FILED
October 23 2014
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DC11-0723

BARRY ALLAN BEACH
Petitioner,

V.

STATE OF MONTANA,
Respondent

FILED
OCT 23 2014
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

PETITION FOR WRIT OF HABEAS CORPUS

Montana Fifteenth Judicial District Court, Roosevelt County
The Hon. Katherine M. Bidegaray Presiding

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I.

FACTS WHICH SUPPORT THE EXERCISE OF SUPREME COURT JURISDICTION

Petitioner Barry Beach ("Beach") is incarcerated at the Montana State Prison serving an invalid sentence of 100 years without the possibility of parole. Beach's sentence violates the Eighth Amendment to the United States Constitution and Article II, Sec. 19 of the Montana State Constitution.

Beach has standing and jurisdiction is proper under M.C.A. §§ 46-22-202 and 46-22-201.

II.

LEGAL ISSUES RAISED

Is Beach's sentence illegal because the trial court did not consider Beach was a minor old at the time of the offense as a mitigating factor in sentencing?

Is Beach's sentence illegal because the sentence leaves no meaningful opportunity for release?

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III.

INTRODUCTION

A. <u>The Court did not Consider Beach's Minority in imposing its Sentence – at Least there is No Indication of Such</u>.

On May 11, 1984, Beach was sentenced to 100 years in prison without the possibility of parole for killing Kimberly Nees. (Ex. 1). Beach was born February 15, 1962, and was 17 years 4 months old at the time of the offense. He had just finished his junior year at Poplar High School. After his confession to authorities in Louisiana, Beach was initially charged in youth court. However, when Beach turned 21 the Youth Court petition was dismissed and Beach was re-charged in District Court. Prior to this offence, Beach had no significant serious prior record before his conviction in this case. He had no felony level offenses at all.

At sentencing the court recited the materials and factors taken into account in determining the sentence. (Ex. 1) At no time in the pre-sentence report (Ex. 2), in the court's oral pronouncement; or in the written statement of reasons for the sentence (Ex. 3) did the court note any consideration of Beach's minority at the time of the crime. Furthermore, neither the prosecutor, the defense lawyer, the probation officer, nor the sentencing judge ever mentioned Beach was a minor in connection with sentencing.

In 1985, as part of his direct appeal, Beach challenged his sentence on 8th Amendment grounds and this Court upheld the sentence. However, the advancements in 8th Amendment law raised here are recent and the underlying science did not exist in 1985. Not surprisingly, this Court's review, as with the district court, did not consider Beach's minority – at least there is no evidence of such consideration in the record.

B. Beach's 100 Year, no Parole Sentence was intended as a Life Sentence and is the Functional Equivalent of a Life Sentence.

It is clear from the sentencing order Judge Sorte intended Beach's sentence to be a life sentence in order to 'remove him from society'. (Ex. 3, p. 3) Indeed, the sentence of 100 years with no parole eligibility is the functional equivalent of life without parole for eighth amendment purposes because Beach's life expectancy is less than or equal to the term of the sentence.

When Barry Beach was sentenced on May 11, 1984, to 100 years with no possibility of parole he was 22 years old. Under Montana law in effect in 1984, if Beach was lucky enough to receive full "good time" credit on his 100-year sentence, he would be required to serve a minimum of 50 years in prison, meaning at the earliest he could have been released at age 72. According to the Montana Board of Pardons and Parole decision of May 28, 2014, Beach's earliest release

date is October 15, 2036, at which time (if he is still alive) Beach will be nearly 75 years old.

According to the Center for Disease Control, the life expectancy of a white male born in the United States in 1961 is 67.4 years. According to the Montana Department of Public Health and Human Services Public Health and Safety Division, Montana Vital Statistics 2012, the median age at death for a white male in Montana from 2008-2012 was 75. These statistics do not take into account the reduction in life expectancy for long-term prison inmates. American Journal of Public Health, March 2013, Vol. 103. No. 3 pp. 523-528, The Dose-Response of Time Served In Prison On Mortality: New York State, 1989-2003 ("Each year in prison produced a 15.6% increase in the odds of death for paroles, which translates to a 2-year decline in life expectancy for each year served in prison.")

"[T]here is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987).

C. At Age 17, Beach was Less Capable Of Mature Judgment Than an Adults and is, Therefore, Less Culpable.

The U.S. Supreme Court has recognized minors have less capacity for

mature judgment than adults, and as a result are more likely to engage in risky behaviors. "[A]s any parent knows and as … scientific and sociological studies … tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more under-standable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper v. Simmons*, 543 U.S. 551, 569 (2005). Because juvenile brains are not fully developed, especially in the areas of judgment and impulse control, they are less culpable than adults who engage in the same behavior.

Research has shown adolescents' judgment and decision-making differ from adults' in several respects: Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even older adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55-56 (2008).

Empirical research confirms adolescents are less capable of self-regulation than adults and, accordingly, are less able to resist social and emotional impulses.

For example, in a study conducted by Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000), adolescents, including 17-year olds, scored significantly lower than adults on measures which included "impulse control" and "suppression of aggression." More recent studies confirm this result. It is generally accepted now that as adolescents mature they experience "gains in impulse control occur[ring] throughout adolescence" and into young adulthood. Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 Developmental Psychol. 1764, 1774-1776 (2008).

"[A]dults tend to make more adaptive decisions than adolescents," in part because "they have a more mature capacity to resist the pull of social and emotional influences and remain focused on long term goals." Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Research on Adolescence 211, 220 (2011); *see also* Adriana Galvan et al., *Risk Taking and the Adolescent Brain*, 10 Developmental Sci. F8, F13 (2007) (finding, in study of individuals aged 7 to 29, that impulse control continues to develop throughout adolescence and early adulthood); Rotem, Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual

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Differences 681, 684-686 (2007) (reporting significant decline in impulsivity from ages 14-16 to 20-22).

From a criminal justice standpoint, juveniles are less culpable than adults because at the same time their brains are underdeveloped in areas of impulse control, planning, and self regulation, they also lack experience navigating social and environmental contexts, and regulating the new emotional pressures of adolescence. *See Roper*, 543 U.S. at 569. Conforming ones conduct to the requirements of law requires the ability to resist and control emotional impulses, to gauge risks and benefits in an adult manner, and to envision the future consequences of one's actions. Yet, empirical research confirms that even older adolescents have not fully developed these abilities and hence lack an adult's capacity for mature judgment.

IV.

BEACH IS ENTITLED TO HABEAS RELIEF BECAUSE HIS 100-YEAR, NO-PAROLE SENTENCE IS INVALID

A. This Application is Proper and is Not Procedurally Barred.

"The privilege of the writ of habeas corpus shall never be suspended." Montana Constitution, Article II, Section 19. Although M.C.A. §46-22-101(2) states "the writ of habeas corpus is not available to attack the validity of the

conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal", this bar does not preclude habeas relief where, as here, a person is serving a "sentence which as a matter of law the court had no authority to impose..." *State v. Lott*, 334 Mont. 270, 279 (2006).

This Court should find Beach's sentence violates the 8th Amendment as well as Mont. Const., Art. II § 22 prohibiting excessive sanctions including cruel and unusual punishment.

B. Petitioner's Sentence Is Unconstitutional Because The Court Failed To Consider Beach's Minority on the Record as a Mitigating Factor.

The U.S. Supreme Court has recently begun to address the 8th Amendment limits of punishment for juvenile offenders. In a line of cases including *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48; 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, __ U.S.__, 132 S.Ct. 2455 (2012), the U.S. Supreme Court has established children have diminished culpability and greater prospects for reform. Thus, "they are less deserving of the most severe punishments." *Graham*, 560 U. S. at 67.

Miller v. Alabama, supra, held prior to imposing a life without parole sentence on a juvenile offender, the sentencer must take into account the juvenile's

decreased culpability. *Miller,* 132 S. Ct. at 2460. The mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. *Id.* (quoting *Graham,* 130 S. Ct. at 2026-27, 2029-30). *Miller* clarified that none of what *Graham v. Florida, supra,* "said about children - about their distinctive (and transitory) mental traits and environmental vulnerabilities - is crime-specific." *Id.* at 2465. Accordingly, *Miller* emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.*

In the process of striking down mandatory penalty schemes, *Miller* requires sentencing courts make individualized determinations of juvenile's offenders' culpability, taking into account the unique characteristics associated with their age. *Miller* sets forth specific factors that the sentencer, at a minimum, consider. These include:

(1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;"

(2) the juvenile's "family and home environment that surrounds him;"

(3) "the circumstances of the homicide offense, including the extent of the youth's participation in the conduct and the way familial and peer pressures may have affected him;"

(4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and

(5) "the possibility of rehabilitation."

Miller, supra, at 2468.

Pursuant to *Miller,* prior to imposing a juvenile life without parole sentence, the 8th Amendment *"require[s]* [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller,* 132 S. Ct. at 2469 (emphasis supplied).

In the case at bench, the trial court considered ***none*** of the *Miller* factors. The record reflects no consideration of Beach's young age at the time of the offense and there are no findings with respect to Barry Beach's youth or juvenile status. Because there is no indication the trial court ever considered how Beach's minority counseled against sentencing him to 100 years without parole, his sentence is unconstitutional and must be vacated.

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of

> his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored.

Graham, supra, 130 S. Ct. at 2028 (internal citations omitted). While the U.S. Supreme Court has left open the possibility that a trial court could impose a life without parole sentence,"given all we have said in *Roper, Graham,* and *[Miller]* 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." Miller,* 132 S. Ct. at 2469 (emphasis added).

In Beach's case, thirty years ago in 1984, the trial court was not aware of the social and developmental science that underpins recent advancements in 8th Amendment law regarding juvenile offenders. Without consideration of Beach's minority and without any other reasons (other than the court's view of the offense conduct), the trial court found Beach was beyond redemption and should be "effectively removed from society." (Ex. 3, p. 3.)

Recently in *State v. Long*, 138 Ohio St. 3d 478; 8 N.E. 3d (March 12, 2014) the Ohio Supreme Court had the opportunity to consider the impact of *Miller* on a 'life without parole' sentence involving a juvenile offender convicted of aggravated murder. The issue in *Long* was whether Ohio's non-mandatory

sentencing scheme violated the 8th Amendment to the United States Constitution. The Ohio Court of Appeals denied Long's petition and distinguished *Miller v. Alabama* on the grounds Long's sentence was not a mandatory 'life without parole' sentence, and that the trial court had exercised its discretion when sentencing Long to life imprisonment with or without parole eligibility after 20, 25, or 30 years. The Ohio Supreme Court reversed.

The Ohio Supreme Court in *Long* framed the issue before it as:

> The sole proposition of law before this court is that "[t]he Eighth Amendment requires trial courts to consider youth as a mitigating factor when sentencing a child to life without parole for homicide." In adopting this proposition, we further hold that the record must reflect that the court specifically considered the juvenile offender's youth as a mitigating factor as sentencing when a prison term of life without parole is imposed.

Long, supra, p. 480. The Ohio court held not only that the defendant's youthfulness be considered, but that the sentencing court's consideration of the defendant's age be on the record:

> Long argues that *Miller* requires a trial court to consider the defendant's youth and its attendant characteristics when imposing sentence if that defendant committed the offense as a juvenile. And he contends that the record must show that the trial court actually considered the defendant's youth. We agree.

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Id. at p. 481. Similarly, here, Beach's sentence should be overturned. Although Beach's sentence is '100 years without parole' rather than "life", it is the functional equivalent of a life sentence and, therefore, subject to the same 8th Amendment criteria. See *People v. Caballero,* 55 Cal. 4th 262, 282 P. 3d 291, 295 (Cal. 2012) (Pursuant to *Graham*, a term-of-years sentence which doesn't allow for parole eligibility within offender's life expectancy treated as life sentence); *People v. Rainer*, __ Colo. __; 2013 COA 51; 2013 WL 149107, *6 (Colo. App. Apr. 11, 2013) (lengthy aggregate sentence "qualifie[d] as an unconstitutional de facto sentence to life without parole" because it did not "offer ... meaningful opportunity to obtain release before the end of his expected life span ..." per Centers for Disease Control statistics); *People v. Lucero,* No. 11CA2030, 2013 WL 1459477, at *1 (Colo. App. Apr. 11, 2013) (84 year sentence which allowed release at age 57 not equivalent to a "life" sentence); *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at *1, *12 (Fla. 1st DCA Aug. 8, 2012) ("*Graham* applies not only to life without parole sentences, but also to lengthy term-of-years sentences that amount to de facto life sentences" – "a de facto life sentence is one that exceeds the defendant's life expectancy.")

On remand, this Court should clarify that juvenile no-parole sentences are only permissible in rare and unusual cases. *See Miller,* 132 S. Ct. at 2469. A no-

parole sentence is appropriate only for children convicted of deliberate homicide when, consistent with the factors outlined in *Miller,* the trial court concludes, *on the record,* that *all* of the following apply:

- The nature and circumstances of the offense are unrelated to the hallmarks of adolescent development and reflect the child's irreparable corruption;

- The nature and circumstances of the offense are unrelated to the child's family and home environment and reflect the child's irreparable corruption;

- The child's participation in the offense, including the extent of his participation, were unrelated to family and/or peer pressures;

- The child's level of participation in the offense, including the child's participation in both the planning and commission of the offense, reflect the child's irreparable corruption;

- The child possessed the sophistication to competently negotiate the criminal justice system, including his interactions with law enforcement; and

- The child's culpability, age, mental capacity, maturity, criminal sophistication, and other factors dictate a finding that the child cannot be rehabilitated.[1]

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[1] Pennsylvania and North Carolina, for example, now require trial courts to consider enumerated factors *on the record* before sentencing a juvenile to life without parole. *See* Act effective July 12, 2012, 2012 N.C. ALS 148 (amending

Reserving juvenile no parole sentences for circumstances when all of these factors are met is consistent with the Supreme Court's finding in *Miller* that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* (quoting *Roper,* 543 U.S. at 573).[2]

C. **Beach's Sentence is Unconstitutional because it Provides no Meaningful Opportunity For Release.**

Absent a specific finding Beach is among the rare juveniles for whom life without parole is appropriate, the trial court must impose a sentence that provides Beach a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 130 S. Ct. at 2030. The Eighth Amendment generally "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id.* at 2032. Juveniles "should not be deprived of the opportunity to achieve maturity of judgment and self-

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the state sentencing laws to comply with the United States Supreme Court Decision *Miller v. Alabama);* 18 Pa.C.S. § 1102.1(d).

[2] Other state courts have provided this sort of guidance to lower courts. The Wyoming Supreme Court, for example, held:
To fulfill *Miller's* requirements, Wyoming's district courts must consider the factors of youth and the nature of the homicide at an individualized sentencing hearing when determining whether to sentence the juvenile offender to life without the possibility of parole or to life according to law.
Bear Cloud v. State, 2013 WY 18, P42 (Wyo. 2013). See Ex. 4 hereto; summary of recent cases.

recognition of human worth and potential." *Id.* Therefore, absent a finding that the juvenile is among the most culpable juvenile offenders, a sentencer cannot replace a "life without parole" with a sentence that is the functional equivalent of life without parole.

For an opportunity for release to be "meaningful" under *Graham,* review must begin long before a juvenile reaches old age. "'For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper,* 543 U.S.at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 Am. Psychologist 1009, 1014 (2003)).

Under the current sentence, assuming Beach lives long enough to obtain release, eventually (at age 75), this does not satisfy *Graham* because it would be based upon Beach's longevity and not upon "demonstrated maturity and rehabilitation." 130 S. Ct. at 2030. Just as a sentence labeled "life without parole," Beach's 100-year sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the

future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Graham*, 130 S. Ct. at 2027 (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (bracketed material in *Graham*)). Mr. Beach's sentence also means that he will spend more of his life in prison than would an adult convicted of the same crime. *Graham*, 130 S. Ct. at 2028.

Accordingly, this Court should clarify that, unless the trial court makes on-the-record findings that establish that a juvenile homicide offender is among the rare and uncommon juveniles who are irredeemable and for whom life without parole is appropriate, the trial court must impose a sentence that provides a meaningful opportunity for release based on the juvenile's demonstrated maturity and rehabilitation. *See Graham,* 130 S. Ct. at 2030.

V.

CONCLUSION

Beach is exactly the type of juvenile offender that the ruling in *Graham* was meant to cover. He was seventeen at the time of the offense. He will not be eligible for release within his expected lifetime. Further, prior to this conviction Beach had no significant prior criminal record – in fact, he had no felony level offenses at all.

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Further, in Beach's over 30 years of incarceration he has demonstrated he has matured, is rehabilitated and is not a danger to society but rather can be an asset to society and live a productive, responsible life. Beach is now a rehabilitated middle-aged man who has served more time than almost any other juvenile offender for this type of crime. This is demonstrated by not only is prison record but also by his behavior throughout his 18 months of freedom during which he (1) complied to the letter with his conditions of release, (2) found employment and provided himself a home, (3) made numerous friends in the Billings community resulting in an overwhelming outpouring of support including strong support from the Mayor of Billings. Beach's conduct stands in stark contrast to the predictions of the sentencing judge made back in 1984. Beach is an excellent candidate for parole but his sentence makes him ineligible for such.

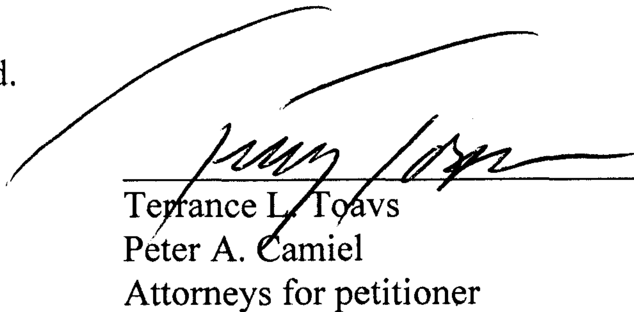
When one reviews the sentencing history in the State of Montana for persons convicted of deliberate homicide, and in particular the class of defendants who were less than 18 years of age at the time of the crime, the following is evident: According to the Montana Department of Corrections 2013 Biennial Report the average length sentence for persons convicted of deliberate homicide for the years 2008-2012 is a total term of 487.7 months with a net prison term of 259.8 months (less than 22 years).

It is exceedingly rare in Montana and elsewhere for a person who was a juvenile at the time of the crime to receive a sentence and actually serve over 30 years in prison. In constitutional terms, it is "excessive" and "cruel and unusual."

Beach's sentence should be vacated and this case remanded for re-sentencing in light of recent U.S. Supreme Court precedent. In the alternative, this court should strike the unlawful portion of Beach's sentence – i.e. the restriction on parole, and thereby allow the parole board to apply their judgment concerning issues surrounding his release.

The petition should be granted.

DATED: 10/22/14

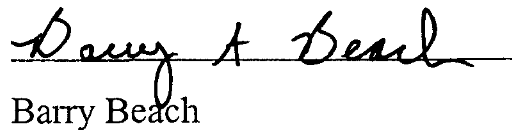


Terrance L. Toavs
Peter A. Camiel
Attorneys for petitioner

STATE OF MONTANA)
)
County of Powell)

VERIFICATION

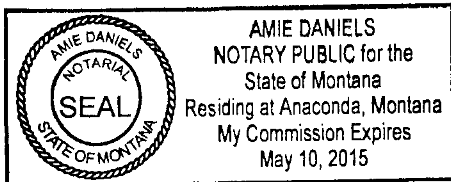
Barry Beach, being first duly sworn upon his oath, deposes and says that he has read the foregoing petition for writ of habeas corpus and the facts and matters contained therein are true, accurate and complete to the best of his knowledge and belief.



Barry Beach

SUBSCRIBED AND SWORN to before me this 25 day of Sept., 2014.

Notary Public for the State of Montana



CERTIFICATE OF SERVICE

I, Terrance L. Toavs, hereby certify that I served the foregoing Petition for Writ of Habeas Corpus by depositing a true and correct copy of the same in the United States Mail, postage prepaid, and addressed as follows:

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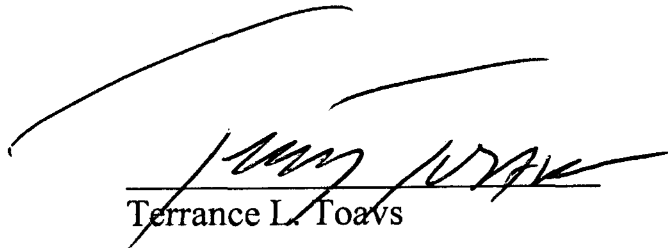

Date: 10/22/14

Terrance L. Toavs

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the Montana Rules of Appellate Procedure, I certify that this petition for a writ of habeas corpus is printed with a Times New Roman, proportionately spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, and is 3889 words as counted by the attorney's word processing software, excluding table of contents, table of citations, certificate of service, certificate of compliance and addendum, if any.

Dated this 22 day of October, 2014.

Terrance L. Toavs

EXHIBITS

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Exhibit 1: Conviction and Sentence for Deliberate Homicide, a Felony, May 11, 1984.

Exhibit 2: Presentence Investigation Report dated May 2, 1984

Exhibit 3: Transcript of Sentencing Hearing dated May 11, 1984