No. _____

In The
Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

ETHAN ALLEN WINDOM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Ethan Windom, who was fascinated by serial killers, psychopaths, and schizophrenics, was almost seventeen years old when he brutally murdered his mother; he received a fixed life sentence for that crime. Prior to the imposition of sentence, Windom had the opportunity to present age-related mitigation evidence, and the sentencer considered his youth as a mitigating factor. After *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Montgomery v. Alabama*, 136 S.Ct. 718 (2016), the sentencing court found that, even if *Miller* and *Montgomery* apply to a discretionary life sentence, because Windom's crime did not reflect "transient immaturity," but was instead one of the "rare" cases justifying a fixed life sentence, Windom's sentence does not violate the Eighth Amendment. The Idaho Supreme Court reversed, holding that *Miller* and *Montgomery* precluded the sentencer's "retrospective" finding regarding transient immaturity. The question presented is:

Is the Eighth Amendment satisfied when, in a non-mandatory sentencing regime, a juvenile convicted of murder had the opportunity to present evidence of "youth and its attendant characteristics," and the sentencing court had the ability to and did consider youth and subsequently made a retrospective finding in light of *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Montgomery v. Alabama*, 136 S.Ct. 718 (2016), that the juvenile's crime did not reflect "transient immaturity," but was instead one of the "rare" cases justifying a fixed life sentence?

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The opinion of the state district court denying Ethan Windom's petition for post-conviction relief is unreported but is reproduced in the Appendix at 21. The Idaho Supreme Court's opinion in Ethan Windom's post-conviction appeal is reported at 398 P.3d 150, and is reproduced in the Appendix at 1.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on July 10, 2017. The State of Idaho is filing this Petition within 90 days of the entry of judgment. Supreme Court Rules 13.1, 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTORY PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Idaho Code Section 18-4004 provides, in relevant part: "Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life."

STATEMENT OF THE CASE

A grand jury indicted Ethan Windom for first-degree murder after he brutally murdered his mother, Judith Windom, in January 2007, by beating her in the face with a club and stabbing her repeatedly while she slept. *State v. Windom*, 253 P.3d 310, 311 (2011) ("*Windom I*"). Windom was less than one month shy of his seventeenth birthday when he committed the murder (App. at 27 n.4). Pursuant to a plea agreement, Windom pled guilty to an amended charge of second-degree murder. After an extensive sentencing hearing, at which Windom had the opportunity to present evidence of his youth and its attendant characteristics, the trial court imposed a discretionary fixed life sentence for what it correctly characterized as the "brutal" and "heinous" murder of Judith Windom. *Windom I*, 253 P.3d at 314. Prior to imposing a fixed life sentence, the sentencing judge considered "the nature of the offense," "the mental health issues," aggravating factors, and mitigating factors, which included "the fact that [Windom] does not have a long criminal record," and Windom's "relative youth." (App. at 30-31).

On direct appeal, Windom challenged his sentence, claiming it was an "abuse of discretion." *Windom I*, 253 P.3d 310. The Idaho Court of Appeals affirmed the sentence, and the Idaho Supreme Court also affirmed Windom's sentence after granting his petition for review that was based solely on a claim that the district court abused its sentencing discretion. *Windom I*, *supra*. Windom filed a petition for rehearing, which the Idaho Supreme Court denied. *See Windom v.*

Blades, 2014 WL 12685923 *4 (D. Idaho 2014) ("*Windom II*"). The Idaho Supreme Court issued its Remittitur in Windom's direct appeal on June 21, 2011. *See id.*

On June 25, 2012, this Court issued its opinion in *Miller v. Alabama*, holding: "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S.Ct. 2455, 2460 (2012).

On September 12, 2012, Windom filed a *pro se* federal habeas petition alleging his fixed life sentence violates the Eighth Amendment pursuant to *Miller*, *supra*. *See Windom II* at *1. The state moved to dismiss Windom's habeas petition because the only claim alleged – an Eighth Amendment violation – was procedurally defaulted since Windom failed to present the claim to the Idaho Supreme Court. *See id.* The federal district court agreed that Windom "clearly did not raise an Eighth Amendment claim before the Idaho Court of Appeals," nor did Windom "raise an Eighth Amendment claim in his briefing before the Idaho Supreme Court" when he sought review of the court of appeals' decision. *Id.* at *4. Moreover, on review, the majority of the Idaho Supreme Court "refused to apply Eighth Amendment precedent to the state-law abuse-of-discretion claim, and it refused to sua sponte convert the abuse-of-discretion claim into a federal constitutional claim." *Id.* at *4.

The federal district court, however, found it "less clear whether, after the Idaho Supreme Court issued its opinion, [Windom] had any proper means, other than a petition for rehearing to raise the Eighth Amendment claim that he identified as *first arising* from the Idaho Supreme Court's opinion in his same case." *Windom II* at *4 (emphasis original). Nevertheless, "because [Windom] could have, but did not, raise a companion claim that his sentence violated the Eighth Amendment" when he filed his direct appeal, the federal district court found the *Miller*-based Eighth Amendment claim Windom raised in his habeas petition "improperly exhausted and procedurally defaulted." *Id.* at *5. "[R]ather than affording [Windom] an opportunity to show cause and prejudice for the failure to raise the claim," the federal district court denied the claim on the merits. *Id.* In doing so, the court noted that, although this Court has "issued several recent decisions regarding minors and life sentences for *non-homicide* crimes, and minors subject to *mandatory* life sentences," it has "left untouched [Windom's] particular situation – minors imprisoned for *homicide* under *non-mandatory* life sentences." *Id.* at *7 (emphasis in original) (citing *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller*, 132 S.Ct. 2455).

On January 7, 2014, when the federal district court denied Windom's *Miller* claim, this Court had not yet issued its decision in *Montgomery v. Alabama*, 136 S.Ct. 718 (2016), in which this Court made *Miller*'s holding retroactive. *See Windom II*. The district court, however, assumed retroactivity and concluded *Miller*

did not apply to Windom's case because Windom "was not sentenced under a mandatory sentencing scheme." *Windom II* at *7 (citing similar conclusions in *Bell v. Uribe*, 729 F.3d 1052 (9th Cir. 2013) and *U.S. v. Nguyen*, 2013 WL 2151558 *7 (E.D. Ca. 2013) (unpublished)). Because "*Miller* did *not* foreclose a sentencing court's ability to impose a fixed life sentence in homicide cases" and "[g]iven the brutal circumstances of the murder of [Windom's] mother that were presented to the sentencing court and the contradictory evidence of whether [Windom] was, indeed, suffering from a psychotic episode when he killed his mother or had planned the murder in advance," which "includ[ed] a plan to feign a mental illness," the federal district court concluded Windom's fixed life sentence does not violate the Eighth Amendment. *Windom II* at *8 (emphasis original).

On August 18, 2015, Windom filed a state post-conviction petition in which he did not allege a substantive Eighth Amendment claim, but did allege ineffective assistance of trial counsel for failing to object to a fixed-life sentence as a violation of the Eighth Amendment and ineffective assistance of appellate counsel for failing to raise an Eighth Amendment claim on direct appeal (App. at 5). It was not until January 26, 2016, after this Court's decision in *Montgomery*, *supra*, that Windom moved to amend his post-conviction petition to allege a substantive Eighth Amendment claim (App. at 6). The state district judge who considered Windom's post-conviction petition was the same judge who imposed sentence. That judge

denied Windom's petition for post-conviction relief, and denied Windom's motion to amend to include a substantive Eighth Amendment claim, concluding (1) the claim was untimely; (2) neither *Montgomery* nor *Miller* entitled Windom to sentencing relief because Windom's fixed life sentence was not mandatory; and (3) even if applicable, the court complied with the "heightened standards" referenced in *Miller* and *Montgomery* because Windom's crime was not reckless or impulsive, and "did not reflect 'the transient immaturity of youth' "; the circumstances surrounding Windom's crime demonstrate "irretrievable depravity," and "irreparable corruption," which qualify it as one of the "rare case[s] that justifies imposing life without parole for a juvenile." (App. at 21-72). The court, therefore, dismissed Windom's post-conviction petition (App. at 72).

The Idaho Supreme Court reversed the denial of post-conviction relief concluding that, although the "*Montgomery* Court held that *Miller* announced a new substantive rule of constitutional law," "[i]n addressing that issue, the Court did not limit the new rule to a prohibition on mandatory fixed-life sentences for juveniles." *Windom v. State*, 398 P.3d 150, 155 (Idaho 2017) ("*Windom IV*") (App. at 11). The Idaho Supreme Court reasoned that while "it is possible" this Court "intended *Miller* to be applied retroactively only to those juveniles who were given mandatory sentences of life without parole, that reading would be inconsistent with" some of the language in *Montgomery*, including the statements from *Montgomery* that (1) *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'"; and (2) "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.'" *Windom IV*, 398 P.3d at 156 (App. at 11-15). In Windom's case, the Idaho Supreme Court found "the sentencing was not in conformity with the requirements of *Montgomery*" because, although the sentencing court made a specific finding in post-conviction that Windom's crime was not the product of transient immaturity, "the sentencing hearing did not show that evidence was presented regarding the factors required by *Miller*," and any finding by the post-conviction court that Windom's actions were not the product of "transient immaturity" and that Windom's case is one of the "rare" instances where fixed life is appropriate was improperly "retrospective." *Windom IV*, 398 P.3d at 151, 157 (App. at 16-20).[1]

[1] Windom also appealed the denial of federal habeas relief. The Ninth Circuit issued its Memorandum Opinion on June 22, 2016, and remanded to the district court on the basis that the district court did "not have the benefit of the Court's opinion in *Montgomery* when it ruled on Windom's petition." *Windom v. Blades*, 667 Fed.Appx. 240 (9th Cir. 2016). The Ninth Circuit advised Windom that, on remand, he could "file a motion with the district court to stay his federal habeas petition pending the Idaho Supreme Court's decision on his state habeas [sic] petition." *Id.* Following remand, the federal district court stayed Windom's case pending resolution of his state post-conviction appeal. Windom's habeas case remains stayed.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to address the questions created and unanswered by *Miller* and *Montgomery* with respect to the procedural requirements necessary to impose or uphold a fixed life sentence on a juvenile defendant found guilty of homicide.

THE EIGHTH AMENDMENT DOES NOT PRECLUDE A DISCRETIONARY JUVENILE FIXED LIFE SENTENCE FOR MURDER WHERE THE JUVENILE HAD AN OPPORTUNITY TO PRESENT AGE-RELATED MITIGATION AND YOUTH WAS CONSIDERED BY THE SENTENCER, OR PRECLUDE A RETROSPECTIVE DETERMINATION REGARDING TRANSIENT IMMATURITY

In *Miller*, this Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'" because a mandatory sentence "runs afoul" of the Court's cases that require "individualized sentencing for defendants facing the most serious penalties." 132 S.Ct. at 2460. The Court reasoned that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468. A mandatory life sentence also "prevents taking into account the family and home environment that surrounds [the juvenile] – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional," "neglects the

circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and "ignores that [the juvenile] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Id.* "And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S.Ct. at 2468 (citations omitted).

In *Montgomery*, the Court considered "whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive." *Montgomery*, 136 S.Ct. at 732. The Court held that "*Miller*'s prohibition on mandatory life" is retroactive because "*Miller* announced a substantive rule of constitutional law" since "it rendered life without parole an unconstitutional penalty for a class of defendants because of their status," *i.e.*, "juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 734 (quotations and citations omitted). The Court in *Montgomery* also framed *Miller*'s prohibition as "bar[ring] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S.Ct. at 734.

In addition to holding that *Miller* announced a substantive rule, the Court recognized that "*Miller*'s

holding [also] has a procedural component" in that "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S.Ct. at 734. Such a "procedure" is "necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S.Ct. at 735. The Court, however, acknowledged that "*Miller* did not impose a formal factfinding requirement" with respect to transient immaturity versus irreparable corruption or permanent incorrigibility. *Montgomery*, 136 S.Ct. at 735. In acknowledging this point, the Court explained that it is "careful to limit the scope of any attendant procedural requirement" when it announces a new substantive rule of constitutional law in order to "avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* The only guidance the Court gave regarding the procedural requirements necessary to address the substantive guarantees of *Miller* was the assurance that "[g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." 136 S.Ct. at 736. In such cases, the Court indicated a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.*

Because the Court's opinions in *Miller* and *Montgomery* left open the question of what procedure is necessary to "remedy a *Miller* violation" if a state declines to accept the Court's invitation to simply permit "juvenile homicide offenders to be considered for parole" in lieu of resentencing, the states have become divided on what procedure the Constitution requires post-*Miller*. Certiorari is appropriate to resolve the important procedural questions this Court has yet to address because, while states may be "laboratories for experimentation," the correct constitutional parameters must define those experiments. *See Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014).

The first question that must be answered before determining what procedure is required to cure a "*Miller* violation" is what qualifies as a "*Miller* violation." The rule announced in *Miller* was that a *mandatory* life sentence imposed upon a juvenile who committed homicide violates the Eighth Amendment. The Court did not expressly state in *Miller* or *Montgomery* that a discretionary life sentence imposed upon a juvenile who had the opportunity to present evidence of youth-related mitigation, and where youth was considered by the sentencer, also violates the Eighth Amendment. As such, some state courts have held that no post-*Miller* procedure is required to reconsider a juvenile's fixed life sentence if that sentence was imposed as a matter of discretion. *See*, *e.g.*, *Newton v. State*, 2017 WL 3882020 *14 (Ind. Ct. App. 2017) ("We hold that the mandate of *Miller* and *Montgomery* does not apply to the narrow circumstance, such as here, where a

juvenile defendant voluntarily enters into a plea agreement to serve LWOP."); *Brown v. Hobbs*, 2014 WL 2566091 (Ark. June 5, 2014); *Foster v. State*, 754 S.E.2d 33 (Ga. 2014); *Conley v. State*, 972 N.E.2d 864 (Ind. 2012) (citing *Miller*, 132 S.Ct. at 2472 n.10) ("we note the Supreme Court mentioned Indiana as being one of fifteen jurisdictions where life without parole for juveniles was discretionary, and therefore not unconstitutional in violation of the Eighth Amendment").

The plain language of *Miller* supports the view of many states that there is a distinction between discretionary life sentences and mandatory life sentences. *Miller*, 132 S.Ct. at 2460 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' "); *id.* at 2464 ("the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment"); *id.* at 2466 ("the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations"); *id.* (noting "defects" in "mandatory schemes"); *id.* at 2467 (noting "flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders" and noting "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it"); *id.* at 2468 ("To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark

features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences."); *id.* ("And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."); *id.* at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

Other courts, including the Idaho Supreme Court, have concluded that *Montgomery* extended the rule from *Miller* to discretionary life sentences even though the defendant in *Montgomery* was sentenced to fixed life because the "sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." *Montgomery*, 136 S.Ct. at 726. *See*, *e.g.*, *Windom IV*, 398 P.3d at 156; *Cook v. State*, 2017 WL 3424877 *2 (Miss. Ct. App. 2017); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *State v. Valencia*, 386 P.3d 392 (Ariz. 2016); *State v. Riley*, 110 A.3d 1205, 1213-1215 (Conn. 2015). The general rationale for this conclusion is the language from *Montgomery* that, "[e]ven 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.'" *Montgomery*, 136 S.Ct. 734 (quoting *Miller*, 132 S.Ct. at 2469). The states are, therefore, split on the preliminary but fundamental question of whether *Miller* and *Montgomery* apply or require a new sentencing hearing, or some other remedy, when the fixed life sentence was

discretionary, not mandatory. Only this Court can resolve that split.

The split among states deepens further once the courts determine that a "*Miller* remedy" is constitutionally required. For example, the states have divided on whether "*Miller* requires consideration of set factors associated with youth." *People v. Holman*, 58 N.E.3d 632, 641 (Ill. App. Ct. 2016) (citing cases). Some have concluded it does, while "other courts have found that although the *Miller* Court did require sentencing courts to consider mitigating circumstances related to a juvenile defendant's youth, it did not require courts to consider any set list of factors." *Id.* (citing cases).

Related disagreement has arisen with respect to whether evidence of youth and its attendant characteristics must be presented before a court may impose a fixed life sentence on a juvenile, or whether it is sufficient for a court to conclude that the original sentencing record supports a finding of "permanent incorrigibility." For example, Oklahoma has stated that "*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.'" *Luna v. State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016) (quoting *Montgomery*, 136 S.Ct. at 734) (emphasis added). This procedure requires "evidence pertinent to deciding whether [the juvenile's] crime reflected only transient immaturity or whether his crime reflected permanent incorrigibility

and irreparable corruption," "evidence of [the] important youth-related characteristics" articulated in *Miller*, and/or "evidence concerning adolescent brain development and its effect on behavior and the juvenile's capacity to consider the consequences of his wrongful acts." *Luna*, 387 P.3d at 962. On the other hand, the Indiana Supreme Court reviewed a juvenile fixed life sentence where the sentencer considered the defendant's age as a mitigating factor, but the evidence presented did not include specific evidence of "youth and its attendant characteristics," and found that the court adequately took age into account in weighing the mitigating and aggravating evidence before imposing a fixed life sentence. *Conley v. State*, 972 N.E.2d 864 (Ind. 2012).

The Idaho Supreme Court has followed Oklahoma's lead despite the sentencer's specific finding in post-conviction proceedings that Windom's discretionary fixed life sentence was appropriate even if *Miller* applies to discretionary sentencing regimes because Windom's crime was not the product of "transient immaturity" and his is one of the "rare" cases where fixed life is warranted. The Idaho Supreme Court rejected the sentencer's express finding because "the sentencing hearing did not show that evidence was presented regarding the factors required by *Miller*." *Windom IV*, 398 P.3d at 157 (App. at 17). According to the Idaho Supreme Court, a "retrospective analysis does not comply with *Miller* and *Montgomery* where the evidence of the required characteristics and factors was not presented during the sentencing hearing." *Windom IV*, 398 P.3d at 157 (App. at 18). It was on this basis that

the Idaho Supreme Court distinguished Windom's case from its prior decision in *Johnson v. State*, 395 P.3d 1246 (Idaho 2017),[2] in which it affirmed Johnson's discretionary life sentences imposed upon her convictions for murdering her parents when she was sixteen years old. *Windom IV*, 398 P.3d at 158 (App. at 19). Specifically, the Idaho Supreme Court found it significant that, at Johnson's pre-*Miller* sentencing hearing, evidence was presented "about the developmental state of an adolescent's brain compared to an adult and how youth are more prone to impulsivity and more likely to be able to be rehabilitated." *Windom IV*, 398 P.3d at 158 (quoting *Johnson*, 395 P.3d at 1258) (App. at 19). But, neither *Miller* nor *Montgomery*, nor anything in the Eighth Amendment, requires the presentation of *evidence* of youth and its attendant characteristics. Rather, all that is required is the *opportunity* to present such evidence and *consideration* of youth and its attendant characteristics. A trial court's compliance with that mandate, which occurred in Windom's case, satisfies any constitutional prerequisite to imposing a fixed life sentence on a juvenile who commits murder.

This Court should grant certiorari to address the questions created and unanswered by *Miller* and *Montgomery* with respect to the procedural

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[2] A petition for certiorari is pending in *Johnson v. State*, Docket No. 17-236. In her petition, Johnson has asked this Court to categorically bar fixed life sentences for juveniles even in homicide cases. Alternatively, Johnson asks this Court to "grant the writ to clarify the scope and application of *Miller*'s protections," arguing, in part, that the "sentencing court should be required to consider" the evidence presented at her sentencing hearing "in light of *Miller*."

requirements necessary to impose a fixed life sentence on a juvenile defendant guilty of homicide. This issue is important to the states not only because the states have an interest in complying with constitutional requirements, but also because states have an interest in avoiding potentially costly resentencing hearings, and because states and victims have an interest in the finality of sentences imposed in conformance with the Constitution.

As an alternative to granting certiorari, this Court should summarily reverse the Idaho Supreme Court because it has misinterpreted the mandate of *Miller* and *Montgomery*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 44037-2016

ETHAN ALLEN WINDOM, **Petitioner-Appellant,** **v.** **STATE OF IDAHO,** **Respondent.**	**Boise, June 2017 Term** **2017 Opinion No. 83** **Filed: July 10, 2017** **Karel A. Lehrman, Clerk**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County. Hon. Cheri C. Copsey, District Judge.

The judgment of the district court is *vacated*, and this case is *remanded.*

Andrew H. Parnes, Ketchum, argued for appellant.

Jessica M. Lorello, Deputy Attorney General, Boise, argued for respondent.

EISMANN, Justice.

This is an appeal out of Ada County from a judgment dismissing a petition for postconviction relief after the district court denied a motion to amend the petition to raise a claim that petitioner, who had been

sentenced to life without parole for murdering his mother when he was a juvenile, was entitled to be resentenced pursuant to the United States Supreme Court's decision in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016). The district court denied the motion to amend on the ground that *Montgomery* did not apply to the petitioner because he had not been sentenced to a mandatory fixed-life sentence and because, if *Montgomery* did apply, the sentence would be upheld. We vacate the judgment of dismissal, hold that the sentencing was not in conformity with the requirements of *Montgomery*, reverse the order denying the petitioner's motion to amend, and remand this case for further proceedings.

I.

Factual Background.

On January 24, 2007, sixteen-year-old Ethan Windom brutally murdered his mother by repeatedly striking her head with a club that he had fashioned by attaching weights to one end of a dumbbell. After his arms tired from the weight, he then stabbed her dead body repeatedly in the throat, chest, and abdomen and finally thrust a knife into her exposed brain. He pled guilty to murder in the second degree, and the district court sentenced him to a determinate life sentence. This Court affirmed that sentence on appeal. *State v. Windom*, 150 Idaho 873, 253 P.3d 310 (2011).

On June 25, 2012, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 567 U.S.

460 (2012), which addressed whether state laws that required a mandatory fixed life sentence for juveniles convicted of murder violated the Eighth Amendment. The Court held that they did, but it also stated that

> a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477-78.

The Court concluded by stating:

> But given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this

> early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id. at 479-80.

On July 3, 2012, an attorney who did not represent Windom sent him a letter at the correctional institution in which he was housed. The attorney wrote:

> You may have heard that the United States Supreme Court recently decided that mandatory fixed-life sentences for juveniles are unconstitutional. You do not have a mandatory fixed life sentence. But, it is possible that Judge Copsey did not consider all the factors that the Supreme Court says courts should consider before she imposed your discretionary fixed life sentence.
>
> Therefore, you may want to challenge your sentence in court. I have enclosed a form to fill out if you want to file a federal habeas corpus petition. You need to file that petition in the federal court in Boise no later than September 19, 2012. You also might be able to file a state post-conviction petition, but the deadline for that might have been June 21, 2012. So you might be too late if you haven't filed a

> state post-conviction petition already. Finally, you might be able to file a Rule 35 motion to correct an illegal sentence. I suggest you write to your trial attorney, Ed Odessey, to see if he thinks that is advisable.
>
> I spoke to Justin Curtis today and he said that he would be writing you too.
>
> I do not know if any of these court challenges will end up helping you. I write only out of a concern that you may have let one opportunity slip by and would hate to see you lose any chance to challenge your sentence, should you want to do so.
>
> Please feel free to write or call if you have any questions or concerns. My office accepts collect calls.

On September 12, 2012, Windom filed a petition for habeas corpus in federal district court, alleging that his sentence violated the Eighth Amendment. The court dismissed the petition on August 13, 2014, and Windom appealed to the Ninth Circuit Court of Appeals.

On August 18, 2015, Windom filed in the State district court a petition for postconviction relief in which he alleged ineffective assistance of trial and appellate counsel. The petition was filed by Lori A. Nakaoka, who is to be commended because she has represented him throughout this case pro bono. On August 26, 2015, the district court gave notice of its intent to dismiss the petition on the ground that it was untimely under Idaho Code section 19-4902(a) because it was not filed

within one year of the determination of the direct appeal. In response, Windom filed a brief in which he presented argument as to why his petition should not be dismissed based upon the doctrine of equitable tolling.

On November 3, 2015, the State filed an answer, a motion for summary disposition, and a supporting brief. The State argued that the petition was barred by the statute of limitations and that equitable tolling did not apply. On January 11, 2016, the district court heard oral argument on the State's motion for summary disposition, and it took the matter under advisement to issue a written decision.

On January 25, 2016, the United States Supreme Court issued its opinion in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), and it revised that opinion on January 27, 2016. In *Montgomery*, the Court held that *Miller* was retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided. On January 26, 2016, Windom filed a motion to amend his petition to include a claim that his fixed-life sentence violated *Miller*. The State responded by filing a brief in which it argued that *Montgomery* could not cure the problem that the petition was untimely. On February 22, 2016, the district court heard oral argument on Windom's motion to file an amended complaint. It took that motion under advisement and stated it would issue a written decision.

On February 23, 2016, the district court filed its decision on Windom's motion to amend his petition and

on the State's motion for summary disposition. The court denied Windom's motion to amend on the ground that "*Montgomery* did not change the holding announced in *Miller* and, thus, does not apply to Windom's case or change the fact this Petition is untimely." The court granted the State's motion on the grounds that Windom's petition was untimely and that, even if *Montgomery* applied to Windom, the sentencing transcript shows that the court "in fact applied the heightened standards and factors identified in *Montgomery* and previously in *Miller*." The court entered a judgment dismissing Windom's petition with prejudice, and Windom timely appealed.

On June 22, 2016, the Ninth Circuit Court of Appeals vacated the federal district court order dismissing Windom's petition for habeas corpus. The court remanded the petition to the federal district court with instructions to stay the federal habeas petition until this Court's decision on his petition for post-conviction relief.

II.

Did the District Court Err in Denying Windom's Motion to Amend His Complaint?

Windom pled guilty to the charge of murder in the second degree. All of Windom's claims in his petition for post-conviction relief were based upon the alleged ineffective assistance of counsel during his sentencing and the appeal of his sentence. The basis of the district

court's order conditionally dismissing Windom's petition was that the petition was barred by the statute of limitations, as was the State's motion for summary disposition.

On January 26, 2016, Windom filed a motion to amend his petition to add a claim pursuant to *Montgomery* and *Miller*. The district court denied the motion on the grounds that *Miller* and *Montgomery* do not apply to Windom because he did not receive a *mandatory* fixed-life sentence, so the proposed amendment would be futile. The court also held that if *Montgomery* announced new standards for sentencing a juvenile to life without parole, the transcript of the sentencing hearing shows that the court "in fact applied the heightened standards and factors identified in *Montgomery* and previously in *Miller*." The court therefore held that "amendment would be futile. Windom's Petition is untimely."

"An application for post-conviction relief is in the nature of a civil proceeding, entirely distinct from the underlying criminal action. The Idaho Rules of Civil Procedure generally apply." *Ferrier v. State*, 135 Idaho 797, 798-99, 25 P.3d 110, 111-12 (2001) (citation omitted). "The denial of a plaintiff's motion to amend a complaint to add another cause of action is governed by an abuse of discretion standard of review." *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 210, 61 P.3d 557, 567 (2002). "To determine whether a trial court has abused its discretion, this Court considers

whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." *Reed v. Reed*, 137 Idaho 53, 57, 44 P.3d 1108, 1112 (2002). "A court may consider whether the allegations sought to be added to the complaint state a valid claim in determining whether to grant leave to amend the complaint." *Estate of Becker v. Callahan*, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004).

Idaho Code section 19-4902(a) provides that a petition for post-conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." The one-year period begins to run when the appellate court issues a remittitur. *Hauschulz v. State*, 144 Idaho 834, 837, 172 P.3d 1109, 1112 (2007). This Court upheld Windom's sentence on direct appeal, and that determination became final on June 21, 2011, when this Court issued the remittitur. The one-year period within which Windom could file a petition for post-conviction relief expired on June 21, 2012. Four days later, the United States Supreme Court issued its decision in *Miller*.

The district court held that the "actual holding" in *Miller* and *Montgomery* was that mandatory fixed-life sentences for juveniles were unconstitutional and that those decisions did not apply to Windom because he was not subject to a mandatory fixed-life sentence. Although the issue in *Miller* was the constitutionality

of a mandatory fixed-life sentence for juveniles who commit murder, the basis of the decision was that a fixed-life sentence precluded the sentencing court from considering age-related characteristics and other factors before imposing the sentence. The Court concluded by stating, "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require* it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480 (emphasis added) (footnote omitted). Thus, *Miller* mandated that a sentencing court take certain factors regarding a juvenile murderer into account before sentencing the juvenile to a fixed-life sentence. However, as mentioned above, *Miller* was issued four days after the deadline for Windom to file a petition for post-conviction relief, even assuming that the decision would apply to a juvenile whose sentence had become final over a year earlier. There was nothing in the *Miller* decision that indicated it would be applied retroactively.

Idaho law does not preclude the granting of relief pursuant to a petition for postconviction relief that was filed beyond the one-year deadline. Because there may be claims that are not known to the defendant within that time limit, we have held that there must be a reasonable time beyond that deadline within which claims can be asserted once they are known. *Charboneau v. State*, 144 Idaho 900, 904-05, 174 P.3d 870, 874-75 (2007). A petition raising any such claims "must be filed within a reasonable time after the petitioner has

notice of the issue(s) raised." *Charboneau v. State*, ___ Idaho ___, ___, 9395 P.3d 379, 389 (2017).

On January 25, 2016, the United States Supreme Court issued its decision in *Montgomery.* It stated that the issue was "whether its [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Montgomery*, ___ U.S. at ___, 136 S.Ct. at 725. With respect to the *Miller* decision, the Court in *Montgomery* stated that "*Miller* held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 726 (internal quotation marks omitted). However, the Court also stated:

> *Miller* required that sentencing courts consider a child's "diminished culpability and heightened capacity for change" before condemning him or her to die in prison. 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.' "

Id. (internal citation omitted).

The *Montgomery* Court held that *Miller* announced a new substantive rule of constitutional law. In addressing that issue, the Court did not limit the new rule to a prohibition on mandatory fixed-life sentences for juveniles. Rather, the Court reiterated the factors that must be considered by the sentencing

court before imposing a discretionary fixed-life sentence on a juvenile offender. The Court stated at length:

> *Miller* took as its starting premise the principle established in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing." These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways:
>
> > "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, 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. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.' "
>
> As a corollary to a child's lesser culpability, *Miller* recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juvenile offenders. Because retribution "relates to an offender's blameworthiness, the case for retribution is not as strong with a

minor as with an adult." 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." The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender "'forever will be a danger to society.'" Rehabilitation is not a satisfactory rationale, either. Rehabilitation cannot justify the sentence, as life without parole "forswears altogether the rehabilitative ideal."

These considerations underlay the Court's holding in *Miller* that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." *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." 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."

> *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." 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.'" 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,'" 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. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'" – here, the vast majority of juvenile offenders – "'faces a punishment that the law cannot impose upon him.'"

Id. at ___, 136 S.Ct. at 733-34 (citations omitted). The Court held that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Id.* at ___, 136 S.Ct. at 732.

Although it is possible that the Court intended *Miller* to be applied retroactively only to those juveniles who were given mandatory sentences of life without parole, that reading would be inconsistent with the last paragraph quoted above. The Court stated that *Miller* "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. As a result, *Miller* announced a substantive rule of constitutional law." *Id.* at ___, 136 S.Ct. at 734. Thus, it appears that *Montgomery* declared that *Miller* was retroactive not only for those juveniles sentenced to a mandatory of life without parole, but also for those for whom the sentencing court imposed a fixed-life sentence without considering the distinctive attributes of youth. As we held in *Johnson v. State*, No. 42857, 2017 WL 1967808 (Idaho May 12, 2017), regarding a postconviction petition filed by a petitioner who had been sentenced to life without parole for the murder of her parents while she was a juvenile, *id.* at *1, "*Montgomery* also made it clear that '*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence,'" *id.* at *11.

Windom did not have a claim under *Miller* until *Montgomery* was issued, and the day after it was issued he filed his motion to amend his petition to include a claim under *Miller* and *Montgomery.* In *Johnson v. State*, No. 42857, 2017 WL 1967808 (Idaho May 12, 2017), the petitioner had been sentenced to life

without parole for the murder of her parents while she was a juvenile. *Id.* at * 1. She filed a petition for post-conviction relief based upon *Miller* and *Montgomery*, and the trial court ruled that she could have brought an Eighth Amendment claim in her direct appeal or in her first petition for post-conviction relief and therefore her claim under *Miller* was barred by Idaho Code section 19-4901(b) as being untimely. *Id.* at *10. We held that the trial court erred, stating, "While it's true Johnson could have made *an* Eighth Amendment claim that her sentence was generally excessive or cruel or unusual, she could not have made the claim that her sentence was *illegal* under *Miller*'s holding interpreting the Eighth Amendment until after *Miller* was decided." *Id.*

Windom would not have had a claim under *Miller* until *Montgomery* was decided, which made *Miller* "retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Montgomery*, ___ U.S. at ___, 136 S.Ct. at 725. Therefore, his motion to amend his petition to include a claim under *Miller* and *Montgomery*, made one day after the *Montgomery* decision was issued, was timely.

The district court also held that the transcript of the sentencing hearing showed that the court complied with the requirements of *Miller* and *Montgomery.* The transcript does not show that any evidence was presented regarding the distinctive attributes of youth mentioned by the Supreme Court in *Miller* and *Montgomery.* When commencing its explanation of the sentence it was going to hand down, the court stated: "I

have considered the nature of the offense. I have considered the mental health issues. I have considered mitigating and aggravating factors. I have considered in mitigation, for example, the relative youth. I have considered the fact that he does not have a long criminal record."

Although 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.'" *Id.* at ___, 136 S.Ct. at 734 (emphasis added). Before imposing sentence, the district court discussed at length Windom's statements to classmates that he hated his mother; the brutal nature of the murder; his apparent lack of remorse when questioned by police; his fascination with serial killers; his diagnosis as a paranoid schizophrenic; and the need, if he is released into society, that he be treated by a competent mental health professional, that he take his medications, and that they actually work. However, the sentencing hearing did not show that evidence was presented regarding the factors required by *Miller*. Those factors must be individualized for the juvenile being sentenced. *Miller*, 567 U.S. at 465, 477.

In holding that it complied with the requirements of *Miller* and *Montgomery*, the district court wrote, "Based on the horrific facts of the murder itself, the past behaviors, and Windom's own statements and

actions in the interviews, the Court concluded, after careful deliberation, that Windom's actions did not reflect 'the transient immaturity of youth' but in the words of the United States Supreme Court, reflected those actions of 'the rarest of children' whose crime reflected 'irreparable corruption' deserving life without parole." The quotes in this sentence did not appear in the court's comments at the sentencing hearing, obviously because the hearing predated the Supreme Court's opinions in *Miller* and *Montgomery*, nor did the court point to any statements it made that have the equivalent meaning. In making this statement, the court was apparently holding retrospectively that it did not believe that Windom's actions reflected "the transient immaturity of youth" and instead were the actions of "the rarest of children" whose crime reflected "irreparable corruption."

A retrospective analysis does not comply with *Miller* and *Montgomery* where the evidence of the required characteristics and factors was not presented during the sentencing hearing. "*Miller*'s holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics *before* determining that life without parole is a proportionate sentence." *Montgomery*, ___ U.S. at ___, 136 S.Ct. at 734 (emphasis added).

> A hearing where 'youth *and its attendant characteristics*' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Id. at ___, 136 S.Ct. at 735 (emphasis added). It is the lack of such evidence at *Windom*'s sentencing hearing that distinguishes this case from *Johnson v. State.* In *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. In *Johnson*, "Drs. Craig Beaver and Richard Worst testified at the sentencing hearing about the developmental state of an adolescent's brain compared to an adult and how youth are more prone to impulsivity and more likely to be able to be rehabilitated." *Johnson v. State*, 2017 WL 1967808, at *11. "Dr. Beaver's testimony was approximately forty pages. Dr. Worst's testimony was approximately sixty-eight pages." *Id.* at n.9. Therefore, we held:

> 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.

Id. at *11.

Thus, the district court erred in denying Windom's motion to amend his petition. The denial of the motion was not consistent with applicable legal standards because Windom's motion to amend was filed within a reasonable time after the issuance of the *Montgomery* decision, which made *Miller* applicable to Windom's sentence of life without parole. The sentencing hearing in Windom's case did not include evidence of the factors required by *Miller* and *Montgomery*, and therefore his sentencing did not comport with the requirements of those decisions.

III.

Conclusion.

We vacate the judgment dismissing Windom's petition for post-conviction relief, reverse the order denying his motion to amend, and remand this case for further proceedings that are consistent with this opinion.

Chief Justice BURDICK, and Justices JONES, HORTON and BRODY **CONCUR**.

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT

THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

ETHAN ALLEN WINDOM, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. CV-PC-2015-14391 **ORDER DISMISSING PETITION** (Filed Feb. 23, 2016)

Pursuant to a plea agreement, Ethan Allen Windom pled guilty to Murder, Second Degree. *See* Case No. CR-FE-2007-0000274 (formerly Case No. H0700274). On December 12, 2007, the Court imposed a fixed life sentence. Windom appealed, challenging the Court's sentence, and the Court of Appeals upheld the Court's sentence in an unpublished decision. Windom appealed to the Idaho Supreme Court, again challenging the Court's sentence. The Idaho Supreme Court affirmed the Court of Appeals' decision affirming the Court's sentence in a published decision on March 16, 2011, and the Supreme Court remitted the decision to the Court on July 5, 2011. *State v. Windom*, 150 Idaho 873, 253 P.2d 310 (2011). The State Appellate Public Defender represented him in both appeals.

On July 3, 2012, following the United States Supreme Court decision holding *mandatory*[1] fixed life sentences for juveniles to be unconstitutional, attorney Dennis Benjamin wrote to Windom and clearly informed him, in relevant part, as follows:

> You may have heard that the United States Supreme Court recently decided that mandatory fixed-life sentences for juveniles are unconstitutional. You do not have a mandatory fixed life sentence. But, it is possible that Judge Copsey did not consider all the factors that the Supreme Court says courts should consider before she imposed your discretionary fixed life sentence.
>
> Therefore, you may want to challenge your sentence in court. I have enclosed a form to fill out if you want to file a federal habeas corpus petition. You need to file that petition in the federal court in Boise no later than September 19, 2012. *You also might be able to file a state post-conviction petition, but the deadline for that might have been June 21, 2012. So you might be too late if you haven't filed a state post-conviction petition already.* Finally, you might be able to file a Rule 35 motion to correct an illegal sentence. I suggest you write to your trial attorney, Ed Odessey, to see if he thinks that is advisable.

[1] Windom's sentence was not *mandated* by statute, distinguishing it from the United States Supreme Court decision.

> I spoke to Justin Curtis[2] today and he said that he would be writing you too.
>
> I do not know if any of these court challenges will end up helping you. I write only out of a concern that you may have let one opportunity slip by and would hate to see you lose any chance to challenge your sentence, should you want to do so.

Declaration of Lori Nakaoka in Support of Petitioner's Reply to the State's Reply to Order Conditionally Dismissing Petition, Exhibit A (emphasis added). Thus, Windom clearly knew his post-conviction rights and knew time was critical.

As Dennis Benjamin advised him, Windom filed a federal *habeas corpus* case *pro se* in federal court on September 12, 2012. Windom argued that his fixed life sentence was unconstitutional under the Eighth Amendment. *Windom v. Blades*, 2014 WL 3965031, at *1 (D. Idaho, 2014). The Federal District Court denied his claim. He appealed. Apparently the appeal is still pending.

The time to file a post-conviction petition ran no later than July 5, 2012. Windom filed this Petition on August 18, 2015, *over three (3) years late.* In fact, Windom filed the Petition nearly three (3) years *after* he filed his own federal *habeas corpus* case in federal court and over three (3) years after Dennis Benjamin wrote him and informed him about filing a

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[2] Justin Curtis was a member of the State Appellate Public Defender's office at the time.

post-conviction petition and habeas. Windom was represented by counsel in filing this Petition.[3]

Under every view of the evidence in a light most favorable to Windom, Windom's Petition is untimely and Windom never presented any evidence that supports tolling the statute of limitations. The Court notified Windom on August 26, 2015, it intended to dismiss his Petition as untimely and carefully disclosed the grounds for that decision.

Windom, *represented by counsel*, replied on September 8, 2015, and among other things argued that he needed discovery in order to establish that his mental condition prevented him from filing his petition or that there was some other ground to toll the statute.

On September 15, 2015, the Court denied Windom's request for discovery finding it was nothing more than a fishing expedition. The Court extended the time for Windom to reply to its notice until October 31, 2015, and provided him with a copy of his presentence report from his criminal case. The State also

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[3] That his counsel was appearing without compensation is not relevant. In reviewing his response to the State's answer and motion for summary disposition, in footnote 6, he argued, among other things, that the Court did not "permit" appointed counsel. That is not true; the record does not support that claim. In fact, Windom never filed a motion in compliance with statutory authority, I.C. §§ 19-4904, 19-852. Because he failed to file a motion or comply with the statutory requirements, the Court gave Windom additional time to comply with the statute on November 30, 2015.

moved to summarily dismiss Windom's Petition on the basis it was untimely.

The Court scheduled oral argument for December 15, 2015. On November 24, 2015, Windom again opposed the potential summary disposition. In support, his attorney attached a copy of the letter Windom received from Dennis Benjamin and copies of medications the Department of Corrections administered to him *in 2011*. Windom also complained that he did not have the funds to hire an expert.

On November 30, 2015, after reviewing his November 24, 2015, response to the State's motion and answer, the Court vacated oral argument to allow Windom the opportunity to comply with the statutory requirements and file the appropriate motion for appointed counsel. Windom's counsel filed a motion to appoint what amounted to substitute counsel. The Court denied the motion and re-scheduled oral argument on the State's motion to summarily dismiss his Petition.

The Court heard argument on January 11, 2016, and Windom's *pro bono* counsel continued to represent him. His attorney alerted the Court to the fact its order denying substitute counsel had significant errors in it. The Court corrected those errors and reissued its decision.

On January 26, 2016, the United States Supreme Court issued a new decision, *Montgomery v. Louisiana*, 136 S.Ct. 718, 733-34 (U.S. La. 2016), clarifying its earlier decision, *Miller v. Alabama*, 567 U.S. ___, ___, 132 S.Ct. 2455, 2460 (2012). The Supreme Court ruled that

Miller announced a substantive change in the law and, thus, applied retroactively. Windom's attorney immediately moved to amend his Petition and argued that this new decision tolled the statute of limitations. The State opposed. Windom replied on February 16, 2016.

The Court heard argument on February 22, 2016, and took the matter under advisement. As discussed below, *Montgomery* did not change the holding announced in *Miller* and, thus, does not apply to Windom's case or change the fact this Petition is untimely. Windom was not subject to a mandatory life sentence. *Montgomery* does not stand for the proposition that a Court may never impose a life sentence on a juvenile without possibility of parole. At sentencing, while a person may disagree with the Court's sentence, the Court applied reason, considered Windom's youth, the horrific nature of the crime that reflected "irretrievable depravity" and exercised discretion to sentence Windom. The Court denies his motion to amend because amendment would not change the outcome. Amendment is futile; the Petition is untimely.

The Court takes judicial notice of the attached transcript of the sentencing hearing in the underlying case, Case No. CR-FE-2007-0000274 (formerly Case No. H0700274).

Having reviewed the Petition, argument, and any evidence in a light most favorable to Windom, the Court finds that it is satisfied that Windom is not entitled to post-conviction relief because his Petition is untimely and the statute was not tolled. I.C. § 19-4906(2). The

Court further finds there was no dispute of *material* fact and no purpose would be served by any further proceedings. Therefore, the Court dismisses his Petition.

FACTUAL BACKGROUND

Ethan Allen Windom was nearly 17 years old[4] when he brutally murdered his mother. On appeal, the Idaho Supreme Court summarized the facts of this murder, in relevant part, as follows:

> Ethan Windom (Windom) lived alone with his divorced mother, Judith Windom (Judith). In late 2006, sixteen-year old Windom was diagnosed as suffering from anxiety and a major depressive disorder with no psychotic features. He was prescribed medications appropriate to those conditions. His counselor expressed concern that Windom may be a psychopath, and noted that if so, his condition was not treatable.
>
> Windom was fascinated by serial killers, psychopaths, and schizophrenics. Beginning in the eighth grade, he modeled aspects of his daily life upon the habits of the protagonist in the movie *American Psycho*, carrying a briefcase to school, maintaining a specific hygiene routine, and using particular brands of hygiene products and luggage. He kept a day planner within which he wrote about

[4] Windom's birthday is February 15, 1990, making him 16 years and 11 months of age at the time of the murder.

"kill[ing] everyone" and "see[ing] how" human organs would taste. The day planner contained sketched figures of naked women being tortured and killed in gruesome ways.

Windom had an aggressive relationship with his mother. He bullied her into buying him the expensive personal hygiene products and accessories he knew from *American Psycho*, and intimidated her into occupying their home's smallest bedroom. He dominated the remaining spaces in the home. He repeatedly told his friends that he wanted his mother dead. Windom's father, Judith's ex-husband, testified that on more than one occasion, she had expressed fear that Windom would kill her as she slept.

On the evening of January 24, 2007, Windom experienced a strong urge to kill. He took five times his normal dose of anti-anxiety medication. He considered seeking out "bums" to kill, but feared that his mother would stop him. Instead, Windom fashioned a club by attaching several weights to the end of a dumbbell. He collected two knives and took the club to Judith's bedroom. Windom placed his hand over his mother's mouth while she slept and began to beat her in the face with the club. When his arms tired from the weight, he took one of the knives and stabbed her repeatedly in the throat, chest, and abdomen. Eventually convinced that Judith was dead, Windom removed his hand from what he "thought was her mouth" and thrust the second knife into her exposed brain.

Windom then changed the home's answering machine message to relate that he and his mother had unexpectedly left town to deal with family issues. He called a friend and left her a voicemail stating that he would not meet her as was their normal morning routine. He then attempted to hitchhike to his father's house and eventually walked there. Upon arriving, Windom told his father that someone had attacked Judith and that she was dead. After Windom's father called the police, Windom was arrested and interrogated. Later that day, he confessed to the murder. He was charged as an adult with first-degree murder, eventually pleading guilty to an amended charge of second-degree murder.

While he was incarcerated, two mental health professionals assessed Windom. The first, Dr. Craig Beaver, a licensed psychologist, tentatively diagnosed him as suffering from schizophrenia, paranoid type. Dr. Beaver observed that Windom's symptoms appeared to be in partial remission as he was stabilized by the antipsychotic medication administered during his incarceration. Dr. Beaver opined that the murder occurred during a psychotic break. He noted that research demonstrates that individuals with similar psychiatric illnesses change and modify as they age, and their risk for future violence diminishes "precipitously" after they turn thirty. Dr. Beaver expressed concern that Windom would present a threat of violent behavior if he were to stop regularly taking medication.

> The second mental health professional, Dr. Michael Estess, is a psychiatrist. He first met Windom a few days after his arrest. At that time, Dr. Estess viewed Windom as "acutely psychotic." Dr. Estess viewed Windom as suffering from "an evolving paranoid, psychotic, delusional illness." Dr. Estess opined that the murder was "entirely a product of [Windom's] inappropriate, disorganized, illogical and psychotic process that was evolving above and beyond his control." Dr. Estess viewed Windom as having been "perfectly compliant" with all of his treatment recommendations. Finally, Dr. Estess opined that Windom was a "good candidate for treatment, both inpatient and outpatient" and expressed his belief that Windom "would be compliant with treatment recommendation" regardless of whether he were incarcerated.

State v. Windom, 150 Idaho 873, 874-75, 253 P.3d 310, 311-12 (2011).

In affirming the Court's sentence, the Supreme Court noted that the Court spent a great deal of time explaining its decision and made clear that it understood the gravity of what it was doing. The Supreme Court observed:

> As a prelude to its lengthy sentencing remarks, the district court explicitly noted that it was exercising its sentencing discretion, stating:
>
> > I have considered the nature of the offense. I have considered the mental

> health issues. I have considered mitigating and aggravating factors. I have considered in mitigation, for example, the relative youth. I have considered the fact that he does not have a long criminal record. And I have to say it is the most difficult case I have ever had. Ever. It will haunt me forever. Not just the pictures of the crime scene and what you did to your mom, but the entirety of the case.
>
> It is particularly difficult in this case because, as [the prosecutor] pointed out, I am presented with four different mental health diagnoses in the presentence report, or four different mental health professionals who have had contact with Mr. Windom at various times who have come to either a different diagnosis or a different prognosis.

The court then conducted an extended examination of the evidence relating to Windom's mental health including the differing diagnoses reached by the mental health professionals who worked with Windom prior to the murder and those who saw him later, the circumstances of the murder and Windom's behavior following the crime, including the manner in which he conducted himself during the interviews with law enforcement officers and the content of his statements to investigating officers. The district court concluded:

I don't know which mental health professional has it right. But I tend to agree with [the prosecutor], assuming that Dr. Beaver and Dr. Estess are correct and Mr. Windom is a paranoid schizophrenic, as Dr. Beaver indicated, the safety of society requires a couple [of] things. If Mr. Windom is let out, the safety of society, according to Dr. Beaver, requires that first he be treated by a mental health professional who really has it right and we can have no assurances of that. The second thing is that he actually takes his medications and that they actually work and that he doesn't play with his medications. And I don't know that I'm willing to trust that.

My primary concern in a sentencing like this is protection of society. Mental health professionals cannot guarantee that Ethan Windom will be compliant or his medications will work or that he will be under proper treatment. We know in jail he has continued to titrate his medications. We know that he was not compliant before he entered incarceration. We know that he is still isolated from others. We know that he has continued on occasion to have bad thoughts even while in jail. We know that the only reason – we know that he is compliant because his medications

> are being injected. I cannot gamble that Ethan Windom will be compliant or that he will receive the proper care or that the medications will continue to work against some potential victim. Society deserves better than that.
>
> Fixed life is – it is one of the harshest sentences that we can hand down and it's reserved only for those offenses that are so egregious that it demands an exceptionally high measure of retribution, or that the evidence indicates that the offender cannot successfully be monitored in society to reduce the risk to those who come in contact with him and that imprisonment until death is the only way to insure that we are protecting society. In my view that is the case here.
>
> . . . [This murder] is so brutal and so heinous that I believe that a fixed life sentence is appropriate. I do not do that lightly. I have only on one other occasion given fixed life and it was for these similar reasons.

From these comments, it is evident that the district court was conscious of our earlier decisions holding that a fixed life sentence may be appropriate both when there is a high degree of certainty that the defendant can never be released safely into society and when the

> nature of the offense warrants such punishment. It is equally evident that the district court believed that both circumstances existed in this case. Windom asserts that the sentence imposed by the district court was an impermissible "judicial hedge against uncertainty" and argues that the district court abused its discretion, noting his expressed remorse for his crime, his youth, his rehabilitative potential and the evidence that his mental illness resulted in the murder. The State responds that the trial court properly considered each of the sentencing factors and reasonable minds may differ as to its conclusion that a determinate life sentence was warranted. Thus, the State concludes that the sentence cannot be deemed to represent an abuse of discretion.

Id. at 876-77, 253 P.3d at 313-14. The Supreme Court observed that this Court carefully considered a lot more than just Windom's youth. In particular, this Court focused on Windom's potential for rehabilitation. The Supreme Court wrote:

> In this case, although the trial court had evidence before it including the opinions of two well-regarded mental health professionals regarding Windom's rehabilitative potential, it was the judge who bore the heavy burden of evaluating whether Windom would actually comply with rehabilitative programming and whether such programming would reduce his risk of future violent behavior to an acceptable level. [footnote omitted] Although Windom

and the dissent rely heavily on these opinions, *the trial court engaged in a lengthy discussion of other evidence casting doubt that Windom possessed the rehabilitative potential* reflected in the opinions advanced by Drs. Beaver and Estess.

The district court's comments reflect that it was not wholly persuaded of the accuracy of their shared diagnosis of schizophrenia, paranoid type. The trial court discussed the differing diagnoses of Windom's earlier treating mental health professionals and the "tentative" diagnosis advanced by Dr. Beaver.

When considering the opinions that Windom's crime was the product of a psychotic break, *the trial court considered the differing diagnoses of Windom's earlier treating mental health professionals as well as the evidence that Windom had planned and looked forward to the murder of his mother. For months preceding the murder, he had intimidated and bullied her, forcing her to move into the smallest bedroom while he dominated the other spaces in their home. He drew in his day planner graphic images of tortured women. He told friends and even his brother that he despised his mother and that he wanted her dead. Windom was so brazen that even his mother – his eventual victim – told Windom's father that she feared he might kill her while she slept. The trial court cited evidence suggesting that Windom had studied the symptoms of mental illness and believed he could use them as a guise if he was ever in trouble with the law.*

During his interviews with police, he mentioned that he had researched the symptoms of schizophrenia, and when pressed by an officer about whether "another part of Ethan" killed his mother., he laughingly replied that "MPD, multiple personality disorder, don't work." Additionally, it appeared that Windom modeled some of his conduct prior to and after the murder in the likeness of the serial-killer protagonist from a movie called *American Psycho. Based upon the district court's sentencing comments, it is evident that the court did not reject the possibility that Windom believed that he could mimic the brutal murders committed by the American Psycho protagonist and evade punishment by simulating a mental illness. The court also noted that Windom's logic, responsiveness, and demeanor during the several interviews in the hours following the murder were suggestive that Windom may not have been actively psychotic.*

The trial court further noted that even if Windom did suffer from a treatable mental health condition, both expert opinion and the course of Windom's treatment indicated that the condition of his illness and his treatment regime would require meticulous oversight. During incarceration, Windom's medication regime required titration, or monitoring of its efficacy and appropriate adjustment, several times. The Court noted evidence in the record that Windom was resistant to recommendations of Dr. Estess and others that he integrate with other juveniles and "go out into the yard and

> exercise" so that they could evaluate his behavior. The district court observed that before the murder, Windom had abused medications prescribed to treat his mental health by adjusting dosages and combining them with other substances. Although defense counsel pointed out that Windom had been compliant with his pharmacological regime while incarcerated, the court did not consider this to be a strong indication of his future compliance with the requirements imposed by mental health professionals. Rather, the district court pointed out that Windom's compliance was merely the passive receipt of medication by way of injection.

Id. at 878-79, 253 P.3d at 315-16 (emphasis added).

ANALYSIS

Windom's post-conviction claims are clearly untimely; Windom does not claim they are timely. The statute of limitation for post-conviction actions, I.C. § 19-4902, requires a petition for post-conviction relief be filed within one (1) year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. *See also Gonzalez v. State*, 139 Idaho 384, 386, 79 P.3d 743, 745 (Ct. App. 2003); *Hanks v. State*, 121 Idaho 153, 154, 823 P.2d 187, 188 (Ct. App. 1992). The "appeal" referenced in that section means the appeal in the underlying criminal case. *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088,

1089 (Ct. App. 1992); *Hanks v. State*, 121 Idaho 153, 154, 823 P.2d 187, 188 (Ct. App. 1992).

All of Windom's claims relate to his sentencing and appeal. *See e.g.*, *Hauschulz v. State*, 144 Idaho 834, 836-39, 172 P.3d 1109, 1111-14 (2007). Thus, the issues presented by this Petition stem from matters that occurred over seven and one-half (7 ‘/2) years ago and are untimely. The failure to file a timely petition is a basis for dismissal of the petition. *Evensiosky v. State*, 136 Idaho 189, 30 P.3d 967 (2001); *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). Furthermore, to the extent he challenges this Court's sentence, he actually challenged his sentence on appeal and lost. Post-conviction is also not the appropriate mechanism to challenge the Court's sentencing decision, and the doctrine of *res judicata* precludes Windom from relitigating an issue already decided. I.C. §19-4901(b)[5]; *State v. Creech*, 132 Idaho 1, 966 P.2d 1, 23 (1998).

The fact Windom filed a federal *habeas corpus* action does not extend the statute of limitations. The case law is clear. Where there has been a post-judgment motion or proceeding in a criminal action, the order

[5] I.C. § 19-4901(b) "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier."

entered on the post-judgment matter, like in a *habeas corpus* action, ordinarily does not extend the statute of limitation for a post-conviction action pertaining to the judgment of conviction or the original sentence. *Gonzalez v. State*, 139 Idaho 384, 386, 79 P.3d 743, 745 (Ct. App. 2003); *Cf. Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997) (holding a post-conviction petition was untimely because the limitation period was measured from the judgment of conviction, and claims challenging the judgment were barred). It is thus established that where there has been a post-judgment motion or proceeding in a criminal action, the order entered on the post-judgment matter ordinarily does not extend the statute of limitation for a postconviction action pertaining to the judgment of conviction or the original sentence. *Id.*

An untimely petition for post-conviction relief – one filed outside of the one-year limitation period – *must* be dismissed absent a showing that the limitation period should be equitably tolled. *Peregrina v. State*, 158 Idaho 948, 354 P.2d 510 (Ct. App. 2015); *Evensiosky v. State*, 136 Idaho 189, 190-91, 30 P.3d 967, 968-69 (2001); *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). In this case, Windom claims the statute of limitations was equitably tolled.[6]

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[6] Windom complains that the State never addressed the merits of his underlying claims. However, untimeliness deprives a court of jurisdiction and until the timeliness issue is resolved, neither the State nor the Court should address the merits. I.A.R. 21; *Amboh v. State*, 149 Idaho 650, 652, 239 P.3d 448, 450 (Ct. App.

Idaho appellate courts recognize the statute of limitations applicable to post-conviction may be equitably tolled in several circumstances. First, where the petitioner was incarcerated in an out-of-state facility without legal representation or access to Idaho legal materials, the time is tolled. *See Martinez v. State*, 130 Idaho 530, 536, 944 P.2d 127, 133 (Ct. App. 1997).

Windom does not base his tolling claim on this circumstance. Second, Idaho courts hold the time tolled where a mental disease or psychotropic medication prevented the petitioner from timely pursuing challenges to the conviction. *See Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996). Windom claims his mental condition or the medications prescribed prevented him from timely pursuing post-conviction relief. In cases where equitable tolling is allowed, the petitioner must establish that he or she was *unable* to timely file a petition due to extraordinary circumstances beyond his or her effective control, or show that the facts underlying the claim were hidden from the petitioner by unlawful state action. *Amboh v. State*, 149 Idaho 650, 653, 239 P.3d 448, 451 (Ct. App. 2010). Windom does not allege that the State unlawfully hid facts underlying his claims.

Windom generally contends the statute of limitations was equitably tolled[7] because he was young,

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2010); *State v. Payan*, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996); *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983).

[7] Windom initially relied on *Dunlap v. State*, 131 Idaho 576, 577, 961 P.2d 1179, 1180 (1998). As previously observed by the Court, *Dunlap* is a capital case governed by a specific statute, I.C.

diagnosed with schizophrenia, taking psychotropic medication, inexperienced in the law, had ineffective appellate counsel, suffered from ongoing mental health

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§ 19-2719(3), which explicitly creates a discovery exception as follows:

> (3) Within forty-two (42) days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed, the defendant must file any legal or factual challenge to the sentence or conviction that is known *or reasonably should be known.* The defendant must file any claims of ineffective assistance of appellate counsel within forty-two (42) days of the Idaho supreme court issuing the final remittitur in the unified appeal from which no further proceedings except issuance of a death warrant are ordered.

I.C. § 19-2719(3) (emphasis added). Furthermore, *Dunlap* was not a tolling case; the issue on appeal was whether Dunlap knew that his appellate and post-conviction attorney had failed to file a post-conviction petition. His claim was ineffective assistance of appellate and post-conviction counsel. The statute that applies to Windom's case is I.C. § 194908 which provides in relevant part as follows:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

I.C. § 19-4908. Nothing in that statute provides a discovery exception like the one in the statute applicable to death penalty cases, I.C. § 19-2719(4). Thus, *Dunlap*, does not apply.

issues and some *as yet* undisclosed conditions of confinement.[8] He failed to support his claims with *any specific evidence* that he was incompetent throughout his confinement and, in fact, provided no support for any of these claims at all. To date, the appellate courts in Idaho have not recognized that being young, inexperienced in the law, or represented by inadequate appellate counsel, toll the statute of limitations for post-conviction. Similarly, Idaho appellate courts soundly rebuff petitioner arguments that statute of limitations are tolled by language barriers or ignorance of the law. *See Sayas v. State*, 139 Idaho 957, 958, 88 P.3d 776, 777 (Ct. App. 2003); *Reyes v. State*, 128 Idaho 413, 414, 913 P.2d 1183, 1184 (Ct. App. 1996).

After the Supreme Court issued the *Montgomery* decision, Windom supplemented his contention that the statute was tolled and now also argues that this decision applies to his case, thus tolling the statute and that he should be allowed to amend his Petition. As discussed below, the Court finds the Supreme Court *Montgomery* decision does not change the outcome or Windom's tolling arguments. Therefore, amendment would be futile. Windom's Petition is untimely.

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[8] To the extent he complains that at the time he was arrested, he was housed separately from the adult population, such complaints are irrelevant. He is now twenty-six and at the time the statute ran he was twenty-two years old.

I. Windom presents no facts to support tolling the statute of limitations.

Like his burden of proof on the Petition itself, Windom also has to prove that facts exist to support his claim the statute of limitations is tolled. To sustain his burden of proof, Windom must support his allegations with competent, admissible evidence. *Curless v. State*, 146 Idaho 95, 99, 190 P.3d 914, 918 (Ct. App. 2008); *Hall v. State*, 126 Idaho 449, 453, 885 P.2d 1165, 1169 (Ct. App. 1994); *Roman v. State*, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994). It is not enough to allege that a witness would have testified to certain events, or would have rebutted certain statements made at trial, without providing through affidavit non-hearsay evidence of the substance of the witness' testimony. Windom's arguments thus far contain "only bare and conclusory allegations, unsubstantiated by factually based affidavits, records, or other admissible evidence." As the State argued, it appears that Windom's argument is "I need more time and I need money to determine whether I have a basis to toll the statute."

Windom even failed to indicate the duration of any of these alleged conditions. For example, the murder occurred over nine (9) years ago. Windom is presently twenty-six (26) years old. Thus, even if Idaho case law recognized youth as a basis to toll the statute, Windom's age does not equitably toll the statute; he turned eighteen before the statute of limitations ran. Furthermore, in support of his Petition, his step-mother, father and grand-parents all testify that he has matured into a more thoughtful, insightful and caring individual.

Finally, to the extent Windom suggests that the State "waived" the arguments because its brief was one day late, the suggestion is specious. The Court had already given notice of its intent to dismiss on the same basis, and the Court is not limited to the arguments made by the State. *See e.g.*, *Martinez v. State*, 130 Idaho 530, 533, 944 P.2d 127, 130 (Ct. App. 1997). Furthermore, the Court may *sua sponte* initiate summary disposition. *Id.*

However, for the purpose of this decision, the Court assumed Windom takes psychotropic medications and that he suffers from mental disorders. *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); *Martinez v. State*, 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct. App. 1997); *Ramirez v. State*, 113 Idaho 87, 88, 741 P.2d 374, 375 (Ct. App. 1987). Those facts still do not support tolling the statute in this case.

A. Windom's own lack of diligence caused or contributed to the untimeliness of the Petition.

The State contends that Windom failed to exercise due diligence and that his own actions caused or contributed to the untimeliness of his Petition. The Court agrees. The State relies, in part, on *Amboh v. State*, 149 Idaho 650, 653, 239 P.3d 448, 451 (Ct. App. 2010). In response, Windom seems to argue that *Amboh* stands for the proposition that *counsel's* failure to exercise due diligence equitably tolls the statute of limitations. However, that is not what this case says.

The Supreme Court found that Amboh himself failed to exercise due diligence because Amboh knew that his attorney failed to timely appeal the underlying conviction and still failed to timely file his post-conviction petition.

> Idaho appellate courts have not permitted quitable tolling where the postconviction petitioner's *own lack of diligence caused or contributed to the untimeliness of the petition. See, e.g.*, *Kriebel v. State*, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009) (even assuming petitioner did not have access to Idaho legal materials while incarcerated out-of-state for less than four months, he still had over nine months to file a timely petition but failed to do so); *Leer v. State*, 148 Idaho 112, 115, 218 P.3d 1173, 1176 (Ct. App. 2009) (petitioner demonstrated the ability to craft and file a petition, but failed to timely file one). Rather, in cases where equitable tolling was allowed, the petitioner was alleged to have been unable to timely file a petition due to extraordinary circumstances *beyond his effective control, Abbott*, 129 Idaho at 385, 924 P.2d at 1229; *Martinez*, 130 Idaho at 536, 944 P.2d at 133, or the facts underlying the claim were hidden from the petitioner by unlawful state action, *Charboneau*, 144 Idaho at 904, 174 P.3d at 874. None of these analogous circumstances are present in Amboh's case. As of August 2007, Amboh was informed in writing that his trial counsel had not filed a timely appeal from the judgment of conviction. At that point, he was on notice that his opportunity

> for appeal had been lost, and on notice of the deficient performance of counsel that he now alleges as his post-conviction claim. Even though the defense attorney may have contributed confusion by pointlessly filing an *untimely* notice of appeal, if Amboh had exercised reasonable diligence he could have determined that the appeal was dismissed long before the limitation period for a post-conviction action expired. Instead, despite having been notified that his appeal was filed after the appeal deadline, Amboh waited for *nearly one and a half years* before he made any inquiry about the disposition of the appeal and thereby learned of its dismissal. Neither the State nor anyone else concealed from Amboh the fact that this appeal was untimely or that it had been dismissed. Amboh's failure to file a timely petition raising his claim of ineffective assistance of counsel was not due to an extraordinary circumstance beyond his control, *but by his own lack of diligence.* In this circumstance, equitable tolling is not appropriate.

Amboh, 149 Idaho at 653, 239 P.3d at 451 (emphasis added). The fact that Amboh was informed of his post-conviction rights was not cited as a basis for the appellate court's decision.

However, even if being advised of his rights was integral to the Supreme Court's *Amboh* decision, in this case, Dennis Benjamin clearly and unequivocally informed Windom more than three (3) years before he actually filed his Petition about his right to file for

post-conviction relief and his concern that the time may have run. Therefore, applying the reasoning in *Amboh*, Windom failed to diligently pursue post-conviction and his Petition is untimely due to his own lack of diligence. Waiting over three (3) years after he filed his federal habeas case and even appealed that case, demonstrates Windom failed to act diligently in pursuing post-conviction relief.

B. *Martinez v. Ryan* does not apply; Windom's due process rights are not violated by applying the statute of limitations.

Windom argues that the United States Supreme Court case, *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) applies. However, it does not apply. The *Martinez* case is limited to federal habeas corpus cases and the role federal courts play in reviewing the constitutionality of a state prisoner's conviction and sentence. Generally, federal courts follow the "doctrine of procedural default". This doctrine precludes a federal court from reviewing the merits of claims that a state court declined to hear or consider because the prisoner failed to comply with a state procedural rule.

> Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a

> federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule. See, *e.g.*, *Coleman*, *supra*, at 747-748, 111 S.Ct. 2546; *Sykes*, *supra*, at 84-85, 97 S.Ct. 2497. A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. See, *e.g.*, *Walker v. Martin*, 562 U.S. ___, ___, 131 S.Ct. 1120, 1127-1128, 179 L.Ed.2d 62 (2011); *Beard v. Kindler*, 558 U.S. ___, ___, 130 S.Ct. 612, 617-618, 175 L.Ed.2d 417 (2009).

Martinez v. Ryan, 132 S.Ct. at 1316. The *Martinez* case considered one exception to that general rule.

Martinez involved an Arizona prisoner. In Arizona, *unlike Idaho*, defendants *cannot* assert ineffective assistance of counsel claims on direct appeal and can *only* raise that issue on postconviction. In *Martinez*, the Supreme Court ruled that in that narrow set of cases where a prisoner *cannot* raise ineffective assistance of counsel on direct appeal and where the ineffective assistance of counsel claim is substantial, the procedural default doctrine may not apply. Only in those narrow set of cases, the federal court may hear the claim.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim

> in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez v. Ryan, 132 S.Ct. at 1318-19.

However, in Idaho, *unlike in Arizona*, defendants enjoy the right to raise ineffective assistance of counsel claims either on post-conviction or on direct appeal.

> A defendant may raise the issue of ineffective assistance of counsel at trial either on direct appeal or in a petition for post-conviction relief, but not both.

Matthews v. State, 122 Idaho 801, 806, 839 P.2d 1215, 1220 (1992). Therefore, Idaho prisoner cases are distinguishable and *Martinez* does not apply. In addition, in

Martinez, the United States Supreme Court also observed as follows:

> Other States appoint counsel if the claims have some merit to them or the state habeas trial court deems the record worthy of further development. . . . *Hust v. State*, 147 Idaho 682, 683-684, 214 P.3d 668, 669-670 (2009). . . . It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings.

Martinez v. Ryan, 132 S.Ct. at 1319.

As previously noted, Windom appealed to both the Court of Appeals and to the Idaho Supreme Court challenging his sentence. In both cases, the State Appellate Public Defender represented him. Not only were his due process rights not violated, but a federal court would be barred by the doctrine of procedural default from examining application of the statute of limitations to Windom's post-conviction claims. *Martinez* does not change that analysis.

C. There are no material facts in dispute precluding dismissal or requiring an evidentiary hearing.

Windom claims he was under the influence of medications, Cogentin, Prozac and Resperdal, at least in 2011, and that he suffers from a mental defect that

effectively tolled the statute. However, the bar for equitable tolling based on mental defect or use of psychotropic medications is high. *Chico-Rodriguez v. State*, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005).

> It is not enough to show that compliance was simply made more difficult on account of a mental condition. We hold that in order for the statute of limitation under the UPCPA to be tolled on account of a mental illness, an unrepresented petitioner must show that he suffered from a serious mental illness which rendered him incompetent to understand his legal right to bring an action within a year or otherwise rendered him incapable of taking necessary steps to pursue that right. *Equitable tolling will apply only during the period in which the petitioner's mental illness* ***actually*** *prevented him from filing a post-conviction action*; any period following conviction during which the petitioner fails to meet the equitable tolling criteria will count toward the limitation period.

Chico-Rodriguez, 141 Idaho at 582, 114 P.3d at 140 (emphasis added). In other words, even if Windom established he suffered from a mental defect or was under the influence of medication, the tolling ends once the condition ends. In this case, the problem Windom faces is that he actually filed a federal habeas case three (3) years before he filed this Petition. Idaho case law is clear, the act of initiating any legal action demonstrates a petitioner's competency.

The question is whether Windom made a prima facie showing that his mental health or use of psychotropic medications *actually* prevented him from filing his petition within the limitations period. *See Mahler v. State*, 157 Idaho 212, 216-17, 335 P.3d 57, 61-62 (Ct. App. 2014). However, Windom presented no admissible evidence supporting his claim. *Mahler* demonstrates how high the bar is.

> We conclude that Mahler's affidavits are insufficient to present a genuine issue of material fact. First, the statement that Mahler does not know or cannot remember the applicable statute of limitations is irrelevant. *The relevant question is* not whether he knew the statute of limitations, but *whether he had the ability to file his post-conviction claims for a reasonable time before the limitations period expired.* [footnote omitted] Second, Mahler provided no evidence as to when he became able to pursue a post-conviction action with assistance. His affidavit says he was provided help in 2011. He did not file his petition until March 2012. Accordingly, based solely on the admissible evidence submitted to the post-conviction court, Mahler may have taken many months to file his petition *after* the right to do so was adequately explained to him. Although Mahler claims to have been unable even to communicate orally upon his arrival at the prison, his evidence does not state when this inability ended.

Id. (emphasis added). The Court continued:

> Third, there is no evidence in the record that Mahler made any attempt to use the resources

> made available by the prison for illiterate inmates. According to his brief below, Mahler was able to understand the relevant procedures after "over an hour" of help from a fellow inmate. There is no evidence that Mahler ever sought help earlier or would have been unable to file his petition earlier using the aid provided by the prison. In short, *Mahler's evidence shows that for some undefined period after his incarceration he did not understand that he could file a post-conviction action and did not know the statute of limitations. The same could undoubtedly be said for nearly every first-time inmate upon his or her arrival at a state prison.* They learn about these matters by giving attention to information provided by the prison and through conversations with other inmates. Mahler has not shown that his intellectual disability *actually* prevented him from filing a post-conviction action within the limitations period.

Id.

Idaho appellate courts clearly hold that mental incapacity does not equitably toll the statute of limitations where a defendant timely files a *pro se* motion for appointment of post-conviction counsel or otherwise demonstrates his mental capacity at some point in the past. The Court of Appeals ruled even filing a *pro se* motion for counsel demonstrates a petitioner's mental alertness. *See Leer v. State*, 148 Idaho 112, 218 P.3d 1173 (Ct. App. 2009).

Significantly, even assuming Windom was under the influence of psychotropic medications or suffered from mental illness,[9] in September 2012, Windom filed a federal habeas action *pro se.* Filing a post judgment motion or initiating a post judgment proceeding, clearly demonstrates that *at least in September 2012*, Windom exhibited the appropriate mental capacity to pursue legal relief. In Idaho, where a defendant claiming mental incapacity timely files a *pro se* motion for

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[9] To the extent Windom complains that this Court failed to provide him funds to hire an expert or do some unidentified discovery, the Court notes that when he filed this Petition, Windom supported it with August 2015 affidavits from Craig Beaver, Ph.D. and Timothy Ashaye, M.D. (albeit *pro bono* as well). Neither opined as to his present condition or what his condition would have been during the relevant time frame. The Court further notes that, other than vaguely talking about the need for experts, at no time has Windom specifically requested funds or indicated what he needed in any particular way or how much he needed or for what he needed these funds. The Court is not required to simply provide a petitioner or defendant with a blank check to go on a fishing expedition.

The Idaho Supreme Court has held that such assistance is not "automatically mandatory, but rather depends upon [the] needs of the defendant as revealed by the facts and circumstances of each case." *State v. Powers*, 96 Idaho 833, 838, 537 P.2d 1369, 1374 (1975) (murder case). In ruling on a specific request, the trial court considers the defendant's needs and the facts and circumstances of the case, and then decides whether an adequate defense is available to the defendant without the assistance of the requested expert or investigative aid. *State v. Olin*, 103 Idaho 391, 395, 648 P.2d 203, 207 (1982). Such "a denial of a defendant's request for expert assistance or investigative assistance will not be disturbed absent a showing that the trial court abused its discretion by rendering a decision which is clearly erroneous and unsupported by the circumstances of the *case*." *Id.*

appointment of post-conviction counsel, his mental incapacity does not toll the statute of limitations because this act demonstrates the petitioner's mental alertness. *See Leer v. State*, 148 Idaho 112, 218 P.3d 1173 (Ct. App. 2009). Thus, even assuming the statute was tolled by his use of psychotropic medications or by his diagnosis prior to September 2012, as of September 2012, any tolling ended[10] when he exhibited his mental capacity by filing a federal habeas action. Windom filed this Petition nearly *three* (3) years later. Additionally, Dennis Benjamin clearly notified him about his post-conviction rights in his letter.

An evidentiary hearing is not necessary because his counsel's affidavit, as well as the record, establishes that he was competent enough to understand his legal right to bring action at least in September 2012. Based on the fact that not only did he apparently understand his right to file a habeas action in response to Dennis Benjamin's letter but that he actually did file the action, *even assuming he was taking the medications listed or that he suffered from a mental condition.* The fact is that he filed the habeas action *pro se.* Windom provided no explanation why being competent enough to file the federal habeas action did not also

[10] Windom misapprehends the effect of tolling. Even where a petitioner meets the heavy burden and establishes the statute was tolled for some reason outside his or her control, the statute of limitations period does not begin again. A petitioner must act and diligently pursue his or her rights. As previously discussed, Windom failed to diligently pursue his rights.

mean that he could have filed a petition for post-conviction relief.

Therefore, Windom's Petition is time-barred and no evidentiary hearing is required.

D. There are no material facts in dispute precluding dismissal or requiring an evidentiary hearing.

Finally, as previously observed, even if timely, to the extent that he claims the Court's sentence is excessive, *res judicata* bars that claim as well. Idaho law applies *res judicata* to criminal and post-conviction cases. *State v. Creech*, 132 Idaho 1, 9 n. 1, 966 P.2d 1, 9 n. 1 (1998).

II. The recent *Montgomery* case does not change the Court's tolling analysis; any amendment is futile and the motion to amend is denied.

On January 25, 2016, the United States Supreme Court issued the *Montgomery* decision. *Montgomery v. Louisiana*, 136 S.Ct. 718 (U.S. La. 2016). In response to that new decision, Windom immediately moved to amend his Petition to allege his sentence violated the Eighth Amendment. The State opposed. If amending his Petition to include an Eighth Amendment claim would not change the Court's analysis, such amendment would be futile and should be denied.

A. The *Montgomery* case only holds that *Miller* announced a new substantive law.

The *Montgomery* decision does not change the actual holding in *Miller*. In *Montgomery*, the Supreme Court simply ruled that *Miller* announced a new substantive constitutional law that applied retroactively to all juveniles who had been sentenced under a mandatory statutory scheme. Like the defendant in *Miller, but unlike Windom*, Montgomery was sentenced under a sentencing law that *mandated* fixed life without the possibility of parole. As the Supreme Court observed:

> In *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing.

Montgomery v. Louisiana, 136 S.Ct. 718, 725 (U.S. La. 2016) (emphasis added). If *Montgomery*'s reasoning applied to Windom and would have changed the outcome or required the Court's sentence to be overturned, the statute may have been tolled and, thus, amendment would be appropriate. However, *Montgomery*'s holding does not apply to Windom and, in any event, does not change the outcome of the tolling analysis.

Windom pled guilty to second degree murder and was never exposed to a *mandatory* life sentence without possibility of parole. In fact, the Court had a great

deal of discretion in sentencing Windom. The record establishes that Windom's sentence was the result of an exercise of discretion. Furthermore, as the Court's sentencing comments prove, the Court in fact considered Windom' s "special circumstances", considered the possibility of rehabilitation, and properly applied Windom's special factors to determine Windom's sentence. Thus, on its face, *Montgomery* does not apply to Windom and the statute is not tolled by this case.

Moreover, while Windom suggests that *Montgomery* announced new standards for imposing a fixed life sentence to a juvenile and that this Court failed to apply those standards, he is incorrect.

B. Windom's actions did not reflect "the transient immaturity of youth" and the facts establish that this is one of those rare cases where fixed life is appropriate.

At sentencing, the Court carefully disclosed its reasoning. The transcript proves that in reaching its sentencing decision, the Court in fact applied the heightened standards and factors identified in *Montgomery* and previously in *Miller.* In a lengthy sentencing, the Court, in effect, found that Windom's crime did not reflect "the transient immaturity of youth". The Court carefully weighed Windom's potential for rehabilitation and his potential danger to the community. Neither *Miller* nor *Montgomery* precludes a fixed life sentence for a juvenile or finds such a sentence categorically violates the Eighth Amendment. Even the

Montgomery Court acknowledged that *Miller* specifically recognized: " . . . a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S.Ct. at 733-34.

Thus, while clearly such a sentence should be reserved for the rare case, in fact, both *Montgomery* and *Miller* clearly recognize that life without parole may be *appropriate* in some limited circumstances. Those circumstances existed here. This case was that rare case that justifies imposing life without parole for a juvenile.

The sentencing transcript[11] confirms this Court carefully considered his special circumstances, including his youth, mental health and relative lack of significant criminal history. In fact, the Court noted during sentencing that it reviewed the psychological reports (even discussing them in detail), the crime itself, the police interviews and considered what was going on in the house before the crimes. However, based on the murder itself and Windom's behavior and attitude before, during and after the murder, the Court determined that even considering these factors, fixed life was appropriate.

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[11] From this point on, the Court summarizes, in part, and quotes, in part, the Court's sentencing comments from the sentencing transcript, attached to the decision.

The murder was carefully planned and particularly horrific. The murder was not reckless or impulsive. Windom himself describes how he coldly and indifferently brutalized his mother. Windom did not want to get caught. His actions clearly demonstrated that he knew what he was doing and that he went to great lengths to conceal his own involvement in order to preserve his ability to kill more people. At sentencing, the Court took great pains to explain the evidence for that planning.

For example, Windom wore gloves. He changed the message on the phone. He called a friend to tell her he and his mother were going out of town. He threw out one of the knives he used. The Court at sentencing carefully recounted what Windom did and noted his cautious attempts to hide his involvement. This was not a murder demonstrating a lack of maturity or an "underdeveloped sense of responsibility". It was the opposite. Furthermore, the Court carefully examined Windom's police interviews. This interviews took place within hours of the murder. In a nearly one hour sentencing, the Court disclosed what the Court observed in those interviews. The interviews themselves and Windom's own words and demeanor demonstrated that Windom exhibited "irretrievable depravity."

At school, Ethan Windom was well-liked and was not a loner. He integrated well into his high school. Windom's brother Mason, Windom's friends and cousins, described how Windom controlled the Windom household and how he had repeatedly abused his mother for some time. His mother was a well-liked

counselor with the school district. She told many people that she feared Windom. Windom ran the household. He forced his mother to move from her master bedroom to the smallest bedroom and he had the master bedroom instead. In fact, his mother's new bedroom barely accommodated a twin bed, dresser, and rocking chair. This was where Windom brutally murdered her.

In addition to commandeering the master bedroom, Windom also took over the next larger bedroom when his brother moved out. He moved his toys, like his weights, into his brother's old bedroom. Windom also took over the living room. For example, he had a large, very nice chair in the living room for him to sit in, watch television and play his video games. However, his mother did not even have a chair for her to use.

All of his friends and classmates recounted how Windom told them over a period of time, "I hate my mom. She's such a bitch. I want to kill her." They also describe him openly discussing killing people in general. Those who actually went to his home described how he treated his mother as a servant. One friend told police Windom often spoke of wanting to kill people and wanting to be a famous serial killer. In fact, when Andrew Layman, Windom's therapist, diagnosed Windom as possibly having psychopathy or being psychopathic, his friend told police Windom was excited and happy. Windom told him he did not love his mother or anyone.

As the Court observed during sentencing, Windom was in complete control of both his environment for a

long time prior to the murder and in control of the crime itself. He was not the victim of a "horrific, crime producing setting". His mother was by all accounts a wonderful and caring individual. But she lived in fear of Windom. The evidence suggested that he knew exactly what he was doing.

After the murder, police found a day planner belonging to Windom at the murder scene. The day planner contained a series of drawings that this Court reviewed and discussed at sentencing. The first set of the drawings depicted naked females being tortured and killed. Many of the females were restrained. It was extremely disturbing.

For example, one drawing depicted a restrained female being hung and shot in the face. A second drawing depicted a female with her head cut off by an ax. The third drawing depicted a female stabbed by a knife in her mid-torso. A fourth female was hanged and another picture depicted a female being cut in half with a chain saw and stabbed in the neck. The sixth and seventh drawings depicted a female being killed with a chain saw. Another drawing dated December 7th depicted a naked female being restrained with nails in her hands and chains on her feet. This same drawing also depicted a chain saw inserted into her vagina. Another drawing depicted a judge, a pig, and a police officer being shot multiple times by a gun.

The day planner also contained handwritten messages that said, "Kill everyone. Cut them into pieces.

Fry organs like heart and brains and see how it tastes. Heart is an okay organ to eat if fried."

The Court noted during sentencing Windom was fascinated with psychology, psychopaths and schizophrenia. He took psychology as a sophomore and in his junior year (the year of the murder) Windom took abnormal psychology. Windom bragged during the interviews about his knowledge.

Before sentencing, the Court watched a video of his police interviews, where he confessed. These interviews occurred within hours after the murder. In fact, as the record indicated, the Court watched those videos over and over again to try to get a sense of what Windom was doing, what he was thinking, the reasons why he murdered his mother, and to ensure that this was not an impulsive act or in reaction to an abusive situation. In fact, the Court saw exactly the opposite was true. The Court observed an intelligent, coldly calculating, nearly 17-year-old man bent on murder.

At sentencing, the Court recounted the more chilling aspects of the interviews and carefully quoted Windom himself. The Court also described Windom's physical reactions and demeanor. At sentencing, the Court explained its own observations of those interviews. As the Court observed, in response to the officer's request to tell him about the murder, Windom proudly discussed his actions in murdering his mother:

> "What do you want to know?" "What started it?" "I was up at night. I was twitching." He had indicated earlier that the medication,

he felt, was causing him to twitch. He says, "It's a'growing inside me, a need for a killin'." He was up late.

She [the officer] asked whether she [his mother] had – "She did not do anything to make you mad?" "No," shaking his head shrugging. "I just whacked her with the weights. The only thing around." "Where did you whack her?" "In the head." He acts exasperated rolling his eyes upward. He says, "How many times?" "I didn't count."

"Approximate guess?" "I don't know. I don't remember. It was either she was making noise or her" . . . "f'ing' brain was making noise." "What kind of noise?" "Kind of a hissing sound. Could have been her flicking brain. Kind of, uh, gurgling. Kind of – yeah, gurgling, hissing." He demonstrates how he uses the weights. He picks it up in his hands and he puts it over his head and he shows a repeated whacking motion.

"Do you know how many times?" "Yeah, just whacked her. Wasn't sure if she would scream or not." That's when he talks about having his hand over her mouth. "One wasn't good enough?" "Guess not. Wasn't sure if she was going to scream or not. I couldn't tell if she was alive or not." And he crossed his arms about this point.

"She continued making noises." "Loud noises?" "No, small noises," and he kind of shrugs. He is maintaining good eye contact with this. His voice is modulated. "But I hit

> her." "Until the noises stopped?" And that's the question. He says, "No." "How long did you hit her?" "No, I first hit her a couple of times," and he shrugs again and he looks like he is trying to remember. He says, "Then I stabbed her with a knife," and he smiles. And the question is, "What knife?" He smiles broadly, "a knife."

Transcript[12], p.123, ln. 23 through p. 125, ln. 5. In the interview, Windom continued to describe his murder:

> He says, "I hit her two more times, less than ten because I didn't have the strength after that. She's still making noises. Then I stabbed her in the heart a couple of times." "With what?" "The knife."
>
> He says it very specifically with a smile. "Which knife, the Winchester knife," which is the one that's in her brain. Smilingly he says, "No, with a special knife." And he smiled.
>
> He got it from his brother's apartment. He described the knife and he says, "I know how to use a knife." Again, he's smiling, "Real well. Real well. Real well. But I could not get in the angles to do the three-shot kill." . . . The officer has no idea what he's talking about and so he asked him to describe it. Very quietly he [Windom] says – and he shows him where these are [on the body]. . . .

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[12] All of the transcript cites come from *State v. Windom*, Case No. CR-FE-2007-0000274 (formerly Case No. H0700274) sentencing dated December 12, 2007.

> He says, "I couldn't get in, though, the last part because she was sleeping like this." And he demonstrated how she was on her side. He says, "All three and you're dead." He turned her over and stabbed her – according to what he said, stabbed her in the thigh and then heart. Then he says, "Because I was thinking where" – he says, "I was thinking" – I was feeling where my own heart was," and he gestured to his own heart, "to make sure that I got it right."
>
> Then he says he stabbed her and she's still making – hissing is coming from her and her heart gurgling. "I don't know what the hell it was so I stabbed her in the lungs. I don't know, maybe I slit her throat," and he kind of looks puzzled and looks like he is thinking about it, "before I stabbed her in the lungs. I can't remember. I think I stabbed her in the lungs and then I slit her throat."

Transcript, p.125, ln. 24 through p. 127, ln. 3. The officer asked him how many times he stabbed her in the lungs and in response, Windom:

> . . . thinks for a minute, "Quite a few. I don't know. There's a lot of stab wounds and they are not superficial." "Real deep?" He says like – and he starts smiling. "Never seen actual skin be torn apart like that, like paper but worse." Big smiling. "Worse?" "Yeah." Smiling. You know – and he explains that.
>
> He says, "You know clay? Kind of that thing. You just spread it apart. That's how it

> is. It is elastic. Would kind of just rip. He makes stabbing motions. "This knife, the one that's thrown out is a monster." He said, "I wasn't sure she was still alive and then the blood started pouring out and then I thought it might be making noises, but I had to make sure. I had the glove over her mouth the whole time or what I thought was her mouth."

Transcript, p.127, lns. 4-17. The officer asked him "How do you feel about what you did?" Transcript, p. 127, ln. 20. Windom smiled broadly when he responded:

> "Nothing." "You don't feel nothing about it?" Big smile again, "Nothing at all." "Do you feel good about it," he's asked. Sort of a light laugh, "Don't feel good about it. Told you I don't feel nothing. I don't regret nothing. I already knew it was going to end this way.

Transcript, p. 127, lns. 20-25. Windom told the officer:

> People did not listen to me. And I told them exactly. It is a'growing inside me." And he was asked why. And he says, "Because it is fucking stupid." He says, "Only Andrew Layman, I started expressing things to him about how little I cared. He thought I put so much hate into this world and I told him, 'Holmes, I don't even use energy to hate. It is already there.' He was the one who knew. He's the closest. My psychiatrist, he probably – his problem is that he talked to my stepmom too much so anything she told him, that's mainly what he went on. He didn't know much about

> nothing. I had my guy, Andrew Layman,[13] send the psychiatrist a letter, but I don't know what it said."
>
> He says, "I've had these thoughts since 8th grade, for four years." And he was asked, "Why your mom?" He says, "The closest person. I was thinking – he says, "Closest person. I was thinking about going downtown and stabbing a couple of bums, too. They're worthless bums. You know what, they live on the fucking streets and make up all of these excuses of why they don't work. Just lazy. If she wakes up, she would have spoiled my plan. Besides I was going to kill bums anyway. Why not add to the list."
>
> At the very end he says, "There are things in life you are not meant to understand. I'm one of them. I wasn't meant to be Bourne [sic]. I shouldn't have. I should have been in the hospital most of my life. I will do whatever I fucking want, not care whether I screw up their head or not."

Transcript, p.128, lns. 1-25.

Windom played with his interrogators throughout the interview, even asking the officers about their relationships. At one point he said to one of the officers,

> "You think you are smarter than I am. I have street smarts. I feel sorry for you because you are the one controlled. I can see people and their wants and desires. I'm smarter than

[13] Andrew Layman diagnosed Windom as a psychopath.

> anyone I know. I can tell them exactly what they want to hear. I ain't got nothing in common with my friends. I just watch people. I watch them and I see them. I can easily say what they want to hear. It's fun. People are stupid. They're easy."

Transcript p. 118, lns. 5-12. At another point, they discussed *American Psycho*, a book and movie that fascinated Windom. One officer asked whether *American Psycho* influenced him, Windom responded:

> "Only stupid people are influenced by those things. People should be able to take responsibility essentially for their actions." . . . "Most people are weak and stupid. And they're too dumb to create their own way. That's why they use the book/movie as an excuse."

Transcript p. 118, lns. 13-17; p. 119, lns. 5-7. According to the transcript, the Court observed that throughout the interview, Windom appeared well oriented in time, demonstrated a good memory, kept good eye contact, and seemed relaxed. Unprompted, Windom said at another point in the interview:

> "Did you notice most of my reference books are all on psychopathic minds?" He says, "I admire psychopaths. They're the smartest group of guys. And they're the most interesting. They have an exciting life." He says – he says, "Now, Dahmer, he was a sissy. Gacey, he was smart. He was in the Republican party. He was, I think, a deputy sheriff."

> But he says, "Now Bundy's, he had a great life. He was extremely smart."

Transcript p. 118, ln. 22 through p. 119, ln. 3;

Based on the horrific facts of the murder itself, the past behaviors, and Windom's own statements and actions in the interviews, the Court concluded, after careful deliberation, that Windom's actions did not reflect "the transient immaturity of youth" but in the words of the United States Supreme Court, reflected those actions of "the rarest of children" whose crime reflected "irreparable corruption" deserving life without parole.

In affirming this Court's carefully considered and agonizing decision, the Idaho Supreme Court opined:

> The task of sentencing is a difficult one. When evaluating the defendant's prospects for rehabilitation, trial judges are asked to make a probabilistic determination of a human being's likely future behavior. The reality is that a sentencing judge will never possess sufficient information about the defendant's character, life circumstances and past behavior so as to project future behavior with unerring accuracy. To the contrary, the factual determination of the defendant's probability of reoffense will always be based upon limited data. This extraordinarily difficult task is made more difficult because it is merely one factor to be considered by the sentencing judge – and a subordinate consideration at that. *State v. Moore*, 78 Idaho 359, 363, 304 P.2d 1101, 1103 (1956) ("Rehabilitation is not the controlling consideration. . . . The primary

consideration is, and presumptively always will be, the good order and protection of society.").

Sentencing is less a science than an art. Judges face a different uncertainty principle than physicists: they must make a factual finding of the probability of future criminal behavior based upon limited data. In so doing, they draw upon their accumulated experience. It is precisely because of the difficulty of fashioning an objectively appropriate sentence that this Court has adopted a deferential standard of review of sentencing decisions. In this case, Windom essentially asks this Court to re-weigh the evidence presented to the district court and reach a different conclusion as to his prospects for rehabilitation. It is evident that the district court did not believe that it was appropriate to abdicate its responsibility to conduct its own assessment of Windom's mental condition based upon the evidence before it and to accept, without reservation, the opinions of two doctors who offered promises of Windom's complete rehabilitation. If we were acting as sentencing judges, we may well have done as the dissent suggests, and placed greater weight on the opinions of Dr. Beaver and Estess than did the district court. However, our role is not to reweigh the evidence considered by the district court; our role is to determine whether reasonable minds could reach the same conclusion as did the district court. Applying this standard, we can find no

> error in the district court's finding that Windom represented an unreasonable risk of future dangerous behavior.

Windom, 150 Idaho at 879-80, 253 P.3d at 316-17.

Therefore, even if the Court allowed the Petition to be amended, it would not change the outcome. The most recent Supreme Court decision does not change that outcome and did not toll the statute. The motion to amend the petition is denied as futile.

CONCLUSION

Having reviewed the Petition and any evidence in a light most favorable to Windom, the Court finds that it is satisfied that Windom is not entitled to post-conviction relief as the petition is untimely. LC. § 19-4906(2). Windom failed to establish the statute of limitations was tolled. The Court further finds there is no dispute of *material* fact and no purpose would be served by any further proceedings. Therefore, the Court dismisses Windom's Petition and denies his motion to amend his Petition.

IT IS SO ORDERED.

Dated this 23rd day of February 2016.

/s/ Cheri C. Copsey
Cheri C. Copsey,
Senior District Judge

The undersigned authority hereby certifies that on February, 2016, I mailed one copy of the **ORDER DISMISSING PETITION** as notice pursuant to Rule 77(d) I.C.R. addressed as follows:

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