No. _____

In The

Supreme Court of the United States

SARAH MARIE JOHNSON,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOHN R. MILLS
Counsel of Record
PHILLIPS BLACK PROJECT
836 Harrison Street
San Francisco, CA 94107
(888) 532-0897
j.mills@phillipsblack.org

DENNIS BENJAMIN
DEBORAH WHIPPLE
NEVIN BENJAMIN
MCKAY & BARTLETT
P.O. Box 2772
Boise, ID 83701

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

Petitioner Sarah M. Johnson, a sixteen-year-old girl with no prior criminal record and a demonstrated capacity for rehabilitation, has been sentenced to life without the possibility of parole in 2005. In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court expressly declined to address the question of whether a life sentence without the possibility of parole for a defendant under the age of eighteen categorically violated the Eighth Amendment. *Id*. at 469.

Since *Miller*, an additional sixteen jurisdictions have prohibited the imposition of juvenile life without parole by statute or court ruling, raising the current number of jurisdictions banning the sentence to twenty. Many other states have acted to severely limit the application of juvenile life without parole. In thirteen additional states, zero – or very few – individuals are actually serving the sentence. The juvenile life-without-parole sentences that remain are now localized in a few jurisdictions where prosecutors and courts are demonstrating a resistance to this Court's juvenile jurisprudence. Therefore, this case gives rise to the following questions:

1. Does the Eighth Amendment categorically prohibit life-without-parole sentences for juvenile offenders?

2. Where the evidence demonstrates Ms. Johnson lacks a prior history of violence and has high potential for rehabilitation does the state's pre-*Miller*

QUESTIONS PRESENTED FOR REVIEW – Continued

sentencing proceeding comply with *Miller*'s requirement to limit juvenile life-without-parole sentences to the rare juvenile offenders who are irreparably corrupt?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. The petitioner is Sarah Johnson, who was the petitioner, defendant and appellant in the courts below. The respondent is the State of Idaho, who was the respondent, plaintiff, and appellee in the courts below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sarah Johnson respectfully petitions for a writ of certiorari to the Idaho Supreme Court.

OPINIONS BELOW

The Idaho Supreme Court affirmed the denial of Ms. Johnson's petition for post-conviction relief on May 12, 2017, *Johnson v. State*, 395 P.3d 1246 (Idaho 2017). (Appendix A). Sarah Johnson filed a petition for post-conviction relief in Idaho's district court, which was denied on October 27, 2014. (Appendix B).

STATEMENT OF JURISDICTION

This Petition is being filed within ninety days after entry of judgment, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

In 2005, Ms. Johnson was sentenced to two fixed life (life-without-parole) sentences for the murder of her parents, Alan and Diane Johnson. *Johnson v. State*, 395 P.3d 1246, 1249 (Idaho 2017). At the time of the offense, Ms. Johnson was a sixteen-year-old child with a history of clinical depression and a suicide attempt. *Id*. (T. 6287, 6306).[1] Prior to the murders, Johnson had never committed another violent or criminal act. (T. 6289, 6475, 6477). The evidence at trial indicated that Alan and Diane Johnson were both shot and killed with a rifle while they were in their home. *Johnson*, 395 P.3d at 1248. The purported motive for the murders was to prevent them from pursuing statutory rape charges against, or seeking the deportation of, their daughter's nineteen-year-old boyfriend. *Id*. at 1256 (T. 6472-73).

Ms. Johnson's sentencing hearing took place in June of 2005. (T. 6183). Dr. Richard Worst, a psychiatrist appointed by the court to evaluate her, testified at

[1] In this petition, "T." refers to the trial transcript.

length about her personality, mental state and potential for rehabilitation. (T. 6279-6350). Dr. Worst concluded that, although Ms. Johnson had suffered from clinical depression for two years preceding the murders, she showed no evidence of psychosis, conduct disorder, or anti-social personality disorder. (T. 6287-89). Dr. Worst found that Johnson was not prone to violence, and, in fact, he described her as a "pretty darn normal girl." (T. 6289, 6321). Dr. Worst testified that he believed Ms. Johnson was amenable to rehabilitation. (T. 6289, 6320-21). After considering Ms. Johnson's "intelligence, . . . ability to do abstract thinking, the fact that she's not psychotic, [and] doesn't seem to be belligerent," as well as her life history prior to the crime, he concluded that her prospects for a life devoid of further criminal behavior were strong. (T. 6319-21).

Craig Beaver, a psychologist retained by defense counsel, agreed with Dr. Worst's analysis and conclusions. Dr. Beaver testified that Johnson had a high potential for successful rehabilitation. (T. 6392). Based on his assessment of Ms. Johnson's offense, mental health history, and personality characteristics, Dr. Beaver testified that the scientific research showed there was a substantial likelihood she could be reformed and would not, in the future, pose a danger to society. (T. 6402, 6406, 6414). Although the court questioned whether someone, like Ms. Johnson, who had not admitted her involvement in the offense, could be successfully rehabilitated, Dr. Beaver assured the court that it was

possible. (T. 6396). Acceptance of responsibility, particularly at an early stage, was not essential to her rehabilitation. (T. 6396).

Other witnesses who knew Johnson testified that she had a history of caring, nurturing behavior, had recently demonstrated these characteristics by providing physical care and assistance to her cellmate in jail, and, after two years of incarceration, had no record of disciplinary infractions whatsoever. (T. 6299, 6359, 6364).

After considering the statutory sentencing considerations applicable to adults, *see* (T. 6465), citing I.C. § 19-2521, the court concluded that the severity of the offense required a fixed life sentence. (T. 6499). Any sentence lesser than fixed life, in the court's opinion, would depreciate the seriousness of the offense because, in the court's view, "society cannot tolerate and will not tolerate a child rebelling against parents and killing them." (T. 6469).

Although the court acknowledged the evidence of Johnson's rehabilitative potential, it repeatedly concluded that other sentencing considerations overwhelmed the significance of her rehabilitation, which it dismissed as concerning "the needs of the defendant" rather than those of the victim, next-of-kin, or society at large. (T. 6468); *see also* (T. 6490, 6499). Specifically, the sentencing court noted, "I'm a big believer in rehabilitation. I'm a big believer in hope. But there's certain conduct that crosses the line. There's a price to be paid for certain things greater than the price to be paid for

others." (T. 6489-90). The price the court concluded Ms. Johnson needed to pay – regardless of whether or not she could ever become a contributing member of society – was life without parole. (T. 6500-01).

Ms. Johnson's convictions and sentence of fixed life were affirmed on direct appeal. *State v. Johnson*, 188 P.3d 912 (Idaho 2008). She filed a Successive Petition for Post-Conviction Relief in 2012, which she amended in 2014. *Johnson*, 395 P.3d at 1246. After the lower court denied the petition, she appealed, raising, among other claims, a challenge to the constitutionality of her two life-without-parole sentences under *Miller v. Alabama*, 567 U.S. 460 (2012). *Id*.

The Idaho Supreme Court affirmed the sentences, concluding that they complied with *Miller*. *Id.* at 1259. In doing so, the Idaho court focused on the procedural aspects of *Miller* and failed to address the substantive guarantees incorporated within. Although the Court acknowledged in passing that *Miller* had established a substantive limitation on juvenile life-without-parole sentences, it specifically relied on this Court's acknowledgement that *Miller*'s rule did not necessarily require a sentencer to make specific findings of fact to uphold Ms. Johnson's sentence. *Id*. at 1258, quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) ("'*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility.'").[2] According to the

[2] Although the parties presented the Idaho Supreme Court with the categorical question of whether juvenile life without parole complies with the Eighth Amendment, the court declined to

Idaho Court, *Miller* only "'requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.'" *Id*., quoting *Montgomery*, 136 S. Ct. at 734. In that court's view, because the trial judge considered the effect of Ms. Johnson's youth and potential for rehabilitation during her 2005 sentencing hearing, the Idaho Court concluded her life-without-parole sentence complied with the Eighth Amendment. *Id*. at 1259. The Court noted, "the [trial] 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*. The Court's opinion did not examine whether or not the evidence presented in this case would be sufficient to support the conclusion that Johnson is irreparably corrupt or incapable of rehabilitation. *Id*.

REASONS FOR GRANTING THE WRIT

This case illustrates the timeliness, as well as the pressing need, for the Court to address the question explicitly left open in *Miller*: whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." 567 U.S. at 469. Since *Miller* was decided, the nation as a whole has rapidly and uniformly moved away from imposing life-without-parole

address it. Appellant Br. 65, *Johnson v. State*, No. 42857-2015 (Idaho Dec. 17, 2015).

sentences on juvenile offenders. Legislatures have prohibited the practice, state courts have found it unconstitutional *per se*, and, even where it is available, the numbers of sentences imposed has dwindled substantially. To the extent the sentencing practice remains, it is confined to a few isolated jurisdictions, where prosecutors and courts have refused to honor both the spirit and the requirements of this Court's rulings. These cases, like that of Sarah Johnson, demonstrate the pressing need for this Court to act.

I. SENTENCING A CHILD TO DIE IN PRISON CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

A. THIS NATION'S STANDARDS OF DECENCY HAVE EVOLVED TO PROHIBIT SENTENCING A JUVENILE TO LIFE WITHOUT PAROLE

The Eighth Amendment's prohibition on cruel and unusual punishments is measured against the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *see also* U.S. Const. amends. VIII, XIV. The evolving standards of decency are measured against both whether there exists a national consensus about the imposition of such a punishment and its independent judgment about the proportionality of the punishment for a particular offense. *See Roper v. Simmons*, 543 U.S. 551, 564 (2002).

The Court has already (repeatedly) concluded that, for juveniles, life-without-parole sentences are usually disproportionate because of the "distinctive (and transitory) mental traits and environmental vulnerabilities" of children. *Miller v. Alabama*, 567 U.S. 460, 473 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 69 (2010)); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Thus, the primary question here is whether there is a national consensus against imposition of life-without-parole sentences on juvenile offenders.

To make such an assessment, the legislative enactments as well as "[a]ctual sentencing practices" are important indicia. *Graham*, 560 U.S. at 62. On the former, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). On the latter, the Court examines the frequency with which a punishment is imposed, as well as whether that punishment is isolated to a handful of outlier jurisdictions. *See Graham*, 560 U.S. at 64. The objective indicia demonstrate that juvenile life without parole runs contrary to our nation's moral and constitutional values.

1. States are Rapidly Prohibiting Juvenile Life Without Parole

Nineteen states and the District of Columbia currently prohibit JLWOP sentences. Prior to this Court's decision in *Miller* in 2012, only four states prohibited

the practice: Alaska, Colorado, Kansas, and Kentucky.[3] Following *Miller*, an additional sixteen jurisdictions prohibited the imposition of JLWOP by statute or court ruling. Arkansas, Connecticut, the District of Columbia, Hawaii, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming abolished JLWOP by statute;[4] Massachusetts

---

[3] Alaska Stat. § 12.55.125; Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1); Kan. Stat. Ann. § 21-6618; Ky. Rev. Stat. 640.040(1).

[4] *See* Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections), http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SB294.pdf; S.B. 796, Jan. Sess. (Conn. 2015), amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a; B21-0683, D.C. Act 21-568 (D.C. 2016) (amending, in relevant part, D.C. Code §§ 24-403 et seq.); H.B. 2116, 27th Leg. Sess. (Haw. 2014), amending Haw. Rev. Stat. §§ 706-656(1), 706-657 (2014); A. 373, 217th Leg. (N.J. 2017), amending N.J.S. 2C:11-3; A.B. 267, 78th Reg. Sess. (Nev. 2015), enacting Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107; N.D. H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting a new section in ch. 12.1-32), http://www.legis.nd.gov/assembly/65-2017/documents/17-0583-04000.pdf; S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016), amending S.D. Codified Laws § 22-6-1 and enacting a new section; S.B. 2, 83d Leg. Special Sess. (Tex. 2013), enacting Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071; H.B. 405 (Utah 2016), amending Laws of Utah §§ 76-3-203.6, -206, -207, -207.5, -207.7 and enacting § 76-3-209; H. 62, 73rd Sess. (Vt. 2015), enacting Vt. Stat. Ann. tit. 13, § 7045; 5 H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), enacting W. Va. Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b; H.B. 23, 62nd Leg., Gen. Sess. (Wy. 2013), enacting Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402.

and Iowa abolished by court ruling;[5] and Delaware, although nominally retaining the punishment, provides every juvenile sentenced to life without parole with the opportunity to petition for a sentence reduction after the sentence is imposed.[6] In these twenty jurisdictions, every child has a meaningful opportunity to demonstrate to a parole board or judge that he has rehabilitated himself in prison and should be released.

In addition to those states which now prohibit the practice outright, several states have narrowed the availability of JLWOP and other extreme juvenile sentencing practices. Since *Miller*, six states have passed legislation that directly limits the availability of JLWOP: California, Florida, Pennsylvania, North Carolina, Louisiana, and Washington. California, Florida, and Pennsylvania, three states that, prior to *Miller*, were among the jurisdictions most frequently imposing the sentence, have dramatically curtailed the availability of JLWOP.[7] California now allows JLWOP sentencing only in two narrow categories: homicide offenses where the defendant tortured the victim, and homicide offenses where the victim was a public safety

---

[5] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (2013) (holding that JLWOP sentences violate the Massachusetts Constitution); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (JLWOP sentences violate the Iowa Constitution).

[6] S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), amending Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d).

[7] *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole*, http://www.hrw.org/sites/default/files/related_material/updated JLWOP10.09_final.pdf.

official.[8] Under its revised statutes, Florida only allows JLWOP sentencing where a "defendant actually killed, intended to kill, or attempted to kill the victim" *and* was previously convicted of an enumerated violent felony.[9] Therefore, although the sentence is still technically available in Florida, not a single child has actually been resentenced to JLWOP under the new statute.[10] Pennsylvania moved from imposing mandatory life without parole for juvenile offenders convicted of second-degree murder to eliminating JLWOP for that crime.[11] In addition, the Pennsylvania Supreme Court recently held JLWOP is unconstitutional unless the State establishes with competent evidence, and beyond a reasonable doubt, that the child is irreparably corrupt, *see Commonwealth v. Batts*, No. 45 MAP 2016, 2017 WL 2735411 (Pa. June 26, 2017).[12] Because of the

---

[8] Cal. Penal Code § 1170 (2015).

[9] Fla. Stat. § 921.1402(2)(a) (The enumerated felonies include: murder; manslaughter; sexual battery; armed burglary; armed robbery; armed carjacking; home-invasion robbery; human trafficking for commercial sexual activity with a child under 18 years of age; false imprisonment; or kidnapping.).

[10] Juvenile Sentencing Project at Quinnipiac University School of Law and the Vital Projects Fund, *Juvenile Life Without Parole Sentences in the United States, June 2017 snapshot* ("*June 2017 snapshot*"), available at http://www.juvenilelwop.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences_01.pdf.

[11] S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012), enacting Pa. Cons. Stat. §§ 1102, 1102.1, 9122, 9123, 9401, 9402, 6301, 6302, 6303, 6307, 6336, 9711.1, 9714, 6139.

[12] The Pennsylvania Supreme Court clarified, "for a sentence of life without parole to be proportional as applied to a juvenile

substantial evidentiary burden it imposes on prosecutors, this decision is likely to effectively eliminate the sentencing practice within Pennsylvania's borders.[13] North Carolina revised its sentencing statutes to prohibit JLWOP for felony-murder convictions.[14] Louisiana, like Pennsylvania, prohibited JLWOP sentences for second-degree murder convictions.[15] Finally, Washington State has abolished the penalty for defendants younger than sixteen.[16]

Meanwhile, other states have provided parole eligibility to those previously sentenced juveniles. The Missouri and Colorado legislatures recently passed

---

murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change. It must find that there is no possibility that the offender could be rehabilitated at any point later in his life, no matter how much time he spends in prison and regardless of the amount of therapeutic interventions he receives, and that the crime committed reflects the juvenile's true and unchangeable personality and character." *Batts*, *supra* at *17.

[13] *See* Riley Yaes, *Pennsylvania Supreme Court throws out life without parole sentence for juvenile*, Pittsburgh Post-Gazette (June 26, 2017), available at http://www.post-gazette.com/news/state/2017/06/26/Qu-eed-Batts-case-pennsylvania-supreme-court-juvenile-parole/stories/201706260160.

[14] S.B. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012), enacting N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (2012).

[15] S.B. 16, St. Legis., 2017 Reg. Sess. (La. 2017).

[16] S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2014), amending Wash. Rev. Code §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430, -.435, -.440, 10.95.030. In addition, an intermediate appellate court in Washington recently held that JLWOP categorically violates the Washington State constitutional prohibition of cruel punishment. *State v. Bassett*, 394 P.3d 430 (Wash. Ct. App. 2017).

laws granting parole eligibility to every one of their inmates previously sentenced to JLWOP.[17] The Minnesota Supreme Court granted parole eligibility to all inmates sentenced pre-*Miller*.[18] Several additional states have moved to require consideration of the mitigating factors of youth before entering any extreme sentence against a juvenile, even if it is not JLWOP.[19]

This trend away from JLWOP has been uninterrupted and rapid. Since *Miller*, the rate of JLWOP abolition is more than three jurisdictions per year, while no state has passed legislation broadening its scope.

2. In most states that have not yet banned juvenile life-without-parole sentences, its application is either rare or nonexistent

Looking beyond JLWOP abolition as a matter of law to its application in practice, as the Court did in

---

[17] S.B. 590, Gen. Assemb. Reg. Sess. (Mo. 2016); S.B. 16-181, Gen. Assemb. Reg. Sess. (Colo. 2016).

[18] *See Jackson v. State*, 883 N.W.2d 272 (Minn. 2016).

[19] *See Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn. 2015) (holding court must consider mitigating features of youth before imposing fifty-year sentence); *People v. Sanders*, 2014 Ill. App. 21732-U, at *30, 2014 WL 7530330 (Ill. Ct. App. 2014) (unpublished); *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (holding sentencing court required to consider same for sentence that would end when juvenile was in his sixties, explaining that "[e]ven if a lesser sentence than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after half a century of incarceration sufficient to escape the rationales of *Graham* and *Miller*.").

Graham, the movement away from the sentence is even more striking. *See* 560 U.S. at 64. In addition to the twenty jurisdictions that have formally abandoned JLWOP sentencing, six states appear to have zero individuals serving a JLWOP sentence: Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island.[20] Seven more states have five or fewer individuals serving JLWOP sentences: Idaho, Indiana, Montana, Nebraska, Nevada, New Hampshire, and Oregon.[21] In total, thirty-three jurisdictions are either abolitionist, or functionally so.[22] As the Court explained in *Graham*, "It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades." 560 U.S. at 65.

3. JLWOP sentencing only remains in a few isolated jurisdictions that have resisted implementing this Court's juvenile jurisprudence

As a result of the rapid abandonment of JLWOP since *Miller*, JLWOP sentencing in the United States

---

[20] *June 2017 snapshot*, *supra* note 10.

[21] *Id*.

[22] *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (including jurisdictions where the laws "continue to authorize executions, but none have been carried out in decades" in consensus rejecting the execution of the intellectually disabled); *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (Oregon is on the abolitionist side of the ledger because it has "suspended the death penalty and executed only two individuals in the past 40 years.").

is localized in a few isolated jurisdictions. In *Graham*, the Court pointed to the extreme geographic concentration of the states that imposed JLWOP for non-homicide offenses as evidence that the practice violated contemporary standards of decency and the Eighth Amendment. 560 U.S. at 65. A similar concentration exists in the current use of JLWOP for homicide offenses.

While most jurisdictions are following the letter and spirit of this Court's juvenile jurisprudence, a handful persists in pursuing the harshest penalties against large numbers of juvenile offenders. Around the time of *Miller*, most JLWOP sentences nationwide were concentrated in a handful of *counties*.[23] Since *Miller*, the sentence is increasingly isolated to a handful of extreme outliers that are flouting this Court's dictate to limit JLWOP to the rare juvenile offender. In Michigan, for example, where 363 children were serving JLWOP at the time of *Miller*, prosecutors have indicated their intent to seek JLWOP anew for 247 of them – a startling 68 percent.[24] In Louisiana, where over 300 children are serving JLWOP sentences, prosecuting attorneys have also demonstrated their

---

[23] John R. Mills, et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 572-75 (2015) ("*JLWOP in Law and Practice*").

[24] *June 2017 snapshot*, *supra* note 10; Ted Roelofs, *Michigan prosecutors defying U.S. Supreme Court on 'juvenile lifers'*, Bridge Magazine (Aug. 26, 2016), available at http://www.bridgemi.com/public-sector/michigan-prosecutors-defying-us-supreme-court-juvenile-lifers.

continued zeal for harsh juvenile sentencing.[25] Since *Miller*, 18 of 23 children newly convicted of murder in Louisiana have received JLWOP sentences.[26] District attorneys successfully opposed proposed legislation which would have provided an opportunity for parole to every child in the state.[27] Now, in the hundreds of *Miller* resentencings still pending there, prosecutors must indicate, within 90 days of August 1, 2017, whether they will continue to seek JLWOP in each case.[28] Given the penchant of district attorneys to seek JLWOP, the prospect of substantial reform within the state remains bleak.[29]

Overall, the trend is clear: in the vast majority of United States jurisdictions, sentencing children to die in prison is no longer acceptable. A substantial majority of states have abandoned JLWOP in law or practice, and others have acted to narrow its application. Today, the use of JLWOP is carried on by a handful of prosecutors in a shrinking number of counties and states.

---

[25] Adam Geller, *Louisiana Reluctantly Wrestles With Cases of Juvenile Lifers*, U.S. News and World Report (July 31, 2017), available at https://www.usnews.com/news/best-states/louisiana/articles/2017-07-31/louisiana-reluctantly-wrestles-with-cases-of-juvenile-lifers.

[26] *Id*.

[27] *Id*.

[28] *Id*.; S.B. 16, St. Legis., 2017 Reg. Sess. (La. 2017).

[29] Additional substantial problems appear to inhere with administration of JLWOP sentences, including that African American homicide offenders are much more often sentenced to JLWOP than their white counterparts. *JLWOP in Law and Practice*, *supra* note 23 at 575-81.

Our standard of decency has evolved: sentencing children to die in prison is cruel and unusual.

B. BECAUSE THE UNIQUE CIRCUMSTANCES OF YOUTH SUBSTANTIALLY UNDERMINE THE PENOLOGICAL JUSTIFICATIONS FOR LIFE WITHOUT PAROLE AND PREVENT A COURT FROM RELIABLY DETERMINING THAT AN OFFENDER IS IRREPARABLY CORRUPT, JUVENILE LIFE-WITHOUT-PAROLE SENTENCES ARE UNCONSTITUTIONAL

The logic of *Miller* and *Graham*, "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," *Miller*, 567 U.S. at 472, means that life without parole should be declared a categorically excessive punishment with respect to children.

The Court has repeatedly confirmed what reason and scientific inquiry demonstrate to be true: children are categorically different from adults in ways that undermine the rationale for imposing a life-without-parole sentence. *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 72. While even a significant period of incarceration may be appropriate for children convicted of serious crimes like murder, because of the diminished culpability and capacity for change inherent in youth, the touchstones of juvenile incarceration must be rehabilitation and reform.

Even if a life-without-parole sentence could, under some theoretical circumstance, be proportionate, there is simply no way to reliably distinguish at the time of sentencing between children whose crimes "reflect transient immaturity" and "those rare children whose crimes reflect irreparable corruption," *Montgomery*, 136 S. Ct. at 734. This Court recognized the same in *Roper v. Simmons*, 543 U.S. 551 (2005). In part because there was simply too substantial a risk of wrongful execution, the Court determined the Constitution must categorically prohibit juveniles from being sentenced to death:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating.

Id. at 572-73. The Court's concern about the wrongful execution of juveniles was deepened by its recognition that the task of "differentiat[ing] between the juvenile offender whose crime reflects unfortunate yet

transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," was simply too difficult to perform, and the risk of erroneous sentencing determinations too great, to permit jurors to issue the "grave[] condemnation . . . that a juvenile offender merits the death penalty." *Id*. at 573.

> The same logic holds true here.
>
> [A] district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination.
>
> No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem.

State v. Sweet, 879 N.W.2d 811, 837 (Iowa 2016) (holding that the Iowa Constitution categorically prohibits juveniles from being sentenced to life without parole).

As this case clearly illustrates, there is too great a risk of disproportionate sentencing to permit a judge or jury to impose a guaranteed lifetime of incarceration on a juvenile offender. Every child, even those convicted of the most heinous crimes, must be given an opportunity to demonstrate reform. "A categorical rule

avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole." *Graham*, 560 U.S. at 78-79.

The substantive right defined in *Miller* does not require that juvenile offenders be released; indeed, some, and perhaps many, may never show themselves to be deserving of reintegration into society. However, the Constitution and the law developed by *Graham*, *Roper*, *Miller* and *Montgomery* make clear that we can no longer justify sentencing children to die in prison without affording a meaningful opportunity to demonstrate change over the course of decades spent behind bars.

II. PETITIONER'S SENTENCE OF LIFE WITHOUT PAROLE VIOLATES *MILLER V. ALABAMA* AND *MONTGOMERY V. LOUISIANA*

Even if this Court declines to consider the categorical Eighth Amendment issue raised above, or concludes that a sentence of life without parole imposed upon a juvenile offender does not always violate the constitution, Ms. Johnson's life-without-parole sentence, imposed before *Miller* and despite evidence that she has the capacity for rehabilitation, violates the substantive guarantee of *Miller v. Alabama*, 567 U.S. 460 (2012).

A. THE IDAHO SUPREME COURT FAILED TO APPLY *MILLER*'S SUBSTANTIVE GUARANTEE

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court established a substantive rule: a life-without-parole sentence was disproportionate for any juvenile whose crime does not reflect "irreparable corruption." 567 U.S. at 479-80; *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*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.").

Although the Idaho Supreme Court acknowledged in passing this critical aspect of Eighth Amendment jurisprudence, it failed to apply it to Johnson's case. *See Johnson*, 395 P.3d at 1258-59. Instead, the court ruled that *Miller* was not violated because the *procedural protections* afforded juveniles were observed here. *Id*. at 1259. Because the *Montgomery* Court declined to require a specific factual finding of irreparable corruption in juvenile life-without-parole cases, the Idaho court proceeded to disregard *Miller*'s substantive guarantee altogether. *Id*.

Although *Miller* did not specifically require a formal finding of irreparable corruption, the absence of that particular requirement arose out of federalist concerns, not a half-hearted devotion to *Miller*'s principles. *See Montgomery*, 136 S. Ct. at 735. As this Court noted, "[t]hat *Miller* did not impose a formal factfinding

requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id*. While this Court understandably sought to "avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems," *id.*, it should now act. The freedom to implement *Miller* is not the freedom to violate or ignore it.

B. MS. JOHNSON'S LIFE-WITHOUT-PAROLE SENTENCE, IMPOSED DESPITE UNCONTRADICTED EVIDENCE THAT SHE IS CAPABLE OF REHABILITATION, VIOLATES THE EIGHTH AMENDMENT

As discussed above, *Miller* prohibits sentencing a juvenile homicide offender to a lifetime in prison except in "exceptional circumstances" where the evidence indicates that she is among the worst-of-the-worst juvenile offenders, "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. The record in this case demonstrates that Ms. Johnson is not such an offender. At a minimum, a sentencing court should be required to consider this evidence in light of *Miller* and its progeny.

Ms. Johnson was only sixteen years old at the time of the offense, had no history of criminal behavior or violence, before or since the murders, and suffered

from clinical depression. Both mental health professionals who testified at her sentencing hearing agreed that, owing to her intelligence, abstract thinking abilities, relatively stable mental health, and personal history, she was a "normal girl" who had a substantial capacity for rehabilitation. (T. 6320). These facts fail to establish that Johnson's character was so depraved, as compared to other juvenile homicide offenders, that she could actually be considered among the worst-of-the-worst. On the contrary, they suggest just the opposite. The trial court did not necessarily disagree with these assessments, but nevertheless imposed fixed life sentences because of the severity of the offense. The trial court's decision, and the Idaho Supreme Court's approval of it, demonstrates a fundamental misunderstanding of this Court's juvenile jurisprudence. *See Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (quoting *Roper*, 543 U.S. at 570 ("[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.' ")).

The Court should grant the writ to clarify the scope and application of *Miller*'s protections. In the alternative, the Court should summarily reverse the Idaho Supreme Court. This Court has not hesitated to do so to ensure the proper enforcement of the Eighth Amendment's protections in juvenile life without

parole cases. *See, e.g.*, *Arizona v. Tatum*, 137 S. Ct. 11, 11 (2016); *Adams*, 136 S. Ct. at 1796-97. In light of the Idaho Supreme Court's flouting of this Court's precedent, summary reversal is also appropriate here.

CONCLUSION

For the foregoing reasons, Ms. Johnson respectfully requests that the Court grant her Petition.

Respectfully submitted,

JOHN R. MILLS
Counsel of Record
PHILLIPS BLACK PROJECT
836 Harrison Street
San Francisco, CA 94107
(888) 532-0897
j.mills@phillipsblack.org

DENNIS BENJAMIN
DEBORAH WHIPPLE
NEVIN BENJAMIN
MCKAY & BARTLETT
P.O. Box 2772
Boise, ID 83701

IN THE SUPREME COURT
OF THE STATE OF IDAHO
No. 42857

SARAH MARIE JOHNSON, **Petitioner-Appellant,** **v.** **STATE OF IDAHO,** **Respondent.**	**Boise, February 2017 Term** **2017 Opinion No. 45** **Filed: May 12, 2017** **Stephen W. Kenyon, Clerk**

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon. G. Richard Bevan, District Judges.

Order dismissing successive petition for post-conviction relief, *affirmed*.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Idaho Attorney General Boise, for respondent. Jessica Lorello, Deputy Attorney General argued.

BURDICK, Chief Justice.

Sarah Johnson appeals from the Blaine County district court's order dismissing her successive petition for post-conviction relief. On appeal, Johnson argues: (1) the district court erred in denying her request under Idaho Code section 19-4902 for additional DNA

testing; (2) that in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the district court erred in dismissing her Eighth Amendment claim because as a minor, the imposition of two fixed life sentences is cruel and unusual punishment; and (3) this Court's decision in *Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014), which holds that ineffective assistance of post-conviction counsel does not constitute a sufficient reason for filing a successive post-conviction petition, should be overturned. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Alan and Diane Johnson were shot and killed in their home on September 2, 2003. Sarah Johnson (Johnson), the Johnsons' sixteen year old daughter, was home at the time of the shooting. Johnson consistently denied any involvement, but gave several different accounts of what she was doing, what she saw, and what she heard prior to and after the murders. However, in all accounts she fled the home either before hearing the second shot or immediately thereafter. After fleeing the house, she ran to a neighbors' house and the police were called. Johnson was ultimately charged with both murders.

Police found a leather glove from a pair usually kept in Diane's SUV, Johnson's keys, including a key to the guesthouse, the magazine of a nine-millimeter handgun wrapped in a bandana, and two .264 caliber

magnum shells in Johnson's bedroom. In a garbage can outside of the residence the police also found a latex glove, a leather glove (matching the one found in Johnson's bedroom), and a pink robe covered in blood that belonged to Johnson and had .25 automatic pistol ammunition in the pocket. Testing revealed that Johnson's DNA was present inside of the latex glove and that paint chips found inside of the robe matched paint on the shirt Johnson was wearing on the morning of the murders.

The murder weapon, a .264 rifle, belonged to Mel Speegle, who was renting the Johnsons' guesthouse, but was out of town at the time of the murders. There were no prints on the rifle, scope, or ammunition that matched Johnson's. Speegle testified at trial that he kept the rifle in his closet, which was unlocked. Speegle also testified at trial that Johnson had access to the guesthouse, knew he would be gone the weekend before the murders, and knew that the rifle along with his other guns and ammunition were located in the closet. Johnson had a key to the guesthouse and had been in there several times including the days immediately preceding the murders. A physical examination of Johnson on the day of the murders revealed linear bruising on Johnson's left shoulder that would be consistent with gun recoil. Johnson testified that she got the bruising when she tripped over a coffee table at her boyfriend's house over the weekend.

In 2005, after a lengthy trial, a jury found Johnson guilty of the murder of her parents. *State v. Johnson* (*Johnson I*), 145 Idaho 970, 972, 188 P.3d 912, 914

(2008). She was sentenced to two fixed-life terms of imprisonment with a fifteen-year gun enhancement. *Id.* Johnson's first direct appeal was dismissed for failure to timely file a notice of appeal. *State v. Johnson* (*Johnson II*), 156 Idaho 7, 10, 319 P.3d 491, 494 (2014). Johnson then filed a petition for postconviction relief alleging, among other things, ineffective assistance of counsel for her attorney's failure to timely file her notice of appeal. *Id.* The district court found ineffective assistance of counsel for the failure to timely file the notice of appeal and re-entered the conviction of judgment. *Id.* Johnson then filed a timely notice of appeal, and the district court stayed proceedings on her remaining post-conviction claims pending resolution of the direct appeal. *Id.* On direct appeal, we affirmed the district court's judgment of conviction. *Johnson I*, 145 Idaho at 980, 188 P.3d at 922. Following resolution of her direct appeal, Johnson filed a second amended petition for post-conviction relief. *Johnson II*, 156 Idaho at 10, 319 P.3d at 494.

In her second amended petition for post-conviction relief, Johnson claimed, among other things, that:

> (1) her trial counsel was ineffective for failing to elicit testimony from Robert Kerchusky, the defense's fingerprint expert; (2) the unidentified prints on the murder weapon, its scope, and an insert from the box of ammunition were fresh; and (3) newly discovered evidence warranted a new trial. The newly discovered evidence claim was based on the discovery that Christopher Hill's fingerprints matched

> the previously unidentified prints on the murder weapon, its scope, and the ammunition.

Id. The district court held an evidentiary hearing on Johnson's claims and denied relief. Johnson appealed, and we affirmed. *Id.* at 13, 319 P.3d at 497. In regard to the newly discovered evidence, we noted that identifying the previously unidentified prints as Hill's did little to change the likelihood of Johnson's guilt and, in fact, due to Hill's credible testimony about why his prints were on the rifle, "[made] the fingerprint testimony even less valuable than it was at the time of the trial, when the defense could argue that a nameless third party handled the gun, the shells and removed the scope." *Id.*

On April 9, 2012, with the help of *pro bono* counsel, Johnson filed a DNA and Successive Petition for Post-Conviction Relief (Successive Petition) and, almost two years later, on January 22, 2014, an Amended DNA and Successive Petition for Post-Conviction Relief (Amended Successive Petition). Following Johnson's filing of the Amended Successive Petition, the district court ordered the Successive Petition, the Amended Successive Petition, and an affidavit by Dr. Greg Hampikian supporting the Successive Petition to be filed "*nunc pro tunc* to April 9, 2012, in a separate case and assigned a separate case number." Johnson's allegations in her Second Amended Petition can largely be narrowed down to three issues: (1) a request for DNA testing under Idaho Code section 19-4902(b); (2) a claim under *Miller* and *Montgomery* that her two fixed life sentences violate the Eighth Amendment;

and (3) an ineffective assistance of post-conviction counsel claim alleging numerous deficiencies.

The State filed a motion for summary dismissal of Johnson's Amended Successive Petition, and the district court held a hearing on the State's motion. Following the hearing, the district court issued a written opinion in which it noted that Johnson conceded that the claims relating to ineffective assistance of post-conviction counsel were barred by *Murphy*. The court then discussed the remaining two issues – the request for DNA testing and the Eighth Amendment claim – and granted the State's motion for summary dismissal. Johnson timely appeals.

II. STANDARD OF REVIEW

> Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact. On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an

> evidentiary hearing. Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.

Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010) (quoting *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007)).

III. ANALYSIS

A. Whether the district court erred in denying Johnson DNA testing under I.C. § 19-4902.

Under Idaho Code section 19-4902, post-conviction testing of DNA is generally available to a petitioner when: (1) the evidence to be tested was not subject to the requested testing because the technology for the testing was not available at the time of the trial; (2) identity was an issue in the trial; (3) the evidence to be tested has been subject to a proper chain of custody; (4) the result of the testing has the scientific potential to produce new evidence that would show it is more probable than not that the petitioner is innocent; and (5) the testing method would likely produce admissible results under the Idaho Rules of Evidence. I.C. § 19-4902(b)-(e).

Johnson is seeking to have two different categories of DNA samples tested. The first involves DNA samples that were tested, analyzed, and profiled at the time of the trial but were unmatched when run

through law enforcement databases. Johnson wishes to re-run these samples through current law enforcement databases, which now include more DNA profiles with which to compare the samples.[1] The second category involves testing DNA samples, which due to their small size, were unable to be tested at the time of the trial. The district court denied postconviction DNA testing on both categories of samples, ruling that the requested testing failed to meet the requirements of section 19-4902. Specifically, the district court found that: (1) Johnson's request to re-run the previously analyzed DNA samples through the expanded law enforcement database did not involve technology that was not available at the time of the trial; and (2) although the DNA samples that were too small to be tested previously did involve new technology, the testing did not have the scientific potential to produce new evidence that would show it is was more probable than not that Johnson was innocent. Johnson appeals both findings, and we address each in turn.

[1] Specifically, Johnson wishes to compare these profiles to those in the FBI's current Combined DNA Index System (CODIS) database.

1. Whether Johnson's request to re-run previously analyzed and tested DNA samples through current law enforcement databases constitutes a request for testing that was not conducted at trial "because the technology for the testing was not available at the time of trial," as required under Idaho Code section 19-4902(b).

Idaho Code section 19-4902(b) states:

> A petitioner may, at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but *which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial.*

I.C. § 19-4902(b) (emphasis added). Thus, under the statute, post-conviction DNA testing is only available if the requested testing relies on technology that was not available at the time of the original trial. Johnson argues that her request to compare a number of unidentified but already analyzed and compiled DNA profiles with Christopher Hill's DNA profile and an updated DNA profile database satisfies this requirement.

In support of her argument, Johnson points to a definition of technology found in Merriam-Webster's online dictionary defining technology as "a manner of

accomplishing a task especially using technical processes, methods, or knowledge <new technologies for information storage>."[2] Focusing on the knowledge aspect of the definition of technology, Johnson argues that the now available DNA profile of Christopher Hill and additional DNA profiles in the CODIS database are new knowledge, i.e., technologies, that were not available at the time of trial. Thus, Johnson asserts that her request to compare unmatched and unidentified DNA samples that were collected and profiled at the time of trial to these newly available profiles encompasses technology that was not available at the time of trial. Johnson further asserts this definition of technology is supported by the legislative purpose of section 19-4902.

When interpreting the meaning of a word in a statute, this Court exercises free review. *State v. Lee*, 153 Idaho 559, 561, 286 P.3d 537, 539 (2012). In the absence of a statutory definition, "[t]he language of a statute should be given its plain, usual and ordinary meaning." *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001). To ascertain the ordinary meaning of an undefined term in a statute, this Court often turns to dictionary definitions of the term. *E.g.*, *Marek v. Hecla, Ltd.*, 161 Idaho 211, ___, 384 P.3d 975, 980 (2016); *Arnold v. City of Stanley*, 158 Idaho 218, 221, 345 P.3d 1008, 1011 (2015).

---

[2] This definition is almost verbatim the one used by the district court: "[A] manner of accomplishing a task esp. using technical processes, methods, or knowledge." (quoting *Merriam-Webster's Collegiate Dictionary* 1206 (10th ed. 2001)).

Technology, as pointed out by Johnson, is defined as: "a manner of accomplishing a task especially using technical processes, methods, or knowledge." Thus, broken down, technology is broadly the "manner of accomplishing a task" and particularly "the manner of accomplishing a task using technical processes, methods or knowledge." In both the broader and particular senses of the word, the focus is on the "manner of accomplishing a task." But in the particular meaning, the manner of accomplishing the task is narrowed to the technical aspects of accomplishing the task, i.e., the "nuts and bolts" of how the task is accomplished. Johnson, however, suggests that technology can be defined by the simple increase of knowledge, i.e., that increased knowledge or data standing alone is technology. However, this interpretation overlooks the primary definition of technology, which requires not an increase or change in knowledge, but rather the technical or practical application of that knowledge to a manner of accomplishing a task to produce a new capability.[3] More simply, technology encompasses technical knowledge, which is the knowledge relied on to

---

[3] The full definition of technology from the same online dictionary used by Johnson defines technology as:

> **1 a:** the practical application of knowledge especially in a particular area: engineering <medical *technology*>
>
> **b:** a capability given by the practical application of knowledge <a car's fuel-saving *technology*>
>
> **2:** a manner of accomplishing a task especially using technical processes, methods, or knowledge <new *technologies* for information storage>

change the "nuts and bolts" of how a task is accomplished. Rather than the simple *increase* or availability of knowledge, it is the *application* of knowledge to a specific process or method of accomplishing a task that is included in the definition of technology.

Here, the availability of Christopher Hill's DNA profile and the increase in DNA profiles in the CODIS database do not involve the application of technical knowledge to create a new DNA testing capability or technique that was not available at the time of trial. The mere fact that there may now be more DNA profiles available for comparison does not constitute technology in the plain and ordinary sense of the word. The district court was correct in finding that the simple availability of Hill's DNA and the general increase in DNA profiles with which to compare the unidentified DNA samples does not constitute "technology" that was not available at the time of Johnson's trial.[4] Accordingly, we affirm the district court's decision to deny

---

3: the specialized aspects of a particular field of endeavor <educational *technology*>

Technology, https://www.merriam-webster.com/dictionary/technology.

[4] Although we do not rely on the legislature's statement of intent for our decision today, *Wright v. Ada Cty.*, 160 Idaho 491, 497, 376 P.3d 58, 64 (2016) ("The asserted purpose for enacting the legislation cannot modify its plain meaning." (quoting *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892-93, 265 P.3d 502, 505-06 (2011))), we note that despite Johnson's argument to the contrary, the plain, usual, and ordinary definition of technology does not conflict with the legislative intent of the statute. The legislative statement of intent to Idaho Code section 19-4902 reads in part: "The purpose of this legislation is to allow for

"any requests in Johnson's Successive Petition seeking the comparison of previously tested but unidentified DNA samples with newly acquired profiles[.]"

2. Whether the district court erred in determining that testing on the previously untested DNA samples did not have the scientific potential to produce new, noncumulative evidence that would show it is more probable than not that Johnson is innocent.

Under Idaho Code section 19-4902(e) a trial court "shall allow" DNA testing "upon a determination" that:

---

post-conviction DNA testing in appropriate cases. . . . Idaho inmates have no statutory right to tests that may exonerate them." H.B. 242, 56th Leg., 1st Reg. Sess. (Idaho 2001), https://legislature.idaho.gov/sessioninfo/2001/legislation/H0242/#sop. Thus, ostensibly, the purpose of section 19-4902 is to give Idaho inmates a statutory right to DNA testing that may exonerate them. Assigning a name to DNA samples that have already been tested and presented to a jury will not exonerate the defendant. At most, it would simply attach a name to DNA evidence that was presented at trial as belonging to an unidentified person. Such identification does nothing to lessen the evidence against the defendant because the jury already knew at the time of trial that the DNA was unidentified and chose to convict anyway. This is different than the case where no testing was performed on a DNA sample and it was unknown whether the DNA sample matched the defendant or not. In such cases, DNA testing may very well exonerate the defendant if the DNA sample can be shown to have come from the perpetrator. *See Fields v. State*, 151 Idaho 18, 2-24, 253 P.3d 692, 696-98 (2011) (holding that even though previously untested DNA samples that were taken from under the victim's fingernails did not match the defendant, the evidence did not exonerate the defendant because there was no evidence those DNA samples belonged to the attacker).

> (1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and
>
> (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

I.C. § 19-4902(e)(1)-(2).

There is no dispute the second requirement, that the testing method would produce admissible results, is met. This leaves only the first requirement for our review.

After a hearing on Johnson's request for DNA testing, the district court concluded that the "possibility of identifying a third party DNA source from previously untestable samples will not make it more probable than not that Johnson is innocent. . . ." In reaching this conclusion, the district court stated:

> The jury was aware that DNA that did not belong to Johnson was present at the scene of the murders. . . . Even with that knowledge, the jury convicted Johnson, deciding that Johnson either (1) fired the murder weapon herself while wearing gloves or (2) aided and abetted that actual shooter. Either theory was sufficient for a conviction. Given the fact that the possibility of a third party shooter, as evidenced by the presence of unidentified fingerprints and DNA, failed to convince the jury that Johnson was innocent of murdering her parents, the slim possibility that a name or

> face might now be given to that shooter adds little to the mix.

(footnote omitted).

Johnson argues that the district court erred in two respects. First, Johnson argues that the court improperly weighed the evidence at trial against the potential test results rather than simply considering the potential of the test results to prove Johnson's innocence irrespective of the trial evidence. Second, Johnson argues that the test results could identify who fired the murder weapon and that if that person was not Johnson, the DNA testing results would contradict the state's theory of the case and show that it is more probable than not that Johnson is innocent. Each contention is discussed in turn.

a. Whether under I.C. § 19-4902(e)(1), the district court properly weighed the potential DNA test results against the evidence at trial.

Under section 19-4902(e)(1), the trial court is required to "make a determination that" the testing results have the "scientific potential" to "show that it is more probable than not that the petitioner is innocent." I.C. 19-4902(e)(1). "[T]he more probable than not standard, is essentially a 51% standard." *Bourgeois v. Murphy*, 119 Idaho 611, 622, 809 P.2d 472, 483 (1991). Thus, before allowing post-conviction DNA testing, the district court must make a determination that the testing results, whatever they may be, have the scientific

potential to demonstrate that it is more than fifty percent likely the petitioner is innocent.

Johnson contends that she is not required to demonstrate that the testing results "will exonerate her," and that the district court erred by weighing the potential test results against the evidence from trial. Rather, Johnson argues that "weighing the evidence is not appropriate at this juncture" and that "it is sufficient that the evidence have the 'scientific potential' to produce exonerating evidence." Johnson is partly correct – she does not have to show that the testing results *will* exonerate her. However, Johnson does have to show that the testing has the potential to produce not just exonerating evidence, but rather evidence that would make it "more probable than not that [she] is innocent." I.C. § 19-4902(e)(1). As we stated in *Fields v. State,* "test results by themselves will never show that the petitioner is not the person who committed the offense." 151 Idaho 18, 23, 253 P.3d 692, 697 (2011). Consequently, to "make a determination" about whether DNA testing has the potential to "show that it is more probable than not the petitioner is innocent," it is necessary for the district court to examine the evidence of guilt from trial and weigh whether the requested DNA testing has the potential to overcome that evidence and demonstrate that "it is more probable than not that the petitioner is innocent." I.C. § 19-902(e)(1).

In addition to showing that the test results have the potential to "more probably than not" exonerate the petitioner, the testing results also have to produce evidence that is noncumulative. *Id.* Here, again, because

the court cannot determine whether the potential DNA evidence would be cumulative without comparing it to the evidence already produced, the district court must examine the evidence produced at trial and compare it to the potential DNA testing results to determine whether the testing results can produce noncumulative evidence.

Ultimately, section 19-4902(e)(1) acts as a gateway to obtaining DNA testing. Before a court may allow post-conviction DNA testing it must make a determination of whether the requested testing has the potential to produce noncumulative DNA evidence that would make it more probable than not that the petitioner is *innocent*. This necessitates a weighing of the evidence at trial against the potential testing results. Accordingly, we hold that section 19-4902(e)(1) requires the district court to weigh the potential testing results against the evidence from trial to determine: (1) whether it is more probable than not the test results may exonerate the petitioner, and (2) whether the testing results would produce new, noncumulative evidence.

b. Whether the district court erred in concluding that the DNA evidence that was not tested at the time of trial but may now be tested using advanced DNA technology did not have the potential to show that it was more probable than not that Johnson was innocent.

In ruling on Johnson's motion, the district court concluded:

> Further testing might reveal the source of DNA samples found on Johnson's robe, on the gun and elsewhere, but that knowledge does nothing to establish that the source of those samples was present in the Johnson's home on the morning of the crime, that the source of those samples was the shooter, or that Johnson didn't aid and abet the murderer of her parents. Consequently, because an analysis of previously untestable DNA samples will not make it more probable than not that Johnson is innocent, her request for DNA testing will not be granted.

Johnson argues the DNA testing does, in fact, have the potential to identify the shooter. And, if the shooter is not Johnson, her argument continues, then "the DNA evidence would show that she is innocent of first degree murder." Johnson premises this argument on the theory that because Johnson was given a deadly weapon enhancement the jury must have found that Johnson was the shooter and not an accomplice or aider and abettor.

At the outset, we note that Johnson is correct. An aider and abettor cannot be given a sentence enhancement under Idaho Code section 19-2520. *State v. Sivak*, 105 Idaho 900, 908, 674 P.2d 396, 404 (1983) ("The statute cannot be used to convict a person who was merely an aider or abettor."). Rather, the sentencing enhancement can only be applied where the defendant had "actual physical possession of guns during the commission of [the crime]." *State v. Thompson*, 101 Idaho 430,

438, 614 P.2d 970, 978 (1980). Moreover, during sentencing, the trial court explicitly stated: "The jury found you [Johnson] were the shooter." As a result, any DNA evidence that shows Johnson was not the shooter would militate against the jury's verdict.

However, as explained above, post-conviction DNA testing under section 19-4902 is not allowed for *any* potentially exonerating DNA evidence. Testing is only allowed in circumstances where the DNA evidence has the potential to "show that it is more probable than not that the petitioner is innocent." I.C. § 19-4902(e)(1). Such a determination requires weighing the evidence at trial against the potential DNA evidence. *Supra*, Part 2.a.

According to Dr. Greg Hampikian, the potential DNA evidence that was not tested at the time of trial but may now be tested using advanced DNA technology is as follows:

> 11. In particular, no conclusions could be reached due to insufficient amounts of DNA concerning the bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, the stain from Bruno Santos' pants, the fibers imbedded in unknown material, bloodstain B from the rifle, and bloodstain G from the rifle. This evidence may now be tested using advanced DNA amplification, purification, and analysis techniques.

12. Robe samples #24-30 were never analyzed and may now be tested using advanced DNA amplification, purification, and analysis techniques.[5]

13. DNA from the unidentified fingerprint on the .264 round (Item # 14) could not have been tested at the time of trial, but may now be tested using advanced DNA amplification, purification, and analysis techniques.

14. DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) could not have been tested at the time of trial, but now may be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after and submitted to a CODIS databank.

15. DNA from the palm prints (Items 20-2 and 20-3) could not have been tested at the time of trial, but may now be tested using advanced DNA amplification, purification, and analysis techniques.

---

[5] After examining the record, it is apparent that robe samples 24 and 25 were examined. The testimony was that bloodstain 24 on the robe was too small to get a complete profile. However, the predominate profile from bloodstain 25 on the robe matched Diane's profile. Robe samples 26-30 were explicitly reserved for DNA testing in the event the defense chose to request testing for trial. The defense did not request the testing. Thus, out of stains 24-30, only bloodstain 24, as a sample that could not be tested at the time of trial due to the lack of proper technology, would be available for post-conviction testing under section 19-4902.

> 16. DNA from the print on the empty shell casing (Item 12-1) could not have been tested at the time of trial, but now may be tested using advanced DNA amplification, purification, and analysis techniques.
>
> 17. One of the hairs removed from Bruno Santo's [sic] sweater has a small root and could now be analyzed using advanced DNA amplification, purification, and analysis techniques.
>
> 18. DNA from an unknown contributor found on the inside of the latex glove can now be further analyzed using advanced DNA amplification, purification, and analysis techniques.
>
> 18. [19.] Low levels of DNA from an unidentified source were found on the leather glove from the garbage can. That DNA can now be analyzed using advanced DNA amplification, purification and analysis techniques.

After examining the record, there is nothing to establish that any of these DNA samples came from the shooter. There is no DNA or fingerprint evidence on the trigger, trigger guard, or bolt lever of the gun. Additionally, testimony at trial was clear that there is no way to determine when any of the fingerprint or DNA samples on the gun, the shell casings, the robe, the latex glove, or the leather glove were deposited on the items.[6]

---

[6] For example, Amber Moss, a forensic DNA analyst, testified about the blood stains:

Thus, even if we view the potential outcome of the requested testing in the light most favorable to Johnson and assume that some or even all of these samples

---

Q: Let's talk about that for a minute. Do you have any way to age when a sample was placed on an item?

A: No. DNA cannot indicate the time that the stain was placed on an item.

Q: Okay, and so there's no way to determine whether or not this stain was put on [the gun] 10 years before, 20 years before, or that day, is that correct?

A: No. In fact, if it was stored properly, it could have been 10 years ago. DNA doesn't tell. It can't discriminate between old stains and new stains.

Testimony from Cynthia Hall, a DNA forensic scientist, revealed the following about DNA samples generally:

Q: How about DNA? Are you able to age it? Do you know when it was placed on a surface?

A: No, I do not.

Q: And why is that?

A: There is no method of testing to determine how old a DNA sample is. I can determine whether or not DNA is present, and whether or not I'm able to obtain a profile, but I cannot say how old that sample is.

Tina Walthall, a fingerprint forensic scientist, gave similar testimony about fingerprints:

Q: Is there any wat to determine, just looking at a fingerprint, how old it is?

A: No, there is no way.

Q: Okay, so all of the fingerprints that you identified as latent prints in this case, you can't say whether they're a day old or whether they're ten years old, is that correct?

A: That is correct.

came from a single third-party source, it would – at best – show that at some unidentified point in time, and in some unidentified manner, such person was close enough to those items to leave their DNA on them. But, because there is no way to tell when the DNA was deposited on the items, the evidence cannot show that such person used the gun, gloves, ammunition, or robe on the day of the murder. Therefore, the evidence has no potential to show, and again, even assuming that all these samples came from the same person, that such person was the shooter. Likewise, the evidence cannot show that Johnson was not the shooter. At best, the evidence would provide some additional evidence from which the jury might infer that someone else besides Johnson was involved. However, the jury was already informed of the possible involvement of a third-party due to the presence of DNA samples and fingerprints that were tested at the time of trial and returned unknown. For example, at trial, the jury was aware of unidentified fingerprints on the scope, gun, some of the shells, and the box containing shells.[7] The jury was also aware of unidentified DNA samples from the bathrobe. The defense used these unidentified samples and fingerprints to present the theory that a third-party was involved, but the jury still

[7] These were later identified as belonging to Christopher Hill. *Johnson II*, 156 Idaho 7, 10, 319 P.3d 491, 494 (2014). Hill helped Speegle move into the guesthouse in 2002. *Id.* In explaining why his prints would be on the gun and ammunition box, Hill testified that in 2001, when he was a caretaker at Speegle's ranch, he "took [the rifle] out, tried to sight it," and shot it "six or seven times." *Id.*

chose to convict Johnson. Adding a few more pieces of evidence that a third-party was present at the time of the murders is unlikely to produce an acquittal. Furthermore, the results do nothing to lessen the evidence produced at trial that implicated Johnson. And that evidence was substantial.

Some of that evidence included the following: Johnson was angry with her parents because they were going to report her boyfriend, a nineteen-year-old illegal immigrant, to the police on the day they were murdered. Johnson gave at least five different accounts about the events of the morning of the murders. Differences in those accounts included whether she was asleep or awake then the first shot was fired, whether she was in her room or outside her parents' room when the second shot was fired, and whether her parents' bedroom door was open or closed. Expert testimony was that the parents' and Johnson's bedroom doors were open. Johnson's bedroom door and her parents' bedroom door are parallel to each other in the hallway. Yet, in at least one account, Johnson testified that aside from the two gunshots, she did not hear or see any sign of a struggle in her parents' bedroom. Police found a leather glove from Diane's SUV in Johnson's room and the matching glove wrapped in a bloody bathrobe in a garbage can that was placed out for collection. A latex glove was also found in the garbage can. The bathrobe, the leather glove, and the latex glove all had Johnson's DNA on them. The bathrobe, which belonged to Johnson, had paint chips on it that matched the paint on the shirt Johnson was wearing on the

morning of the murders. Testimony indicated that Johnson's path out of the house took her past the garbage can. There was testimony that the garbage was supposed to be collected the morning of the murders and that Johnson became upset when she learned the garbage collection had been halted. Police observed footprints in the dew on the lawn going to and from the Johnson home and the guesthouse. The murder weapon, a .264 rifle, was kept in the guest house, Johnson knew the gun was there and she was known to have been in the guesthouse on the days immediately preceding the murders. A guesthouse key, along with unspent .264 caliber shells, one of which had Diane's tissue matter on it, were found in Johnson's room on the morning of the murders. Finally, when Johnson was examined on the day of the murder she had linear bruises on her left shoulder that were approximately between two and four inches long and were consistent with a recent impact, such as gun recoil.

Johnson goes to great lengths to point out how the district court erred in its assessment of the evidence from trial; however, nothing in her attack on the district court's assessment establishes that the untested DNA samples came from the shooter. Without evidence establishing that the DNA samples came from the shooter, we cannot say – especially when compared to the substantial amount of evidence from trial that implicates Johnson – that the district court erred in determining the testing results do not have the potential to demonstrate that it is more probable than not Johnson is innocent. *See Fields v. State*, 151 Idaho 18, 24,

253 P.3d 692, 698 (2011) (holding that without evidence to show that previously untested DNA samples came from the perpetrator of the crime, speculation about who the DNA samples came from or how they got there would not show that the petitioner was innocent).[8]

B. Whether the Eighth Amendment, under *Miller* and *Montgomery*, provides Johnson relief from her two fixed life sentences.

Johnson argues that her fixed life sentences constitute cruel and unusual punishment in violation of the Eighth Amendment and that under *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (outlawing mandatory

[8] Johnson argues that because testing was allowed in *Fields* testing should be allowed in this case as well. However, this argument overlooks that fact that the district court in *Fields* had already allowed the testing when the case reached this Court. This Court was not asked to determine whether testing was appropriate and did not hold that the testing was properly allowed. It simply held that the test results from the already completed testing, could not support a finding that Fields was innocent. *Fields*, 151 Idaho at 24, 253 P.3d at 698. That holding was premised on the fact that there was no evidence establishing that the DNA matter that was tested came from the murderer. *Id.* Without such evidence, this Court held that the results could not establish Fields's innocence. *Id.* Such reasoning also would support a finding that the testing did not need to be allowed in the first place. Without evidence that the DNA material to be tested came from the attacker, the testing results had little to no potential to prove Fields's innocence and, therefore, the district court could have denied testing in the first instance. Consequently, the fact that the district court allowed testing in *Fields* does nothing to support a claim that testing should be allowed here.

life for juveniles and requiring courts to consider youth and its attendant circumstances before sentencing a minor to fixed life without parole), and *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (holding that *Miller* is retroactive and binding on the States), her sentence is illegal. The district court dismissed this claim under Idaho Code sections 19-4901(b) and 19-4908. The district court also found that even if the claim was not barred by sections 19-4901(b) and 19-4908, the sentence did not violate the Eighth Amendment because the trial court, as required by *Miller*, properly considered Johnson's youth in its sentencing.

1. Whether section 19-4901(b) or section 19-4908 bar Johnson's claim.

Post-conviction "is not a substitute for . . . an appeal from the sentence or conviction." I.C. § 19-4901(b); *accord Rogers v. State*, 129 Idaho 720, 725, 923 P.2d 348, 353 (1997). "Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings." I.C. § 19-4901(b). However, "[p]ost-conviction relief proceedings are designed to permit a challenge to an underlying conviction or to an *illegal* sentence." *Brandt v. State*, 118 Idaho 350, 352, 796 P.2d 1023, 1025 (1990); *accord Hollon v. State*, 132 Idaho 573, 580, 976 P.2d 927, 934 (1999).

The district court found that Johnson could have brought her Eighth Amendment claim in her direct appeal and because the claim did not raise a substantial

doubt about the reliability of the finding of guilt it was barred by section 19-4901(b). The district court's ruling was incorrect.

Although Johnson could have brought a claim in her direct appeal arguing that her sentence was cruel, unusual, or excessive, *see, e.g.*, *Hollon*, 132 Idaho at 581, 976 P.2d at 935, she could not have argued that her sentence was *illegal* under *Miller*'s interpretation of the Eighth Amendment until after *Miller* was decided. *Miller* was decided in 2012. Johnson's direct appeal was decided in 2008. Thus, she could not have brought her claim that her sentence was illegal in her direct appeal because *Miller* was decided after her direct appeal was decided. Consequently, the district court erred in dismissing the claim under section 19-4901(b).

This is also true of the district court's dismissal under section 19-4908, which states that any grounds for post-conviction relief not raised in an original petition are permanently waived absent "sufficient reason" for failure to do so. I.C. § 19-4908. An analysis of "sufficient reason" "must necessarily include an analysis of whether the claims being made were asserted within a reasonable period of time." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). We determine what constitutes a reasonable period of time on a case-by-case basis. *Id.*

Here again, the district court found that Johnson could have made an Eighth Amendment claim in her

original post-conviction petition but did not and therefore her claim was barred. 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. The State, however, argues that even if that is true, Johnson did not bring her *Miller* claim until approximately a year and a half after *Miller* was decided. A year and half, the State argues, is not a reasonable amount of time to wait to bring a claim.

We make two observations on this point. First, we note that the district court ruled that the Amended Successive Petition was filed *nunc pro tunc* to April 9, 2012. Thus, the Amended Successive Petition has the legal effect of being filed on that date. *Miller* was argued in March and decided in June 2012, thereby placing the legal filing of Johnson's Amended Successive Petition squarely within the *Miller* timeframe. Second, we note that the recent decision in *Montgomery* made the holding in *Miller* retroactive and binding on the States. *Montgomery*, 136 S. Ct. at 732. Consequently, even if we decline to address the issue today, Johnson would be free to file a new petition and bring the claim anew. Given these unique circumstances surrounding this claim, we hold that in this particular case, Johnson's Eighth Amendment claim was brought within a reasonable time. *Charboneau*, 144 Idaho at 905, 174

P.3d at 875 (noting that we will decided what a reasonable time is on a case-by-case basis). We will decide the issue on the merits.

2. Whether Miller and Montgomery provide Johnson relief.

Miller held that the Eighth Amendment forbids sentencing schemes that require mandatory life in prison without possibility of parole for juvenile offenders. 132 S. Ct. at 2469. The Court then went on to state that while sentencing courts may still impose life in prison without possibility of parole for juvenile offenders in homicide cases, the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

Montgomery made the holding in *Miller* retroactive and binding on the states. 136 S. Ct. at 734 ("*Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive. . . ."). *Montgomery* was careful, however, to note that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* at 735. Indeed the Court specifically stated: "[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986) (alterations in original)). That being said, *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 734.

Johnson argues because the district court sentenced her "without adequate consideration of mitigation arguments based on youth and without a finding that she was irreparably corrupt," her sentence violated the Eighth Amendment. As to the latter part of her argument, that the court erred because it did not specifically find that Johnson was "irreparably corrupt," that argument is without merit. *Id.* at 735 ("*Miller* did not impose a formal factfinding requirement. . . ."). *Miller* and *Montgomery*, do, however, require that the sentencing court weighs the juvenile offender's youth and characteristics against the nature of the crime to determine whether the crime was one that "reflected the transient immaturity" of youth. *Id.* The requirement to hold such a hearing "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.*

Here, the trial court held just such a hearing. 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.[9] Indeed, Johnson herself

[9] Dr. Beaver's testimony was approximately forty pages. Dr. Worst's testimony was approximately sixty-eight pages.

spends approximately two pages in her Amended Successive Petition highlighting the evidence presented about her youth. Following the testimony about Johnson's youth and the possible effects that it would have on her decision-making ability and her propensity for rehabilitation, the trial court spent considerable time discussing the reasons why it was imposing life without parole and explicitly noted that it had heard and considered the evidence presented on Johnson's youth. The trial court's sentencing colloquy was approximately forty-four pages and makes specific reference to having considered the testimony about Johnson's youth, including: "I also want to say to everyone here that I have heard what you have said. I have listened attentively"; "I would also say to you that it's important to me, in this analysis, to consider the totality of all the facts and circumstances, and not any one piece in isolation"; "[ ] I recognize that some of the psychological evidence presented here at this sentencing hearing was to the effect that adolescents can act impulsively . . . "; "[ ] on the mitigating side, there is in fact your age"; "[ ] I don't think it's a product of your age." Although *Miller* and *Montgomery* had not been decided at the time of the sentencing hearing, and therefore the terms of "irreparably corrupt" and "transient immaturity" where not in the court's lexicon at that time, the court clearly considered Johnson's youth and all its attendant characteristics and determined, in light of the heinous nature of the crime, that Johnson, despite her youth, deserved life without parole. Accordingly, we affirm the district court's ruling that Johnson's Eighth Amendment claims under *Miller* fail.

C. Whether *Murphy* should be overruled.

Claims 2-5 of Johnson's Amended Successive Petition alleged ineffective assistance of her original post-conviction counsel because original post-conviction counsel did not properly assert ineffective assistance of counsel claims regarding trial counsel. The district court dismissed those claims on the grounds that Johnson had conceded that *Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014), precluded her from bringing those claims. *Murphy* held that claims of ineffective assistance of post-conviction counsel are not a "sufficient reason" under Idaho Code section 19-4908 for allowing a successive petition. *Id.* at 395, 327 P.3d at 371.

On appeal, Johnson contends that *Murphy* should be overruled and claims 2-5 of her Amended Successive Petition should be remanded to the district court. The State responds that the Court should not consider Johnson's argument because: (1) Johnson's claims were untimely; (2) the dismissal of her claims was invited; and (3) Johnson has failed to demonstrate that *Murphy* was manifestly wrong, unwise or unjust. We address each argument in turn.

1. Whether claims 2-5 in Johnson's successive petition were untimely.

A post-conviction proceeding is commenced by filing a petition "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

proceedings following an appeal, whichever is later." I.C. § 19-4902(a).

The appeal from Johnson's original post-conviction proceeding was decided on February 18, 2014. *Johnson II*, 156 Idaho at 7, 319 P.3d at 491. The original post-conviction proceeding is a "proceeding following an appeal." Therefore, the one-year time limit under section 19-4902(a) did not begin to run until February 18, 2014. Johnson filed her successive petition on April 9, 2012.[10] Consequently, Johnson's successive petition, which was filed before the one-year time limit even began to run, was timely. The State's argument to the contrary is simply unavailing.

2. Whether Johnson should be barred from arguing that Murphy should be overruled because she did not argue the issue in the district court.

The State argues that Johnson should be barred from arguing that *Murphy* should be overruled because Johnson conceded that her claims were barred by *Murphy* and indicated that she would bypass the state courts and proceed with those claims in federal court.

In her Objection to Respondent's Motion for Summary Dismissal, Johnson's counsel stated:

---

[10] Later amended on January 22, 2014, but ruled as being filed *nunc pro tunc* to April 9, 2012.

> *Murphy* now appears to present a bar to [claims 2-5]. Accordingly, [Johnson] will file a Petition for a Writ of Habeas Corpus raising the ineffective assistance of counsel claims. . . . Now that *Palmer* has been overruled by *Murphy, Martinez* permits [Johnson] to raise the ineffective assistance of counsel claims in this petition directly in federal court and bypass the state courts entirely.

This constitutes a clear concession that claims 2-5 are barred by *Murphy.* Further, Johnson's counsel's statement that Johnson "will file a Petition for a Writ of Habeas Corpus raising the ineffective assistance of counsel claims" and "bypass the state courts entirely" without presenting any argument as to why the claims should be allowed in state court, constitutes a withdrawal of the issue. This conclusion is further buttressed by Johnson's counsel's statement at the hearing: "[W]e concede that, following the *Murphy* decision of our Supreme Court, there are certain claims that have been obviated. As [counsel] has pointed out, that matter can be taken up in federal habeas proceedings."

While Johnson's statements are not sufficient to find that she invited the district court to dismiss the claims, they do clearly indicate an intention to abandon those claims in state court and pursue them in federal court.[11] Because Johnson withdrew these claims

[11] Johnson has filed such a petition and it is currently stayed, pending resolution of this appeal. *Johnson v. Kirkman*, No. 4:14-CV-00395-CWD, 2014 WL 7186842, at *1 (D. Idaho Dec. 16, 2014).

from the district court's consideration and provided no argument as to why the claims should be allowed despite our ruling in *Murphy*, we need not address the issue. *E.g.*, *State v. Phillips*, 123 Idaho 178, 182, 845 P.2d 1211, 1215 (1993) ("[C]ounsel for appellant withdrew this issue. . . . Therefore, we decline to address it."). However, given that both parties have fully briefed the issue, including authority and arguments, and considering that Johnson has already filed her habeas petition in federal court, we will address the issue to provide future guidance. *See cf. Comer v. Cty. of Twin Falls*, 130 Idaho 433, 436, 942 P.2d 557, 560 (1997) (noting that the rule that issues not listed as issues on appeal can be relaxed when both parties "fully brief th[e] issue, including authority and arguments"); *Johnson v. Bonner Cty. Sch. Dist. No. 82*, 126 Idaho 490, 493, 887 P.2d 35, 38 (1994) (deciding to address a moot issue to provide future guidance and direction).

3. Whether Murphy should be overruled.

"*Stare decisis* requires that this Court follows controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued justice." *State v. Owens*, 158 Idaho 1, 4-5, 343 P.3d 30, 33-34 (2015).

Johnson argues that in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), this Court's holding in *Murphy*

should be overturned.[12] In *Murphy*, we held that claims of ineffective assistance of post-conviction counsel "cannot demonstrate 'sufficient reason' for filing a successive petition," 156 Idaho at 395, 327 P.3d at 371. In reaching this holding, we relied on the U.S. Supreme Court's ruling in *Coleman v. Thompson*, which held that "[t]here is no constitutional right to an attorney in state post-conviction proceedings" and therefore "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." 501 U.S. 722, 752 (1991).

In *Martinez*, the U.S. Supreme Court announced a "narrow exception" to *Coleman*:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

---

[12] Johnson also argues *Murphy* should be overturned because the Court erroneously interpreted the phrase "sufficient reason" to require a showing of a constitutional violation. This argument misconstrues *Murphy*. *Murphy* did not interpret the phrase "sufficient reason," rather it simply held that because there is no right to post-conviction counsel a claim of ineffective assistance of post-conviction counsel necessarily fails and therefore such a claim can provide no reason, let alone a sufficient one, to allow a successive petition. 156 Idaho at 394-95, 327 P.3d at 370-71.

132 S. Ct. at 1320. In *Trevino v. Thaler*, the Court extended its holding in *Martinez* to include states where the "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal."[13] 133 S. Ct. 1911, 1921 (2013). Thus, *Martinez* applies in Idaho. *See Matthews v. State*, 122 Idaho 801, 806, 839 P.2d 1215, 1220 (1992) (recognizing that the post-conviction setting is the "preferred forum for bringing claims of ineffective assistance of counsel," though in limited instances such claims may be brought on direct appeal "on purported errors that arose during the trial, as shown on the record"); *see also Nielson v. Yordy*, No. 1:14-CV-00236-EJL, 2016 WL 427062, at *11-15 (D. Idaho Feb. 3, 2016) (ruling that *Martinez*, as defined in *Trevino*, applies in Idaho).

However, while *Martinez* made it obligatory for federal habeas courts to hear claims of ineffective assistance of trial counsel if initial post-conviction counsel was not provided or failed to properly raise those issues, *Martinez* is explicitly equitable in nature. *Martinez*, 132 S. Ct. at 1319-20. Because the holding in *Martinez* is not a constitutional holding it is not binding on state courts. *Id.* at 1320 ("In addition, state collateral cases on direct review from state courts are

[13] In *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013), the Ninth Circuit extended *Martinez* even further, holding that it can also apply to underlying claims of ineffective assistance of appellate counsel.

unaffected by the ruling in this case."). Accordingly, we are not obligated to follow *Martinez* in our state courts. And we choose not to. The underlying policy in *Murphy* has not changed in the two years since it was decided, and we decline to apply *Martinez* in our state courts. *Murphy* remains good law. *Martinez* simply means such claims will not be procedurally defaulted in federal habeas proceedings and the federal court will have to address those claims on the merits.[14] The district court's dismissal of counts 2-5 in Johnson's Amended Successive Petition is affirmed.

IV. CONCLUSION

We affirm the district court's rulings regarding DNA testing under section 19-4902. We recognize the holdings in *Miller* and *Montgomery* apply to Idaho, but affirm the district court's ruling that the substantive requirement in those cases – that the sentencing court holds a hearing that considers the youth of the offender – was met. We further recognize the U.S. Supreme Court's holding in *Martinez*, but decline to apply *Martinez* in Idaho state law and thus affirm the district court's dismissal of claims 2-5 of Johnson's Amended Successive Petition.

---

[14] *Kirkman*, 2014 WL 7186842, at *2 n.l. (noting that due to *Murphy* and *Martinez*, such claims will not be procedural defaulted and the federal courts will be required to address the claims on the merits).

Justices EISMANN, JONES, HORTON and BRODY, **CONCUR**.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV 2014-0353 **ORDER GRANTING MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S <u>AMENDED</u> DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF** (Filed Oct. 27, 2014)

This matter is before the court on the State's Motion for Summary Dismissal of Petitioner's *Amended* DNA and Successive Petition for Post-Conviction Relief, filed on 07/18/14. The *Amended* DNA and Successive Petition for Post-Conviction Relief was filed on 01/22/14. A hearing on the State's motion was held on 10/20/14. At the hearing, Jessica Lorello represented the State. The petitioner, Sarah Marie Johnson, was not in attendance, but her counsel, R. Keith Roark and Dennis Benjamin, were present. After reviewing the briefs, hearing oral arguments, and researching the applicable law, the Motion is GRANTED.

I. BACKGROUND

Sarah Marie Johnson ("Johnson") was convicted of two counts of first-degree murder following a lengthy jury trial. The court sentenced Johnson on 06/30/05 to two fixed life sentences (concurrent), plus fifteen years for a firearm enhancement. Johnson's first direct appeal was dismissed for being untimely. Thereafter, Johnson filed a petition for post-conviction relief, claiming ineffective assistance of counsel and denial of due process. The district court found ineffective assistance of counsel in the failure to file a timely notice of appeal and Johnson's appellate rights were reinstated.

Johnson immediately filed a direct appeal and the district court stayed proceedings on her remaining post-conviction claims. In her appeal, Johnson argued that (1) the aiding and abetting instruction constructively amended the charging document and resulted in a fatal variance; (2) she was denied her constitutional right to a unanimous jury verdict because the district court did not instruct the jury that it must unanimously agree on whether she actually killed her parents or whether she merely aided and abetted in their killing; and (3) her constitutional rights were violated when the district court failed to remove a certain juror from the jury pool or obtain an unequivocal commitment that the juror would follow all of the court's instructions. The Idaho Supreme Court, in *State v. Johnson*, 145 Idaho 970, 188 P.3d 912 (2008), denied Johnson any relief and affirmed the district court on each claim. A remittitur was issued on 07/18/08.

On 08/15/08, the stay was lifted and on 01/12/10, Johnson filed a Second Amended Petition for Post-Conviction Relief, in which she alleged lack of jurisdiction, due process violations, multiple instances of ineffective assistance of both trial and appellate counsel, and newly discovered evidence. The State filed a motion for summary dismissal, which was granted in part and denied in part. An evidentiary hearing was then held, after which the court denied relief on Johnson's six remaining claims. Johnson then appealed.

On 04/09/12, while the appeal was pending, Johnson filed a DNA and Successive Petition for Post-Conviction Relief under CV-2006-0324 (her original post-conviction action). On 01/22/14, Johnson filed an *Amended* DNA and Successive Petition for Post-Conviction Relief ("Successive Petition"), again under CV-2006-0324. The Successive Petition includes six broad claims for relief that can be boiled down to three categories: (1) a request for DNA testing under I.C. § 19-4902(b); (2) ineffective assistance of postconviction counsel; and (3) a claim that Johnson's fixed life sentences constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

On 02/18/14, the Idaho Supreme Court affirmed[1] the district court's decision to deny Johnson's original post-conviction petition, and a remittitur was issued on 03/12/14. The district court then ordered that Johnson's Successive Petition and all supplemental filings

---

[1] *Johnson v. State*, 156 Idaho 7, 319 P.3d 491 (2014).

be filed *nunc pro tunc* to their original filing dates with a new case number assigned (CV-2014-0353).

On 07/18/14, the State filed a Motion for Summary Dismissal of Johnson's Successive Petition. Johnson, represented by R. Keith Roark and Dennis Benjamin, filed an Objection to Respondent's Motion for Summary Dismissal on 08/25/14, dropping four of her six original claims. The court heard the State's motion on 10/20/14.

II. SUMMARY DISMISSAL STANDARD

Summary dismissal of a post-conviction petition is appropriate where "there exists no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief." *Remington v. State*, 127 Idaho 443, 446, 901 P.2d 1344, 1347 (Ct. App. 1995). The court, in determining whether a genuine issue of material fact exists, "does not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence." *Id. See also Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994) (Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing.)

A petitioner's application "must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Goodwin v. State*, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002). If a petitioner fails to present evidence establishing an essential element on which she bears

the burden of proof, summary dismissal is appropriate. *Mata v. State*, 124 Idaho 588, 592, 681 P.2d 1253, 1257 (Ct. App. 1993). Where the alleged facts, even if true, do not entitle the petitioner to relief as a matter of law, the trial court may dismiss the application without an evidentiary hearing. *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975).

III. ISSUES

A. Claims Two Through Five Are Dismissed By Stipulation of the Parties.

Johnson conceded in her Objection to Respondent's Motion for Summary Dismissal that Idaho caselaw precludes her from proceeding on four of the six claims included in her Successive Petition.[2] At the hearing held on 10/20/14, both parties stipulated to the dismissal of these claims. Therefore, claims two through five of Johnson's Successive Petition are summarily dismissed.

B. Claim One (Johnson's DNA Claim) Is Dismissed For Failure to Satisfy I.C. § 19-4902(e)(1).

Johnson petitions this court to allow the DNA testing of evidence, available at trial, based on the existence of new DNA technology not available at the time

[2] *See Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014) (holding that there is no right to effective postconviction counsel).

of trial. I.C. §19-4902(b), Idaho's DNA testing statute, allows a petitioner to

> at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of the trial.

In short, the existence of new DNA technology can be the basis of a post-conviction claim.

The State argues that just because new "techniques" for DNA testing have become available that were not available at the time of Johnson's trial, the underlying technology for DNA testing did exist. Therefore, this argument goes, the ability to amplify and test samples that were previously untestable does not constitute new technology as contemplated by the statute. The State also argues that Johnson's requests to run previously tested but unidentified DNA samples against an updated database (that now includes Christopher Hill) fall outside the parameters of I.C. § 19-4902(b).

The State's first argument, that new DNA amplification techniques do not constitute new technology because DNA testing existed at the time of Johnson's trial, is without merit. The statute in question does not define "technology," but a well-known rule of statutory

construction requires that statutory language "be given its plain, usual and ordinary meaning." *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001). Technology is commonly defined as "a manner of accomplishing a task esp. using technical processes, methods, or knowledge." *Merriam-Webster's Collegiate Dictionary* 1206 (10th ed. 2001).

New technology need not be radically different technology, as the State seems to be asserting. A stagecoach and an SUV are the same technology (i.e., four wheeled transportation devices), but to say that the latter is not newer technology than the former would be untenable. Thus, while certain DNA testing methods existed at the time of Johnson's trial, DNA technology has advanced significantly since then, and these processes and methods that allow for testing of smaller and smaller samples satisfy the requirements of I.C. § 19-4902(b).

The State's second argument has considerably more merit. Many of Johnson's DNA requests do not involve testing samples too small to be tested under technology existing at the time of trial. Instead, Johnson wants to compare a number of *already analyzed*

but unidentified[3] DNA samples with Christopher Hill's DNA profile and with an updated DNA database.[4]

Such comparisons do not utilize new DNA testing techniques. The existence of new DNA profiles with which to compare samples tested prior to trial by DNA technology existing at the time, does not satisfy the requirements of I.C. § 19-4902(b). Therefore, any requests in Johnson's Successive Petition seeking the comparison of previously tested but unidentified DNA samples with newly acquired profiles (e.g., that of Christopher Hill), will be dismissed.

I.C. § 19-4902(c) further requires that a petitioner seeking DNA testing make a prima facie showing that

> (1) Identity was an issue in the trial which resulted in his or her conviction; and (2) The evidence to be tested has been subject to a

---

[3] By "unidentified" the court does not mean unidentifiable. Instead, the court is referring to samples that resulted in valid profiles that were simply never matched to a particular individual.

[4] For example, Johnson seeks to run the following tested, but unidentified DNA samples against a reference sample taken from Christopher Hill: (1) [b]loodstain 2 from the robe" that "contains a mixture of at least three individuals including an unknown individual," (2) "tissue from the left collar area of the robe" that "is from an unknown male," (3) "[b]loodstain C on the rifle . . . from an unknown male," (4) "[o]ne of the two hair samples recovered from the barrel of the .264 rifle" that "could not be matched to Sarah or any of her maternal relatives," "[t]wo of the three hairs removed from Bruno Santo's sweater" that "were excluded as coming from Sarah," and (5) "DNA from an unknown contributor found on the inside of the latex glove." *See Successive Petition*, pp. 7-10.

> chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.

The State does not dispute the second requirement, but it does dispute whether identity was an issue at trial.

Again, as the statute does not define "identity," it should be given its plain, usual, and ordinary meaning. Identity is defined as "the condition of being the same with something described or asserted." *Merriam-Webster's Collegiate Dictionary* 574 (10th ed. 2001). At trial, the State asserted that Johnson was the individual that murdered her parents. Voluminous evidence was presented to this end. The defense argued that Johnson was not the murderer, pointing the finger at an unknown third party. The jury, based on the evidence before it, was asked to decide whether Johnson was indeed the murderer (either directly, or by aiding and abetting the shooter). Therefore, because the identity of the murderer *was* at issue in Johnson's trial, the requirements of I.C. § 19-4902(c) have been met.

Once a prima facie showing has been made, a petitioner must clear two remaining statutory hurdles. I.C. § 19-4902(e) states that the trial court

> shall allow the testing . . . upon a determination that: (1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner

> is innocent; and (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

As with I.C. § 19-4902(c)(2), the State is not disputing that the requested testing methods would likely produce admissible results. The State does argue, however, that the testing requested by Johnson does not have the scientific potential to produce new, noncumulative evidence that would show that it is more likely than not that Johnson is innocent. The court agrees.

At trial, a considerable amount of evidence was presented that placed Johnson at the scene and that linked her to the murders.[5] Her stories were inconsistent and conflicted with the evidence. Her DNA was found in a latex glove, found wrapped in her blood splattered robe, and discarded in a trash can on the property. She knew where the murder weapon was kept (in the guest house safe) and had requested the key a few days earlier. *See also* this court's opinion in *Johnson v. State*, CV-2006-0324, pp. 89-92 (Outlining the "mountain of evidence" against Johnson and quoting Judge Wood as stating at trial that the amount of evidence against Johnson was "overwhelming.")

Evidence was also presented that suggested the possible involvement of another party, in the form of unidentified fingerprints and unidentified DNA. The defense argued Johnson's innocence under the theory

---

[5] The court uses the term "linked" because the jury could have convicted Johnson if they believed that she was the shooter or if they believed that she aided and abetted the shooter.

that a stranger entered the house and murdered Johnson's parents. The jury considered this evidence and heard these arguments and still convicted Johnson of first degree murder.

Therefore, the possibility of identifying a third party DNA source from previously untestable samples will not make it more probable than not that Johnson is innocent, just as the post-trial discovery that the fingerprints on the murder weapon belonged to Christopher Hill did not entitle Johnson to a new trial.[6] The jury was aware that DNA that did not belong to Johnson was present at the scene of the murders, just as they were aware that the fingerprints on the rifle were not hers. Even with that knowledge, the jury convicted Johnson, deciding that Johnson either (1) fired the murder weapon herself while wearing gloves or (2) aided and abetted the actual shooter. Either theory was sufficient for a conviction. Given the fact that the possibility of a third party shooter, as evidenced by the presence of unidentified fingerprints and DNA, failed to convince the jury that Johnson was innocent of murdering her parents, the slim possibility[7] that a name or

[6] The Idaho Supreme Court held that the post-trial identification of these fingerprints as Hill's would not likely produce an acquittal because the jury knew at trial that the prints did not belong to Johnson and still convicted her. *Johnson v. State*, 156 Idaho 7, 319 P.3d 491 (2014) (affirming the district court's order denying Johnson post-conviction relief on newly discovered evidence claims).

[7] The court uses the term "slim possibility" because this previously unidentifiable DNA could just as likely remain unidentifiable, could turn out to be Johnson's DNA, or the DNA of an unknown individual, whereupon we would be left in the exact

face might now be given to that shooter adds little to the mix.

The Supreme Court of Idaho faced a strikingly similar situation in *Fields v. State*, 151 Idaho 18, 253 P.3d 692 (2011). There, Fields was accused of robbing and stabbing to death the sole employee of a gift shop. Two witnesses testified on Fields' behalf at trial, claiming to have seen an unidentified male that did not match Fields' description in the store shortly before the murder. Fields was convicted and later brought a DNA claim under I.C. § 19-4902, requesting the testing of unidentified DNA found under the victim's fingernails and on her clothing. Testing was allowed and the DNA did not belong to Fields. However, in applying I.C. § 19-4902(f), under which relief must be granted where the DNA test results demonstrate that the petitioner is not the person who committed the offense, the court held that Fields failed to meet this burden. *Id.*, 151 Idaho at 24, 253 P.3d at 698.

According to the Court, this evidence failed to establish Fields' innocence because there was no evidence linking this DNA, found underneath the victim's fingernails and on her clothes, to the victim's attacker. *Id.* Without such evidence, the Court concluded that the test results could not show that Fields was not the murderer. *Id.*

---

same position as before. Additionally, merely establishing the source of this unidentified DNA does nothing to show that the DNA actually came from the killer.

The same is true in this case. Further testing might reveal the source of DNA samples found on Johnson's robe, on the gun, and elsewhere, but that knowledge does nothing to establish that the source of those samples was present in the Johnson's home on the morning of the crime, that the source of those samples was the shooter, or that Johnson didn't aid and abet the murderer of her parents.[8] Consequently, because an analysis of previously untestable DNA samples will not make it more probable than not that Johnson is innocent, her request for DNA testing will not be granted.

C. Claim Six Is Dismissed Under I.C. §§ 19-4901(b) and 19-4908.

Johnson claims that her fixed life sentences constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. This claim has been waived because (1) Johnson did not raise the issue on direct appeal, (2) she did not raise the issue in her initial post-conviction petition, and (3) *Miller v. Alabama*, 132 S.Ct. 2455 (2012), does not provide sufficient reason for failure to do so.

---

[8] Johnson's counsel admitted at the 10/20/14 hearing that the standard required by I.C. § 19-4902(e)(1) has not been met. R. Keith Roark stated on the record that "we are not at this point in a position to say that the evidence either is or is not cumulative. We are not in a position to say that the evidence will or will not, more probably than not, demonstrate the innocence of Ms. Johnson . . . but we need the testing."

Johnson did not raise an Eighth Amendment issue on direct appeal. I.C. § 19-4901(b) states that a post-conviction "remedy is not a substitute for . . . an appeal from the sentence or conviction." *See also Rodgers v. State*, 129 Idaho 720, 923 P.2d 348 (1997) (any claim or issue that could have been raised on appeal, but was not, may not be considered in post-conviction proceedings). The statute goes on to say that

> [a]ny 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.

I.C. § 19-4901(b) (emphasis added). Therefore, a court may not consider, as part of a post-conviction petition, issues that could have been raised on direct appeal, unless the court determines that the claim for relief raises a substantial doubt about the reliability of the finding of guilt.

Johnson claims that her sentence violated her Eighth Amendment rights. A claim that a sentence was excessive or illegal can be raised on direct appeal. *Hollon v. State*, 132 Idaho 573, 580-81, 976 P.2d 927, 934-35 (1999). Additionally, a claim that a sentence was excessive or illegal, by its very nature, cannot raise a substantial doubt about the reliability of the finding

of guilt.[9] Consequently, because Johnson failed to raise this issue on direct appeal, and because the asserted basis for relief does not raise a substantial doubt about the reliability of the finding of guilt, this issue is forfeited and may not be considered in a post-conviction proceeding.

Even if this claim was not barred by I.C. § 19-4901(b) for failure to assert it on direct appeal, I.C. § 19-4908 would act as an additional barrier. I.C. § 19-4908 states that any grounds for post-conviction relief not raised in an original petition are permanently waived absent "sufficient reason" for failure to do so. *See also Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995) (I.C. § 19-4908 prohibits the filing of a second petition unless the petitioner shows sufficient reason why the issues could not have been raised in the original petition). Idaho courts have refused to find sufficient reason where the grounds for relief were known or should have been known at the time of the original petition. *Lake v. State*, 126 Idaho 333, 336, 882 P.2d 988, 991 (Ct. App. 1994).

Johnson did not raise this issue in her initial post-conviction petition. Therefore, absent sufficient reason for failing to do so, this issue is waived. To this end, Johnson must show that these grounds for relief were unknown at the time that her original petition was filed.

---

[9] Sentencing occurs post-conviction; therefore, no claim regarding the legality of a particular sentence can have any bearing on the reliability of the finding of guilt.

Johnson argues that because her claim is based on *Miller v. Alabama*, a case decided by the United States Supreme Court in 2012, these grounds for relief could not have been known when she filed her original post-conviction petition.[10] However, this argument falters for two reasons.

First, if Johnson believed that her sentence (and fixed life sentences for juveniles in general) constituted cruel and unusual punishment, she should have known that when the sentence was handed down. As such, she should have claimed as much in her original petition. Instead, Johnson claims that because case-law at the time that she filed her original petition would not have supported such a claim,[11] these grounds for relief were "unknown." However, the lack of established case-law supporting one's argument or the presence of case-law directly adverse to one's argument is a far cry from sufficient reason for failure to bring that argument as required by statute. Johnson's

---

[10] Johnson argues that *Miller* completely changed the legal landscape surrounding fixed life sentences for juvenile offenders.

[11] Under Idaho law at the time that Johnson filed her original post-conviction petition, fixed life sentences for juveniles convicted of murder did not constitute cruel or unusual punishment under Idaho's Constitution or the Constitution of the United States. This is still the case today, as affirmed in a number of recent appellate cases. *See, e.g.*, *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011); *State v. Adamcik*, 152 Idaho 445, 272 P.3d 417 (2012).

case may have changed the law; such is the purpose of the appellate and post-conviction process.[12]

Second, *Miller* is not the panacea that Johnson claims. *Miller* has not been found to be retroactive, by either the United States Supreme Court or the Idaho Supreme Court. Additionally, the holding in *Miller* has no bearing on Johnson's situation. *Miller* held that *mandatory* fixed life sentences for juveniles convicted of homicide violate the Eighth Amendment. Idaho does not have a mandatory fixed life sentencing scheme, for juveniles or adults. Johnson's sentence was discretionary.

Johnson argues that *Miller* means more than that. She argues that *Miller* requires a sentencing court to take a juvenile's youth into account as a sentencing factor. However, assuming that Johnson's interpretation of *Miller* is correct, Johnson admits in her Successive Petition that her youth was taken into account at her sentencing.

Dr. Richard Worst testified at Johnson's sentencing as to the development of the adolescent brain. *Successive Petition*, p. 40. Dr. Craig Beaver testified that the development of the areas of the brain associated with high level decision making, organization, problem solving, inhibitory control, and higher-level adult reasoning and functioning do not fully develop until sometime in the mid-twenties. *Id.*, at p. 41. Johnson's

---

[12] *Miller* itself was argued on appeal in the face of adverse case-law.

sentencing judge heard this testimony and acknowledged on the record (1) that psychological evidence had been presented to the effect that adolescents can act impulsively and (2) that he considered Johnson's young age to be a mitigating factor. *Id.*, at p. 42.

These statements, included in Johnson's Successive Petition, and as supported in the record of Judge Wood's sentencing colloquy, show that Johnson's youth *was* taken into account as a sentencing factor. Therefore, even if Idaho courts were to hold that *Miller* is to be retroactively applied and even if they were to agree with Johnson that *Miller* requires a sentencing court to take a juvenile's youth into account as a sentencing factor, *Miller* provides Johnson with no new grounds for relief and cannot establish sufficient reason for Johnson's failure to raise her Eighth Amendment claim in her original petition. Absent such sufficient reason, Johnson's failure to assert this claim in her original post-conviction petition permanently waived the issue.

IV. CONCLUSION

Based on the foregoing, the Motion for Summary Dismissal of Petitioner's *Amended* DNA and Successive Petition for Post-Conviction Relief is GRANTED.

IT IS SO ORDERED.

October 23, 2014
Date

/s/ G. Richard Bevan
G. RICHARD BEVAN
District Judge

[Certificate Of Service Omitted]

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV 2014-0353 **JUDGMENT** (Filed Oct. 27, 2014)

The *Amended* DNA and Successive Petition for Post-Conviction Relief is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 23 day of October, 2014.

/s/ G. Richard Bevan
G. RICHARD BEVAN
District Judge

[Certificate Of Service Omitted]