APPENDIX

APPENDIX A

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2019 ND 103

Barry C. Garcia, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20180316

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Wade L. Webb, Judge.

AFFIRMED

Opinion of the Court by Jensen, Justice

COUNSEL

John R. Mills (argued), San Francisco, CA, and Samuel A. Gereszek (appeared), East Grand Forks, MN, for petitioner and appellant.

Birch P. Burdick, Fargo, ND, for respondent and appellee.

Todd E. Zimmerman, Benjamin J. Hasbrouck, and Aubrey J. Fiebelkorn-Zuger, Fargo, ND, for amicus curiae The Promise of Justice Initiative.

S. Bradley Perkins and Namrata Kotwani, San Francisco, CA, for amicus curiae The Promise of Justice Initiative.

OPINION

Jensen, Justice.

[¶1] Barry Garcia appeals from a district court order denying his request for a new trial and determining N.D.C.C. § 12.1-32-13.1 does not apply to his criminal sentence. We affirm the order of the district court denying Garcia's request for a new trial and determining N.D.C.C. § 12.1-32-13.1 is not applicable to his sentence.

I.

[¶2] In 1996, Garcia was found guilty of the offense of murder, committed while he was a juvenile, and he was sentenced to life imprisonment without parole. Garcia's sentence was affirmed on appeal. *State v. Garcia*, 1997 ND 60, 561 N.W.2d 599.

[¶3] In 2016, Garcia filed a petition for post-conviction relief arguing that imposing a sentence of life without parole on a juvenile violated the constitutional standards set forth by the United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The district court denied his petition and Garcia appealed. *See Garcia v. State*, 2017 ND 263, ¶ 10, 903 N.W.2d 503.

[¶4] While Garcia's appeal was pending, the North Dakota legislature passed HB 1195, which was enacted on April 17, 2017 as N.D.C.C. § 12.1-32-13.1 and effective August 1, 2017. Garcia, 2017 ND 263, ¶ 32, 903 N.W.2d 503. Section 12.1-32-13.1, N.D.C.C., allows juvenile offenders who have been in state custody for more than twenty years to seek relief from their sentence. Sentencing relief under

N.D.C.C. § 12.1-32-13.1 requires consideration of the factors set forth in Miller and Montgomery. Garcia requested this Court to either rule on the applicability of the provision or remand the issue to the district court. Garcia, at ¶ 30. This Court declined to rule on Garcia's request to apply N.D.C.C. § 12.1-32-13.1 because it had not been raised in the district court, and ruled without remanding the issue to the district court. Id. at ¶ 31.

[¶5] Following the appeal of the 2016 denial of post-conviction relief, Garcia filed a motion for a new trial in the district court. The court found that a motion for a new trial was not the correct vehicle for requesting relief under N.D.C.C. § 12.1-32-13.1, but pursuant to the consent of both parties, agreed to consider whether N.D.C.C. § 12.1-32-13.1 applied to Garcia. After a hearing, the court issued an order denying the motion for a new trial and finding N.D.C.C. § 12.1-32-13.1 does not apply to Garcia. On appeal, Garcia argues the court erred in finding N.D.C.C. § 12.1-32-13.1 is not applicable to him.

II.

[¶6] Garcia initially framed this matter as a motion for post-conviction relief asserting the enactment of N.D.C.C. § 12.1-32-13.1 was newly discovered evidence. "We review post-conviction relief applications based on newly discovered evidence as a motion for a new trial based on newly discovered evidence under N.D.R.Crim.P. 33." *Kovalevich v. State*, 2018 ND 184, ¶ 5, 915 N.W.2d 644. To prevail on a motion for a new trial on the basis of newly discovered evidence under N.D.R.Crim.P. 33, the defendant must show: (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal. Id. (citations omitted). A district court's ruling on a motion for new trial is subject to the abuse of discretion standard of review. Id. The enactment of N.D.C.C. § 12.1-32-13.1 cannot be considered as material to issues at trial or likely to result in acquittal. A motion for a new trial was

improper, the district court did not abuse its discretion in denying the motion, and we affirm the district court's denial of the motion.

[¶7] Generally, requests for a court order must be made by motion. The motion must be in writing, unless made during a hearing or trial. N.D.R.Civ.P. 7(b)(1)(A). However, courts have discretion to hear improper motions. *See Matter of Adoption of J.S.P.L.*, 532 N.W.2d 653, 657 (N.D. 1995).

[¶8] Here, while the matter was framed as a motion for a new trial, both parties had briefed and prepared for a hearing to determine whether Garcia could seek relief from his sentence through N.D.C.C. § 12.1-32-13.1. The district court inquired with both parties if they were in agreement that the court could address the applicability of N.D.C.C. § 12.1-32-13.1. Both parties indicated their consent to have the court proceed with a determination of whether N.D.C.C. § 12.1-32-13.1 could be applied in Garcia's case. In turn, this Court will treat Garcia's appeal as an appeal of the district court's denial of a motion for reduction of his sentence under N.D.C.C. § 12.1-32-13.1.

III.

[¶9] Garcia argues the district court erred in determining he could not seek relief from his sentence pursuant to N.D.C.C. § 12.1-32-13.1. Garcia contends the statute can be applied in a prospective manner because the triggering event (twenty years of custody) can occur subsequent to the enactment of the statute, that a plain reading of the statute supports retroactive application, or that the statute is ambiguous and the legislative history supports retroactive application.

[¶10] A statute that lessens the punishment for a criminal act cannot be applied to a sentence if the statute becomes effective after a conviction is final. *State v. Cummings*, 386 N.W.2d 468, 472, n.2 (N.D. 1986). "A statute is employed retroactively when it is applied to a cause of action that arose prior to the effective date of the statute." Id. at 471 (citing *Reiling v. Bhattacharyya*, 276 N.W.2d 237, 239 (N.D. 1979); *State v. Iverson*, 2006 ND 193, ¶ 6, 721 N.W.2d 396). When an individual is convicted and that conviction is affirmed on appeal, the conviction is considered final. *Iverson*, at ¶ 8.

[¶11] "Legislation lessening punishment may not be applied to final convictions because this would constitute an invalid exercise by the Legislature of the executive pardoning power." *Cummings*, 386 N.W.2d at 472, n.2 (citing *Ex parte Chambers*, 69 N.D. 309, 285 N.W. 862, 865 (1939)). Statutes that reduce final sentences infringe on the executive's pardoning power. *Iverson*, 2006 ND 193, ¶ 9, 721 N.W.2d 396.

[¶12] Garcia's original conviction was affirmed on appeal in 1997. *Garcia*, 1997 ND 60, 561 N.W.2d 599. The effective date of N.D.C.C. § 12.1-32-13.1 was August 1, 2017. Because Garcia's conviction was final before the statute's effective date, granting his requested relief would require retroactive application of the statute and would constitute an infringement on the executive pardoning power. *See Cummings*, 386 N.W.2d at 472, n.2.

[¶13] We conclude Garcia's argument that the legislature's inclusion of a future triggering event results in prospective application of the statute, not retroactive application of the statute, must fail. Allowing modification of a final sentence by including within the statute a delay, would allow

unfettered infringement on the executive pardoning power. Any final sentence could be modified through legislative action simply by including within the statute a triggering event. A statute enacted after a final sentence, even one with a delayed application, requires a retroactive application to modify the final sentence and is an infringement on the executive pardoning power.

IV.

[¶14] Garcia failed to provide newly discovered evidence to support his motion for a new trial. Additionally, any application of N.D.C.C. § 12.1-32-13.1 to Garcia's sentence would require retroactive application and be an infringement on the executive pardoning power. We affirm the order of the district court.

[¶15] Jon J. Jensen
Jerod E. Tufte
Daniel J. Crothers
Lisa Fair McEvers
Gerald W. VandeWalle, C.J.

Tufte, Justice, concurring specially.

[¶16] The Governor alone has the power to "grant reprieves, commutations, and pardons." N.D. Const. art. V, § 7; *State v. Iverson*, 2006 ND 193, ¶ 7, 721

N.W.2d 396. As the Majority explains, when the Governor is presented with a bill that reduces punishment for a criminal offense, our long-established precedent confirms that the bill may apply only to those whose criminal convictions are not yet final. If the Governor intends to give new legislation retroactive effect to final convictions, the Governor must not only sign the bill into law pursuant to article V, section 9, but also exercise the commutation power under section 7 to grant clemency to those whose convictions are final. For those, like Garcia, whose convictions were final before a potentially applicable statute lessening punishment became effective, the Constitution limits the available relief to the Governor's power to grant executive clemency. Our recent decisions affirming these principles do not foreclose relief to those whose convictions are final; they merely require the request be made to the state official who holds the sole power to grant such relief. *Odom v. State*, 2018 ND 163, 913 N.W.2d 775; *Beeter v. State*, 2018 ND 129, 911 N.W.2d 886; *State v. Cook*, 2018 ND 100, 910 N.W.2d 179; *State v. Myers*, 2017

ND 265, 903 N.W.2d 520; *State v. Iverson*, 2006 ND 193, 721 N.W.2d 396.

[¶17] Jerod E. Tufte
Gerald W. VandeWalle, C.J.

APPENDIX B

SUPREME COURT OF NORTH DAKOTA

May 16, 2019

RE: Petition for Rehearing - Garcia v. State, Supreme Court No. 20180316S

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

/s/ Sheree Locken

Deputy Clerk

North Dakota Supreme Court

P.S. This appeal will continue to proceed until final disposition and mandate under the North Dakota Rules of Appellate Procedure that were in effect when the notice of appeal was filed in this matter. The amendments that are effective March 1, 2019, will not apply.

APPENDIX C

STATE OF NORTH DAKOTA
IN DISTRICT COURT COUNTY OF CASS EAST
CENTRAL JUDICIAL DISTRICT

Barry C. Garcia
Petitioner,

vs.

State of North Dakota
Respondent.

No. 09-2016-CV-00309
June 29, 2018

ORDER

[¶1] On June 29, 2018, the above-entitled matter came on for a hearing on Petitioner Barry C. Garcia's Motion for New Trial, dated February 19,2018, the Honorable Wade L. Webb presiding. Attorney Samuel Gereszek appeared for Petitioner. Mr. Garcia was not present. Cass County State's Attorney Birch P. Burdick appeared for Respondent State of North Dakota.

[¶2] The Court reviewed the documents filed by Petitioner and Respondent, heard the arguments of counsel, reviewed the related files and records and was otherwise fully advised.

[¶3] For all the reasons stated on the record, it is hereby **ORDERED:**

A. Petitioner's Motion for New Trial, it is hereby **DENIED**.

B. In *Garcia v. State*, 2017 ND 263, ¶32, 903 N.W.2d 503, the North Dakota Supreme Court left to this court the determination of whether Petitioner comes within the scope of N.D.C.C. §12.1-32-13.1. Having considered the matter, this court's determination is **NO**.

Hon. Wade L. Webb
District Court Judge

APPENDIX D

This opinion is subject to petition for rehearing Filed 11/16/17 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2017 ND 263

Barry C. Garcia, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20170030

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Wade L. Webb, Judge.

AFFIRMED

Opinion of the Court by Tufte, Justice

Samuel A. Gereszek (on brief), East Grand Forks, Minnesota, and John R. Mills (argued), San Francisco, California, for petitioner and appellant.

Birch P. Burdick, State's Attorney, Fargo, North Dakota, for respondent and appellee.

Garcia v. State
No. 20170030

Tufte, Justice.

[¶1] Barry Garcia appeals from a district court order summarily dismissing his application for post-conviction relief. He argues his sentence of life imprisonment without the possibility of parole was imposed in violation of the Eighth Amendment and this Court should eliminate his parole restriction or remand for resentencing. We affirm.

I.

[¶2] On the evening of November 15, 1995, sixteen-year-old Barry Garcia drove around Fargo-Moorhead with three teenage members of the Skyline Piru Bloods street gang. The teens carried with them a sawed-off shotgun owned by the gang and 10 to 15 shotgun shells. While driving in a

West Fargo residential area around 10 p.m., Garcia asked the driver to stop, after which he and another young man exited the vehicle. Garcia took the shotgun in hand and the two began walking around the neighborhood.

[¶3] Nearby, Pat and Cherryl Tendeland were dropping off their friend, Connie Guler, at her home. Guler saw the two teens walking down the sidewalk toward the Tendeland car. Guler thought she saw the shorter of the two, later identified as Garcia, carrying a gun, but Pat Tendeland thought it was an umbrella. The two teens stood near Guler's driveway for awhile and then began walking back toward the Ford sedan. Thinking this was suspicious behavior, Pat Tendeland drove slowly away from Guler's driveway toward the Ford sedan. Garcia lagged behind the other teen, who walked briskly toward the Ford sedan. As the Ford started to pull away, Guler turned and saw Garcia standing next to the front passenger window of the Tendeland car. Garcia raised the shotgun and shot Cherryl Tendeland in the forehead. Shotgun pellets also struck Pat Tendeland's face. Pat Tendeland drove toward a nearby police station while Guler, a nurse,

tended to Cherryl's wounds. Upon realizing the severity of Cherryl's wounds, they stopped and called 911 for emergency assistance. An ambulance arrived and took the Tendelands to the hospital. Cherryl Tendeland was pronounced dead at the emergency room.

[¶4] Police officers determined the address of the Ford sedan's registered owner from a description of the sedan and its license plate number. The officers then located the car when it turned into the owner's driveway at 11:45 p.m. Garcia alone refused police orders to either remain in the car or lie on the ground. He fled on foot. Police recovered a sawed-off shotgun from the sedan's backseat along with several shotgun shells. Police chased Garcia and arrested him at a nearby athletic field. He had four shotgun shells in his possession. A juvenile petition was filed alleging Garcia had committed murder, attempted robbery, aggravated assault, and criminal street gang crime. At the State's request, the court transferred Garcia to adult court for trial.

[¶5] At trial, the district court dismissed the robbery and criminal street gang charges. The jury found Garcia guilty of murder, a class AA felony,

and aggravated assault, a class C felony. After a sentencing hearing, the district court sentenced Garcia to life imprisonment without parole on the murder conviction, and to a concurrent five years' imprisonment on the aggravated assault conviction.

[¶6] Garcia appealed, arguing his sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. This Court affirmed his conviction and sentence. *State v. Garcia*, 1997 ND 60, ¶ 60, 561 N.W.2d 599, *cert. denied*, 522 U.S. 874 (1997).

[¶7] In 1998, Garcia applied for post-conviction relief. The district court denied his application, and Garcia appealed. While his appeal was pending, he filed a second application for post-conviction relief, and the district court denied the application. Garcia appealed, and the two appeals were consolidated. This Court affirmed the district court's decisions. *Garcia v. State*, 2004 ND 81, 678 N.W.2d 568.

[¶8] In 2004, Garcia petitioned for a writ of habeas corpus in federal district court, raising many of the same issues he raised in his prior state cases, including that his sentence amounts to cruel and unusual punishment under the Eighth Amendment

and that his counsel was ineffective because he failed to present mitigating information during sentencing. *Garcia v. Bertsch*, 2005 WL 4717675 (D. N.D. Sept. 12, 2005). The federal district court denied his petition. Garcia appealed, and the Eighth Circuit Court of Appeals affirmed the federal district court's decision. *Garcia v. Bertsch*, 470 F.3d 748 (8th Cir. 2006), *cert. denied*, 551 U.S. 1116 (2007).

[¶9] In 2013, Garcia petitioned for a writ of habeas corpus in federal district court, arguing his sentence constitutes cruel and unusual punishment because he was a juvenile at the time of the offense, citing *Miller v. Alabama*, 597 U.S. 460 (2012). The federal district court concluded it lacked subject matter jurisdiction over Garcia's second petition and dismissed the petition without prejudice. *Garcia v. Bertsch*, 2013 WL 1533533 (D. N.D. Apr. 12, 2013).

[¶10] In 2016, Garcia applied for post-conviction relief, arguing his sentence constitutes cruel and unusual punishment and violates the North Dakota and United States Constitutions. After an attorney was appointed to represent Garcia, his application was supplemented, arguing his sentence is

unconstitutional as a result of recent United States Supreme Court decisions causing a significant change in substantive and procedural law.

[¶11] The State moved to dismiss or for summary disposition. After a hearing, the district court denied the State's motion to dismiss, granted the State's motion for summary disposition, and denied Garcia's application for post-conviction relief.

II.

[¶12] An application for post-conviction relief may be summarily dismissed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Leavitt v. State*, 2017 ND 173, ¶ 4, 898 N.W.2d 435. We review an appeal of a summary denial of post-conviction relief as we would review an appeal from summary judgment. *Id.* "The party opposing the motion is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." *Id.* (quoting *Lindsey v. State*, 2014 ND 174, ¶ 7, 852 N.W.2d 383).

[¶13] Garcia argues the district court erred in summarily dismissing his application for post-conviction relief, because his sentence of life imprisonment without parole was imposed in violation of the Eighth Amendment to the United States Constitution. He contends the district court inflicted cruel and unusual punishment by sentencing him without an individualized consideration of the distinct attributes of his youth and giving mitigating effect to his youth before he was sentenced to life without parole.

[¶14] The issue raised by Garcia is not a facial challenge to the statutes authorizing the sentence he received. Rather, he argues his sentence violates the Eighth Amendment as a result of inadequate consideration by the sentencing court at the sentencing hearing regarding whether Garcia's murder conviction reflected transient immaturity or irreparable corruption. See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1224 (2010) ("A violation of the Constitution is an event. There is a moment before the constitutional violation. There is a moment after the violation."). If the district court at

sentencing in 1996 gave adequate consideration to these factors, the sentence was constitutional when imposed and remains constitutional today. If these factors were not adequately considered, Garcia argues he must have a new sentencing hearing or we must strike the restriction on parole eligibility from his sentence.

[¶15] The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to the states through the Fourteenth Amendment. *Roper v. Simmons*, 543 U.S. 551, 560 (2005). The U.S. Supreme Court has explained that "proportionality is central to the Eighth Amendment" and the amendment's protections include "the right not to be subjected to excessive sanctions." *Miller*, 567 U.S. at 469 (citations omitted). The proportionality of a sentence is measured with reference to both the offense and the offender. Id. The prohibition against cruel and unusual punishment applies to both capital and non-capital cases. *Garcia*, 1997 ND 60, ¶ 47, 561 N.W.2d 599.

[¶16] Garcia previously argued to this Court that his sentence constituted cruel and unusual punishment, and we rejected his argument. *Garcia*, 1997 ND 60, ¶ 46, 561 N.W.2d 599. However, since that decision, the United States Supreme Court has decided several cases related to sentencing juvenile offenders and has said that juveniles are constitutionally different from adults such that certain punishments are disproportionate when applied to most juveniles.

[¶17] In *Roper*, the Supreme Court held the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed constitutes cruel and unusual punishment and is prohibited by the Eighth Amendment. 543 U.S. at 574-75 (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)). The Court stated juvenile offenders are different from adults and their culpability is diminished because they lack maturity and have an underdeveloped sense of responsibility often resulting in impetuous and ill-considered actions and decisions, they are more susceptible to negative influences and outside pressures, their character is not as well-formed, and

their personality traits are more transitory and less fixed. *Id.* at 569-71. The Court also stated the penological justifications for the death penalty apply to juveniles with less force than to adults because of their diminished capacity. *Id.* at 571.

[¶18] In *Graham v. Florida*, 560 U.S. 48, 82 (2010), the Supreme Court held the Eighth Amendment prohibits imposition of a sentence of life without parole on a juvenile offender for a non-homicide crime. The Court considered juvenile offenders' limited culpability, the penological justifications, and the severity of the sentence and concluded a sentence of life without parole for a juvenile offender who did not commit homicide is cruel and unusual and violates the Eighth Amendment. *Id.* at 69-74.

[¶19] *Roper* and *Graham* established that children are constitutionally different from adults for purposes of Eighth Amendment challenges to disproportionate sentencing. *Miller*, 567 U.S. at 471. In *Miller*, at 465, the Supreme Court extended the rationale of Roper and Graham to declare unconstitutional all mandatory sentences of life imprisonment without parole for juveniles convicted

of homicide. The Court reasserted that juveniles are less deserving of the most severe punishments because they have diminished culpability and greater prospects for reform, and that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders. *Id.* at 471-72. The Court said the characteristics of youth matter in determining the appropriateness of a life without parole sentence and a mandatory sentencing scheme takes from the sentencer the opportunity to consider the "mitigating qualities of youth." *Id.* at 473-76. The Court noted youth is a time of immaturity, irresponsibility, impetuousness, and recklessness; youth may also be more susceptible to influence and to psychological damage; and these "signature qualities" of youth are all "transient." *Id.* at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). The Court held the Eighth Amendment forbids mandatory sentences of life in prison without the possibility of parole for juvenile offenders, explaining:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for

> change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id. at 479-80 (citations omitted). The Court further explained its decision did not categorically bar the penalty of life in prison without the possibility of parole, but it mandates that a sentencer consider a juvenile offender's youth and attendant characteristics before imposing the sentence. *Id.* at 483.

[¶20] In *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), the Supreme Court held its decision in *Miller* announced a new substantive constitutional rule that applies retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided. The Court reasserted:

Miller requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," Miller made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose

> crimes reflect the transient immaturity of youth.

Id. at 733-34 (citations omitted). "*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. The Court held that *Miller* applies retroactively and that prisoners who received a mandatory sentence of life in prison without the possibility of parole for an offense committed when they were juveniles must be given the opportunity to show their crime did not reflect irreparable corruption. *Id.* at 736.

[¶21] When the U.S. Supreme Court determines that one of its decisions applies "retroactively," it suggests that the rule announced in the decision did not exist prior to that decision and yet will be given application to judgments made final before the decision issued. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). That "is incorrect." *Id.* By declaring *Miller* to be retroactive, *Montgomery* means that because the source of the *Miller* rule "is the Constitution itself," it "necessarily pre-exists our articulation of the new rule." *Id.* Thus,

Montgomery states that the Eighth Amendment always required a sentencing court to consider youth, and what the Supreme Court articulates in 2015 is simply a clearer formulation of the requirements that the Eighth Amendment demanded of sentencing courts in 1996.

[¶22] The holding of *Miller* is limited to mandatory sentences of life in prison without the possibility of parole, and its central rationale rests on the mandatory nature of the sentence prohibiting the sentencing court from considering the mitigating attributes of youth. The Court's broader rationale applies to all cases where juvenile offenders are sentenced to life without the possibility of parole: "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Miller*, 567 U.S. at 473. The Court elaborated in *Montgomery*: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567

U.S. at 479). The Court further stated, "*Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." *Montgomery*, at 736. Although the holding in *Montgomery* applies only to mandatory sentences, we understand the touchstone for Eighth Amendment proportionality analysis is that consideration of whether a juvenile's crimes reflect "transient immaturity" rather than "irreparable corruption" is required even when a sentence of life without parole is imposed as a matter of the sentencing court's discretion.

[¶23] Garcia was sentenced to life in prison without parole after an individualized sentencing hearing. However, he was sentenced before *Miller* and *Montgomery* were decided, and the district court lacked the specific articulation that it was to distinguish between those whose crimes reflect "permanent incorrigibility" or "irreparable corruption" as opposed to "transient immaturity." We read these not as magic words without which a sentence cannot pass muster under the Eighth Amendment, but, instead, we review the district

court's sentencing hearing to determine whether it met the substantive requirements of *Miller* and *Montgomery* in its consideration of youth and its attendant circumstances. Without that substantive compliance, Garcia's sentence of life imprisonment without parole would have been imposed in violation of the Eighth Amendment.

[¶24] At the sentencing hearing, both the State and Garcia's attorney made arguments supporting their recommended sentences. The State described Garcia's "unstable, chaotic" family history, his father's imprisonment, his mother's murder, and his choice to commit numerous crimes. The State also noted that an evaluation by the North Dakota State Hospital determined Garcia was "minimally amenable" to rehabilitation and that Garcia had not shown any responsibility or remorse. Garcia did not testify or make a personal statement during the sentencing hearing. His attorney did argue that the court should consider Garcia's age. Garcia's attorney argued the court should remember Garcia was young, young people exercise extremely poor judgment and do not think before things happen, and a doctor at the State Hospital said he was

"minimally amenable" to treatment but did not say he was not amenable to treatment. Garcia's attorney argued young people do not have any insight and may be written off as being total failures, but a lot of those people straighten themselves out. Garcia's attorney did not offer witnesses or other evidence, but he argued that Garcia's family was supportive and were willing to testify that Garcia had been great with his younger brothers, he took care of them, and he had assumed the responsibility of a parent in certain situations. He requested the court not "write off" Garcia but give him an opportunity to change. He recommended the court sentence Garcia to thirty years in prison or, alternatively, to life with the opportunity for parole to give Garcia an incentive to complete any programs available to him and to allow the parole board an opportunity to look at what he has done while in prison.

[¶25] The district court said it considered information from various documents, including the presentence investigation, the information, police reports, Garcia's statement shortly after his arrest, a report from the State Hospital, and victim impact

statements. The court made specific findings about the statutory sentencing factors under N.D.C.C. § 12.1-32-04 and explained its decision to sentence Garcia to life in prison without the possibility of parole, stating:

> *The defendant acted under strong provocation.* Best evidence at this point indicates that Mr. Garcia fired a shotgun at point-blank range at Mrs. Tendeland because she looked at him the wrong way. That is not provocation. In fact, it's the most senseless explanation for a murder I have ever heard of. That favors the State's position.
>
> *There are substantial grounds present which tend to excuse or justify the defendant's conduct.* The only argument that seems to have been offered to excuse or explain this conduct has been youth and/or drug use. There is simply no basis for believing that the drug use on the night in question was the cause of the defendant's conduct. In fact, juveniles . . . the defendant's juvenile history would indicate that he has a serious history of serious assaults and that his problems are most likely the result of an unresolved anger problem, and that he possesses some sort of an explosive personality.
>
> His record would indicate that he's the type of individual who is likely to blow at any point. There does not seem to be any justification for

the conduct in this case. That favors the State's position.

. . . .

The defendant's history of previous offenses and/or lapse of time since any previous offenses. In reviewing the juvenile history of the defendant, it appears that there are 16 convictions in the past—well, in a period of time from June of 1993 through September of 1995. A number of the offenses would have been felonies had they been committed by an adult.

Included in those 16 priors are five assaults or terroristic convictions. The defendant has shown a criminal pattern of increasing violence and consistent violence. That favors the State's position.

Eight, the defendant's conduct was the result of circumstances unlikely to recur. The crime in this case remains unexplained to such a degree that the best evidence before the Court is simply that Mr. Garcia acted on an impulse, that that impulse was the result of being looked at the wrong way. This is certainly a set of circumstances that could recur at any point.

As I have indicated earlier, the best evidence is that the defendant has an explosive personality. I think that the best evidence would suggest that this could recur. This favor's [sic] the State's position.

The defendant's unlikely to commit another crime. The defendant's prior history indicates that he's a one-person judicial wrecking crew. He's committed any number of crimes. And I think that there's no reason to believe that he'll refrain from committing crimes in the future.

The defendant's likely to respond affirmatively to probation. He's been involved in the probation system for years and has failed to respond to treatment. It favors the State's position.

. . . .

The fifteenth factor is other factors. There are a couple of other factors that the Court deems to be significant. The first is Mr. Garcia's youth. All human beings possess certain inalienable attributes. And one of these is the possibility of redemption or rehabilitation. It is possible for a person to undergo, as a result of a life-changing circumstance, youth, spiritual, and personal change. These types of changes are more likely to occur in young people than they are in older people because, in young people, their personalities are still in formation.

However, in order for this to be accomplished, the person must be willing to admit the wrongfulness of their conduct, their powerlessness to change what has already happened, and to express a real willingness to make amends to the fullest extent possible.

> In this case, Mr. Garcia has not demonstrated that he understands the seriousness of his crime or that he has changed as a result of his experiences.
> I came to this case with a personal philosophy. I think that it's safe to say that every judge, when they take the bench, comes to every case with a personal philosophy. My personal philosophy is that young people are never beyond redemption.
>
> My personal philosophy is that particularly young people are capable of changing, they are capable of reforming their lives, that they are capable of starting anew.
>
> I came to this case, looking for some reason, some justification, some excuse, to hand down a sentence less than the maximum. Mr. Garcia has given me no alternative, he has given me no opportunity.
>
> . . . .
>
> If I had heard anything from you that indicated to me that you had started this path of change, that you had started the process of change, I might have viewed your lawyer's pleas far more sympathetically. You haven't given me any reason to believe that you've—that you're in a position to change.

[¶26] *Miller* held a sentence of life without parole for a child whose crime reflects transient immaturity is a disproportionate punishment and therefore unconstitutional. *Montgomery*, 136 S. Ct. at 735. *Miller*, 567 U.S. at 480, requires the

sentencer to take into account how children are different from adults, and how those differences counsel against irrevocably sentencing a child to a lifetime in prison. *Miller* did not impose a formal factfinding requirement, and the sentencer is not required to use the words "incorrigible" or "irreparable corruption." *Montgomery*, at 735. *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, at 483.

[¶27] The district court considered Garcia's age, the circumstances of the offense, and his prior criminal history, and recognized that young people are more capable of rehabilitation. The court considered how children are different and said young people are never beyond redemption and are capable of changing and reforming their lives, but Garcia did not do anything to indicate he can change. The court considered the circumstances of the crime and the lack of any justification for Garcia's conduct. The court considered Garcia's criminal history, which showed a pattern of increasing and consistent violence, and his history

of violating probation. The court considered Garcia's youth and attendant circumstances and determined Garcia deserved a sentence of life without parole, despite his youth. Garcia is the only person in North Dakota serving a life without parole sentence for a crime committed when he was a minor. Without using the precise words the Supreme Court used in Miller, the court found Garcia to be the rare juvenile offender whose crime reflected irreparable corruption and not transient immaturity. *See Johnson v. State*, 395 P.3d 1246, 1258-59 (Idaho 2017) (rejecting *Miller* claim where sentencing court "clearly considered Johnson's youth and all its attendant characteristics").

[¶28] Garcia argues that even if the sentencing court gave consideration to youth, the significance of that factor has changed to such a degree that a new sentencing hearing is required. As authority, he cites *Bobby v. Bies*, 556 U.S. 825 (2009). In *Bies*, the Supreme Court considered the change in legal circumstances resulting from *Atkins v. Virginia*, 536 U.S. 304 (2002). Prior to *Atkins*, intellectual disability was a mitigating factor in considering eligibility for the death penalty. After *Atkins*, a

determination of intellectual disability barred imposition of the death penalty. *Bies* stands for the proposition that the significant shift in importance from intellectual disability as one factor among several to one having conclusive importance required further proceedings. The change in legal significance of youth resulting from *Montgomery* is superficially similar to but distinguishable from the change at issue in *Bies*. *Bies* explained that the prosecution may have little incentive to challenge mitigating evidence of intellectual disability because that same evidence may support the aggravating factor of future dangerousness. *Bies*, at 836-37. *Atkins* thus completely changed the incentives. Here, *Montgomery* does not change the incentive of either the prosecution or Garcia in highlighting youthful prospects for rehabilitation. Youth was the central thrust of Garcia's plea for mercy. The State's central argument was that, despite his youth, Garcia had demonstrated a pattern of increasingly violent and senseless offenses and had demonstrated nothing to question the state hospital's assessment that he was "minimally amenable" to rehabilitation.

[¶29] Garcia's sentencing fulfilled the requirements from *Miller* and *Montgomery*. His sentence is proportionate to the offender and the offense and does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. We conclude the district court did not err in summarily dismissing Garcia's application for post-conviction relief.

III.

[¶30] Garcia argues his case should be remanded to the district court to provide him with an opportunity to request a reduction in the length of his sentence under N.D.C.C. § 12.1-32-13.1. He contends the statute allows juvenile offenders to seek a sentence reduction after they have served twenty years and he is potentially eligible for relief under the new law. The State argues the statute does not allow Garcia to move for a reduction in sentence, because it does not apply retroactively.

[¶31] In 2017, the legislature enacted N.D.C.C. § 12.1-32-13.1, and the statute became effective on August 1, 2017. Section 12.1-32-13.1(1), N.D.C.C., allows defendants who were convicted of an offense

committed before they were eighteen years old to request a reduction in their sentence, stating:

> Notwithstanding any other provision of law, a court may reduce a term of imprisonment imposed upon a defendant convicted as an adult for an offense committed and completed before the defendant was eighteen years of age if:
>
> a. The defendant has served at least twenty years in custody for the offense;
>
> b. The defendant filed a motion for reduction in sentence; and
>
> c. The court has considered the factors provided in this section and determined the defendant is not a danger to the safety of any other individual, and the interests of justice warrant a sentence modification.

The statute requires the court to consider various factors in deciding whether to reduce a term of imprisonment, including the age of the defendant at the time of the offense, whether the defendant has demonstrated maturity and rehabilitation, the defendant's family and community circumstances at the time of the offense, and juveniles' diminished culpability and failure to appreciate risks and consequences. N.D.C.C. § 12.1-32-13.1(3).

[¶32] Because section 12.1-32-13.1 became law after Garcia's petition for post-conviction relief, Garcia could not and did not move for a reduction in his sentence under this statute before the district court. Issues that were not raised before the district court will not be considered for the first time on appeal. *Linstrom v. Normile*, 2017 ND 194, ¶ 19, 899 N.W.2d 287. Although the parties have fully briefed to us the issue of whether this new statute applies retroactively to Garcia's final conviction, we leave for the district court to determine in the first instance whether Garcia comes within its scope. *See State v. Iverson*, 2006 ND 193, ¶¶ 6-8, 721 N.W.2d 396 (explaining application of ameliorative penal legislation exception to general rule against retroactivity).

IV.

[¶33] We conclude the district court's 1996 sentencing of Garcia to life imprisonment without parole did not violate the Eighth Amendment. We affirm the district court's order summarily dismissing Garcia's application for post-conviction relief.

[¶34] Jerod E. Tufte

Daniel J. Crothers
Lisa Fair McEvers
Jon J. Jensen
Gerald W. VandeWalle, C.J.

APPENDIX E

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF CASS EAST CENTRAL JUDICIAL DISTRICT

Barry C. Garcia
Plaintiff,
vs.

State of North Dakota,
Defendant.

CASE NO: 09-2016-CV-00309

POST-CONVICTION HEARING

TRANSCRIPT OF PROCEEDINGS

Taken At

Cass County Courthouse

Fargo, North Dakota

January 13, 2017

BEFORE THE HONORABLE WADE L. WEBB

DISTRICT JUDGE

A P P E A R A N C E S

SAMUEL A. GERESZEK, Attorney At Law

HAMMARBACK & SCHEVING, PLC 308
DeMers Avenue
East Grand Forks, MN 56721 (218) 773-6841
sam@egflawyer.com

FOR THE PLAINTIFF

BIRCH P. BURDICK, Cass County State's Attorney

CASS COUNTY STATE'S ATTORNEY'S
OFFICE P.O. Box 2806
Fargo, ND 58108-2806
(701) 241-5850
sa-defense-notices@casscountynd.gov

FOR THE DEFENDANT

(WHEREUPON, on January 13, 2017, the following proceedings were had, to-wit:)

***

THE COURT: All right, folks. We'll go on the record in regards to Cass County District Court file number 09-2016-CV-309, Barry Garcia versus the State of North Dakota, a post-conviction matter originally filed February 1st of 2016.

Appearing in court today, we have petitioner's counsel, Mr. Gereszek. We have Mr. Burdick on behalf of the respondent, the State of North Dakota.

It's about -- well, it's 1:43 in the afternoon right now. The hearing was to commence at 1:30. Counsel was present. The Court was ready to proceed at that point in time. Previously in regards to this file, Mr. Gereszek and Mr. Burdick, as you folks are aware, the Court allowed for, in the civil post-conviction proceeding, Mr. Garcia to appear telephonically. My understanding is he's in the custody of the North Dakota Department of

Corrections and Rehabilitation, presently, if my understanding is correct, serving his sentence in the Bureau of Federal Prisons in the state of Arizona. And so the Court, trying to accommodate that, allowed for telephonic appearance?

MR. BURDICK: No, no objection.

THE COURT: Okay. The way that works through the Bureau of Prisons is court staff was told, and I believe Mr. Gereszek was told as well, counsel for Mr. Garcia, the Bureau of Prisons would have Mr. Garcia call us. So we provided the number. We've waited 14 minutes now, and Mr. Garcia has not called, for whatever reason the Court doesn't know, but the Court did wait an extra 10, now 14, minutes. So we will proceed with the arguments, with the hearing, here today without Mr. Garcia present.

Based upon all the filings, it's the Court's understanding, clearly, that there will be no testimony. No facts are in dispute. It's a legal matter that the parties wish for the Court to decide, however complicated, but still a legal matter for the Court to decide, is the way the Court looks at it, anyway.

So we will proceed at this point in time without Mr. Garcia appearing telephonically, unless you have some other information for the Court, Mr. Gereszek. Is that okay with you and your client?

MR. GERESZEK: That's perfectly fine, Your Honor. For the Court's record, I did -- I called Mr. Garcia's counselor here approximately five minutes ago or so, and it went straight to voicemail, his counselor's voicemail. And then I spoke with Mr. Garcia yesterday at about 11:00 a.m., and his counselor, and they were both aware of today at 1:30 and they knew the phone number, so I'm not sure what's going on.

THE COURT: Okay. And you don't have any control other than that, correct?

MR. GERESZEK: No, Your Honor.

THE COURT: Okay. Mr. Burdick, you're fine proceeding at this point in time?

MR. BURDICK: Yes, Your Honor.

THE COURT: Thank you. Counsel, the Court proposes we argue in this matter. There's [sic] a handful of issues before the Court at this point in time. The original post-conviction application -- well, first, we'll start with the Court has reviewed the

entire file, okay, including the original post-conviction application, the amended pro se post-conviction application, supplement by counsel after counsel was on the case for the petitioner, Mr. Garcia here. That's all been reviewed, along with attachments. The State's reply, response, has been reviewed, along with attachments, including the transcript of the sentencing hearing in July of 1996. All has been reviewed by the Court in regards to this matter, the entire file.

There are a couple different things pending, the post-conviction application and also the State of North Dakota did file, in August, its motion to dismiss and motion for summary disposition. The way the Court would propose this -- and I'll hear counsels' argument or discussion as to whether it's a good plan or not -- is that we take them piecemeal, two sections, as it were. First, let's have argument on the State's motion to dismiss, meaning, alleged misuse of process, res judicata, statute of limitations. We'll hear that discussion. The Court will likely then give you a ruling. Then we will hear the second half, which is the motion for summary disposition, which, frankly, counsel for the

petitioner requested, as well, thereafter, meaning that both of you want me to summarily dispose of this case. But I think we take up the State's motion to dismiss, misuse of process, res judicata, statute of limitations first, and then, depending upon how the Court rules, then we move on to the motions for summary disposition by each party. Does that sound like a good plan, for the petitioner?

MR. GERESZEK: Yes, Your Honor.

THE COURT: Mr. Burdick, for the respondent?

MR. BURDICK: The State is fine with that, Your Honor. Thank you.

THE COURT: Okay. Then we will proceed in such a manner.

The Court has reviewed the entire file, once again, for the record. We will begin with that motion to dismiss, issues of misuse of process, res judicata, statute of limitations.

It's your motion, Mr. Burdick.

MR. BURDICK: Thank you, Your Honor. I'm not sure to what extent the Court wants to hear this, recognizing that the Court is very familiar with the pleadings already, but, in essence, the claim

that the State made on its affirmative defense relative to misuse of process, statute of limitations, and res judicata are these:

That the defendant -- excuse me -- Mr. Garcia had, over a number of years, submitted numerous pleadings to this Court, and to other courts, including the district court, where he argued, essentially, that he was sentenced too harshly in this matter; so the idea bing of his sentence being beyond what it ought to be is something he argued from day one. In each of those arguments he made in the past, including his direct appeal, a prior post-conviction matter, and a federal habeas corpus matter, the courts, both the North Dakota Supreme Court and the Eighth Circuit Court of Appeals, looked at the entire record, looked at the arguments of counsel at sentencing, looked at what Judge Erickson, the sentencing judge at that time at the district court here in Cass County did, said, and explained on his way to a sentence of life imprisonment without parole. I add that, to the best of my knowledge -- and I'm not completely confident, but fairly confident -- that was the first time that that sentence had been imposed in this state. I

think the law that allowed for sentencing without the possibility of parole was passed in 1995, maybe, or 1993. Somewhere in there. He imposed it in this case, but he started out his argument -- and, again, I won't get at all the detail here -- that he understood that Mr. Garcia was a juvenile and that he felt all juveniles were beyond -- were capable of redemption. The point is not so much that. I realize that's point two of the argument here, but just as a backdrop for the rest of our discussion. So he raised those at this time.

Over the course of years, from 2005 with the Roper case to 2012 where we had the Miller case and the 2016 case which I think spurred Mr. Garcia to file this application, the Court has gone -- the United States Supreme Court has explained, at some considerable depths, its thinking, again, that juveniles are just different. Again, this mostly goes to the second argument that we'll have later on, but it ties to the first argument in this way. The key decision here, the key law here, arose in Miller in 2012. Again, preceded by Roper in 2005 and Graham, I think, in 2012. The law did not prevent Mr. Garcia from taking the Miller

decision after it was announced in 2012 and asking for it to be applied to him here in Cass County District Court in a post-conviction-type matter. He did not do that. While there is the Teague decision with which the Court is probably familiar talking about when things are retroactive -- and that was discussed in the Montgomery case earlier this year -- having said that, if you look at that decision, together with the Danforth decision out of Minnesota, what it says is that that did not prohibit him from raising this claim at an earlier time. So he could have raised it. As far as the State is concerned, he probably could have raised it in 2005, he could have raised it in 2010, but particularly in 2012 when the United States Supreme Court talked about the inappropriateness of mandatory life sentences without parole.

THE COURT: So he could have, but does that prohibit him from now raising it? He could have. I agree. He could have raised it in 2012 and 2013, but does that prohibit him from now raising it?

MR. BURDICK: So that -- my argument, as far as it's gone, my answer to that would be no,

except that the North Dakota law has a statute of limitations of two years that went into effect, as I recall, in 2013. So he would have 2012, 2013, perhaps 2014, or maybe into 2015, to raise this claim, and he did not. He could have and did not. What the State's argument here is is [sic] that his failure to do so, under both the Danforth and Teague analysis and the statute of limitations that we have for post-conviction relief matters, now prohibits him from raising it at this time. His argument, essentially, is untimely.

The advantage of the Montgomery decision earlier in 2016, January of 2016, said that it was definitely retroactively applicable. But he could have exercised this argument several years ago, didn't do it in a timely way, and the State's argument is that, therefore, he has blown his statute of limitations and, therefore, should not have an opportunity to raise it at this time, that essentially he sat on his rights and cannot now claim that he was prejudiced and should have an entitlement to those rights.

There is an argument in our brief about res judicata, as well, and it's a little bit tied in with this,

but it relates to all the decisions that have been made to date on this case, and that this argument is essentially a repeat of arguments he made in the past. Although, the State acknowledges that at the time that Judge Erickson made that decision for the district court here, Judge Erickson did not have the benefit of the Roper, Graham, Miller, and Montgomery decisions. He didn't have that. But -- and neither did the State Supreme Court or the Federal District Court or the Eighth Circuit Court of Appeals. But they had Judge Erickson's underlying analysis of the sentence that was appropriate in this case, and I believe that the decisions that were made in this case in the past are and should be considered res judicata to him now raising this here. Sort of dual arguments there. Thank you.

THE COURT: Thank you, Mr. Burdick. Those limited issues, the State's motion to dismiss, misuse of process, res judicata, statute of limitations, argument, Mr. Gereszek.

MR. GERESZEK: Thank you, Your Honor. With regard to – I'll just start with the misuse of process piece. Essentially it goes – I think I agree with Mr. Burdick in that regard where it

goes into a little bit of the actual merits of the supplement, but we have this lineage of cases, this Roper, Miller, Graham, Montgomery, a lineage of cases that comes out, and Montgomery comes in 2016, which gives us the retroactive piece. To say that Mr. Garcia should have filed in 2012 or 2013, it would render Montgomery moot. Montgomery should have never even been decided if it was a foregone conclusion that every single juvenile who was sentenced under a scheme like Mr. Garcia should have filed in 2012, 2013, or 2014. Montgomery was a moot point. But it needed to be decided in order to allow people like Mr. Garcia to file their applications to apply Miller to their situations. So we feel that when you look at the lineage of cases, we needed Montgomery to make the lineage of cases apply to Mr. Garcia's situation.

THE COURT: Okay. But, in fact, Mr. Garcia did, in prior post-conviction applications or other appeals to the North Dakota State Supreme Court, talk about the Eighth Amendment and that his sentence was cruel and unusual, and the North Dakota Supreme Court "pre" some of the cases you're discussing there, said that, no, the Court was

fine under North Dakota law and the federal constitution and the Eighth Amendment. So he's already had an Eighth Amendment bite at the apple, so to speak, so how many bites at the apple does he get?

MR. GERESZEK: With all due respect, when the United States Supreme Court changes their analysis of the Eighth Amendment -- back in 1996, this was a perfectly valid sentence. In 2000, this was a perfectly valid sentence. In 2004, this was a perfectly valid sentence. Once we start the lineage of cases from Roper through Montgomery, the change, the shift in the winds, if you will, is coming. And we see this change in analysis of the Eighth Amendment, so we have to allow an applicant for post-conviction relief, if they've already had a bite at an old, if you will, an old Eighth Amendment apple, the apple has changed. We have a new apple because the United States Supreme Court has given us a different apple. So you have to look -- we have to give him the opportunity to look at -- to analyze his case under this new analysis that the United States Supreme Court has given us through their

lineage of cases. So I would respectfully disagree that he was -- that it's misuse of process.

And I think that kind of ties into the res judicata piece where saying that he raised it before, now he can't raise it again, would preclude any -- would preclude the North Dakota Century Code 29-32.1-01 where it says under 3(3), "A petitioner asserts a new interpretation of federal or state constitutional law." So you have that clause in the North Dakota Century Code that says if there is a new interpretation, you can bring forth a post-conviction application. It doesn't say that if you've already had it analyzed you can't do it again. It would negate that purpose for that clause. That clause is saying, look, if there's a change in the interpretation, you should have the ability to have your situation looked at if it applies to that situation. And here, in Mr. Garcia's case, when you peel everything back, he is a juvenile in 1996 who is sentenced to life without the possibility of parole. Roper, Graham, Miller, Montgomery are those cases, those specific issues of life without the possibility of parole of juveniles. When you have this situation where the cases have been changed, again

kind of using the apple analogy, the apple has changed. Yes, he may have had a bite at the apple, but we have a new apple. We have a different apple, and he should have that ability to at least have the Court analyze his case under that new auspice.

For those reasons, Your Honor, we feel that the State's motion should be denied and his application should at least be heard by the Court.

THE COURT: Thank you.

The Court being fully advised in the premises, upon review of the entire file, the Court has already indicated all the documents that the Court has reviewed in regards to this matter, the applicable law, including the line of cases discussed by counsel, the Court being fully advised in the premises, the State's motion to dismiss filed and dated August 29, 2016, is denied for the following reasons. Again, we're talking about the limited issues on the State's motion to dismiss in regards to misuse of process, res judicata, and statute of limitations.

The Court generally agrees with Mr. Garcia's counsel, Mr. Gereszek's arguments, in regards to this aspect of the matters in front of the

Court at this point in time in that the State's motion to dismiss is denied. In regards to this matter, pursuant to North Dakota Century Code 29-32.1-01(3)(3), the statute of limitations, the Court deems, finds, and concludes it does not apply to your statute of limitations for post-conviction relief as the petitioner is asserting a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or -- and the rest doesn't matter because the United States Supreme Court, in this Court's opinion, Miller at 2012, but certainly Montgomery in early 2016, Montgomery clearly spoke to the retroactivity of the substantive rule, a new rule in 2012 of Miller, retroactively applied by Montgomery in early 2016. Here, we're dealing with a sentencing from the 1990s, so that's retroactive from 2012, along with more recent U.S. Supreme Court opinion, including in Tatum, indicates and reaffirms Montgomery's retroactivity in regards to this matter in discussion thereof. Therefore, this is a new interpretation or claimed new interpretation that would apply to this case of federal constitutional law by the United States Supreme Court. Therefore, that exception

applies under 29-32.1-01-3(3). And so that statute of limitations does not apply.

In regards to the misuse of process in regards to res judicata, it is true, an accurate statement, that the Eighth Amendment has been previously raised by Mr. Garcia in prior proceedings, including in front of the North Dakota Supreme Court. The Supreme Court has not found any sort of federal Eighth Amendment violation thus far in regards to this matter, and clearly stated as such. However, the argument was a slightly different one, frankly. It was an Eighth Amendment argument that had to do with the failure to provide guidelines for a sentencing court in a juvenile matter citing earlier U.S. Supreme Court case law and such. Again, Miller decided in 2012 is certainly a new interpretation, and then in 2016 Montgomery retroactively applying it. These are new items that were not fully discussed, fully litigated. It's not a misuse of process, nor res judicata. Therefore, the State's motion to dismiss is denied at this point in time.

The new jurisprudence upon which Mr. Garcia's current application is based is and rises to

the level that it should be heard at this point in time. Both parties agree it should be heard as a matter of law, so I will hear discussions as a matter of law.

The original moving party, the post-conviction application, was filed by petitioner, so I'll hear from petitioner's counsel first. You may proceed.

MR. GERESZEK: Thank you, Your Honor.

With regard to – I'm going to kind of – I briefed everything, so I don't want to waste the Court's time reiterating the brief, but I will zero in on specific aspects of it that I think are pertinent to this issue and how this -- how Mr. Garcia should be afforded a post-conviction relief in the sense of not vacating the judgment, not vacating his conviction, but allowing him to be resentenced under the new guidelines that Graham, Miller, Montgomery, and Roper give us.

When we look at Miller, specifically zeroing in on the most important factor from Miller, Miller stated that when you're going to give a sentence of life without the possibility of parole to a juvenile, it should be an uncommon sentence, and it should only

be employed after the sentencing Court takes into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

So essentially what the Miller court told sentencing courts in 2012 was, if you're going to do it, you have to take very specific care when you're looking at the factors of the juvenile. And when we look at the transcript that was provided and we look at what Judge Erickson looked at in 1996 -- again, I'm not saying he did anything wrong in '96 -- but under this new analysis, we see, on page 23 of the transcript, Judge Erickson is talking about the defendant's conduct was a result of circumstances that are likely to reoccur. Towards the end there, he says, "This is certainly a set of circumstances that could reoccur at any point." Well, that flies in stark contrast to the science that the United States Supreme Court relied on in Miller where it talks about the developments in psychology and brain science that continue to show a fundamental difference between juveniles and adults.

THE COURT: Sorry to interrupt. With that line of argument -- and you tell me what your

argument on behalf of your client is, and perhaps it's both -- but with that line of argument, if you take that particular view of the science involving juveniles and sentencing, life imprisonment without the benefit of parole, discretionary, because that's all that's left, if that's left, if you go down that road, then every single juvenile or child is able to be rehabilitated. Okay. Or possibly able to be rehabilitated. And the U.S. Supreme Court hasn't said that life without parole, discretionary, is unconstitutional, an Eighth Amendment violation. They haven't said that, have they? I mean, maybe they will, but they haven't said it.

MR. GERESZEK: No, I will agree with you there, Your Honor. They have not said that. But --

THE COURT: So do you want this Court -- are you asking this Court to say that the trend of the cases, Miller, Montgomery, even more recently Tatum on Halloween of 2016, that this Court should go down that road and, as a Court, not as an elected legislator, but as a Court, I should make the public policy determination that it simply is an Eighth Amendment violation for life imprisonment, discretionary, after a homicide by a juvenile? So are

you asking me simply to say that it's a violation of the Eighth Amendment period, or are you saying that it violates the Eighth Amendment here because Judge Erickson, back in the mid-1990s, did not comply with the Miller case?

MR. GERESZEK: The latter, Your Honor.

THE COURT: Okay.

MR. GERESZEK: I'm saying Judge Erickson, in 1996, when we look at what Miller says now, Miller says you have to -- if you're going to do it, if you're going to do a discretionary life without the possibility of parole – I'm not saying it's categorically unconstitutional, but if you're going to do it, you have to analyze the juvenile that you're going to do it to in a very specific light. Given what we've learned in the last 21 years since 1996 about juvenile development, brain psychology, all of those factors that the United States Supreme Court looked at, you need to analyze the juvenile under those specific characteristics. And I'm citing to that one specific sentence where he says, "This is likely to reoccur." Well, that stands in stark contrast to the Roper decision in 2005. Children who have committed crimes rarely carry that behavior into

adulthood. That comes directly from Roper where they analyzed this.

THE COURT: And let's say hypothetically the Court agrees with the statement, the scientific statement that you're claiming there, so this does not allow a judge to make a different determination? The judge has to agree with the science in general and the judge can't say, yeah, that's all fine and good, but not here, and here's why?

MR. GERESZEK: No, I would say the judge still has that authority and that ability, but we're looking at it from a different lens today than Judge Erickson was looking at it back then. Judge Erickson's experience back then was that this activity was certainly likely -- this set of circumstances was likely to reoccur. He goes on on [sic] page 25 when he's talking about -- during sentencing, the middle of the page, line 8, he's talking about the person has to be able to –

(WHEREUPON, the phone in the courtroom began ringing.)

MR. GERESZEK: I wonder if this is Mr. Garcia?

THE COURT: Let's just hold tight. So hold your argument tight. I'll have staff answer the phone and maybe it's Mr. Garcia.

(WHEREUPON, the probation officer for Mr. Garcia said they would call back in five minutes if the Court would allow it.)

THE COURT: Okay. So it sounds like they had some sort of a situation at the prison. I have no idea if it had to do with your client whatsoever, by the way. And so apparently he can call back in about five minutes. And at that point in time, my intention would be, if they call back, if Mr. Garcia calls back, that we'll welcome to join him to the proceedings at that point in time, but continue with our discussions at this time. Is that fair enough, for the petitioner?

MR. GERESZEK: Yes, Your Honor.

THE COURT: For the respondent?

MR. BURDICK: Yes, Your Honor.

THE COURT: So that's the plan. You may continue with your argument, sir.

MR. GERESZEK: Thank you, Your Honor.

Referring back to page 25 of the transcript, of the sentencing transcript, it kind of goes into

what Judge Erickson was looking at at [sic] that point. He said that Mr. Garcia, at that time, had shown no remorse, no indication that he had done anything wrong, no way of looking at the possibility of being rehabilitated. One of the factors that we see from the lineage of cases that has come out of the United States Supreme Court is juveniles, yes, at their young age, they typically will show a sign of – they're susceptible to the brain psychology, the science, the lack of development, if you will, where they may not admit wrong. They may not show a sign of remorse because it's not -- it hasn't been developed yet. So I guess when we're looking at what Judge Erickson did in 1996 is he took the snapshot of Mr. Garcia in 1995 when the crime was committed, and he didn't look to the future.

And what the cases are telling us is we have to analyze these juveniles and these children in the auspice and under the lens that there is a future. They are very susceptible to rehabilitation based solely on the lack of development, the lack of brain development. You put them in a situation where they can be rehabilitated, they can be put through the sense of admitting wrong, the sense of

understanding the situation that they've created, and they can be rehabilitated. But Judge Erickson, in '96, took the snapshot of Mr. Garcia at that shot in time, and he failed to look at what the future holds for Mr. Garcia.

THE COURT: Okay. But didn't he put that in the context, Judge Erickson himself, on the record at sentencing, stated in one manner or another, multiple times, how youth have the ability to redeem themselves, so a redemption, and so he came at it from a lens of young people can change, they can be redeemed, and he simply decided here that was not going to happen? Is that not what he said, or you're of the position that he simply said, well, this is where he's at right now and so that's the way it's going to be forever?

MR. GERESZEK: I guess I would respectfully disagree, Your Honor.

THE COURT: Okay.

MR. GERESZEK: When we look further in the transcript, he does admit, "I have a personal philosophy. I came into this with a personal philosophy. Judges have a personal philosophy," and

he admitted that he had a personal philosophy that juveniles can be rehabilitated. But then he looked at Mr. Garcia and said, "I don't see that in you. I don't see that you can be rehabilitated." And again, he is, to a degree, pigeonholing Mr. Garcia.

And we're not asking in any way, shape, or form that he automatically be released tomorrow. That's not -- and that's not what Mr. Garcia is asking. He's asking for the possibility of parole. So, therefore, he serves a period of time, and then the parole board looks at him; and if he hasn't changed, like Judge Erickson thought he wasn't going to, then he doesn't get paroled. But as the lineage of cases tells us, and the science tells us, and what we've learned, tells us, juveniles, because of their different characteristics, their lack of development, their lack of understanding, the penological goals of the criminal justice system must be applied differently to juveniles. So when you look at these goals of the criminal justice system, retribution, deterrence, incapacitation, and rehabilitation, you can't view them under the same lens that you would an adult. And because of that, you look at the factors. And every state has their own code that talks about what

factors a court must look at for sentencing. And I'm not saying there needs to be a blanket across the board, but you must look at those factors -- and I think in North Dakota we have 16 factors -- and analyze those factors with a juvenile's state of mind, not an adult's. Even though they may be tried as an adult and convicted as an adult, when it comes to sentencing, we view them differently because the nature of a life without the possibility of parole sentence is the second-most-harsh sentence that can be given.

(WHEREUPON, the phone in the courtroom began ringing.)

THE COURT: Sorry for the interruption again, counsel, but we'll see if we can get Mr. Garcia on the phone.

(WHEREUPON, the phone call was unable to connect into the courtroom.)

THE COURT: Mr. Garcia, can you hear the Court at all right now or not? (No response.) So nothing. For the record, at this point in time, madam clerk and our court reporter – she's wearing a couple different hats right now, budget cuts, right -- she is attempting to get Mr. Garcia on the

telephone on the speakers, but she cannot raise him on the hand held landline phone, nor can we raise him on the intercom or speaker system. So hopefully he'll call back.

Mr. Gereszek, I apologize for interrupting you a couple times. So we're going to probably interrupt you a third time here in just a minute or two. But, again, we did wait about 15 minutes before we started, and technology is a bugger sometimes, but let's keep on with the arguments. And if Mr. Garcia gets to join us or can join us, that would be great.

You may proceed.

MR. GERESZEK: No problem, Your Honor. It gives me time to think, anyway. I guess the biggest point -- and again, I don't want to keep rehashing my brief because I feel the brief kind of summarizes the argument very well. The point that we're asking this Court to do is grant the post-conviction relief solely for the purpose of resentencing. And it may very likely be the outcome that if he comes back and gets resentenced under the juvenile auspice looking back in time unfortunately to 1996, he may be sentenced again to life without the possibility of parole. But because the sentencing court in '96

couldn't look into the future to see what the United States Supreme Court was going to do in 2012 in Miller, they didn't analyze Mr. Garcia under this juvenile lens. So allow a court, a sentencing court, in this jurisdiction, to resentence him using the Miller analysis, using the Graham, Roper, Montgomery, using this analysis and this knowledge that we have now to determine if it is appropriate for him to be sentenced to life without the possibility of parole. That's all we're asking, is that he simply be resentenced under the new guidelines. That's essentially all we're asking, Your Honor.

THE COURT: And there's no U.S. Supreme Court case law that says I must do that, correct?

MR. GERESZEK: As of right now, no. The Supreme Court rulings simply state you can't send a juvenile to death, we can't sentence them under a mandatory sentencing scheme to life without the possibility of parole. And then Miller carries it a step further and essentially says if you're going to do it, do it very uncommonly and do it with a very specific lens.

THE COURT: Thank you, counsel. (WHEREUPON, the phone began ringing in the courtroom.)

THE COURT: Mr. Garcia, are you on the telephone with us right now? I can hear someone just faintly. If you would turn up the volume greatly, madam clerk. Okay. So we have the volume as loud as it goes.

Mr. Garcia, are you on the telephone with us?

THE PLAINTIFF: Nope.

THE COURT: Mr. Garcia, are you on the telephone with us? (No response.) So about a minute ago, or not even a minute ago, I could hear something faintly in the background, and we turned it up as loud as we could, and now there's simply no answer on the telephone line.

MR. GERESZEK: I heard counselor Johannes, which is his counselor, Your Honor.

THE COURT: Okay.

MR. GERESZEK: I heard that name, but then that's the last I heard.

THE COURT: Okay. So we'll sit dead air time. I appreciate everyone's patience here, counsel included. Thank you. Madam clerk is doing the best

work she can, and she has little or no control, just like the Court, over this technology, but let's wait a minute to see if they put Mr. Garcia on the phone here in the next minute before we need to interrupt Mr. Burdick. Because I think you were done with your initial argument on that phase; is that a fair statement?

MR. GERESZEK: Yes, Your Honor. THE COURT: Thank you.

THE PLAINTIFF: Hello?

THE COURT: Mr. Garcia, are you on the telephone with us?

THE PLAINTIFF: No.

THE COURT: Is that you, Mr. Garcia?

THE PLAINTIFF: No.

THE COURT: Okay. So Mr. Garcia kept saying, "No." Have you had a chance to talk to Mr. Garcia as recent as yesterday; is that correct?

MR. GERESZEK: That's correct, Your Honor. Yes.

THE COURT: Okay. Does that sound like Mr. Garcia's voice? He keeps saying "no," but --

THE PLAINTIFF: It's Mr. Garcia. I'm saying, "Hello."

MR. GERESZEK: That's Mr. Garcia, Your Honor.

THE COURT: There we go. Okay. So, Mr. Garcia, this is Judge Webb in District Court in Fargo, Cass County, North Dakota. Can you hear me?

THE PLAINTIFF: I can hear you.

THE COURT: Okay. So, Mr. Garcia, you don't need to speak or anything, but if you can hear me now, you'll be able to hear the attorneys. You're joining us at 2:19 p.m. central standard time here in Fargo. We commenced the hearing. It was to commence at 1:30 today. We waited until about 1:45. I think it was 1:44 or 1:43, but the record will reflect it. We waited about, oh, 10, 15 minutes for you to call, but you hadn't called, so we started the hearing without you. Counsel have been making their arguments in regards to this matter. You are welcome and allowed to listen along telephonically and appear telephonically by order of the Court and applicable North Dakota law and agreement of the parties. So you're welcome to stay on the telephone line. But there's not going to be testimony or witnesses, but you're welcome to listen to the

arguments, as they certainly do pertain to you, to say the least.

Your counsel has argued. Mr. Burdick has argued. The Court has thus far denied the State's motion to dismiss your post-conviction application under the issues of res judicata, misuse of process, and statute of limitations. So I denied the State's motion to dismiss. We are now in the middle of arguments as a matter of law on whether or not the Court should grant your application or summarily dispose of it by denying it and dismissing it. So we're in the middle of those arguments. Your counsel, Mr. Gereszek, has argued for many minutes now. Now it's Mr. Burdick's turn for the State of North Dakota. So you're welcome to listen, Mr. Garcia.

Mr. Burdick, for the State.

MR. BURDICK: Thank you, Your Honor.

Let me step back to the Miller case for just a moment. In the Miller case, the appellant -- the defendant had requested the Court, their counsel had requested the Court, to establish a categorical ban on life without parole sentences for juveniles, even in homicide cases, who were under the age of

14. And the Supreme Court, at that time, refused to do that, instead holding that mandatory sentences were inappropriate. So when invited to speak to the topic of whether discretionary sentences were unconstitutional, they said, we are not speaking to that. They did go on to speak at some level about the kinds of things that they hope that judges would take into consideration when they were looking at a discretionary sentence. The question as to whether that hope that they have indicated in the Miller decision requires a Court to do that is still, I think, a bit uncertain. There are cases since the Miller decision in the Tenth Circuit, the Seventh Circuit, the First Circuit, that decided that they did not have to do that, that all that Miller was requiring of them was banning mandatory sentences. There's also one out of the Eighth Circuit in 2016. That's a little different set of circumstances. That's the Jefferson case, United States v. Jefferson. At first, the defendant was sentenced to life without parole, I think, and then they resentenced him to something on the order of 600 years. In any case, in all of these four decisions, the Eighth, Tenth, Seventh, First, I understand those Courts to have said this is not a

mandatory requirement under Miller that they review this in the way that Mr. Garcia's counsel is considering. So –

THE COURT: Sorry to interrupt. The Ninth Circuit would disagree, at least on analogous cases, de facto life sentences. The Ninth Circuit has said you have to do the analysis. Am I correct on that or incorrect on that?

MR. BURDICK: I believe Your Honor is correct in that regard. I'm not suggesting to you that the United States courts are uniform in their determination of this, but I'm saying that I understand these four circuits to have established that position, including the Eighth Circuit. So I agree that there's not just one idea in this regard.

Having said that, the argument that the State made in its brief to the Court is essentially this. That Judge Erickson took into account at the time of his sentencing all the kinds of things that the Miller Court and some of these earlier decisions had in mind that a judge assess in a discretionary sentence. So notwithstanding that, I'm arguing that it doesn't really require the Court to do that. The Court did do that back in the sentencing in Mr.

Garcia's case. Clearly, the State acknowledges that the Court did not have the benefit of Roper, Graham, Miller, and Montgomery at the time it sentenced Mr. Garcia. But the issues that those Courts had in mind, and some of the statutory considerations that other states have put in place, or that Supreme Courts in other jurisdictions like Louisiana, as mentioned in my brief, suggest you put in place when doing this kind of analysis, are the kinds of things the State argues that Judge Erickson did. So, for example, he started out, as this Court is aware, and I won't go through all the things in my brief, he said, "I came to this case with a personal philosophy, and that philosophy is that young people are never beyond redemption. My personal philosophy is that particularly young people are capable of changing, capable of reforming their lives, capable of starting a new. I came to this case looking for some reason, some justification, some excuse to hand down a sentence less than the maximum." And then he went through some discussion about the heinousness of the crime here and the circumstances under which it occurred, saying, among other things, "It's hard to imagine a

more serious harm," that Garcia shot Ms. Tendeland at point blank range and allegedly because she had looked at him the wrong way. That he had a serious history of serious assaults. That's the way the judge put it. That he had some 16 convictions, as he referred to them, over the prior two years, including five assaults or terroristic threats, evidencing a criminal pattern of increasing violence and consistent violence. He said one of the inalienable attributes of a human being is the possibility of redemption or rehabilitation. So he's taking into account these things and Garcia's youth at the time he is pronouncing his sentence. He had in hand, as well, an analysis by the State Hospital, which was argued by both the State and Garcia's counsel, Mr. Mottinger, at that time about Garcia's limited amenability to rehabilitation. As Mottinger argued, it doesn't mean he had no possibility of -- no amenability to change, but the State Hospital said -- I can't remember the exact language – but limited ability.

So my point, again, is that the judge took into consideration already what the Courts in the ensuing 15 years have asked judges to consider,

whether or not he needed to do so under the law. And having done all that, he came to the conclusion that Mr. Garcia should be sentenced to life without the possibility of parole. As this Court knows and has noted in the State's –

THE COURT: Sorry to interrupt, Mr. Burdick.

MR. BURDICK: Please.

THE COURT: But, and you can disagree with this, but there seem to be certain key words or buzz words, quote, "permanent incorrigibility," end quote, quote, "irreparable corruption," end quote. These are words used in Miller and used again by Justice Sotomayor in her October 31st, 2016, concurrence on a per curiam opinion, the Tatum case. You don't want to always hang your hat on a per curiam opinion, right, but these are buzz words, clear words using quotes, "permanent incorrigibility," "irreparable corruption." Judge Erickson didn't use those words. Fair enough?

MR. BURDICK: The State would acknowledge that, Your Honor. Those words had not been produced for him to use. The fact that he did not utter them from the bench is not necessarily

indicative that he did not consider them. The State would assert that, in fact, he did consider that kind of thing, as reflected in his comments.

Now, this Court, Mr. Gereszek, myself, we weren't there at the time that this went on. What we have is the record that was established on the transcript of the sentencing, so that is what Judge Erickson said. Obviously, this Court has to be in a position of trying to discern, at least from the State's perspective, whether that satisfied the kind of analysis that the Miller court was considering on discretionary life without parole sentences, if this Court first decides that the district court must have done that. So my argument is it did not have to do that if you're looking at the decisions in the First, Tenth, Seventh, and Eighth Circuit. But having said that, even if it did, the Court undertook the kind of analysis that would be appropriate. I don't think, when the Court mentioned those particular words, that a district court would have to repeat those identical words. Obviously, if I were uttering a sentence today from the bench, I would probably try and take a look at using those kinds of words in

making my decision, but I don't think that that's a requirement of any court in any place. Thank you.

THE COURT: Thank you. Further argument, Mr. Gereszek?

MR. GERESZEK: Just a brief response, Your Honor. With regard to – we'll acknowledge that Judge Erickson in his decision, and it can be seen -- again, I don't want to waste the Court's time -- it can be seen in the transcript. He does analyze, he does talk about, juvenile youth offenders, but one thing that we see a change from 1996 to 2016 is a knowledge of youthful development, a knowledge of brain development, of psychology. And just one note. He makes a comment when he's talking about this analysis of the juvenile -- again on page 25 -- and he states, "These types of changes are likely to occur in young people" – he's talking about the changes, the growing, the rehabilitation – they're likely to change – "they're more likely to change in young people than in old people because the young people's personalities are still in formation. However, in order for this to be accomplished, the person must be willing to admit the wrongfulness of their conduct." What we see in the change in the

psychology and the brain development is a youthful person won't admit wrongfulness, won't admit those things, until later on because of societal impacts, friends, peer influence, that type of thing.

So he's analyzing -- unfortunately, he was analyzing Mr. Garcia from an adult standpoint as a juvenile. He's saying, if you're not willing to admit wrong now, there's no way I can rehabilitate you. What we learn later, through Roper, through Graham, through Miller, the science tells us, at the time of a juvenile committing an offense, it's very likely they won't admit wrong. It takes time. Which is why, when we look at Miller, they said, give them the chance of rehabilitation. Give one of the penological goals, rehabilitation, a chance.

THE COURT: But isn't that a great argument for the United States Supreme Court, not this Court, but the United States Supreme Court? Isn't that a good argument to argue to them to say the Eighth Amendment is unconstitutional, sentences, even discretionary, life without parole for homicides for juveniles? I'm not sure how -- what you're saying here is somehow Judge Erickson would be better informed today if he were to sentence today. But

there's also hypotheticals. This happened in the mid-'90s. The trial was in the mid-'90s. The sentencing was in July of 1996. And so we are to go back in time, retroactively, right? We're supposed to go back in time to apply Miller. Fair enough. But how does that actually work? Okay. If it is an application of, well, some sort of a finding or a conclusion as a matter of public policy by a court, frankly, I think that should be the United States Supreme Court, but it should be the legislative branch more so. But if the U.S. Supreme Court wishes to do that, they get to do that kind of thing, right, in their analysis of the constitution and the Eighth Amendment. That's fine and good. But wouldn't that be simply a prohibition, which they have not done, for life sentences without parole for juvenile homicides? It just seems that you seem to go back to the same argument about the fact that life sentences are just an anathema, they're wrong, for juveniles. And you can get some science to back that up. I understand that. Okay. But I'm a judge of the law, and the law, right now for me, is that they should be uncommon under Miller, but they can happen.

Disagree with me? Tell me where I'm missing your argument.

MR. GERESZEK: I will agree with you that Miller does not do a categorical ban on life without the possibility of parole. And if I'm misstating it, I'm not stating that either. I think the Miller court has made it very clear, and as Mr. Burdick outlined, the Court did not say that in Miller. They were asked, and they did not say that. They simply said that a mandatory scheme is unconstitutional because, and the reason they used that analysis, the reason they said that, is because you have to analyze juveniles vastly differently than adults. So that's where my argument rests below the unconstitutionality bar but at the basis of we need to analyze Mr. Garcia as a juvenile, given what we know now, because Miller stated that we have to analyze juveniles differently. And that, again, goes back to when I rested earlier. All we're really asking for is a resentencing. And it is, again, I'll openly admit, very likely -- or, I shouldn't say very likely – it's possible he could be resentenced to life without the possibility of parole under the Miller analysis, but he should be afforded

the Miller analysis in sentencing. That's simply all we're asking, Your Honor.

THE COURT: Thank you.

Mr. Burdick.

MR. BURDICK: Just one thing, Your Honor. The Court had referenced Tatum, the Arizona case, a little earlier, and Judge Sotomayor's commentary in there. I would note, because most cases revolve on their facts, that she also said in that concurrence that the sentencing judge did not undertake the evaluation Montgomery requires. He imposed a sentence of life without parole finding that Purcell was quote, "likely to do well in the structured environment of a prison," and that he possesses the capacity to be meaningfully rehabilitated. That was not what was said, or anything close to that, in Mr. Garcia's case. So I just wanted to point that out to the Court, and I'm sure you've probably already saw that. Thank you.

THE COURT: And that was one of five cases that were remanded to the Arizona state courts per curiam for this issue. Fair enough, Mr. Burdick?

MR. BURDICK: I can't remember the number, but, yes, I believe there were a number of them.

THE COURT: Okay. Mr. Gereszek, if you wish to argue briefly, you may one more time.

MR. GERESZEK: No, Your Honor.

THE COURT: Thank you. And you're done, Mr. Burdick?

MR. BURDICK: Yes, Your Honor.

MR. GERESZEK: Your Honor, if I may, briefly? And I don't know if this is appropriate or not. I do know Mr. Garcia has prepared a statement for the Court. I know we talked about not calling witnesses and not presenting evidence. He has prepared a statement, if the Court is willing to listen to that statement at this point. I had talked to Mr. Burdick about it. I think he has an objection specifically to the statement, but I just wanted to present it to the Court.

THE COURT: Okay. Mr. Burdick, your thoughts?

MR. BURDICK: Your Honor, my -- this was intended to be a legal argument. I understand that Mr. Garcia wants to say something. I have some

sense of what he's going to say based on what Mr. Gereszek and I had spoken about, so I object because I don't think it's appropriate. However, I think that's really within the Court's jurisdiction to decide. And I would note, having said that, that there is a small piece of my brief which contains a commentary about his current situations and how at the time that he filed this matter he was in solitary and was unable to hold a job because of that. One presumes that it was because of his behavior in the penitentiary, but I don't know more detail than that. So I leave it entirely up to the Court as to how to address that. Thank you.

THE COURT: Okay. Mr. Gereszek, any statement the Court would allow from Mr. Garcia would not be evidence for the purposes of this hearing, but simply an allowance for him to make a brief statement. Is that what's being requested here?

MR. GERESZEK: Yes, Your Honor.

THE COURT: Okay. Mr. Garcia, are you still with us? (No response.) Maybe he's not even still with us anymore. Mr. Garcia, this is Judge Webb. Are you still with us?

THE PLAINTIFF: Can you hear me?

THE COURT: I can just barely hear you, Mr. Garcia. Can you hear me, Mr. Garcia? If you could get close to the microphone or the phone, very close to the microphone or phone, and let me know if you can hear me.

THE PLAINTIFF: I can hear. Can you hear me? This is as close as I can get.

THE COURT: Okay. We can hear you. When you get that close, I can hear you, but just barely.

Mr. Garcia, if you'd speak as loudly as you can, as closely as you can to the phone. I will give you a minute or two here just to make a brief statement. It's not evidence, but the Court will, in its discretion, allow such a brief statement. Speak loudly, speak clearly, right into the phone, as close to the phone as you can get. Don't be afraid of being too loud.

Okay. Go ahead, Mr. Garcia.

THE PLAINTIFF: It's been 21 years since the death of Cherryl Tendeland, since Pat Tendeland was injured and lost his wife, and since Connie Guler witnessed that horrific scene. With every passing day, I become more painfully aware of that

time and how senseless and horrible my actions were on the night of November 15th, 1995.

My intention now is to explain how I arrived at that point, and, by so doing, to answer all possible questions that still remain, and hopefully give some measure of closure to the Tendeland family, the Guler family, and my remaining family.

My life as a kid and a young man can be characterized by one thing: a consistent and pervasive disbelief in all things. I fostered this disbelief as a defense mechanism against the violence and chaos of the environment I grew up in. It was a detachment from the world that allowed me to cope with the reality I did not understand. There is no explaining poverty, violence, and addiction to a youngster. There is no consoling philosophy or clarifying rationalization that offers escape. There is only a feeling as primal as that of hunger, and it is a deeply imbedded instinct to flee. I could not physically flee my environment, so I flowed inward and developed a sense of silence and the aforementioned detachment that became impenetrable to most things.

Many of you have wondered why I never expressed remorse. Well, that is part of the reason, but it was against my conditioning to express myself outward. The other part was that I was advised not to speak by my attorney Steve Mottinger, who had good reasons for doing so. One, that because I was not willing to accept responsibility for the crime, it would be disingenuous. And two, that doing so would hurt my appeal. The simple truth is that had I said then what I'm saying now, we would not be here today arguing about this sentence. I would have been sentenced to life with parole, and not life without parole.

Up until the age of 12, my behavior had never become criminal; but in my twelfth year, something occurred that destroyed me utterly. My mother was murdered. Her name was Rosalinda, and in the prime of her life, she was stabbed to death by three assailants. To this day, I do not know who they are or why they did what they did. What I do know is that the consequences of their crime carried on through me from the streets of San Antonio, Texas, to the Fargo-Moorhead community. The sorrow and rage that festered within me blinded me so that I

began to act with a complete disregard for my life, as well as the lives of others. I had no trust of grown-ups, especially authority figures, so I kept my grief to myself and slowly descended into an all-consuming darkness. That I would hurt someone or end someone's life was inevitable. Thinking back on my escalating criminal behavior, I see it clear as day. It was inevitable but preventible. It was an act in a human story.

I alone murdered Cherryl Tendeland, and for that I am truly sorry. Only in coming to terms with my mother's death was I ever able to come to terms with Cherryl's death, but that I would cause others the pain and sorrow that was mine makes their suffering all too real with my eternal torment.

I cannot deny any wrongdoing. I will not deny any wrongdoing. I robbed Fargo-Moorhead of the sense of innocence that it enjoyed by not knowing that kind of violence. That was mine to bear. Although Fargo-Moorhead wasn't perfect, it did offer a sense of refuge to me and my younger brothers. I repaid that with tragedy. And for that too, I am sorry. But the boiling race relations between the migrant Latino community and the native residents of

Fargo-Moorhead were so great and so bitter with oppression that that is also something I regret. That I caused hearts and minds to have doubts, suspicions, and resentments that were never there is not lost on me. What emotional and spiritual damage I caused to all of those affected by my crime is incalculable and is most likely being manifested to this day in one behavior or another. I am powerless to change the past. If I could, I would. But I am not powerless in this moment. And for those of you who are still chained to my crime, I say to forgive me for your sake. Don't hate me any longer at the continuing expense of your life. There is no evil or harm you can wish upon me that has not been carried out already. My soul only grows in depression to my understanding of the value of life. When the grave bears away into its depths a single human life, the soul of humanity is diminished. I ended Cherryl's life and so I was diminished more than that. I truly am sorry.

That's all, Your Honor.

THE COURT: Thank you, Mr. Garcia.

Anything further, Mr. Gereszek?

MR. GERESZEK: No, Your Honor.

THE COURT: Anything further, Mr. Burdick?

MR. BURDICK: No, Your Honor. Thank you.

THE COURT: The Court being fully advised in the premises, upon review of the entire file, noting the comments of counsel, the applicable law, the line of cases discussed by the United States Supreme Court and other Courts, its review of the file, including the sentencing transcript, the arguments of counsel, the Court being fully advised, the Court chooses to rule from the bench in regards to this matter at this point in time. The Court appreciates counsel's patience here as the Court explains itself on the record for its ruling and reasoning and rationale.

The Court being fully advised in the premises, the Court makes the following. The Court in regards to this matter, in taking a look at each of the party's motions for summary disposition of this post-conviction application matter, rules as follows: The defendant's motion for summary disposition is denied. The State of North Dakota's motion for summary disposition is granted in regards to this matter. And the petitioner's post-conviction application is denied and dismissed, that being the

petitioner Garcia's application of February 1st, 2016.

So the respondent State of North Dakota's motion for summary disposition is granted, and the February 1st, 2016, post-conviction application of Mr. Garcia is denied and dismissed for the following reasons.

The Court first starts with a discussion and makes a statement that, as a matter of law, the Eighth Amendment does not prohibit discretionary life without parole sentences for juvenile offenders in homicide cases. The Court wishes to digress or take a moment to do a brief synopsis of some of the many cases involved in the Court's determination here and arguments of counsel. The Court notes at this point in time from the United States Supreme Court in Roper, 543 U.S. 551 (2005), the United States Supreme Court held that the Eighth Amendment prohibits juvenile offenders from receiving the death penalty. In Graham v. Florida, 560 U.S. 48 (2010), the United States Supreme Court barred juvenile offenders convicted of non-homicide offenses from receiving life imprisonment without parole. Further, the United States Supreme

Court in Miller v. Alabama, 132 S.Ct. 2455 (2012), in that, the United States Supreme Court struck down all mandatory life without parole sentences for juvenile offenders, holding juveniles are constitutionally different than adults due to their diminished developmental capacity and greater prospects for reform. Miller also required sentencing courts to find that juvenile offenders will continue to be a danger to society and make a finding of permanent incorrigibility. The Court also stated, quote, "Even if a Court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate, yet transient, immaturity." In Montgomery v. Louisiana, the Supreme Court at 136 S.Ct. 718 (2016) opinion, the Court extended its Miller holding retroactively to allow collateral view of sentences in state courts. That's what we're doing here. Montgomery also clarified the ruling in Miller reflected a substantive rule by which life without parole could not be imposed upon a juvenile without a finding of permanent incorrigibility and irreparable corruption. Recently, Halloween,

October 31st, 2016, the United States Supreme Court decided Tatum v. Arizona, U.S. Supreme Court, 15-8850, cited at 2016 WL 1381849, from the United States Supreme Court, October 31st, 2016. Tatum is a per curiam opinion, in which the Court does note and understands it is dangerous and unwise, frankly, to put great reliance on per curiam opinions. Nonetheless, there was a concurrence by Justice Sotomayor, and there was a dissent by Justice Alito, which was joined by another justice. The per curiam opinion basically remanded five cases for review back to the Arizona state courts for sentences imposed post-Miller. That's a little bit different than the case here. That language there from the concurring, obviously, opinion of Justice Sotomayor of the per curiam U.S. Supreme Court opinion indicates that a sentencing court must address the question of whether the defendant was among the very rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. Further, she indicated -- Justice Sotomayor -- in her concurrence, "It is clear after Montgomery that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the

imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect irreparable corruption for whom a life without parole sentence may be appropriate."

Further, there is persuasive authority on this issue, including from the Eighth Circuit Court of Appeals, cited by the State of North Dakota. The Eighth Circuit Court of Appeals, a Federal Court, persuasive authority to this Court, but nonetheless recently, in 2016, indicated, among other things, that the U.S. Supreme Court in Roper affirmed a discretionary sentence of life without parole for a juvenile homicide offender. Our sister circuits have uniformly declined to apply Miller's categorical ban to discretionary life sentences, and in United States v. Barraza affirmed a federal life sentence for a defendant who committed crimes, including homicide, at the age of 16. Consistent with these authorities, we reject Jefferson's categorical challenge to his sentence.

So categorically, this Court is of the

opinion, like the Eighth Circuit, and I think pretty clearly Miller and Montgomery still allow for, as a matter of law, such a sentence as handed down by Judge Erickson in the mid-'90s, even applying retroactively what we have learned on today's date.

Further in regards to this matter, if necessary in its discussion of this matter and additionally, sentencing here by Judge Erickson in July of 1996 did comply with and satisfy Miller and Montgomery, and at a minimum satisfactorily or substantially complied with the requirements of Miller and Montgomery. The record would reflect that Judge Erickson did not use the words "permanent incorrigibility" and did not use the words "irreparable corruption." That's without dispute, and I don't think either side really argues that. I don't believe, although they are terms of art clearly used by certain justices of the United States Supreme Court, that it requires, in hindsight, even retroactively applied, for Judge Erickson, back in the mid-'90s, to have somehow figured out the correct exact words to use. What is important is to take a look at the context, what we have learned from Miller, Montgomery, and apply it back in time

retroactively to what Judge Erickson did and what did he say he did and why he did it at the time of his sentencing.

Clearly, under the Eighth Amendment, there is a discussion in regards to this matter about cruel and unusual punishment, and I won't go through the discussion from Graham, from Roper, because the law is what the law is in regards to that matter. However, this Court does note I am a state district judge in the state of North Dakota. The U.S. Supreme Court in Atkins at 536 U.S. 304 (2002) indicated that the clearest and most reliable objective indicium is that the legislation enacted by the country's legislatures, a lot of them talking about public policy issues, further from the North Dakota Supreme Court, which is controlling to me, for example, State v. Vandermeer, 2014 ND 46, at paragraph 19, the North Dakota State Supreme Court has indicated to me that North Dakota's jurisprudence requires deference to the legislature on questions limited to public policy. I am a judge. I am not a legislator. The North Dakota legislature has had more than one session, multiple sessions, after Miller, a couple of them anyway after Miller

and other progeny – they're in session right now -- in order to tweak or change the discretionary ability of a trial judge in a juvenile case, homicide, transferred to adult court to impose, if the judge deems it appropriate under North Dakota law, applying that law, a life sentence without the possibility of parole. The legislature has not taken that away from the courts, Presumably they have done so knowingly. They've had the opportunity to do so. Some states have actually changed their statutory configurations as set forth in petitioner's brief. The majority of states have not. 30-some states still allow for such a sentence, as does the state of North Dakota. And I take my public policy direction from the legislature, as I am a judge. That is not to diminish the ability of the United States Supreme Court to tell me otherwise, because they sure can. And certainly some of their discussion of cruel and unusual punishment intertwines with public policy issues. A chief justice in his dissent in Miller spoke of that. So I'm mindful of that. And I understand I'm able to do that. But in the end, the North Dakota Supreme Court, and I think the United States Supreme Court, has said we take

some direction from the legislators who are elected by the people.

Further in its discussion here today, under Miller and Montgomery, we take a look, then, at what did Judge Erickson do and whether he complied with, satisfied, Miller and Montgomery in his sentencing, and that being the sentencing transcript of July 2nd, 1996. The Court first here -- and the Court will read from parts of it -- in its findings and conclusions finds that Judge Erickson did comply, did satisfy, Miller, Montgomery, retroactively applied to this sentencing in 1996, if it is necessary. And in addition to the earlier findings and conclusions of this Court, at the sentencing, looking at the transcript, Judge Erickson clearly indicated -- because it's important to put things into context -- that he considered the presentence investigation, documents in the court file, the information, police reports, a statement given by Mr. Garcia, a report from the North Dakota State Hospital, victim impact statements. Okay. There also was lengthy discussion by then state 's attorney Goff, by then attorney for Mr. Garcia, Mottinger, in sentencing. Those discussions included at times

discussion of youth, discussion of the State Hospital report. It included the presentence investigation. It included the criminal history of Mr. Garcia. And so youth was discussed by counsel, putting this into the context of how and when Judge Erickson spoke and Judge Erickson imposed the sentence under question and in question here on the post-conviction application.

On page 21, commencing at line 14, Judge Erickson then indicates that he's going to pass sentence. He does an analysis under the North Dakota sentencing factors 12.1-32-04, including subdivision 1. Important to our discussion here today, I'd like to point out the language, his discussion, his statements, that I do believe, taken as a whole, put in the proper context, then do comply with Miller, Montgomery, retroactively applying to this sentence by Judge Erickson in 1996, and that Judge Erickson's findings, conclusion, and order, his reasons, rationale for sentencing, substantially comply, frankly, satisfy, Miller and Montgomery. Judge Erickson, in several of these pages, discusses, but more importantly, considered those factors that apply to our discussion here

today. On page 22 he speaks of the youth of Mr. Garcia, including on line 8, "There are substantial grounds present which tend to excuse or justify the defendant's conduct." That's one of the factors to consider. He then says, "The only argument that seems to have been offered to excuse or explain this conduct has been youth and/or drug use." Later on line 13, Judge Erickson says, "In fact, juveniles – the defendant's juvenile history would indicate that he has a serious history of serious assaults and that his problems are most likely the result of an unresolved anger problem and that he possesses some sort of an explosive personality." Okay. So he's talking about future behavior and his history there, is what he's talking about. On page 23, Judge Erickson, in line 8, talks about the defendant's history of previous offenses. Line 10, the juvenile's history. It appears there are 16 convictions in the past. Line 15 talks about those 16 priors were five assaults or terroristic convictions. "The defendant has shown a criminal pattern of increasing violence and consistent violence." The bottom of that page, 23, indicates, "Mr. Garcia acted on an impulse. That impulse was the result of being looked at the wrong

way. This is certainly a set of circumstances that could reoccur at any point." Further, the next page, page 24, Judge Erickson talks about future likelihood of criminal activity. Line number 6, "The defendant's prior history indicates that he's a one-person judicial wrecking crew. He's committed any number of crimes, and I think that there's no reason to believe that he'll refrain from committing crimes in the future." So in the context of his discussion that we are talking about, a youthful person, a juvenile person, clearly the judge has recognized that. And that is insufficient under Miller, just to do that, but he's done that. He then is now discussing what he's talking about here, that there's no reason to believe that he'll refrain from committing crimes in the future. He's now not just acknowledging we have a young person here, a youthful person here, a child under North Dakota law, but let's take a look at it in the context of what I know, what I've seen in the reports, in the presentence investigation report, and he has no reason to believe he'll refrain from committing crimes in the future. It sounds very close to, although not the same words, as

"permanent incorrigibility" or "irreparable corruption." The Court believes that it satisfies it.

Okay. Moving along. Further on that same page, line number 11, it says, "He's been involved in the probation system for years and has failed to respond to treatment." Then he goes on in a further discussion, starting on page 24, number 34, "The fifteenth factor is other factors. There are a couple of other factors that the Court deems to be significant. The first is Mr. Garcia's youth. All human beings possess certain inalienable attributes, and one of these is the possibility of redemption or rehabilitation. It is possible for a person to undergo, as a result of a life-changing circumstance, youth, spiritual and personal change. These types of changes are more likely to occur in young people than they are in older people because in young people their personalities are still in formation. However, in order for this to be accomplished, the person must be willing to admit the wrongfulness of their conduct, their powerlessness to change what has already happened, and to express a real willingness to make amends to the fullest extent possible." Again, Judge Erickson is saying that there

is redemption. There are certain inalienable attributes to young people, the possibility of redemption, rehabilitation. He's saying, yes, all things that Miller says that he should be considering, but here he's made a decision. He's already stated it, and he further states it, that Mr. Garcia has not demonstrated he understands the seriousness of his crime or that he has changed as a result of his experiences. "I came to this case with a personal philosophy. I think that it's safe to say that every judge, when they take the bench, comes to every case with a personal philosophy. My personal philosophy is that young people are never beyond redemption. My personal philosophy is that particularly young people are capable of changing. They are capable of reforming their lives, that they are capable of starting anew. I came to this case looking for some reason, some justification, some excuse, to hand down a sentence less than the maximum. Mr. Garcia has given me no alternative. He has given me no opportunity." He then sentenced Mr. Garcia for the murder for the rest of his natural life to be held there without the possibility of parole, a harsh sentence by any account, certainly as judged

by the U.S. Supreme Court in general. But nonetheless, Judge Erickson satisfied, complied with, Miller, Montgomery, retroactively applied, that he didn't even know about back in 1996, by not only acknowledging that youth is a factor, but a mitigating factor, and not only indicating his personal views that there is redemption, rehabilitation, able for young people, but he took a look at it here in the context of this case, this sentencing. He didn't just acknowledge the young people, which is not enough under Miller, but he looked at it and says, not here. And as a judge, the Court believes that the U.S. Supreme Court, applicable case law, does allow for a judge to make such a determination. In fact, Miller even says that in those unique circumstances, those unique cases, that, while not common, sometimes this type of a sentence is appropriate. Judge Erickson considered the appropriate factors, even retroactively applying more, and he decided that a severe sentence, the most severe under North Dakota law, was warranted in regards to this matter. So I do believe he considered permanent incorrigibility, irreparable corruption, and concluded that Mr. Garcia,

unfortunately, was one of those folks. So I do believe that Judge Erickson has fully complied with the United States Constitution and the Constitution of the State of North Dakota when imposing sentence in July of 1996, including satisfactorily complied with permanent incorrigibility, irreparable corruption, as based upon his findings in the transcript of July 2nd, 1996.

So based upon the above and foregoing, the Court then, in regards to the motions for summary disposition, the Court denies the petitioner Garcia's motion for summary disposition. The Court grants the State's motion for summary disposition. And the petitioner Garcia's post-conviction application is denied and dismissed, for reasons as stated on the record. So ordered by the Court.

Mr. Garcia, you keep in touch with your attorney, Mr. Gereszek.

Mr. Burdick, if you'd prepare an appropriate order indicating the appearances here today, indicating the ruling by the Court on the State's motion to dismiss, denying it, and then indicating the ruling by the Court on the respondent State of North Dakota's motion for summary disposition

granting it and then dismissing and denying the post-conviction application for reasons as stated on the record. No more finding or conclusion than that. Simply, "for reasons as stated on the record," Mr. Burdick.

MR. BURDICK: Thank you, Your Honor. I will do that.

THE COURT: Anything further, for the petitioner?

MR. GERESZEK: No, Your Honor.

THE COURT: Anything further, for the respondent?

MR. BURDICK: No, Your Honor. Thank you.

THE COURT: So ordered by the Court.

Good luck to you, Mr. Garcia.

We are adjourned.

(WHEREUPON, the proceedings were concluded.)