court took barely seven pages to sentence *both* Torey and Brian Draper. And, after noting "the frontal lobe of [Torey's] brain not being fully developed due to [his] age," the

---

[8] Thus, when the Court said in *State v. Fisher*, — Idaho —, — P.3d —, 2017 Ida. LEXIS 232, *12 (July 17, 2017) that "[t]he considerations of societal retribution and general deterrence are not decided on the basis of the unique characteristics of the *offender*; rather these considerations are decided upon the characteristics of the *offense*," *Id*, *citing State v. Windom*, 150 Idaho 873, 880, 253 P.3d 310, 317 (2011), that statement is limited to cases where an adult is being sentenced. *State v. Windom* is not apposite to juvenile fixed life cases, even though Mr. Windom was a juvenile, because *Miller/Montgomery* had not been decided in 2011, and Mr. Windom did not raise an Eighth Amendment challenge to his sentence. The more recent case of *Windom v. State*, *supra*, establishes that *Miller/Montgomery* now apply to the JLWOP sentence in that case.

court only makes *Windom*-like generic comments about Torey's youth, *e.g.* "That's what you are, you're kids." T (8/24/2007) pg. 53, ln. 22 - pg. 59, ln. 24 ("you're kids" and "you guys are kids"). In that respect, this case is more like *Windom* than *Johnson* and relief should be granted.

2. *Johnson* is also distinguishable because Torey has made a prima facie claim of a substantive Eighth Amendment violation in his pleadings.

Even if the procedure outlined in *Miller* is followed, "*Miller* . . . does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Montgomery*, 136 S. Ct., at 735. Thus this Court's opinion in *Johnson* does not resolve Torey's case for another reason. *Johnson* only addresses the argument that the sentencing hearing did not conform to the procedures required by *Miller.* The Court wrote that

> Johnson argues because the district court sentenced her "without adequate consideration of mitigation arguments based on youth and without a finding that she was irreparably corrupt," her sentence violated the Eighth Amendment. As to the latter part of her argument, that the court erred because it did not specifically find that Johnson was "irreparably corrupt," that argument is without merit. *Id*. at 735 ("*Miller* did not impose a formal factfinding requirement . . . ."). *Miller* and *Montgomery*, do, however, require that the sentencing court weighs the juvenile offender's youth and characteristics against the nature of the crime to determine whether the crime was one that "reflected the transient immaturity" of youth. *Id.* The requirement to hold such a hearing "gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.*
>
> Here, the trial court held just such a hearing. . . . Although *Miller* and *Montgomery* had not been decided at the time of the sentencing hearing, and therefore the terms of "irreparably corrupt" and "transient immaturity" where not in the court's lexicon at that time, the court clearly considered Johnson's youth and all its attendant characteristics and determined, in light of the heinous nature of the crime, that Johnson, despite her youth, deserved life without parole. Accordingly, we affirm the district court's ruling that Johnson's Eighth Amendment claims under *Miller* fail.

Johnson v. State, — Idaho —, — P.3d —, 2017 Ida. LEXIS 131, *31, 2017 WL 1967808 (Idaho May 12, 2017). However, the *Miller* substantive limit on JLWOP sentences is different from the procedural requirements. "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Montgomery v. Louisiana*, 136 S. Ct. at 735. "To be sure, *Miller*'s holding has a procedural component," *id.*, but even faithful compliance with procedure would not be sufficient to resolve the question of whether Torey's substantive Eighth Amendment right against an unwarranted JLWOP sentence has been violated.

It is important to note that this case is on appeal from a summary dismissal of the Eighth Amendment claim. "On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. A claim for post-conviction relief may only be summarily dismissed if it does not present a genuine issue of material fact." *Wheeler v. State*, — Idaho —, — P.3d —. 2017 Ida. LEXIS 188, *4, 2017 WL 2666138 (June 21, 2017). As it evaluates the petitioner's claim as if true, courts must liberally construe the facts and draw reasonable inferences in favor of the petitioner. "A court is required to accept the petitioner's unrebutted allegations as true . . . ." *Wheeler*, *supra, quoting Baldwin v. State*, 145 Idaho 148, 153, 177 P.3d 362, 367 (2008). Consequently, the district court erred in not construing the evidence in the record in the light most favorable to Torey when it summarily dismissed the claim.

The fact that the court imposed a fixed life sentence after hearing *Miller*-type evidence is not evidence that Torey is irreparably corrupt. Prior to *Miller/Montgomery*, an Idaho Court could sentence a juvenile to fixed life based solely upon the nature of the offense, irrespective of whether the juvenile could be rehabilitated. This Court said so in Torey's direct appeal: "In light of the excessively heinous nature of the crime committed here . . . [i]t is unnecessary for this Court to examine Adamcik's potential for rehabilitation." *State v. Adamcik*, 152 Idaho 445, 484, 272 P.3d 417, 456, (2012), *citing, State v. Windom*, 150 Idaho 873, 877, 253 P.3d 310, 314 (2011). No forum – not this Court, the sentencing court, or the post-conviction court – has addressed the question of whether Torey is one of those rare juveniles who is irreparably corrupt under *Miller/Montgomery*. What the sentencing court found in Torey's case does not even address – much less answer – the substantive Eighth Amendment question.

Miller/Montgomery grants Torey a right to a procedure where he can show he is not irreparably corrupt. It was error to summarily dismiss his petition without granting him a hearing to prove his substantive Eighth Amendment claim. As *Montgomery* instructs: "There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish. For example, . . . when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." 136 S. Ct., at 735. (Emphasis added, internal citations omitted) (citing to *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (requiring a procedure to determine whether a particular individual with an intellectual disability "fall[s] within the range of [intellectually

disabled] offenders about whom there is a national consensus" that execution is impermissible). Torey has never had the opportunity to make this showing.

Torey has already presented a prima facie case that he has the potential for rehabilitation based solely upon the evidence presented at the sentencing hearing and the Rule 35 motion. In short summary, Torey had only been sixteen years of age for three months at the time the instant offense was committed. He had no criminal record. Torey's friends, family and teachers all described him as shy, happy, liking children and animals, respectful and never demonstrating a tendency towards violence. T (8-27-07) pg. 27-28, 32-33, 35-37, 39-42, 44-46, 48-50, 52-54; T Vol. III, pg. 2931-2935, 2944-2946, 2953, 2987-2989, 2998-2999, 3023-3028, 3032-3033, 3042-3043, 3045. Torey presented a low risk to re-offend. T Vol. III, pg. 2913, ln. 5-17. Testing of Torey demonstrated that he had an under-developed moral compass, poor judgment and impulsivity. T Vol. III, pg. 2913, ln. 18-25. Adolescent brains are not "particularly developed" and even the average adolescent possesses less than adult abilities in areas including reasoning and judgment. T Vol. III, pg. 2905, ln. 8-25. Torey had less than age appropriate abilities in areas including judgment, impulse control and problem solving. *Id.* at pg. 2904, ln. 20-25; *see also Id.* at pg. 2910, ln. 3-6; *see also Id.* at pg. 2910, ln. 24 (Dr. Corgiat testified that "we have a brain that isn't developed"). Dr. Corgiat testified that Torey presented a low risk to re-offend because the testing "unequivocally" presented no evidence demonstrating a "pathological drive or pathological desire that he would personally harbor that would have led him to these offenses." T Vol. III, pg. 2913, ln. 5-17. Torey's age combined with his less than age appropriate development indicate that he is a good candidate for rehabilitation because he would be more amenable to education and training than an older person or even a person of the same

age with age-appropriate development. *Id.* at pg. 2910, ln. 23 - pg. 2911, ln. 5.[9] Additional evidence of Torey's good character was presented at the post-conviction evidentiary hearing. *Compare, Pizzuto v. State*, 146 Idaho 720, 733, 202 P.3d 642, 655 (2008). (Summary disposition of *Atkins v. Virginia*, 536 U.S. 304 (2002), mental retardation claim affirmed where petitioner did not offer any expert opinion stating that he was mentally retarded at the time of the murders or prior to age eighteen.). In addition, Torey testified about his role in the offense at the evidentiary hearing which contained mitigating evidence about his involvement in the offense including his remorse for his participation in it and which was not available to the sentencing court.

Finally, *Montgomery* notes that evidence of Torey's post-sentencing behavior would be relevant "as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation." *Montgomery v. Louisiana*, 136 S. Ct., at 736. Torey has not had an opportunity to present that sort of post-sentencing rehabilitation evidence because *Montgomery* was not decided until after his post-conviction petition was summarily dismissed.

As *Montgomery* stated: "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). The totality of the evidence before this Court, taken in the light most favorable to Torey,

---

[9] Accordingly, the district court's finding that Torey would kill again if released, T (8/24/2007) pg. 59, ln. 2-5, is not supported by the evidence and represented an abuse of discretion. Moreover, it should not even be considered at this point since the facts at summary disposition must be viewed in favor of the non-moving party. *Wheeler*, *supra.*

raised a genuine question of material fact whether Torey is not one of those rare juveniles who is even eligible to receive a JLWOP sentence. The summary dismissal should be vacated and the matter remanded either for a new sentencing hearing or for an evidentiary hearing. *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 the substantive aspect of the *Miller* claim was also in error and should be vacated.

III. CONCLUSION

The post-conviction court erred in dismissing parts of the post conviction petition 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 19th day of July, 2017.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Torey Adamcik

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):

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 19th day of July, 2017.

/s/Dennis Benjamin
Dennis Benjamin