INDEX TO APPENDICES

APPENDIX A

Order Granting Request for Judicial Notice and Order Denying Motion for Expert Assistance, Cascade County, No. ADV-17-0716 (May 27, 2021)

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STATE OF MONTANA, Plaintiff, vs. STEVEN WAYNE KEEFE, Defendant.	Cause No. ADV-17-076 ORDER GRANTING REQUEST FOR JUDICIAL NOTICE AND ORDER DENYING MOTION FOR EXPERT ASSISTANCE

Two motions are pending before the Court for decision. The first motion is Defendant's Request for Judicial Notice, which was filed on February 18, 2021. The State belatedly responded on March 24, 2021. The Defendant declined to file a reply brief and instead filed a Notice of Issue on March 29, 2021. The second motion is Defendant's Motion for Expert Assistance, which was filed on February 18, 2021. The State belatedly responded on March 24, 2021. The Defendant declined to file a reply brief and instead filed a Notice of Issue on March 29, 2021.

The Court notes that although the Notice of Issue requests the Court deem the motions well taken under Unif. Dist. Ct. R. 2(b), the Defendant did not move to strike the State's late-filed response brief. The Court's decision on either motion does not require consideration of the State's response brief, so the end result is the same regardless of the State's failure to file a timely answer brief. An admission under Unif. Dist. Ct. R. 2(b) that the motion is well taken does not remove the Court's discretion to grant or deny the motion; it may subject the motion to summary ruling. *See State v. Pizzola*, 283 Mont. 522, 524-26, 942 P.2d 709, 711-12 (1997).

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Turning to the substance of the first motion, which is the request for judicial notice, the Court **grants** the request to take judicial notice of all documents and official transcripts in the following docket numbers:

State v. Keefe, ADC-86-059 (Cascade County, Mont.)
State v. Keefe, No. 87-92 (Montana Supreme Court)
Keefe v. Kirkegard, ADV-17-076 (Cascade County, Mont.)
State v. Keefe, No. DA 19-0368 (Montana Supreme Court)

The Defendant's request indicates he is willing to provide a copy of these materials to the Court and the parties in the format of the Court's choosing. The Court appreciates and accepts Defendant's offer to provide copies. The Court requests such copies in .pdf format, and they may be mailed to chambers on a USB drive and provided to the State in the ordinary course of business.

Turning next to the Defendant's Motion for Expert Assistance, the Defendant notes this motion has been filed to preserve the issue for any subsequent appeals. The Defendant also acknowledges the Montana Supreme Court rejected the Defendant's request for expert assistance on appeal. *See State v. Keefe*, 2021 MT 8, ¶¶ 14-20, _____ Mont. _____, 478 P.3d 830. The Montana Supreme Court's decision forecloses any deviation from that decision by this Court under the law of the case doctrine. *See State v. Gilder*, 2001 MT 121, 305 Mont. 362, 28 P.3d 488. Accordingly, the Court **denies** the motion for expert assistance.

It is so ordered.

DATED this 27th day of May, 2021.

Amy Eddy
District Court Judge

cc: Susan Weber
Alex Rate, PO Box 1968, Missoula, MT 59807
Elizabeth Ehret, 3800 O'Leary St., Ste. 104, Missoula, MT 59808
John Mills/Genevie Gold, 1721 Broadway, Ste. 201, Oakland, CA 94612

CERTIFICATE OF MAILING
This is to certify that the foregoing was duly served by mail upon counsel of record at their address this 28 day of May, 20 21
TINA HENRY, CLERK OF COURT
By K. Morris DEPUTY

APPENDIX B

Amended Judgment and Sentence, Montana Eighth Judicial Court, Cascade County, No. ADC-06-059/No. ADV-17-076 (July 16, 2021)

Amy Eddy, District Judge
Department No. 1
Flathead County Justice Center
920 South Main Street, Suite 310
Kalispell, Montana 59901
(406) 758-5906

THE MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

STATE OF MONTANA, *Plaintiff,* vs. STEVEN WAYNE KEEFE, *Defendant.*	Cause No. ADC-86-059 and ADV-17-076-7 AMENDED JUDGMENT AND SENTENCE

On July 16, 2021, following the Montana Supreme Court's decision in *State v. Keefe* (*Keefe II*), 2021 MT 8, 403 Mont. 1, 478 P.3d 830, Defendant Steven Wayne Keefe appeared before the Court for resentencing on the charges of Count I: Deliberate Homicide, Count II: Deliberate Homicide, Count III: Deliberate Homicide; and Count IV: Burglary. The State was represented by Cascade County Attorney Joshua A. Racki. The Defendant was represented by Alex Rate, Elizabeth Ehret and Genevie Gold. The Court had previously taken judicial notice of the record in the underlying proceedings, which it reviewed in pertinent part. The Court also reviewed the *Sentencing Memorandums* of the parties, including the *Appendix* submitted by the Defendant. During the sentencing hearing the Court heard an offer of proof from defense counsel, additionally considered Defendant's Exhibits 1-7, and heard testimony from Adult Probation & Parole Officer Tim Hides.

PROCEDURAL BACKGROUND

In 1987, following the Defendant's conviction before a jury,[1] the district court (Judge Thomas M. McKittrick) sentenced Keefe to three consecutive life terms without the possibility of parole on the deliberate homicide convictions, as well as an additional consecutive ten years on the burglary charge. On each charge the district court also imposed a ten-year enhancement for use of a weapon. This resulted in a net sentence of three consecutive life terms plus 50 years, without the possibility of parole. *See Keefe II*, ¶5.

In 2017, Keefe filed a petition for postconviction relief in the district court, asserting his sentences of life without the possibility of parole were unconstitutional in light of the United

[1] This conviction was appealed and affirmed. *See State v. Keefe* (*Keefe I*), 232 Mont. 258, 759 P.2d 128 (1988).

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States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). These decisions "collectively held that mandatory sentences of life without parole for juvenile offenders were unconstitutional 'for all but the rarest of children, those whose crimes reflect irreparable corruption.'" *Keefe II*, ¶6; *Miller*, 567 U.S. at 479-80. *Montgomery* subsequently held that *Miller* was to be applied retroactively and those juveniles already sentenced to life without parole "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-37. In 2017, the Montana Supreme Court held that the mandates of *Miller* and *Montgomery* "apply to discretionary sentences in Montana." *Steilman v. Michael*, 2017 MT 310, ¶3, 389 Mont. 512, 407 P.3d 313.

The district court (Judge Gregory G. Pinski) granted Keefe's petition for postconviction relief, and Keefe came before the district court for re-sentencing on April 18, 2019. Following the re-sentencing hearing, the district court re-imposed the original sentence, including no possibility of parole, stating, "[b]eyond a reasonable doubt, the Court finds that Mr. Keefe's crimes do not represent transient immaturity, but rather they represent irreparable corruption and permanent incorrigibility as defined by the U.S. Supreme Court." *Keefe v. Kirkegard*, Cascade County Cause No. DV-17-076, *Sentence*, p. 10, dated 5/6/2019 (Doc. 66).

Keefe appealed to the Montana Supreme Court (*Keefe II*), arguing in relevant part that the district court had failed to comply with the demands of *Miller*, and there was insufficient evidence for a finding of irreparable corruption necessary to support a life sentence without the possibility of parole. App. Brf., p. 23. On appeal, Keefe requested the following relief:

> The remedy is for this Court to vacate his sentence and order resentencing that does not include a sentence to die in prison. *See Fuller*, 266 Mont. at 423, 880 P.2d at 1342. Keefe may or may not be entitled to release. But "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing him." *Montgomery*, 136 S. Ct. at 736. That is all he seeks, an opportunity to make his case before the parole board.

App. Brf., p. 26.[2]

[2] Keefe has never appealed the constitutionality of the three consecutive life sentences or the validity of the weapons enhancement —only that there was no possibility of parole. For this reason, the Court rejects Keefe's argument that he should be sentenced for time-served or that there should not be a weapons enhancement. *Keefe II* is clear that this matter was remanded for resentencing limited to the narrow issue of whether consideration of the *Miller* factors supported imposition of a life sentence without the possibility of parole. Keefe had the opportunity to appeal the imposition of the three consecutive life sentences, failed to do so, and also failed to challenge them as part of his petition for post-conviction relief. See Mont. Code Ann. §46-21-105(2).

Keefe II held the district court erred in determining Keefe was "irreparably corrupt" and "permanently incorrigible" because the district court had failed to consider the fifth *Miller* factor: "the possibility of rehabilitation even when the circumstances most suggest it," including post-offense evidence of rehabilitation. *Keefe II*, ¶25 (quoting *Miller*, 567 U.S. at 478, 132 S. Ct. at 2468). Accordingly, *Keefe II* remanded for a resentencing hearing.

JUDGMENT AND SENTENCE

Following the re-sentencing hearing it is the Judgment and Sentence of this Court as follows:

I. **COUNT I: DELIBERATE HOMICIDE, a Felony:** For the murder of David McKay by shooting, the Court sentences the Defendant to the Montana State Prison for the rest of his life. The Court imposes an additional ten (10) years at the Montana State Prison for the use of a weapon during the commission of the offense. This sentence shall run consecutive to Count II, III and IV.

II. **COUNT II: DELIBERATE HOMICIDE, a Felony:** For the murder of Constance McKay by shooting, the Court sentences the Defendant to the Montana State Prison for the rest of his life. The Court imposes an additional ten (10) years at the Montana State Prison for the use of a weapon during the commission of the offense. This sentence shall run consecutive to Count I, III and IV.

III. **COUNT III: DELIBERATE HOMICIDE, a Felony:** For the murder of Marian McKay Qamar by shooting, the Court sentences the Defendant to the Montana State Prison for the rest of his life. The Court imposes an additional ten (10) years at the Montana State Prison for the use of a weapon during the commission of the offense. This sentence shall run consecutive to Count I, II and IV.

IV. **COUNT IV: Burglary, a Felony:** The Court sentences the Defendant to the Montana State Prison for ten (10) years. The Court imposes an additional ten (10) years at the Montana State Prison for the use of a weapon during the commission of the offense. This sentence shall run consecutive to Counts I, II and III.

V. **Credit for Time Served:** The Defendant is given credit for 12,886 days of time previously served in custody on this matter.

VI. **Parole Restriction**

In Montana there is a *presumption against* sentencing a juvenile to life without the possibility parole. *Keefe II*, ¶¶27, 40, 57. Keefe cannot be sentenced to life without the possibility of parole unless this presumption is overcome by competent evidence, which the State has an affirmative evidentiary obligation to provide, and he is found to be "irreparably corrupt" and "permanently incorrigible," as such punishment would otherwise violate the Eighth Amendment's ban on cruel and unusual punishment. *Keefe II*, ¶¶13, 40; U.S. Const., Amend. VIII; see also Mont.

Const., Art. II, §22. In determining whether an individual is "irreparably corrupt" and "permanently incorrigible," the sentencing court must consider the following:

> Mandatory life without parole for a juvenile [1] precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. [2] It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. [3] It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. [4] Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And [5] finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Keefe II, ¶22 (quoting *Miller*, 567 U.S. at 477-478).

During the re-sentencing hearing, neither party asked the Court to impose a parole restriction. The State conceded that based on the language in *Keefe II*, it could not meet the affirmative evidentiary burden required to impose a parole restriction. *Sent. Memo.*, p. 15 (Doc. 100). In light of this concession, for the Court to find otherwise would constitute an illegal sentence. *See State v. Olivares-Coster*, 2011 MT 196, ¶¶18-22, 361 Mont. 380, 259 P.3d 760. Accordingly, the Court will not impose a parole restriction in this matter.[3]

Under the current law, the Defendant would be eligible for parole under Count I, as he has served more than 30 years at the Montana State Prison. Mont. Code Ann. §46-23-201(4). According to the testimony of Probation & Parole Officer Tim Hides, the Parole Board does have the ability to "commence" the Defendant's sentences under Count II, III and IV so that the Defendant could pursue parole. Based on the testimony provided, that is the recommendation of the Court. As soon as possible, the Department of Corrections must make the Defendant available for a hearing before a hearing panel of the Board of Pardons and Parole so that the panel may consider the criteria outlined in Mont. Code Ann. §46-23-208. Mont. Code Ann. §46-23-202.

VII. Conditions: The Court recommends that during any period of supervision the Defendant be subject to those conditions contained in the Presentence Investigation, as amended at the re-sentencing hearing, which are attached hereto as Exhibit A.

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[3] As the Court is not imposing a parole restriction, the Court does not reach the Defendant's invitation to rule that all life sentences without the possibility of parole are unconstitutional under the Montana Constitution. *See Keefe II*, ¶¶43-50 (suggesting Montana's heightened constitutional protections for juveniles make a life sentence without the possibility of parole unconstitutional even if the individual has been found to be "irreparably corrupt" and "permanently incorrigible.") (McGrath, concurring)

XI. **Reasons for Sentence:** In fashioning the sentence the Court has been guided by sentencing policy of the State of Montana to punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders; provide restitution, reparation, and restoration to the victim of the offense; and encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community. Mont. Code Ann. §46-18-101. In addition, the sentence:

☐Is consistent with the plea agreement: There was no plea agreement.

☒Is consistent with Adult Probation and Parole's conclusion that the Defendant has ☐ Low ☐Moderate ☐Medium ☒High criminogenic needs based on the use of a validated risk assessment screening tool.

☒Considers the Defendant's past criminal record: In just the three years prior to these murders, the Defendant was known to have committed 50 separate crimes that were escalating from petty theft to burglaries. He had been committed to numerous correctional and rehabilitation facilities and was on formal probation at the time these murders occurred. After being incarcerated on this matter, he was convicted of Attempted Escape from the Montana State Prison.

☒Takes into account the position and input of the victim(s): Three family members, David and Constance McKay, and their daughter Marian McKay Qamar were senselessly executed in their home while Mrs. Qamar's three-year old child, Muna, slept upstairs. More than 35 years later the tragedy of those shootings continues to reverberate throughout this family and their community. The letters submitted by the family and friends express far more eloquently than the Court ever could the devastating impact of these murders and are incorporated herein.

☒Provides for substantial punishment or potential punishment, commensurate with the seriousness of the offense(s): As has been previously articulated by both Judges McKittrick and Pinski, and acknowledged by the Montana Supreme Court on multiple occasions, there is no more serious crime than Deliberate Homicide, particularly when three family members are coldly and heinously executed in their home. The three consecutive life sentences, plus an additional 50 years, provides for substantial punishment that is proportional to the seriousness of the offenses.

☒Provides opportunity for Defendant's treatment or rehabilitation and is in the best interest of the community: The three consecutive life sentences, plus an additional 50 years, are in the best interests of the community, which continues to fear and be traumatized by the Defendant. If the Defendant is ever paroled, the Court is confident meaningful conditions and structures will be put in place for community's protection, but those determinations are beyond the purview of this Court.

☒Acknowledges the positive steps the Defendant has taken since charges were filed: The Court takes judicial notice of the post-offense evidence of rehabilitation that has been presented throughout these proceedings. *Keefe II*, ¶¶27, 29, 42; and *Def. Sent. Memo*.

☒Acknowledges the financial position of the Defendant.

Bond, if any, posted by or on behalf of the Defendant, is exonerated and shall be released.

The Defendant is remanded into the custody of the Montana Department of Corrections.

If either party believes that the written Judgment filed herein does not conform to the oral pronouncement of this Court at the time of sentencing, either the Defendant or the State may request a hearing to modify the written, filed Judgment. **This request must be made by either the State or the Defendant within 120 days of the filing of the written Judgment.** In the event such request is made, a hearing will be held to consider the motion at which the Defendant must be present unless Defendant waives the right to be present. If no request for modification is filed by either the State or the Defendant within 120 days, the right to a modification hearing shall be waived.

DONE and DATED this 11th day of July, 2021.

Amy Eddy, District Court Judge

c: CA/Josh Racki
Alex Rate, ACLU of Montana, PO Box 1968, Missoula, MT 59806
Elizabeth Ehret, 3800 O'Leary Street, Suite 104, Missoula, MT 59808
John Mills/Genevie Gold, 1721 Broadway Street, Suite 201, Oakland, CA 94612

STANDARD CONDITIONS

1. The Defendant shall be placed under the supervision of the Department of Corrections, subject to all rules and regulations of Adult Probation & Parole.

2. The Defendant must obtain prior written approval from his/her supervising officer before taking up residence in any location. The Defendant shall not change his/her place of residence without first obtaining written permission from his/her supervising officer or the officer's designee. The Defendant must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. The Defendant will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.

3. The Defendant must obtain permission from his/her supervising officer or the officer's designee before leaving his/her assigned district.

4. The Defendant must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. Unless otherwise directed by his/her supervising officer, the Defendant must inform his/her employer and any other person or entity, as determined by the supervising officer, of his/her status on probation, parole, or other community supervision.

5. Unless otherwise directed, the Defendant must submit written monthly reports to his/her supervising officer on forms provided by the probation and parole bureau. The Defendant must personally contact his/her supervising officer or designee when directed by the officer.

6. The Defendant is prohibited from using, owning, possessing, transferring, or controlling any firearm, ammunition (including black powder), weapon, or chemical agent such as oleoresin capsicum or pepper spray.

7. The Defendant must obtain permission from his/her supervising officer before engaging in a business, purchasing real property, purchasing an automobile, or incurring a debt.

8. Upon reasonable suspicion that the Defendant has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, residence of the Defendant, and the Defendant must submit to such search. A probation and parole officer may authorize a law

enforcement agency to conduct a search, provided the probation and parole officer determines reasonable suspicion exists that the Defendant has violated the conditions of supervision.

9. The Defendant must comply with all municipal, county, state, and federal laws and ordinances and shall conduct himself/herself as a good citizen. The Defendant is required, within 72 hours, to report any arrest or contact with law enforcement to his/her supervising officer or designee. The Defendant must be cooperative and truthful in all communications and dealings with any probation and parole officer and with any law enforcement agency.

10. The Defendant is prohibited from using or possessing alcoholic beverages and illegal drugs. The Defendant is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.

11. The Defendant is prohibited from gambling.

12. If the Defendant is convicted of a crime listed in §46-23-502(13), MCA, he shall register as a violent offender. [§46-18-201(7), MCA]

13. The Defendant, required to register as a sexual or violent offender under §46-23-504, MCA, shall submit to DNA testing. (§44-6-103, MCA)

14. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.

15. The Defendant shall abide by a curfew as determined necessary and appropriate by the Probation & Parole Officer.

16. The Defendant shall not enter any bars.

17. The Defendant shall not enter any casinos.

18. The Defendant shall not knowingly associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from the Probation &

Parole Officer outside a work, treatment, or self-help group setting. The Defendant shall not associate with persons as ordered by the court or BOPP.

19. The Defendant shall not knowingly have any contact, oral, written, electronic or through a third party, with the victim(s) unless such contact is voluntarily initiated by the victim(s) through the Department of Corrections. DOC staff may notify victims about the availability of opportunities for facilitated contact with their offenders without being considered "third parties."

20. The Defendant shall attend self-help meetings at the direction of the Probation & Parole Officer.

21. The Defendant shall inform the Probation & Parole Officer of all prescriptions obtained from medical personnel. The Defendant shall take all prescription medications as prescribed and in the manner in which they were prescribed.

22. The Defendant may not be a registered card holder and may not obtain or possess a registry identification card under the Montana Medical Marijuana Act while in the custody or under the supervision of the Department of Corrections or a youth court.

23. The Defendant shall comply with all sanctions given as a result of an intervention, on-site (preliminary), or disciplinary hearing.

24. The PSI report shall be released by the Department to certain persons, such as treatment providers, mental health providers, and/or medical providers, as needed for the Defendant's rehabilitation.

25. The Defendant shall pay all fines, fees, and restitution ordered by the sentencing court.

26. The Defendant shall pay the following fees and/or charges:

a. The Probation & Parole Officer shall determine the amount of supervision fees (§46-23-1031, MCA) to be paid each month in the form of money order or cashier's check to the Department of Corrections Collection Unit, P.O. Box 201350, Helena, MT 59620 ($50 per month if the Defendant is sentenced under §45-9-202, MCA, dangerous drug felony offense and placed on ISP). The DOC shall take a portion of the Defendant's inmate account if the Defendant is incarcerated.

b. Surcharge of the greater of $20 or 10% of the fine for each felony offense. [§46-18-236(1)(b), MCA]

c. Surcharge for victim and witness advocate programs of $50 for each misdemeanor or felony charge under Title 45, Crimes; §61-8-401 (DUI); §61-8-406 (DUI-alcohol); or §61-8-411 (DUI-delta-9-tetrahydrocannabinol). [§46-18-236(1)(c), MCA]

d. $10.00 for court information technology fee. (§3-1-317, MCA)

APPENDIX C

State v. Keefe, 512 P.3d 741 (Mont., June 28, 2022)

DA 21-0409

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 121

STATE OF MONTANA

Plaintiff and Appellee,

v.

STEVEN WAYNE KEEFE,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADV-17-076
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John R. Mills, Genevie Gold, Phillips Black, Inc., Oakland, California

Alex R. Rate, Akilah Lane, ACLU of Montana, Missoula, Montana

Elizabeth Ehret, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Great Falls, Montana

Submitted on Briefs: April 13, 2022

Decided: June 28, 2022

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Steven Wayne Keefe appeals the Amended Judgment and Sentence of the Eighth Judicial District Court following our remand in *State v. Keefe*, 2021 MT 8, 403 Mont. 1, 478 P.3d 830 (*Keefe II*). Keefe raises the following issues:

1. *Whether the District Court failed to comply with our instructions on remand in* Keefe II *and imposed an illegal sentence by only striking the parole restriction.*
2. *Whether the District Court erred when it denied Keefe's request for a state-funded expert.*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Keefe, then seventeen years old, was charged with burglary and three counts of deliberate homicide for the murders of Constance McKay, her husband David J. McKay, and their daughter Marian McKay Qamar following an October 1985 home invasion where Keefe shot and killed the three family members. A jury convicted Keefe on all counts in October 1986. The District Court sentenced Keefe to three consecutive life sentences without the possibility of parole in the Montana State Prison (MSP), with an additional ten years for the burglary charge, and to a ten-year enhancement on each count for the use of a weapon, for a total sentence of three consecutive life terms plus 50 years. Keefe appealed his conviction, and we affirmed in 1988. *See State v. Keefe*, 232 Mont. 258, 759 P.2d 128 (1988).

¶3 Keefe filed a petition for postconviction relief (PCR) in 2017, asserting that his 1986 life sentence without the possibility of parole was unconstitutional following the United

States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718 (2016), and the Montana Supreme Court's application of those cases to discretionary sentences in *Steilman v. Michael*, 2017 MT 310, ¶ 17, 389 Mont. 512, 407 P.3d 313.

¶4 The District Court granted the PCR petition after agreeing that Keefe must be resentenced under *Miller*, *Montgomery*, and *Steilman* "because the original sentencing hearing did not consider Keefe's youth, background, mental health, or substance abuse." *Keefe II*, ¶ 7. The District Court held a resentencing hearing in April 2019, sentencing Keefe to three consecutive life terms at MSP, with fifty years additional time for the burglary charge and weapons enhancements, without the possibility of parole. The District Court determined that Keefe could be sentenced to life without the possibility for parole because he was "irreparably corrupt" and "permanently incorrigible." *Keefe II*, ¶¶ 24, 27.

¶5 Keefe appealed, asserting that the District Court failed to comply with *Miller* and its progeny when it did not consider unrebutted evidence of rehabilitation and when the court did not consider the *Miller* factors. *See Keefe II*, ¶¶ 13, 24. We reversed, holding that "the District Court did not 'adequately consider the mitigating characteristics of youth set forth in the *Miller* factors,'" and remanded for a second resentencing hearing to allow the District Court to "appropriately consider[] the *Miller* factors." *Keefe II*, ¶ 30 (quoting *Steilman*, ¶ 17). We rejected Keefe's claim, however, that the District Court's failure to appoint an expert to testify on his behalf violated the Due Process Clause. *Keefe II*, ¶ 16. We held that Keefe failed to meet the threshold criteria required by *Ake v. Oklahoma*,

470 U.S. 68, 105 S. Ct. 1087 (1985), and that the District Court's appointment of Dr. Page, an independent, neutral expert, "satisfied due process requirements[.]" *Keefe II*, ¶¶ 18-20.

¶6 This appeal arises following further proceedings on remand. Keefe again moved the District Court for expert assistance, acknowledging that we rejected his request in *Keefe II* and noting that the motion served solely to preserve the issue for any subsequent appeals. The District Court denied the motion because our holding in *Keefe II* was the law of the case.

¶7 The District Court held a resentencing hearing on July 16, 2021. At the outset of the hearing, the District Court advised the parties that it had "taken judicial notice of the record in this case and the underlying pleadings" and reviewed "the additional exhibits filed by the Defendant."

¶8 The court next discussed the scope of the resentencing hearing. It questioned whether it had jurisdiction to grant Keefe his requested relief of time served because Keefe had not "appeal[ed] the constitutionality of . . . [his] life sentence" in *Keefe II*. Keefe's counsel argued in response that the PCR petition sought a meaningful opportunity for release and the issue on appeal in *Keefe II* was the District Court's finding that he was "incorrigibly corrupt." Keefe's counsel further asserted that "simply striking the parole restriction" is an "insufficient" remedy that fails to provide Keefe with a meaningful opportunity for release. The court declined to "reopen the sentence other than . . . the parole restriction," holding that Keefe's requested relief in his PCR petition and before the Supreme Court was an opportunity to appear before the parole board.

¶9 Keefe then proffered testimony from two witnesses, both faith leaders and volunteers with whom Keefe worked at MSP; each would have testified to Keefe's personal growth and reformation in prison. The family of the victims, Tavie McKay—the daughter and sister of the victims—and Muña Qamar—the granddaughter and daughter of the victims, who was present in the home when they were killed—testified to the lifetime of pain and trauma Keefe's crimes had caused them. Keefe testified next, apologizing to the family of the victims and speaking to his personal growth in prison.

¶10 The State then recommended three life sentences on all deliberate homicide counts and ten years for the burglary, with an additional ten years per count for the use of a weapon, all to run consecutively. The State did not recommend a parole restriction. Keefe recommended that he be sentenced to time served. Keefe reiterated his position that the District Court was required to provide him with a meaningful opportunity for release and was not limited to only striking the parole restriction.

¶11 The District Court orally pronounced Keefe's sentence, resentencing him to three life sentences for each deliberate homicide count and to a ten-year sentence for the burglary charge, with a ten-year enhancement on each count for the use of a weapon. The court did not restrict Keefe's eligibility for parole and gave him credit for time served. In both its oral pronouncement and amended judgment and sentence, the District Court acknowledged both "the position and impact of the victims" and "the positive steps [Keefe] has taken since charges were filed."

STANDARDS OF REVIEW

¶12 We review criminal sentences for legality. *Keefe II*, ¶ 10 (citing *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897). We review de novo a claim that a sentence violates the constitution and that a district court violated a defendant's constitutional rights at sentencing. *Keefe II*, ¶¶ 10-11 (citations omitted).

¶13 A district court's application of the law of the case doctrine is reviewed for an abuse of discretion. *State v. Glider*, 2001 MT 121, ¶ 8, 305 Mont. 362, 28 P.3d 488.

DISCUSSION

¶14 *1. Whether the District Court failed to comply with our instructions on remand in* Keefe II *and imposed an illegal sentence by only striking the parole restriction.*

¶15 Keefe asserts that, by considering only the parole restriction, the District Court failed to follow our instructions on remand to hold "a new resentencing hearing." *See Keefe II*, ¶ 37. Because the Court did not remand with instructions for the District Court to strike the parole restriction, but instead to hold a resentencing hearing, Keefe argues that the District Court erroneously determined that it lacked jurisdiction to modify Keefe's original sentence beyond the parole restriction. The State contends that the District Court crafted an appropriate sentence for Keefe in line with our instructions on remand in *Keefe II* when it considered the *Miller* factors and removed the parole restriction.

¶16 The United States Supreme Court in *Miller* and *Montgomery* held that mandatory sentences of life without the possibility of parole are unconstitutional "for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 577 U.S. at 195, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469). Juveniles

sentenced to life without parole prior to *Miller* "must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside the prison walls must be restored." *Montgomery*, 577 U.S. at 213, 136 S. Ct. at 736-37. We apply *Miller* and *Montgomery* with equal force to life-without-parole sentences imposed against juvenile offenders under Montana's discretionary sentencing scheme. *Steilman*, ¶ 3. Since our decision in *Keefe II*, the Supreme Court has clarified that *Miller* requires only that a sentencing court sentence a juvenile offender under a "discretionary sentencing procedure." *Jones v. Mississippi*, ___ U.S. ___, 141 S. Ct. 1307, 1322 (2021). *Miller* does not require a sentencing court to make separate factual findings regarding permanent incorrigibility, nor must it explain the sentence on the record. *Jones*, ___ U.S. at ___, 141 S. Ct. at 1311 (citing *Miller*, 567 U.S. at 483, 132 S. Ct. at 2471-72; *Montgomery*, 577 U.S. at 211, 136 S. Ct. at 735).[1]

¶17 Applying *Miller*, we held in *Steilman* that Montana's sentencing judges must account for "how children are different" by "adequately consider[ing] the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole[.]" *Steilman*, ¶¶ 16-17. Those factors include consideration of (1) a juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," (2) "the family and home environment of [a juvenile offender]," (3) the circumstances of

[1] Although *Jones* clarified "how to interpret *Miller* and *Montgomery*," *Jones*, ___ U.S. at ___, 141 S. Ct. at 1321, we have not had the opportunity to consider whether it would affect our analysis, and we apply the law of the case in reviewing the District Court proceedings on remand from *Keefe II*.

the homicide offense, including the extent of [the juvenile offender's] participation in the conduct and the way familial and peer pressures may have affected him [or her]," (4) whether the juvenile offender "might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth," and (5) "the possibility of rehabilitation[.]" *Miller*, 567 U.S. at 477, 132 S. Ct. at 2468. The fifth *Miller* factor took center stage in *Keefe II*.

¶18 At Keefe's first resentencing, the District Court reimposed Keefe's parole restriction after determining that Keefe was "irreparably corrupt" and "permanently incorrigible" but refused to consider "post-offense evidence of [his] rehabilitation." Agreeing with Keefe that consideration of "post-offense evidence of rehabilitation is clearly required," we held that the District Court's failure to analyze the fifth *Miller* factor in reimposing the sentence without possibility of parole "violated Keefe's constitutional rights." We reversed for a new resentencing hearing "which appropriately considers the *Miller* factors." *Keefe II*, ¶ 30. As presented and decided, the central issue was the constitutionality of the parole restriction without accounting for Keefe's post-conviction rehabilitation under *Miller* and *Montgomery*, not the constitutionality of Keefe's life sentences. *Keefe II*, ¶¶ 25, 27, 29-30.

¶19 Though Keefe takes issue with the District Court's decision to limit its consideration to the parole restriction, the court complied with our remand instructions by evaluating the fifth *Miller* factor and weighing evidence of Keefe's post-offense rehabilitation. The remand order did not direct the court expressly to confine its inquiry, as we addressed the issue Keefe presented: the constitutionality of his life-without-parole sentence under *Miller* and *Montgomery*. Whether the District Court could have agreed to entertain other

sentencing options does not affect the lawfulness of Keefe's sentence; the court complied with the remand order when it considered Keefe's post-incarceration history, and it imposed a constitutionally permissible sentence.

¶20 Keefe faults the court for declining to hear testimony from Keefe's two witnesses at the resentencing hearing. But the court noted at the outset of the hearing that it had taken judicial notice of the record and underlying pleadings, reviewed numerous letters from faith leaders, social workers, family members, and individuals at MSP, and reviewed documents evidencing Keefe's personal growth while at MSP. It also took "judicial notice of the post[-]offense evidence of rehabilitation that ha[d] been presented throughout the[] proceedings[.]" That evidence included approximately a dozen letters supporting Keefe's release and testimony at the first resentencing hearing from a correctional officer and the former prison warden, who each described Keefe's rehabilitation in prison. From the evidence, the court "acknowledge[d] the positive steps [that Keefe] has taken" in prison. The record demonstrates that the District Court carefully considered the voluminous evidence of Keefe's rehabilitation. That evidence, moreover, was not disputed by the State, which advised the court it would not recommend a restriction against parole.

¶21 Keefe's rehabilitation was not the only factor the court accounted for in its resentencing. The District Court's sentence also "[t]akes into account the position and input of the victims[.]" Family members of the victims, Tavie McKay and Muña Qamar, testified emotionally about the tragedy of the senseless homicides and how the murders of David and Constance McKay and Marian McKay Qamar "continue[] to reverberate throughout this family and their community."

¶22 The District Court's consideration of Keefe's rehabilitation, along with his criminogenic needs, criminal history, and financial history, the position and input of the victims, the seriousness of the offense, and the best interest of the community comports with the sentencing policy of Montana. As noted in *Keefe II*, sentencing should not "merely provide for punishment, protection of the public, and restitution, but also for rehabilitation and reintegration of offenders back into the community[.]" *Keefe II*, ¶ 30 (citing § 46-18-101(2), MCA). By removing the parole-eligibility restriction, the District Court's amended sentence takes Keefe's "self-improvement," "rehabilitation," and future "reintegration . . . back into the community" into account, while still holding him "accountable" for the offenses and considering the need to "protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders[.]" Section 46-18-101(2), MCA.

¶23 Keefe argues that the practical effect of his sentence will keep him from being parole eligible for many years to come, depriving him of a chance to "rejoin society" and "achieve maturity of judgment and self-recognition of human worth and potential." *Graham v. Florida*, 560 U.S. 48, 79, 130 S. Ct. 2011, 2032 (2010). After Keefe filed his opening brief, however, this Court declined his motion to take judicial notice of Montana Department of Corrections' sentence calculations he proffered to support this argument because the calculations were not before the District Court at the time of its resentencing hearing. *Keefe v. State*, No. DA 21-0409, Order (Mont. Nov. 2, 2021) (citing M. R. App. P. 8(1)). We instructed the Clerk of Court to remove Keefe's proffered

evidence from the record on appeal.[2] Keefe did not raise at the sentencing hearing the objection he now makes. He did not object to the testimony of probation and parole Officer Tim Hides regarding his parole eligibility, nor did he present evidence regarding his parole eligibility calculation or a witness to testify to the intricacies of calculating parole eligibility. Keefe speculates that the District Court would have sentenced him differently had it "properly understood the sentencing calculation[,]" but he failed to preserve his challenge for appeal. We decline to consider this argument further.

¶24 Keefe persists that this Court permits a defendant to challenge a sentence for the first time on appeal "if it is alleged that such sentence is illegal or exceeds statutory mandates." *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). A sentence is illegal if it falls outside "the statutory parameters for that sentence," or if the sentencing court lacks statutory authority to impose it. *State v. Rambold*, 2014 MT 116, ¶ 14, 375 Mont. 30, 324 P.3d 686. Keefe asserts that his sentence is unconstitutional and does not comport with *Miller* and *Steilman* because it does not provide him with a meaningful opportunity for release. He points to his argument at the resentencing hearing that, even without the parole exemption, consecutive terms on each offense rendered the sentence unconstitutional. Though the District Court struck the parole restriction as it determined *Miller* to require, Keefe contends that the only constitutional sentence—one that would

[2] For the same reason, we decline to consider Appendix D, the Montana Board of Pardons and Parole disposition of Keefe's continuation hearing, to the Notice of Supplemental Authority Keefe submitted on June 24, 2022.

give him a meaningful opportunity for release—is for the Court to "impose a sentence of time served."

¶25 *Miller* and its progeny do not stand for the proposition that a juvenile homicide offender is constitutionally entitled to any specific term of years if found not to be irreparably corrupt. *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *Steilman*, ¶ 21 (both citing *Graham*, 560 U.S. at 75, 82, 130 S. Ct. at 2030, 2034). The "meaningful opportunity to obtain release[]" that *Miller* requires is accomplished by prohibiting mandatory life sentences without the possibility of parole for all but the most severe cases. *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *Jones*, ___ U.S. at ___, 141 S. Ct. at 1322 (holding that *Miller* and *Montgomery* require no more than "a discretionary sentencing procedure"). In providing "some meaningful opportunity to obtain release[,]" the State "is not required to guarantee eventual freedom[.]" *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030).

¶26 The District Court considered evidence of Keefe's post-offense rehabilitation and, upon a showing that Keefe "has changed or is capable of changing," struck the parole restriction from Keefe's sentence. *Keefe II*, ¶ 30 (quoting *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc)) (emphasis omitted). In so doing, the court imposed a constitutional sentence that provides Keefe with a meaningful opportunity for release. That the court did not limit his sentence to time served or consider the specific calculation now estimated for Keefe's parole eligibility date does not render the sentence unconstitutional.

¶27 *2. Whether the District Court erred when it denied Keefe's request for a state-funded expert*.

¶28 Keefe urges the Court to reconsider its prior ruling that he is not entitled to state-funded expert assistance under *Ake*, 470 U.S. 68, 105 S. Ct. 1087. *Keefe II*, ¶ 20. As this issue was already litigated and decided by this Court in *Keefe II*, the District Court properly declined to revisit the issue, and we do as well. *See Glider*, ¶ 9 (citing *State v. Wooster*, 2001 MT 4, ¶ 12, 304 Mont. 56, 16 P.3d 409) ("a prior decision of this Court resolving a particular issue between the same parties in the same case is binding and cannot be relitigated").

CONCLUSION

¶29 The District Court adequately considered evidence of Keefe's post-offense rehabilitation under *Miller* and imposed a constitutional sentence by striking the parole restriction. We affirm the District Court's July 16, 2021 Amended Judgment and Sentence.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

APPENDIX D

Sentence Order, Montana Eighth Judicial District, Cascade County, No. ADC-86-059 (Dec. 17, 1986)

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE STATE OF MONTANA, Plaintiff,	:	No. ADC-86-059
vs.	:	
STEVEN WAYNE KEEFE, Defendant.	:	S E N T E N C E

On the 22nd day of October, 1986, the jury found the Defendant, Steven Wayne Keefe GUILTY of Count I: Deliberate Homicide, a Felony, for the death of David J. McKay; GUILTY of Count II: Deliberate Homicide, a Felony, for the death of Constance McKay; GUILTY of Count III: Deliberate Homicide, a Felony, for the death of Marian McKay Qumar; and GUILTY of Count IV: Burglary, a Felony.

On the 15th day of December, 1986, at the State's request, a hearing was held to determine whether or not the Defendant should be sentenced to death.

On the 17th day of December, 1986, the Defendant, Steven Wayne Keefe, appeared with his counsels, John Keith and Nancy Belcheff, and the State was represented by Steve Hagerman and Patrick Paul, for the purpose of being sentenced herein.

Also appearing in the Defendant's behalf was Barbara Wright, sister of the Defendant, who was duly sworn and testified. Defendant stated there was no legal reason why sentence should not be imposed at this time, and the Court having reviewed the pre-sentence investigation report and having heard statements of counsel and being fully advised in the premises, renders its judgment as follows:

NOW, THEREFORE, IT IS HEREBY ORDERED that the Defendant, Steven Wayne Keefe, be sentenced to:

I.

COUNT I:

Deliberate Homicide in that the Defendant purposely or

Knowlingly caused the death of David J. McKay by shooting him:

The Defendant, Steven Wayne Keefe, is sentenced to Montana State Prison for the remainder of his life.

II.

COUNT II:

Deliberate Homicide in that the Defendant purposely or Knowlingly caused the death of Constance McKay by shooting her:

The Defendant, Steven Wayne Keefe, is sentenced to Montana State Prison for the remainder of his life.

III.

COUNT III:

Deliberate Homicide in that the Defendant purposely or Knowlingly caused the death of Marian McKay Qumar by shooting her:

The Defendant, Steven Wayne Keefe, is sentenced to Montana State Prison for the remainder of his life.

IV.

COUNT IV:

Burglary of the Daivd McKay and Constance McKay residence:

The Defendant, Steven Wayne Keefe, is sentenced to ten (10) years in the Montana State Penitentiary.

All of the aforesaid sentences are to run consecutively.

V.

Pursuant to Section 46-18-221 M.C.A., additional sentence for offenses committed with a dangerous weapon:

The Defendant, Steven Wayne Keefe, is sentenced to:

COUNT I: Deliberate Homicide: for the death of David McKay, an additional ten (10) years in the Montana State Penitentiary;

COUNT II: Deliberate Homicide for the death of Constance McKay, an additional ten (10) years in the Montana State Penitentiary;

COUNT III: Deliberate Homicide for the death of Marian McKay Qumar, an additional ten (10) years in the Montana State Penitentiary and;

COUNT IV: Burglary of the David McKay and Constance McKay residence, an additional ten (10) years in the Montana State Penitentiary.

The additional sentences are to be served consecutively to the aforementioned sentences.

VI.

This Court notes under 46-23-201(b) M.C.A., that no convict serving a life sentence may be paroled until he has served thirty (30) years, less the good time allowance provided for in 53-30-105.

VII.

The Defendant, Steven Wayne Keefe, is declared a dangerous offender.

VIII.

Pursuant to 46-18-202(2) M.C.A., this Court finds that an additional restriction is necessary for the protection of society and therefore the Defendant, Steven Wayne Keefe, is declared ineligible for parole and participation in the supervised released program.

DEATH PENALTY

The death penalty is final and irreversible and therefore should be considered with great caution. A considered judgment must be made without regard to passion or prejudice or public opinion or the consideration of factors which are not present within the facts and the law of this case.

The States argument that aggravating circumstances exist, as specified in 46-18-303, M.C.A., have some merit, however, their argument does not present a complete, clear and convincing case so as to mandate the death penalty for the Defendant. The Court further notes that, even if 46-18-303 M.C.A. did apply, 46-18-304(7) M.C.A. clearly applies to this case in that the Defendant was less than 18 years of age at the time the crime was committed and therefore is a mitigating factor which the Court must and does consider in this matter.

INELIGIBLE FOR PAROLE

Pursuant to M.C.A. 46-18-202(2) this Court states the following reasons for declaring the Defendant, Steven Wayne Keefe, ineligible for parole and participation in the supervised release program:

1. Seriousness of the Crime:

Three people were deliberately killed by the Defendant.

2. Harm To Victims/Family:

The surviving family has been devastated. Dr. David McKay and Constance McKay leave one daughter and three sons. Dr. Marian McKay Qumar leaves a husband and infant daughter.

3. Circumstances of the Crime:

a.) The victims were shot in the home of Dr. David McKay and Constance McKay. All of the victims were shot from behind. There was evidence that Dr. Marian McKay Qumar was chased down a hallway and shot twice. The first bullet struck her in the back. The second bullet hit her in the ankle almost severing her foot. There is evidence that the Defendant had to reload his weapon during the course of committing these murders.

b.) There is no evidence of the defendant using alcohol or drugs. There is no evidence of mental or emotional disturbance of a nature which would mandate leniency. There was no evidence that the defendant was acting under the domination of another person.

4. Criminal History of the Defendant:

a.) The Defendant has a history of fifty (50) known crimes committed since June 22, 1982, when he was 14 years old.

b.) At the time of the commission of the offenses the Defendant was on supervised probation.

c.) The criminal history of the Defendant clearly shows a pattern of escalation in terms of the serious nature of the crimes he has committed.

5. Rehabilitation:

a. Youth Evaluation Program, February 4, 1983, reports:

"The group living staff feels Steve needs a highly structured and controlled residence and treatment."

b. John D. Rich, M.D., Yellowstone Boys and Girls Ranch, April 7, 1983, reports:

"My diagnosis would be: conduct disorder, undersocialized, aggressive. I believe that Steve is in need of a highly structured residential treatment program..."

c. Thomas J. Krajacich, (Psychologist) Ph.D., reports:

Impression: "Antisocial Personality Disorder."

d. George Hossack, Psychologist, Pine Hills School, March 11, 1985, reports:

Results of Bipolar Psychological Inventory:
"The result reflects that Steve is rebellious, law breaking, antisocial, a social deviant, irresponsible and possibly psychopathic - with little conscience."

On December 15, 1986, George Hossack testified in Court that they have tried everything - there is little, if any, hope for rehabilitation.

For these reasons, and the entire record of this Defendant, it is the intent of this Court that Steven Wayne Keefe remain in prison for the rest of his life.

DATED this 17th day of December, 1986.

JTC: Continuous custody since 3/5/86
= 288 days
DC = 3/5/86

Thomas M. McKittrick
DISTRICT COURT JUDGE

STATE OF MONTANA) SS.
County of Cascade)

I hereby certify that the instrument to which this certificate is affixed is a true, correct and complete copy of the original on file in the office of the Clerk of the District Court.

Witness my hand and the seal of the District Court of Cascade County this 24 day of Dec 86

TERRENCE C. CONEY, Clerk of Court

By Nancy Morton
Deputy Clerk

cc: CA/Hagerman
CA/Paul
DA/J. Keith
DA/N. Belcheff
Defendant
CCSO
GFPD

State I.D.
Montana State Penitentiary
Adult Probation and Parole
Pine Hills School/Attn. Sterling
Corr. B.

APPENDIX E

Memorandum and Order Re: Petition for Postconviction Relief, Montana Eighth Judicial District Court, Cascade County, No. ADV-17-076 (Dec. 18, 2017)

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STEVEN WAYNE KEEFE, Petitioner, vs. LEROY KIRKEGARD, Warden, Montana State Prison, Respondent.	Cause No. ADV-17-076 MEMORANDUM AND ORDER RE: PETITION FOR POSTCONVICTION RELIEF

This matter comes before the Court on Petitioner Steven Wayne Keefe's Petition for Postconviction Relief. The Petition was filed on January 25, 2017. The State responded to the Petition on June 1, 2017. Proceedings were stayed until resolution of *Steilman v. Fox* before the Montana Supreme Court. The Montana Supreme Court released its opinion on December 13, 2017. The matter is ripe for decision.

Having considered the parties' briefs, the Court issues the following:

Memorandum

Background. Keefe was convicted at trial of having committed three counts of deliberate homicide and one count of burglary. He was sentenced to three consecutive life sentences plus 50 years in prison. He was designated ineligible for parole on all counts. Keefe was seventeen years old at the time he committed the crimes in 1985. The district court considered his age as the sole mitigating factor against the death penalty. The Montana Supreme Court affirmed his conviction. Additional facts will be elicited in the Discussion.

Keefe seeks postconviction relief in the form of resentencing based upon recent United States Supreme Court decisions about life imprisonment without the possibility of parole for juvenile offenders. He specifically raises the Eighth Amendment of the United States Constitution as requiring resentencing for what he believes is a cruel and unusual punishment.

Discussion. Postconviction relief is available when a petitioner "claims that a sentence was imposed in violation of the constitution or laws of this state or the constitution of the United States." § 46-21-101(1), MCA. The petitioner has the burden of proving by a preponderance of the evidence that he is entitled to relief. *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 127 P.3d 422. Although postconviction relief petitions are subject to a one year filing deadline, the State failed to raise the time bar in its response brief. Failure to affirmatively assert the time bar as a defense means the State has waived the defense. *Davis v. State*, 2008 MT 226, ¶ 19, 344 Mont. 300, 187 P.3d 654.

The Eighth Amendment of the United States Constitution states, "Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court has issued a quartet of significant opinions in recent years regarding the applicability of the Eighth Amendment to certain sentences imposed on juvenile offenders. The court held that the Eighth Amendment prohibited the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005). The court held that the Eighth Amendment prohibited a life without the possibility of parole sentence for juveniles convicted of offenses other than homicide in *Graham v. Florida*, 560 U.S. 48 (2010).

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court considered whether mandatory life without parole sentences for juveniles violated the Eighth Amendment. *Miller* acknowledged the basis for treating juveniles differently than adults.

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570.

Miller, 567 U.S. at 471. "Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered." *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). The *Miller* court held that mandatory life in prison without parole sentences violate the Eighth Amendment. The Court added,

> [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. . . . 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.

Miller, 567 U.S. at 479-80. The *Miller* court specifically looked at transfer hearings and decided a transfer hearing is insufficient to meet the individualized sentencing requirement the court imposed. *See Id.* at 488-89.

The final case in the quartet is *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Montgomery* decided that *Miller* is to be given retroactive effect. It also expounded upon the individualized determination necessary for sentencing juveniles to life in prison without parole.

> *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.

Montgomery, 136 S. Ct. at 734. *Montgomery* further explained:

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

Id., at 735.

The Montana Supreme Court extensively reviewed the recent U.S. Supreme Court cases. It concluded, "*Miller's* substantive rule requires Montana's sentencing judges to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole, irrespective of whether the life sentence was discretionary." *Steilman v. Michael*, 2017 MT 310, ¶ 17, ___ Mont. ___, ___ P.3d ___. The *Steilman* court further concluded that *Miller* applies to term-of-years sentences that are the practical equivalences of life without parole sentences. *Id.*, ¶ 20. *Steilman* ultimately was not entitled to resentencing because, with good time credit, he faces the possibility of release in 55 years on his original 110-year sentence. The court concluded this was not the practical equivalent to a sentence of life without parole.

In the case at hand, Keefe received a lengthy death penalty sentence hearing. Judge McKittrick found Keefe's youth a mitigating factor for the death penalty. At sentencing, Judge McKittrick did not consider Keefe's youth at all. He did not consider Keefe's turbulent home life, his mental health conditions, or his substance abuse. Judge McKittrick focused on the harm to the victims and the community. Nowhere is Keefe's youth mentioned in the sentencing hearing transcript.

The Court has carefully reviewed the sentencing hearing transcript and sentence Keefe received. In light of the U.S. Supreme Court decisions in *Miller* and *Montgomery* and the Montana Supreme Court decision in *Steilman*, the sentencing hearing held in Keefe's case is insufficient to

justify imposition of life imprisonment without parole. Unlike *Steilman*, Keefe was sentenced to three consecutive life in prison without the possibility of parole sentences, plus fifty years. The Court must follow the dictates of the U.S. Supreme Court and the Montana Supreme Court and find that the sentence received by Keefe violates the Eighth Amendment because the sentencing hearing failed to account for Keefe's youth, background, mental health, and substance abuse. The Court therefore orders Keefe to be resentenced. The Court cautions Keefe that he still faces the same penalty; however, the Court will reserve judgment on the appropriate sentence for Keefe until the matter is properly before the Court at the resentencing hearing.

Based on the foregoing Memorandum, the Court issues the following:

Order

IT IS HEREBY ORDERED, Petitioner's Petition for Postconviction Relief is GRANTED. A sentencing hearing will be held on Thursday, the 22 day of March, 2018, at 1:30 p.m. Sentencing memoranda will be filed by both sides no later than two weeks before the hearing.

DATED this 18 day of December, 2017.

GREGORY G. PINSKI
DISTRICT COURT JUDGE

cc: Alex Rate, PO Box 9138, Missoula, MT 59807
John Mills, 836 Harrison St., San Francisco, CA 94107
Brant Light, PO Box 201401, Helena, MT 59620-1401
Susan Weber

APPENDIX F

Status Hearing Transcript, Montana Eighth Judicial District, Cascade County, No. ADV-17-0716 (April 9, 2018)

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STEVEN WAYNE KEEFE, Petitioner, vs. LEROY KIRKEGARD, Warden, Montana State Prison, Respondent.	)	No. ADV-17-0076

STATUS HEARING

Cascade County Courthouse
Great Falls, Montana
April 9, 2018
8:32: o'clock a.m.

BEFORE: THE HONORABLE GREGORY G. PINSKI

APPEARANCES:

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Legal Director - ACLU of Montana
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Proceedings recorded by mechanical stenography, transcript produced by computer.

BE IT REMEMBERED that on Monday, April 9, 2018, at the Cascade County Courthouse, Great Falls, Montana, before the Honorable Gregory G. Pinski, State District Judge, the following proceedings were had:

(Following proceedings held in closed court with Counsel personally appearing as well as telephonically.)

THE COURT: All right. Thank you, everyone. This is ADV-17-76, Steven Wayne Keefe v. Leroy Kierkegaard.

This is the time that I've set for a status hearing in this matter. I received a petition to approve the expenditure of a substantial amount of money by the Public Defender's Office, and I have -- I have never received such a request before, so I was somewhat unsure of how to proceed here. I felt like, since the request was coming from an outside appointee by the Public Defender's Office, that I should give the actual Public Defender's Office an opportunity to respond.

So, how are we proceeding today? Can somebody give me some direction here, please?

MR. PARKER: Your Honor, if I may start, it's Chad Parker from the Attorneys General's Office. Mr. Light was on the case. I've, since his retirement, I am on the case now.

There are a couple matters that I think are important to address to give us a background here, first and foremost, while I gave an outline in my respond that I filed on Friday, I think it is fully appropriate upon my reflection over the weekend, to possibly show the Court the actual email exchange about the ex parte filing, the

request for an ex parte filing, so if I may approach, Your Honor?

THE COURT: Sure.

MR. PARKER: And I've highlighted everything. My -- my query and statements are in pink highlighted. This is a -- and then the other side, Mr. Mills' statements, are highlighted in yellow.

This is a chain of emails since -- and issued by Mr. Mills on the 14th of February, and my responses, which I think were fully encapsulated on that day as well.

Looking at that email, Your Honor, I knew what my initial sense was, and you can read in pink there after they ask, Well, we'd like to proceed ex parte on this, Your Honor, under seal, I'm kind of like, Well, I think I'm going to need some education. Just like the Court, I have never, ever seen a request like this. We didn't know, however, at the time that there would be a request for funding from the public to pay for private expenses of counsel, mind you it's expert witnesses, but we don't have a quasi private/public relationship that we -- that we advocate in Montana, so I'm asking for education there because I said, I don't see the connection between going to the court for funding related to your representation.

They then return with, Well, we can't get funding for this unless the public defender from -- the Public Defenders Office tells us that we can't get funding unless we go to the Court.

Now that is the State's mistake. I made a presumption at that point in time, because of the way I know our law works, that there's

some kind of contractual relationship between Mr. Mills and Mr. Rate and the Public Defender's Office. Because there would be no other foreseeable way that they'd be asking or complaining about not getting funding, unless there was such a contractual relationship.

And in my personal experience traveling throughout the state, we do hear contracted attorneys say, Listen, I've got this funding issue, I've have to go address with the Public Defender's Office.

Now they take this, in this email exchange to another extreme, which is We have to go to court.

So I sit back and think, Well, normally we don't get involved in that. I understand because of the assertion they say there might be privileged material there, that they're going to file it under seal as well.

However, it gets served on us. And we see that. And I'm -- so I'm thinking, maybe it's just out-of-state counsel not understanding, you know, what ex parte means. And we see it. I then review it. And I'm thinking, I still am thinking for a period of time, because it will doesn't express otherwise, that this is the Public Defender's Office with a contracted basis.

I then, just a week ago, it dawns upon me, after dealing with other matters, is there actually a relationship here? So I call individuals at the Public Defender's Office, learn that there is, in fact, no relationship between the Public Defender's Office and Mr. Mills and the ACLU in representing Mr. Keefe in this matter.

So I believe it is incumbent upon the State, for various

reasons, ethical rules as well as understanding how candor before the Court is such an important thing, that I should file something before we have this hearing today. I just had an expectation, having practiced in Cascade County for five years before going to Helena, understanding that there's an expectation. We'd like to know what's going on, that we don't play hide-the-ball here.

And so I wrote my response. My understanding, according to the case law, is there's no way on earth, according to the Montana's law that this Court could even grant such a request, regardless of the representational status of the parties.

Because John Mills and Alex Rate from the ACLU are private counsel, in fact, *State v. Angle* (phonetic) says, there's no way on earth that we're going to allow private counsel to request the taxpayers to pay whatever their grocery list is of expert fees, and then approve that.

(Inaudible conversation.)

THE COURT: Hold on. The court reporter is trying to take things down, and with somebody being on the phone, it's difficult. Just let Mr. Parker finish his thought, and then I will take the position of the folks who are on the phone.

Go ahead, Mr. Parker.

MR. PARKER: Thank you, Your Honor.

And so, there have been some conversations back and forth. Mr. Mills, he and I have spoken in the last few days at length about this matter. And I -- I then receive a call back after our initial

conversation, I believe on Thursday, that he was not aware that we had been served with copies of this, and they filed a motion to strike, which I think was filed this morning. And we oppose that motion to strike. We don't believe there's any basis for the motion to strike, Your Honor.

And Mr. Mills calls me back on Friday, calls me back multiple times. We did speak one time, however, very concerned about how I received this filing.

THE COURT: Well, you're on the certificate of service.

MR. PARKER: That's exactly my point, Your Honor. I received it because -- whether they made an error or not in their plan -- I am on the certificate of the service. They took actual thoughtful action to place me on a certificate of service, and serve me with this.

Now looking back upon this, I don't want to impute any kind of ill will to Counsel here. However, the panicked reaction that I've seen, as well as a citation to the professional rules of conduct insinuating that if I don't destroy this copy that I've received, and the request that had made, that I'm somehow in violation of Montana Rules of Professional Conduct Rule 4.4.

THE COURT: Well, I assumed -- and I'll give the Defendant's Counsel an opportunity to respond here -- but I'd assumed because it was captioned as an unopposed motion, that you'd actually received it, and the reason it was being filed under seal is so that it wasn't available to the public. That's why I've closed this

hearing, and I gave notice to the State of this hearing, because it had been my assumption, because the State had received a copy, they were listed on the certificate of service, it was identified as an unopposed motion, that that's what this was about.

So I got to start a jury trial at 9:00 o'clock. This was set as a status hearing for me to understand what's going on.

So who do we have on the phone here today?

MR. MILLS: This is John Mills representing Mr. Keefe. Also on the phone is Alex Rate, also attorney for Mr. Keefe.

MR. OHMAN: Good morning, Your Honor, this is Peter Ohman with the Public Defender's Office.

THE COURT: All right. Thank you. Thank you.

All right. So, Mr. Mills or Mr. Rate, where are you at on this issue?

MR. MILLS: Your Honor, actually, as we tried to explain, both in an email and from conversations with Mr. Parker last week, it was a clerical error, as noted by Mr. Rate, declaration that they were served. We believed we were proceeding ex parte to exclude parties. The basis for that is *Ake v. Oklahoma*.

THE COURT: Mr. Mills -- Mr. Mills, you have a terrible phone connection, and the court reporter cannot -- I mean she can't understand what you're saying. It's all scratchy and cut up. Can you try to move to a different location, try to get a better cellphone connection?

MR. MILLS: Sure. We show a full signal, but I'll see what I

can do.

The reason, Your Honor, the reason we proceeded with our request to go forward ex parte is that the only reason there would be a request for funding as Mr. Keefe's status as an indigent defendant. Our request was never under seal to exclude the public, but intended to be ex parte as to opposing Counsel. And the basis for doing that that was the 14th Amendment, *Ake v. Oklahoma*, which establishes that it would be equal protection violation if a person was unable to access the tools necessary to conduct their sentence because they're indigent.

And so the reason I wanted to interject was an objection before, Your Honor, is given the privileged nature of what I expect the proceedings are going to be, that is how we're going to conduct Mr. Keefe's defense, we would like our opposing Counsel to not be part of that discussion.

THE COURT: Okay. Well, let me just -- let me just tell you right here, I don't have the intention nor the time today to do a line-by-line analysis of these requested expenses.

My purpose here today was to gather the positions of the parties on whether or not my approval of these expenses is even appropriate. And so that's a threshold matter that I need to address before I start to get into a line-by-line analysis of this very extensive request for funding.

MR. MILLS: Yes, Your Honor. And I'd like to address that special matter as well.

You know, Mr. Parker raised some questions about that in his response. Obviously, I didn't receive the response until late on Friday afternoon, so I have not had an opportunity to brief and reply.

But it looks to us like there are a couple of different ways forward in which we do not run a risk of violating Mr. Keefe's right to counsel of choice, and are in compliance with Montana law.

So, the first option I see is having Mr. Rate and I enter a contract, for fewer dollars per hour with the Montana Public Defender's service, so that they can begin to provide expert services in the normal course.

We proposed something akin to that with Mr. Ohman before, and his response was to basically involve the Court, given this is a somewhat unusual circumstances.

The other option I see, and it is based on *State v. Harding* as well, and Section 47-1-103 and 46-15-106 of Montanan Annotated Code is for us to continue to proceed, as we are, pro bono, with Mr. Keefe, and that section of Montana Code provides for payment of expert fees when the client is indigent. There's no question that Mr. Keefe is indigent.

The only threshold issue we are having is we're providing services pro bono for an indigent client and not pursuant to a contract.

So we'd be happy to enter a contract because we'll represent him for fewer dollars per hour, or be happy to go through, you know, the

State v. Harding mechanism.

So those are a couple solutions to the threshold question as I see them. However, admittedly, it is a bit more (Inaudible) given the late hour on Friday that I received Mr. Parker's response.

THE COURT: Mr. Ohman, do you want to weigh in on this? I mean, I obviously unilaterally or sua sponte gave notice to you to have an opportunity to be heard as the Office of Public Defender Administrator, what's your position on this?

MR. OHMAN: Well, thank you for giving us that opportunity, Your Honor.

Well, we're kind of puzzled a little bit about this as well because it is unique. But really, at the end of the day, if an attorney is contracted with us, we're obviously their in-house attorney, then there's a process they can go through to seek expert funds for a particular case.

So if Mr. Mills wants to do what he initially suggested with a pro bono representation via with the OPD, that he would be able to go through the request for funds process that we have for everybody else.

The question I have with respect to this case is the argument that this case should be funded and treated as a capital case, because, Your Honor, is likely aware, we have real deal capital case, then we're going to be spending a whole heck of a lot more money on that than we would have on a case that carries a hundred years, whether that be a homicide case, or even a felony sexual

offense that could carry up to a hundred years.

So for -- at least from my perspective, you know, whatever way the Court wants to go is fine, but I would certainly appreciate some direction from the Court as to the real nature of this case.

I mean, I get it, the argument that as it is, it's a capital offense (Inaudible) when you were 15 or 16, but I think others might say that there's a different between actually executing somebody and putting them in prison for life.

THE COURT: Well, this is a resentencing is what it is. And, you know, by all accounts, the request that's been made is extensive and substantial, and not to mention the fact that, you know, this -- this Court, myself, I have over 1200 pending cases.

And so, to involve the Court in essentially becoming a -- as the US Supreme Court has said, a green eyeshade accountant going over line-by-line requests for the expenditure of funds on a resentencing is unusual, and I'm not convinced is the most effective use of this Court's time or resources.

I mean, the Public Defender's Office has policies and procedures in place for the review of proposed expenditures. They have -- the State of Montana has ample accounting controls in place to ensure that the expenses that are made are reasonable and necessary and legitimate, and made in the ordinary course of the State of Montana's business of providing public defender services.

I have absolutely no expertise or experience whatsoever in the retention, approval of expert witnesses in criminal matters, nor

should I be expected to be. I'm not going to audit these things, or look line-by-line. The last thing that I have any desire to do is to receive monthly bills from expert witnesses recording time in the tenths of an hour where I am going to be auditing whether or not these are appropriate expenses for a hearing on resentencing a defendant who has already been sentenced.

Now I granted the rehearing. And this is not a retrial. It is a rehearing to consider factors that the US Supreme Court has said need to be considered.

Now, there's already been an underlying factual record developed, and so in that regard, the -- it seems appropriate to me to leave this matter to the Public Defender's Office to sort out.

Now, Mr. Ohman, do you have an intention to enter into an agreement with Mr. Mills and Mr. Rate?

MR. OHMAN: Your Honor, that's up to them. You know, they represent Mr. Keefe. We've never been approached by them. We would need an appointment from the Court, though, if Mr. Keefe was to seek that. And then if that's the case, then we would obviously be happy to have Mr. Mill stay on the case pro bono. That's a little unusual as you might expect, but not unheard of.

Ultimately, as you're aware, the Public Defender's Office does have the ultimate authority to decide who actually represents an individual in a case.

I don't see any reason why we wouldn't want to keep Mr. Mills. I think he's done a really great job so far. So we would just have

to figure out funding from there.

THE COURT: All right. Well, at this point, it's clear to me that this motion for the approval of funds is premature until the parties sort out what the arrangement is going to be, until Mr. Keefe determines whether or not he wants to apply for a public defender, if ultimately Mr. Mills and Mr. Rate keep this matter as a pro bono matter, and they want to seek funding for expert witnesses. At that point, then they can come back before this Court. But, I'm -- my intention is to allow the Public Defender's Office to monitor this matter.

There's no doubt that he is an indigent defendant. I'm happy to appoint the Public Defender's Office to represent him. The Public Defender's Office itself is certainly capable and competent and qualified to provide substantial representation for this sentencing rehearing, and they are also competent and capable and qualified to monitor and manage the expenses that are associated with that.

The motion for the approval of expenditure of expert witness fees is denied without prejudice.

All right. Thank you very much.

MR. OHMAN: Thank you, Your Honor.

MR. PARKER: Thank you. Your Honor.

MR. MILLS: Thanks.

(Hearing adjourned)

CERTIFICATE

STATE OF MONTANA)
: ss.
County of Cascade)

I, Anne Perron, RPR, do hereby certify that:

I am a duly appointed, qualified and acting Official Court Reporter of the Eighth Judicial District of the State of Montana; that I reported all of the foregoing proceedings had in the above-entitled action, and the foregoing transcript contains a full, true and correct transcript of the said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand the 11th day of April, 2018.

/S/ Anne Perron
Anne Perron, RPR
Official Court Reporter
P.O. Box 1423
Great Falls, MT 59403-1423
(406) 454-6895

APPENDIX G

Consolidated Order Re: Expert Testimony and Fees, Montana Eighth Judicial District, Cascade County, No. ADV-17-0716 (Dec. 13, 2018)

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STEVEN WAYNE KEEFE, Petitioner, vs. LEROY KIRKEGARD, Warden, Montana State Prison, Respondent.	Cause No. ADV-17-076 CONSOLIDATED ORDER RE: EXPERT TESTIMONY AND FEES

This matter comes before the Court on Steven Wayne Keefe's renewed Motion to Proceed *Ex Parte* and Under Seal to Seek State Funds for Expert and Mitigation Services, which was filed on September 17, 2018. Keefe indicated the Office of Public Defender has refused to pre-authorize payment according to its internal rules. The motion is narrowly drawn; it seeks permission to file a motion for state funds for expert and mitigation services. Section 46-15-116(2), MCA, permits either party in a criminal proceeding to, on motion, seek additional fees for expert witnesses. Proceeding *ex parte* and under seal is appropriate. Accordingly, Keefe's Motion to Proceed *Ex Parte* and Under Seal to Seek State Funds for Expert and Mitigation Services is **granted.** Keefe shall file his motion no later than December 21, 2018.

The Court has determined it is appropriate to order an updated pre-sentence investigation (PSI) in this case under § 46-18-111, MCA, prior to re-sentencing. **The probation and parole office is ordered to prepare an updated PSI.** As part of the PSI, the Court has determined a

mental examination of Keefe is appropriate under § 46-18-112(3), MCA. **The Court appoints Dr. Robert Page** to prepare a mental evaluation of Keefe, which is a state-assumed district court expense. Dr. Page's evaluation is independent; he is appointed by the Court rather than hired by either party. The mental health information provided at Keefe's originally sentencing is outdated in light of the intervening decades' advances in the fields of psychology and neuroscience. Under the guidance of the U.S. Supreme Court cases, Dr. Page's report must consider, at a minimum, the following areas:

1) The brain development of juveniles as a mitigating factor;
2) The effect of Keefe's developmental experiences on his commission of the crime;
3) An examination of Keefe's mental health prior to and contemporaneously with his commission of the crime;
4) An examination of Keefe's chemical dependency history prior to and contemporaneously with his commission of the crime; and
5) Any treatment recommendations related to Keefe's rehabilitation.

It is so ordered.

DATED this 11 day of December, 2018.

GREGORY G. PINSKI
DISTRICT COURT JUDGE

cc: Alex Rate, PO Box 9138, Missoula, MT 59807
John Mills, 836 Harrison St., San Francisco, CA 94107
Brant Light/Chad Parker/Anna Saverud, PO Box 201401, Helena, MT 59620-1401
Susan Weber
AP&P
Dr. Robert Page

APPENDIX H

Consolidated Order Denying Respondent's Motions, Montana Eighth Judicial District Court, Cascade County, No. ADV-17-0716 (Jan. 15, 2019)

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STEVEN WAYNE KEEFE, Petitioner, vs. LEROY KIRKEGARD, Warden, Montana State Prison, Respondent.	Cause No. ADV-17-076 **CONSOLIDATED ORDER DENYING RESPONDENT'S MOTIONS**

This matter comes before the Court on eight motions by Respondent Steven Wayne Keefe:

(1) Motion for Jury Sentencing and Requiring a Finding Beyond a Reasonable Doubt;

(2) Motion for Sentence Eligibility Finding Pursuant to *Miller* and *Montgomery*;

(3) Motion to Exclude the Heinous or Senseless Aspects of the Crime to Support a Finding of Irreparable Corruption;

(4) Motion to Apply Presumptive Sentencing;

(5) Motion to Strike Juveniles' Eligibility for Life without the Possibility of Parole in Light [sic] MT's Statute's Failure to Limit the Pool of Offenders Eligible for that Sentence;

(6) Motion to Categorically Exempt Juveniles from Life without the Possibility of Parole;

(7) Motion in Limine to Apply the Confrontation Clause, Limit Prior Testimony, and to Exclude Evidence of Prior Bad Acts; and

(8) Renewed ***Ex Parte*** and Sealed Motion for State Funds for Expert and Mitigation Services (emphasis original)

Briefing is complete and neither party requested oral argument on any motion. The motions are ripe for decision.

1. **Motion for Jury Sentencing and Requiring a Finding Beyond a Reasonable Doubt**

Keefe argues the United States Constitution and the Montana Constitution, coupled with § 46-18-302(1)(b), MCA, require a jury determination if Keefe is irreparably corrupt.

Keefe cites extensively to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the proposition that a jury must make the irreparable corruption finding. Keefe argues aggravating circumstances enhancing a sentencing require a jury finding. This principle is well-acknowledged in Montana, and neither side disagrees with the general principle. The dispute is whether life without the possibility of parole is a sentence enhancement for a juvenile, thus requiring a jury determination that the juvenile is irreparably corrupt.

Apprendi is not applicable. It applies to aggravating circumstances that are elements of the crime and which subject an offender to a sentence above the crime's statutorily-prescribed maximum sentence. Here, irreparable corruption is not an element of the crime of deliberate homicide; it is a characteristic of the defendant. Likewise, life without the possibility of parole is not a sentence *higher than* the statutorily-prescribed maximum sentence for the crime; it is the maximum statutorily-prescribed sentence when a juvenile commits deliberate homicide. The Court in *Apprendi* clarifies the opinion does not

> render invalid state capital sentencing schemes requiring judges, after a jury verdict, to find specific aggravating factors before imposing a sentence of death. . . . '[O]nce a jury has found the defendant guilty of all of the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, out to be imposed.'

530 U.S. at 496-97 (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 257 n. 2 (1998)).

Keefe also argues the Montana Constitution and § 46-18-302(1)(b), MCA, require the jury to make a finding of irreparable corruption. The Court disagrees. While the Montana Constitution provides greater protections for juveniles, this does not dictate convening a jury to decide irreparable corruption. Section 46-18-302(1)(b), MCA, which requires a jury to make factual findings regarding aggravating circumstances in *capital cases*, does not apply. This is not a capital case. Regardless if life without the possibility of parole is "akin" to the death penalty, it is not a state-sanctioned execution. Additional rules must be followed before a person can be sentenced to death, and these rules do not apply to Keefe.

Further, the Montana Supreme Court in *Steilman v. Michael*, 2017 MT 310, ¶ 17, 389 Mont. 512, 407 P.3d 313, held, "We conclude that *Miller*'s substantive rule requires ***Montana's sentencing judges*** to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole." (emphasis added) (citing *Miller v. Alabama,* 567 U.S. 460 (2012)). This comports with § 46-18-202(2), MCA, which provides it is the sentencing judge's discretion whether to impose a parole restriction. It is clear under Montana law that the sentencing judge decides irreparable corruption, not a jury.

Keefe also argues in this motion the State should have to prove Keefe is irreparably corrupt beyond a reasonable doubt. Neither *Miller* nor *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), require this heightened level of proof. Rather, these cases require "a hearing where 'youth and its attendant characteristics' are considered as sentencing factors [so as] to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery* 136 S. Ct. at 735. The Court in *Montgomery* and *Miller* emphasizes it is not establishing what procedure must be followed; rather, it is up to each state to decide how to implement the new substantive rule of

constitutional law that prohibits life without the possibility of parole for juveniles whose crimes reflect transient immaturity rather than irreparable corruption. *Id.*

Montgomery was decided in 2016. The 2017 Montana Legislature implemented no new statutes regarding the procedure to be followed for considering life without the possibility of parole for a juvenile. The Montana Supreme Court did not establish a procedure in 2017 when it decided *Steilman.* Instead, the court instructed trial courts "to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole." *Id.*, ¶ 17. It is not this Court's place to establish a rule regarding the appropriate burden of proof for deciding whether a juvenile will be sentenced to life without parole. There is no constitutional requirement to set a burden of proof for evidence regarding irreparable corruption and, conversely, evidence regarding the mitigating characteristics of youth. The Court can hear the evidence and making the determinations required of it under *Miller*, *Montgomery*, and *Steilman.*

Neither the United States Constitution nor the Montana Constitution provide a right to have a jury decide whether there is irreparable corruption. The Montana statutes specifically provide that determining a parole restriction is within the discretion of the sentencing court. This Court can effectuate the new substantive rules of constitutional law without overstepping its role by setting rules which the Montana Legislature and the Montana Supreme Court have not found necessary to establish. The Motion for Jury Sentencing and Requiring a Finding Beyond a Reasonable Doubt is **DENIED.**

2. **Motion for Sentence Eligibility Pursuant to *Miller* and *Montgomery***

In his motion for Sentence Eligibility Finding Pursuant to *Miller* and *Montgomery*, Keefe requests the Court first make a factual finding whether he is "irreparably corrupt" before the Court

considers whether life in prison without the possibility of parole is an appropriate sentence. The State objects.

A sentencing hearing is scheduled. The Court has no inclination as to the sentence the State will request. Likewise, the Court has no inclination as to the sentence Keefe will request. The Court suspects, but it is at this point a mere suspicion, irreparable corruption will be front-and-center during the sentencing hearing. Keefe requests the Court make a factual finding regarding irreparable corruption before considering the appropriate sentence, yet he presents no facts or evidence on which the Court could make such a ruling in his briefing. This puts the Court in a position where it must either deny the motion as premature or issue an impermissible advisory opinion. Justice Ginsburg aptly commented regarding this tactic employed by Keefe:

> A well-known work offers this example:
> "'Herald, read the accusation!' said the King.
> On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:
> *'The Queen of Hearts, she made some tarts, All on a summer day:*
> *The Knave of Hearts, he stole those tarts,*
> *And took them quite away!'*
> 'Consider your verdict,' the King said to the jury.
> 'Not yet, not yet!' the Rabbit interrupted. 'There's a great deal to come before that!'"
>
> L. Carroll, *Alice in Wonderland and Through the Looking Glass* 108 (Messner, 1982) (emphasis in original).

Nelson v. Adams USA, Inc., 529 U.S. 460, 468 fn. 2 (2000). Rest assured, the Court can conduct a sentencing hearing and follow the dictates of *Miller* and *Montgomery*.

The Motion for Sentence Eligibility Pursuant to *Miller* and *Montgomery* is **DENIED.**

3. **Motion to Exclude the Heinous or Senseless Aspects of the Crime to Support a Finding of Irreparable Corruption**

Keefe seeks to either altogether exclude evidence regarding the heinous or senseless aspects of the three counts of deliberate homicide for which he faces resentencing, or in the

alternative, to interpret evidence of the heinous or senseless aspects of the crime solely through the lens of youth. The State objects and argues such a ruling would be contrary to Montana's sentencing policy.

Keefe's reading of *Miller* and *Montgomery* has risen to a misinterpretation of Brobdingnagian[1] proportions. Neither *Miller* nor *Montgomery* contemplates the Court ignore the facts or interpret those facts solely in the defendant's favor. Rather, the Court in *Miller* and *Montgomery* requires a trial court engage in an individualized determination whether a juvenile is irreparably corrupt, incapable of rehabilitation and eligible for life without the possibility of parole. This individualized determination must include consideration of, *inter alia*, the developmental science about juveniles, individualized examination of the youth's personal history, mental status, chemical dependency, susceptibility to influences from bad actors, and evaluation of the crime at hand and the past criminal history. It dictates an individual analysis, rather than a mandatory or solely crime-focused sentence of life without the possibility of parole.

The Court must caution Keefe to avoid absurdity. Keefe is welcome to present – and the Court will carefully consider – all evidence and arguments presented during the resentencing hearing. However, statements such as, "Surely Mr. Keefe's impulsive reaction to an unexpected confrontation during a burglary and with a child's heightened sense of fear and reactivity similarly falls into the category of crimes that should not overpower a sentencer's ability to assess rehabilitation," are unnecessary, inflammatory, and insult the Court's competence and vast sentencing experience. (Keefe's Mot. To Exclude the Heinous or Senseless Aspects of the Crime to Support a Finding of Irreparable Corruption at 4 n. 1). [Doc. 29]. Each year, the Court handles

[1] In Jonathan Swift's novel *Gulliver's Travels*, Brobdingnag is the fictional land of giants. In Gulliver's first encounter with the giants, he faces six-foot high steps, giants striding ten-yards, and voices that sound like thunder. Swift's book captures the imagination of many, and his land of giants is now a pop culture reference to anything of gigantic size.

between 30 and 40 juvenile cases, whether filed directly in juvenile court or filed directly in district court. The Court is asked weekly to make individualized decisions regarding treatment, rehabilitation, and accountability for juveniles. A sentence of life without the possibility of parole, constitutionally handed down after individualized consideration of youth and its attendant characteristics, does not, as Keefe asserts, "overpower" this Court's ability to assess rehabilitation. It necessarily considers prospects for rehabilitation. The Court will follow the United States Constitution, the Montana Constitution, and the sentencing policy of the State of Montana in deciding the appropriate sentence for Keefe.

The Motion to Exclude the Heinous or Senseless Aspects of the Crime to Support a Finding of Irreparable Corruption is **DENIED.**

4. **Motion to Apply Presumptive Sentencing**

Keefe requests the Court apply a presumption Keefe is not irreparably corrupt and require the State to provide proof sufficient to overcome this presumption. The State objects.

The appellate courts in *Miller*, *Montgomery*, and *Steilman* do not establish any presumption regarding irreparable corruption. The Court will not read into these opinions a presumption which neither the United States Supreme Court nor the Montana Supreme Court have seen fit to create. The Court will consider all the evidence presented at the resentencing hearing, including what the Montana Supreme Court has called "the mitigating characteristics of youth set forth in the *Miller* factors." *Steilman*, ¶ 17. If the Court determines life without the possibility of parole is the appropriate sentence, it will be based in part on a finding of irreparable corruption. Conversely, if the Court does not find irreparable corruption, the sentence will not be life without the possibility of parole.

The Motion to Apply Presumptive Sentencing is **DENIED.**

5. **Motion to Strike Juveniles' Eligibility for Life without the Possibility of Parole in Light [of] Montana's Statute's Failure to Limit the Pool of Offenders Eligible for that Sentence**

Keefe requests the Court categorically strike life without the possibility of parole for juvenile offenders because Montana's statutes do not limit the pool of offenders eligible for this sentence to those who are "irreparably corrupt." The State objects.

Keefe cites to *Lowenfield v. Phelps*, 484 U.S. 231 (1988) for the proposition that it is unconstitutional to fail to "genuinely narrow" the pool of offenders eligible for a capital sentence. This case does not apply to Keefe, as it is not a capital case. The Court presumes "that all statutes are constitutional. *State v. Trull*, 2006 MT 119, ¶ 30, 332 Mont. 233, 136 P.3d 551. A party asserting a constitutional challenge to a statute bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt is resolved in favor of the statute." *In re T.S.B.*, 2008 MT 23, ¶ 20, 341 Mont. 204, 177 P.3d 429. This Court understands the maximum sentence for a juvenile, life without the possibility of parole, given the constitutional protections afforded by *Miller*, *Montgomery*, and *Steilman*. It is unnecessary to strike down the statutes at issue when they can be read, interpreted, and applied in a constitutional manner. Keefe has failed to prove, beyond a reasonable doubt, the statutes permitting life without the possibility of parole for a juvenile offender are unconstitutional.

The Motion to Strike Juveniles' Eligibility for Life without the Possibility of Parole in Light [of] Montana's Statute's Failure to Limit the Pool of Offenders Eligible for that Sentence is **DENIED.**

6. **Motion to Categorically Exempt Juveniles for Life without the Possibility of Parole**

Keefe requests the Court declare unconstitutional, specifically under the Montana Constitution, the penalty of life without the possibility of parole for a juvenile offender. The State objects.

The Montana Supreme Court has implicitly acknowledged the special constitutional protections afforded to juveniles by extending the protections in *Miller* and *Montgomery* to juveniles facing discretionary life without the possibility of parole sentences and term-of-years without parole sentences. *See Steilman*, ¶¶ 18-23. Neither the United States Supreme Court nor the Montana Supreme Court has not seen fit to categorically exempt juveniles from life without the possibility of parole sentences. While many states have made such an exemption for juveniles, the changing social mores regarding juveniles does not amount to a finding the sentence is unconstitutional. The Montana Legislature and the Montana Supreme Court are entities fit to decide whether the people of Montana support allowing a juvenile offender to face life without the possibility of parole. This Court will not overstep its limited role in a constitutional democracy. This Court's focus is on Keefe, the only juvenile offender in Montana sentenced to life without the possibility of parole, and in affording Keefe the constitutional protections to which he is entitled. Public sentiment is not the Court's concern.

The Motion to Categorically Exempt Juveniles from Life without the Possibility of Parole is **DENIED.**

7. **Motion in Limine to Apply the Confrontation Clause, Limit Prior Testimony, and to Exclude Evidence of Prior Bad Acts**

Keefe requests the Court apply the Confrontation Clause to sentencing, allowing Keefe to confront the witnesses against him. Keefe asks the Court to exclude prior expert testimony. Keefe

finally asks the Court to ignore his prior juvenile delinquency record for sentence enhancement and/or irreparable corruption purposes. The State objects.

The Court does not find convincing the argument the Confrontation Clause should apply to sentencing. At this stage, prior expert testimony has not been offered by the State. The Court has taken judicial notice of the underlying criminal case, but this does not mean the prior expert testimony will again be offered by the State. The Court does not know whether the testimony or its relevance, but the Court has appointed its own expert, Robert Page, Ph.D. The Court anticipates Dr. Page's independent expert testimony will be more appropriate for consideration than the psychiatric reports from decades ago. The Court will decide the weight and the admissibility of such evidence during the sentencing hearing when offered by the State. Finally, the Court will not exclude Keefe's prior juvenile delinquency record. The Court cannot peer into Keefe's mind to determine if he is irreparably corrupt; the Court must consider the objective manifestations of his internal state, such as his prior juvenile history. This is entirely appropriate for the Court to do; it would be error for this Court to exclude such evidence if it is offered.

The Court reminds the parties that the Montana Rules of Evidence do not apply to sentencing hearings. *See* Mont. R. Evid. 101(c)(3).

The Motion in Limine to Apply the Confrontation Clause, Limit Prior Testimony, and to Exclude Evidence of Prior Bad Acts is **DENIED.**

8. **Renewed *Ex Parte* and Sealed Motion for State Funds for Expert and Mitigation Services**

Keefe seeks substantial taxpayer funds for several experts to provide testimony regarding mitigation. Given the sealed motion, the Court will not discuss the various experts for which Keefe requests state funds.

The Court recently appointed Dr. Page to provide unbiased, independent expert testimony on the *Miller* factors. In addition, the Court ordered a new pre-sentence investigative report, during which the assigned probation officer will perform an evidence-based, objective analysis of Keefe's risks and needs. These actions by the Court largely obviate the need for separate defense experts.

The Court has no control over the funding decisions of the Montana Office of the Public Defender. Section 47-1-119(4)(a), MCA, provides OPD will pay witness "fees and expenses as provided for in Title 26, chapter 2, part 5, and 46-15-116" when such payment is authorized by the director of OPD. The director has not authorized payment for the expert witness fees and expenses requested by Keefe's counsel. This Court will not interfere in OPD's administrative process. Further, the Court has discretion whether to allow additional fees for expert witnesses under § 46-15-116, MCA, and the Court declines to exercise this discretion as requested by defense counsel. The State of Montana does not have a blank check to provide expert witnesses requested at the whim of a party. Keefe may have resources to adequately prepare and present his case for resentencing. OPD is more than capable of determining and approving necessary resources, and it has in-house investigators capable of providing many services Keefe requests.

The Renewed *Ex Parte* and Sealed Motion for State Funds for Expert and Mitigation Services is **DENIED.**

IT IS SO ORDERED.

DATED this 14th day of January, 2019.

GREGORY G. PINSKI
CHIEF DISTRICT JUDGE

cc: Alex Rate, P.O. Box 9138, Missoula, MT 59807
John Mills, 836 Harrison St., San Francisco, CA 94107
Brant Light/Chad Parker/Anna Saverud, P.O. Box 201401, Helena, MT 59620-1401
Susan Weber

APPENDIX I

Mental Health Evaluation of Steven Wayne Keefe (March 5, 2019)

Page Forensic Consultation Services
Dr Robert N. Page
LCPC • CCJS • DABPS • Montana License #457

MENTAL HEALTH EVALUATION

Pt: Steven Keefe
DOB: 1/10/1968
Dates of Evaluation: 1/10-3/4/19
Age at Evaluation: 51 Yrs., 2 Mos.

[!] CONFIDENTIAL

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Referral Information:

Steven Keefe is a 51 Y/O male referred for this evaluation under order by the Eighth Judicial District Court of Cascade County, MT. He has been incarcerated since the age of 17 with a sentence of life without parole. After it was ordered that he be re-sentenced under new rules for individuals sentenced to life without parole as juveniles, the court ordered that this evaluation be completed. The court also ordered a new PSI to be accompanied by this evaluation.

This evaluation is to be considered independent and this examiner was appointed by the court rather than hired by either party involved in the case. Due to the length of time passed since his original sentence, along with new advances in the fields of developmental psychology and neuroscience, this evaluation was ordered to provide the court with current data regarding Mr. Keefe's psychological condition and it's relative comparison with his condition at the time of the commission of his offenses.

Pursuant to the order handed down by the court, this evaluation will consider the following areas:

1) Neuropsychological development of juvenile males as a factor involved in the commission of criminal acts.

2) Mr. Keefe's own developmental experiences as a factor involved in the commission of his crimes.

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3) Mr. Keefe's mental and psychological condition at the time of the commission of his crimes.

4) Mr. Keefe's chemical use/dependency history prior to and at the time of the commission of his crimes.

5) Treatment recommendations which may surface at the time of this evaluation.

This evaluation was completed in order to identify Mr. Keefe's current emotional status and personality traits, and make any therapeutic recommendations necessary in the least restrictive environment considering safety to society.

Further, information specific to Mr. Keefe's mental and emotional condition and developmental level at the time of the commission of his offenses will be presented along with indications of any chemical use/abuse elements relevant to the commission of his crimes.

All information relied upon and utilized for purposes of addressing the Court's informational needs has been compiled by this examiner objectively and in the best interest of safety to society first and Mr. Keefe's best interest second. However, it is considered important and responsible to remain focused on any recommendations which may lead to Mr. Keefe's ability to safely become a responsible provider in society if and whenever possible.

Assessment Procedures:

Clinical Interview with Mr. Keefe
Consultation with Tim Hides, P.O
Extensive Review of Case Records
Thorough Review of Mr. Keefe's DOC File
Consultations with the Montana Attorney General's Office
Consultations with the Office of the American Civil Liberties Union (Attorneys for Mr. Keefe)
Interviews with Numerous Prison Officers who had Contact with Mr. Keefe Over the Years During his Incarceration (Kept Anonymous for Purposes of Confidentiality)

Administration and Interpretation of Psychological Test Instruments relevant to Mr. Keefe's Current Psychological Condition as well as his Psychological and Chemical Dependency Conditions at the age of the Commission of his Crimes (17 Y/O) Including the Following:

Current Adult Instruments Utilized:

Life History Write-up Completed by Mr. Keefe
Beck Depression Inventory, Second Edition
Beck Hopelessness Scale
State-Trait Anxiety Inventory
Millon Clinical Multiaxial Inventory, Third Edition

Adolescent Instruments Utilized, Completed by Mr. Keefe as he would have responded at the age of 17:

Substance Abuse Subtle Screening Inventory, Adolescent Version
Millon Adolescent Clinical Inventory

Social/Emotional Development in Children and Juveniles Relevant to Decision Making and Maturation:

The following important information requested by the court in response to item #1 above was compiled by this examiner and is offered for consideration:

Standards of legal competence focuses on two aspects of cognitive functioning, capacity for reasoning and understanding. However, policies directed towards children and adolescents are based not only on the presumption that adolescents and children differ from adults in these two capacities, but also that choice and behavior are affected in ways that distinguish them developmentally from adults. For example, children tend to be more susceptible to peer influence and act in more impulsive ways without as much premeditation as adults, with less understanding of long-term consequences. Children therefore tend to make more risky and uninformed choices with little regard for how their actions may affect others as well as their own futures.

It is generally understood that minors, for developmental reasons, tend to use immature judgment and make poor choices that may result in negative consequences. The issue of competence in legal standards focuses on one's ability to appreciate the relevance of one's own decision making related to the consequences of those decisions, and their ability to use the information in comparing alternative options and weighing the risks and benefits of making such a choice.

Interestingly, only a small number of studies have compared decision-making by adults and adolescents in legally relevant contexts and most of those studies have utilized only a small number of subjects in their research groups. Clearly, more empirical evidence using a number of different methodologies and research design is needed. Overall, the literature refutes any assumption that adolescent capabilities for reasoning and understanding in the decision-making process are similar to those of adults. However, no specific chronological age can be established that absolutely makes all adolescents magically capable of responsible decision making. Further, there are many examples of adults who commit crimes and are not capable of demonstrating responsible decision-making. As is noted in the research, a number of subject variables must be considered on an individual basis.

Generally speaking, teenagers are presumed less independent in decision-making than adults, and are subject to the influence of both parents and peers. Evidence suggests that they are more subject to parental influence than are young adults. While we all know that some adolescents reject the influences of adults in favor of impulsive and hedonistic behaviors, for the most part, adolescents follow parental orientation when the parental influence is healthy and consistent (and unfortunately, when their modeling and influences are not healthy or responsible). The degree and success of parental influence in a positive direction over children relies on the quality and nature of the parent- adolescent relationship, negative aspects of which have been correlated with adolescent problem behavior and parent-adolescent conflict.

It is fair to state that most adolescents have a greater inclination to respond to peer influence than do adults. Through social comparison, teenagers use others' behavior as a comparison to their own and make decisions more along those lines. Further, younger and less mature teenagers tend to adapt their behavior and attitudes to those of their peers. In some

contexts, adolescents are more vulnerable to direct peer pressure when making choices. Also, an adolescent's desire for peer approval may affect decision-making without explicit coercion from others.

Research indicated that teenagers differ from adults in their perception of attitude towards risk. For example, teenagers and younger adults seem to take more risks with health and safety than do older adults and are at higher risk of repeated criminal acts than older adults. Data suggest that compared to adults, teenagers appear to focus less on protection against loss than on opportunities for gain when making choices. Teenagers appear to weigh the rewards of engaging in risky behavior more heavily than adults. However, data also suggest that adolescents may sometimes be unaware of risks where adults are clearer about the potential consequences of their actions. Further, adolescents may calculate differently the probability or magnitude of the behavior and its potential outcome.

Factors such as socioeconomic status, race, and IQ tend to affect a variety of decision-making components such as those incorporating risk and risky behavior. How these factors directly contribute with age have not been studied nor can they be generalized since different children mature in these areas at different ages. Also, adolescents differ from adults when considering a variety of options in thinking about available choices for behavior, or in identifying different consequences when evaluating and comparing alternatives. Also younger decision-makers may differ from adults in their awareness of relevant information or in the amount and type of information they actually use in decision making. However, even when faced with similar information in terms of consequences for actions, different individuals at different levels of emotional development will vary in their responses to the same sources of information.

Research supports the concept that adolescents differ from adults in their perception of the cost-benefit regarding outcomes following certain decisions or behaviors. Adolescent and adults calculate differently the probability of a given risk. Adolescents tends to be more likely than adults to engage in risky behavior because it seems less risky to them than to adults in terms of their own perceptions of potential outcome. This likely involves differences in information access, but also dissimilar attitudes towards risk and different temporal perspectives. In terms of sex and sexual behaviors, adolescents and adults might both understand that sexual behavior poses a

risk of pregnancy and social diseases. However, adolescents differ in their understanding of the probability that the negative consequences will occur or whether a risk of a given magnitude is prohibitive or acceptable to them. Generally, Adolescents and adults differ in the way they attach values to particular consequences and reach different outcomes in terms of decision.

Therefore, with the above information considered, Mr. Keefe will be closely examined and compared to his condition and individual traits between how he presented as a juvenile and how he presents as an adult at 51 Y/O. Further, his the issue of external influences and his susceptibility to influences at the age and time surrounding the commission of his offenses will be addressed, since this appears to hold weight within the research.

Interview with Mr. Keefe:

Mr. Keefe was participatory during the interview process and willingly supplied all requested information. He indicated that he was being evaluated for his upcoming resentencing. He stated that he was contacted by the ACLU in California asking to represent him. He stated, "It's been going on for a couple of years. The Judge in Great Falls ordered my resentencing. Now I have 11 years of clear conduct. I've done all the groups and I had my share of behavior problems when I first got here but I've been here for 33 years, since 1986."

Mr. Keefe reported that he has completed programs including anger management twice, six years of AA, Steps, CP&R1 and 2, criminal thinking errors, and has taught new inmates about education and programming. Mr. Keefe denied any chemical dependency problems but did admit to drinking and smoking pot as a youth. He stated that he started drinking at 14 at parties and started smoking pot at 13. He stated, "I have stolen cars and drove around. I would leave them where they could be found." Mr. Keefe also admitted snorting cocaine on one occasion.

When asked about his plans if he were to achieve parole, he stated, "I was accepted in a halfway house in Billings." He admitted that as a youth, he was in the Yellowstone Boys and Girls Ranch for two years which gave him a familiarity with the city of Billings and surrounding areas. He also stated that Billings is where his sister and two cousins reside.

During the interview process, Mr. Keefe stated that he has learned a lot since being incarcerated. He has worked in the boot shop, furniture factory, bakery, and, "I have a lot of different trades including I was a dog trainer in Shelby." He has worked in the furniture shop now for the past five years and describes himself as a diligent worker. Prior to that, he worked in the boot shop for three years. Regarding any disciplinary actions in the recent past, Mr. Keefe admitted, "I smoked for years until the prison didn't allow it anymore and so I started chewing. I got in trouble for having chew which was a major write-up and then I moved to the high side." Following that disclosure, Mr. Keefe denied any other behavioral problems and indicated that he has 11 years clear conduct at this time.

Mr. Keefe stated that if he were released into society, "my dream job is to open a kennel and teach dogs." While he only completed the 10th grade in high school, he did earn his high set while incarcerated. Mr. Keefe does not know what will happen at his resentencing but said, "If the no parole was dropped, I'd be parole eligible. I just turned 51 and it would be nice to get out and live a little before I die."

Mr. Keefe stated that his mother lives in White Sulfur Springs, Montana and his sister lives in Billings. He also has a brother but he does not know where his brother is. Mr. Keefe stated, "I could depend on them to help me but I'm pretty independent."

During the interview, Mr. Keefe discussed his juvenile criminal history stating, "I have learned to control my anger. I can recognize my signals and I have coping skills. As a kid, I have a lot of breaking and entering, car thefts, and I used to get high off stealing cars. I don't know how many times."

Mr. Keefe stated that he eats without difficulty and sleeps "okay but I have a celli that snores a lot." Mr. Keefe stated that he has a driver's license which is current and is studying for his CDL. During the interview, he denied nightmares or hallucinations. He also indicated that he is not suicidal now, "but I have tried to kill myself as a kid. After I was arrested for this, I took bedsheets in the Great Falls jail and tried to hang myself."

Mr. Keefe reported that if he is allowed parole, "I would be able to go out to the big building next to the dairy and get my CDL and do more to get

prepared to leave here." During the interview, Mr. Keefe denied any history of physical or sexual abuse. He did state, "I was a punk kid. It took me a long time to grow up."

When asked to describe his crimes as a juvenile, leading to his current sentence, he stated, "At 17, I got three counts of deliberate homicide in Great Falls. I was charged as the person who did it. We planned to rob the home and get money and drugs and nobody was going to get hurt. I supplied the 44 caliber that I stole in Helena. I brought the gun to Great Falls to sell but my brother-in-law wouldn't buy it or sell it for me so we had the idea to do the burglary."

Mr. Keefe continued, stating that he and his accomplices had been smoking pot that day and, "everything went wrong. The day it happened, ***I was completely sober*** but he (brother-in-law) was high after a three-day run on drugs. I was scared of him for the most part. I didn't know the victims."

Mr. Keefe indicated that he grew up in Helena and, "did some bad things there so I went to Great Falls to get away from my troubles in Helena. I had been on probation and in Pine Hills before. My job in the burglary was to use duct tape to secure their hands. There was me, my brother-in-law, and another kid named Jim. I never saw him again. He didn't do anything there. I feel responsible for the death of the victims. I rang the doorbell and the man came to the door and I asked if I could use the phone and he let me and the other two inside. I went into the kitchen to use the phone and my brother-in-law pulled out the gun and shot him in the back of the head. I don't know why he shot him. I was stunned. I didn't know what to do. The daughter was downstairs and came up and he ran after her and I heard numerous gunshots. He came back upstairs and told me to check the rest of the house."

Mr. Keefe continued stating, "I got up to check the house. I saw the man on his back in a pool of blood under his head. I checked the rest of the house and upstairs in the bedroom there was a three-year-old girl in the bed sleeping. I went up to her and said I'm sorry for what just happened to your family. She never woke up and I shut the door and my brother-in-law asked me if there was anyone else in the house and I said no so we all left."

Mr. Keefe indicated that after leaving the house, "we got back to my brother-in-law's apartment where my car was parked and he gave me the

gun. I didn't want it but I put it in my jacket. I got in my car. I just wanted to get away from him. He told me he'd kill me if I told anyone about it. I was paranoid. I was at the apartment I was staying with my roommates. I want to forget it ever happened. I had a paycheck waiting for me at the Buttrey's in Helena where I worked even though I had quit the job. I let a roommate pawn my gun for me. That night I got arrested for a previous burglary. My PO picked me up and I went the Pine Hills and then I got arrested in Pine Hills for the murders."

Mr. Keefe stated that he turned 18 years old in Pine Hills and then was arrested for the murders. He stated, "I never said anything about my brother-in-law because I was scared he would hurt my family and I didn't want to go to prison as a snitch. I pled not guilty because there was no evidence. I went to jury trial and got found guilty. The sentence was three natural life sentences with 50 years additional, all to run consecutive with no parole."

During the interview, Mr. Keefe stated, "I'm not proud of what I've done. There's nothing I can do to bring them back. My brother-in-law hung himself in the County Jail and didn't leave a note or anything about what happened. I brought the gun into the situation so I take responsibility for that." When discussing the elements of his crimes, it is noted that Mr. Keefe cried genuine tears of remorse when talking about disappointing his mother over his actions, but ***not*** when he was discussing specifics surrounding the victims in this case.

Social History:

Steven Keefe was born in Townsend, Montana. His family moved to Helena into low income housing and his mother worked waiting tables. Mr. Keefe attended elementary school in Helena and described his social life as good. In the third grade, his mother got married and the family moved to another part of Helena. Mr. Keefe stated, "I think that is when everything started to change for me. I didn't like the new school and I got bullied by bigger kids." Shortly thereafter, his mother and stepfather split up.

Mr. Keefe did not do well in school since he did not like to study. He grew up with three sisters and a brother and he stated that his older sister and brother, "were always getting into trouble in getting yelled at for getting kicked out of school or doing drugs."

Mr. Keefe stated that he always went out for school sports and attempted to get positive attention from his parents but they never came to any of his events. He described himself as a "terrible thief. I got caught a lot and I always got attention for it."

Mr. Keefe remembers stealing motorcycles, stereos, TVs and ultimately was placed in a youth evaluation program in Great Falls at the age of 13. He and another youth ran away from that placement and hitchhiked to Missoula where they were arrested and brought back to Great Falls. Shortly thereafter, he was sent to Yellowstone Boys and Girls Ranch in Billings and spent a year and a half there. He stated, "I was always in trouble for running away and stealing. I got out of Yellowstone and went back to Helena to the old trailer to find that my bedroom was taken out and an expansion to the kitchen was made. My stepdad made a spare room onto the side of the trailer and they put a bed in it but it was used for a storage room."

Mr. Keefe reported that as a youth, he used to "sneak out of the house and steal cars and then sneak back without anyone seeing I was gone. I would go to parties and smoke pot and drink beer but only when I was around peer pressure."

Mr. Keefe's mom had a few boyfriends before marrying his stepdad. He admitted that he was abused by one of them, "because my mom and him were fighting in the back of the trailer and I got up from the table without permission to get a drink and he yelled at me and picked me up by my ears and hit my head on the ceiling. I thought I was going to lose my ears. My mom and him broke up shortly thereafter."

Mr. Keefe reports having several girlfriends during his teen years. He stated, "I lost my virginity when I was 16 and only had sex with three girls in my whole life. I was shy around girls but they pretty much hit on me and I didn't mind." Mr. Keefe attended Helena High School and felt that he had a limited social life. He tried to get good grades in school but found that positive behaviors did not result in positive attention from his parents. He stated, "I was always in and out of court for my troubles with the law. I was sent to Pine Hills when I was 16 for 45 days and tried to escape. I came back and wanted to do good but I fell back into the same friends and getting back into trouble with the law."

Mr. Keefe came out of Pine Hills at 17 years old and was placed in a group home in Helena. Following that, "I went back to live with my mom and little sister after another group home and my mom had bought a house in the East Helena Valley after my stepdad passed away. I was trying to do good but I would steal and joyride. I would steal my mom's truck and do a few breaking and entering's. I worked at the Helena Fairgrounds as a maintenance helper and at Wendy's but those jobs didn't last long."

Mr. Keefe got a job at a grocery store in Helena where he worked full-time after deciding not to go back to school. He stated, "I didn't go back because I thought I had made it. It would've been my 10th grade year but I thought I could get my GED and keep working."

Mr. Keefe stated that he was doing, "okay and then when I was faced with a broken car battery I stole one from a neighbor of my sisters and had the police after me to return it. I panicked and in the middle of the day I quit my job, went and said goodbye to my old girlfriend, and moved to Great Falls to stay with a guy I had met at the Helena skating rink. The rest is what I told you about my crime."

At the end of his life history, Mr. Keefe wrote, "I wish I was more mature growing up and made better decisions but it took me a long time to grow up. I love all my family even though they haven't had much to do with me over the last 33 years. I hope to get out and repair those relationships and lead and honest and productive life outside these walls." In his history, no suggestions of traumatic events or other significant developmental issues surfaced that would have any mitigating factors surrounding Mr. Keefe's criminal actions. Further, no anomalous influences in his life appear to have had a substantial impact on his decision-making process.

Summary of Test Results Mr. Keefe Completed as he would have at 17 Y/O:

Mr. Keefe remained cooperative throughout the evaluation process. Generally, Mr. Keefe provided reliable and valid test data while remaining on task, and these results appear to reflect his true emotional condition. He was asked to complete to test instruments as he would have at 17 years old. Mr. Keefe was vigilant that he could do so knowing himself as he did back then (33 years ago). On the SASSI-A, Mr. Keefe's responses do not indicate

the presence of a chemical dependency disorder when he was a teenager. Through his eyes at the age of 17, he reports no data consistent with the presence of a chemical dependency disorder. He did admit to some drug and alcohol use, but not to the point that he would have been considered chemically dependent. Further, it is notable that he reported being sober on the night of the homicides.

His responses on the MACI, completed at the age of 51 through the eyes of himself as a 17-year-old reveal unpredictable and pessimistic moods, an edgy irritability, a tendency to engage in obstructive behavior, and the feeling of being misunderstood and unappreciated.

An intense conflict between his needs for dependency and nurturance on the one hand and his need to assert himself and be a man on the other contributed to his impulsive, negative, and quick changing emotions. He expressed momentary thoughts and feelings impulsively and could be readily provoked by outside stimuli into sudden and unpredictable reactions. His pattern of negativism and stubbornness was punctuated periodically by self-criticism, shame, and anger.

As a teenager, Mr. Keefe anticipated being disillusioned by others and behaved obstructively, thereby creating a self-fulfilling prophecy. Peer and family relationships were fraught with wrangles and antagonism, often provoked by his characteristic carelessness and antisocial acts as well as by his complaining and passive aggressive attitude. Mr. Keefe struggled between feeling resentment towards authority and self-derogation which resulted in rapid mood swings. Often restless, unruly, and irresponsible, he was easily offended by the comments of others. His low tolerance for frustration was notable as was his vacillation between being self-deprecating and contentious towards others.

As a teenager, Mr. Keefe was stereotyped as a person who dampened the spirits of everyone, a malicious acting out adolescent malcontent who demoralized and obstructed the activities and goals of other people. His major struggle was between acting out and curtailing resentment. His sulking, impulsive, and self-defeating actions as a teenager induced others to react in a similarly inconsistent manner. As a consequence, he felt all the more misunderstood and unappreciated and got angrier and more oppositional, self-critical, overly sensitive, and defensive. He feared

displaying weakness because he viewed weakness as a concession that others could use against him maliciously.

As a teenager, Mr. Keefe was cool and distant and demonstrated little or no compassion for others, viewing their difficulties as the product of their own weaknesses. He was likely to feel no discomfort about ignoring their needs and sensitivities. His lack of empathy led him to serve only himself regardless of the consequences for those around him. Complicating other difficulties, Mr. Keefe described serious problems in his family. He felt that his family lacked support of him.

While he was not found to be chemically dependent as a juvenile, evidence strongly suggests the presence of drug and alcohol use which likely contributed to unpredictable, moody, and impulsive behaviors when he was intoxicated. At these times, his resentment broke out of control, often resulting in stormy and destructive consequences. However, again it is notable that he reports having been sober during the commission of the homicides.

Deep resentment that was restrained in his sober state were unleashed in full force when he was under the influence of drugs or alcohol. When intoxicated, Mr. Keefe acted in irrational and physically intimidating ways, if not brutality.

As a juvenile, Mr. Keefe exhibited a marked disinclination to restrain his impulses, usually of an expansive and hostile character. Repeating a pattern of responding with hostility and failing to reflect on the probable consequences, Mr. Keefe was caught in a vicious cycle of his own actions and the negative reactions from others. Hostile, excitable, subject to tantrums, and interpersonally disruptive, Mr. Keefe exploded into uncontrollable rages if provoked, unleashing thoughtless abuse and verbal contempt on those near him. His impulsiveness contributed significantly to the aggravation of his other family and social difficulties.

As a juvenile, Mr. Keefe engaged in rebellious and illegal activities for some time. Irritable, negative, and hostile, he dealt in various forms of juvenile acting out. His actions not only helped him unwind his tensions and undo his conflicts but also served as a statement of resentful independence from the constraints of social convention and expectations. In addition to

freeing him from feelings of ambivalence towards himself and others, delinquent acts liberated him from whatever remnants of guilt he experienced over discharging less than charitable impulses and fantasies.

Results of Testing as an Adult at 51 Y/O:

On the depression scale, Mr. Keefe reported a score of 9, placing his current level of self-reported depression within the asymptomatic range. He denies active suicidal ideation. Also, the hopelessness scale revealed a total score of 2 which indicates that he is not experiencing hopelessness at this time.

On the anxiety inventory, Mr. Keefe reported a total score of 31 on the trait scale (that which he reported experiencing on a day to day basis over time) placing him at the 39th percentile, which is in the average range.

The MCMI-III profile likely presents reliable information although Mr. Keefe responded in an effort to present a socially acceptable appearance or resist admitting personal shortcomings. This is not uncommon among evaluations of this nature. However, the following information may under represent any existing elements of pathology.

This profile indicates that Mr. Keefe appears to go out of his way to adhere to the expectations of others, particularly those in authority. Especially notable is his defensiveness about admitting to psychological problems.

Fearing criticism and rejection, he may be self-denying and unassertive. Moreover he may be inclined towards self-blame and self-punishment when his behavior transgresses acceptable boundaries. He denies negative feelings, fearful that their expression may result in public condemnation. However, as some staff members have indicated, he still has a tendency to become pouty and defensive if he feels unfairly treated.

Beneath his overtly sociable, cooperative, and controlled façade, there may lie feelings of inadequacy and insecurity that he is reasonably successful in repressing. Mr. Keefe experiences dependency and conformity which is likely the result of a lengthy period of institutionalization. His self-doubts may motivate him to seek a supportive program. Conformity to the rules and values of others is likely to be emphasized in his daily life. This is

consistent with his work ethic and the fact that he has not had a disciplinary write-up in 11 years.

Mr. Keefe has a tendency to be over concerned with irrelevancies, a preoccupation that serves to distract his attention from occasional feelings of minor anxiety and inadequacy. His propriety is usually successful in restraining whatever resentment he feels but at times he may experience low levels of anxiety. Data suggest that at 51 years old, should Mr. Keefe engage in an overt display of hostility, he may become self-punitive and remorseful. Overall, this profile does not present significant signs of psychopathology. It does present consistent signs of what one would expect in an individual who has been programmed and controlled over a substantial number of years.

Responses to the Court's Questions and Concerns:

1) Empirically measured differences between Mr. Keefe's psychological profile at the age of 17 and his current profile at the age of 51, along with research in the area of neuropsychological development and maturation are consistent in suggesting that he has responded to efforts at rehabilitation over a 33 year period of incarceration. Gradual emotional and psychological maturation, along with benefits from programs completed while incarcerated and his natural progression towards self-improvement are notable. However, his maturation process has occurred while under the direct observation and structure of a secure setting with 24 hour supervision. There is no research known to this examiner that addresses how adolescent development (the potential trajectory of maturation) would differ between those who remain in society and those who are essentially raised under the direction of a secure, strictly supervised environment. Also to be considered is the fact that Mr. Keefe not only had a lengthy and disruptive pattern of antisocial behaviors beginning long before he committed the deliberate homicides that resulted in his sentence of life without parole, but also reports that he was sober during the commission of the homicides for which he was convicted by a jury and sentenced. Research indicates that as juveniles, peer and family influences can have a greater impact on the decision making process than that of adults. It does not appear that Mr. Keefe experienced abnormally strong, negative, or chronic influences that would have had an

anomalous impact on his decision making over the span of his history of antisocial acts (13-17 Y/O).

2) The court asked if there were any specific effects of Mr. Keefe's developmental experiences on the commission of his crimes. Mr. Keefe's presentation and his self-reported life history do not reveal any significant developmental experiences, traumatic events, or other life-changing situations that would have had any mitigating factors surrounding his decisions to commit crimes. He began his criminal endeavors at an early age, committing his first theft at the age of 13. He admittedly described himself as a youth using the term, "punk kid." At the age of 51, Mr. Keefe openly admits that he was an antisocial, aggressive, and substance using juvenile who had little regard for how his actions affected other people.

3) Information about Mr. Keefe's mental and psychological condition prior to and around the time of the commission of his crimes are consistent with what one would expect in an individual who was completely irresponsible, immature, undirected, and unable to self-regulate. History, Mr. Keefe's own self-reports, and data obtained at the time of this evaluation suggest that there were no questions of competence and that Mr. Keefe was well aware of how his actions would spawn their consequences. Further, it appears that he had little regard for anything other than how his actions would benefit himself. Since his incarceration, Mr. Keefe has been reporting that he did not actually use the gun to commit the homicides but that he provided the gun to the shooter and prepared the environment for the crimes to be committed. He reports that he did not know that the shooter would commit the homicides and that he actually protected the life of the 3 Y/O child asleep upstairs. Regardless if these reports are true, this is not a re-trial, it is a re-sentencing. At the time, Mr. Keefe was found guilty of 3 counts of deliberate homicide and that is what he was sentenced for.

4) While drug and alcohol use certainly had an influence on Mr. Keefe's thoughts and behaviors at around the time of the commission of his crimes, his responses to test items reflecting back to his teen years do not suggest the presence of a chemical dependency disorder at the time. While it is obvious that

intoxication acts as a disinhibiting agent, catalyzing otherwise inhibited actions and can magnify the potential for one to act in aggressive and violent ways, Mr. Keefe acted on his own volition and was not intoxicated at the time of the homicides. He however contends that he was driven to some degree by fear of his brother-in-law who he alleges actually was the shooter during the commission of the crimes. However, he was informed that this information appears to be irrelevant since it does not appear to have been a factor during the jury trial when he was convicted.

Recommendations:

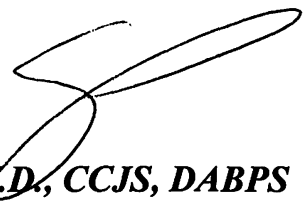
1) To his credit, Mr. Keefe was compliant and cooperative throughout the evaluation process. Initially after his current incarceration, he presented a number of behavioral difficulties to professionals resulting in disciplinary write-ups and at least one known escape attempt. However, as he has matured through the process of his incarceration, he has demonstrated the acquisition and development of an effective work ethic. He has not had a disciplinary write-up in the past 11 years and has not demonstrated proneness towards aggression or violence. He reports having completed a number of therapeutic programs since his incarceration which have very likely benefited him. Many institutional officials were interviewed and the bulk of information indicates that Mr. Keefe has been relatively consistent in showing respect for authority, follows the rules, and is not a management problem. Some quotes from officials include, "Steve has no management problems. He is usually quiet and respectful. He respects authority. I have seen no insolence. I think he would do well under structure and supervision." Some reported that they would not be concerned if Mr. Keefe moved into their neighborhood although some also did indicate concern. One official stated, "I wouldn't be concerned if he moved in next to me. I think he would ask for help if he needed to." Another official who has supervised Mr. Keefe in a number of different work environments stated, "Steven would concern me a great deal if he were released. He would not take accountability for his actions enough to apologize for anything he does." Overall, this examiner views Mr. Keefe as a relatively low risk to commit future acts of

violence as long as he is tightly supervised, at least initially if he is ever allowed parole. That statement is based on current psychological testing, information presented by officials who have known him for years, and the likelihood that if paroled under tight security, he would have much lees to gain by committing crimes and much more to gain by remaining law abiding.

2) It is critical to note that since he has been incarcerated for so long, the process of maturation and therapeutic responding to programs is not sufficient alone to predict a safe reentry into society. Therefore, if he is considered a candidate for parole, he should develop a rather extensive parole plan and present it to the parole board. His parole plan should focus on gradual reentry through step down placements and programs that will adequately monitor his reintegration. Currently, Mr. Keefe does not present as a significant threat to the safety of society as long as he ***gradually*** reenters in a therapeutic and strictly supervised manner. While gradual reentry programming would be critical, it is also appropriate to recommend that Mr. Keefe remain actively involved in individual psychotherapy to support his reentry, as well as add an additional element of supervision.

3) One such viable option for Mr. Keefe was presented by one of his current work supervisors during an interview at the prison. This individual provided valuable, objective information surrounding her observations and experiences with Mr. Keefe over the years. Not only did this individual describe Mr. Keefe as largely respectful and a good worker, she also reported that he has demonstrated a "flip side." At times, he can act in immature ways almost mimicking that of a "kid." This potential was described by 2 different work supervisors. One professional stated, "He started acting out (in a piece of equipment) and when I confronted him he became immature and reactive. I think he would be OK on the outside but I would recommend a slow re-entry." This individual recommended that if Mr. Keefe were to be granted parole in the future, he should start by placement in the work release program (located on the prison grounds) for a few years before being placed as an extended stay pre-release inmate at a pre-release facility. This appears to this examiner as a viable parole plan but caution should

be observed since there is no direct evidence as to how he will tolerate and adapt to life in the world 33 years after his incarceration. The only known evidence as to how he may accommodate to a new world outside of the structure and supervision of prison will come from how he re-integrates and given his history, this process should be strictly supervised and very gradual.



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APPENDIX J

Excerpts from Sentencing Hearing Transcript, Montana Eighth Judicial Court, Cascade County, No. ADV-17-0716 (April 18, 2019)

MONTANA EIGHTH JUDICIAL DISTRICT,

CASCADE COUNTY

STEVEN WAYNE KEEFE, Petitioner, -VS- LEROY KIRKEGARD, Warden, Montana State Prison, Respondent.	BEFORE THE HONORABLE GREGORY G. PINSKI CAUSE NO. ADV-17-0076

RESENTENCING

Cascade County Courthouse
Great Falls, Montana

April 18, 2019

APPEARANCES:

MR. JOHN MILLS, ATTORNEY AT LAW
PHILLIPS BLACK, INC.
836 Harrison Street
San Francisco, California, 94107

ON BEHALF OF THE PETITIONER

MS. ELIZABETH EHRET, ATTORNEY AT LAW
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ON BEHALF OF THE PETITIONER

Pages Intentionally Omitted

particular matter.

DR. ROBERT PAGE,

after having been first duly sworn or affirmed under oath, was questioned and testified as follows:

THE WITNESS: I do.

THE CLERK: You can have a seat.

THE COURT: Mr. Parker, before you begin, I'd like to ask Dr. Page about this issue and his experience as a forensic psychologist that has been raised here regarding these tattoos.

I'd like your psychological insight into that particular issue. As came out in this testimony, Mr. Keefe has these tattoos, these three skulls. I also note that Mr. Hides' report indicates that he has a tattoo with the words "guilty until proven innocent," as well as a tattoo of the Grim Reaper.

In your assessment, in your psychological assessment, do these sort of tattoos have any bearing on your assessment of -- of Mr. Keefe?

THE WITNESS: Yes.

THE COURT: In what way?

THE WITNESS: Okay. So, first of all, I've been doing forensic mental health and psychological evaluations for 24 years. I am licensed as an LCPC, not a psychologist, so I just want to clear that up on the

record.

THE COURT: Sure.

THE WITNESS: But I have done hundreds and hundreds of psychological evaluations for the parole board for a number of prisons and jails across Montana.

And every time I do, I take a look at their art, and I ask them about it because it's relevant in terms of the -- well, at least my experience suggests that tattoos are typically a symbol of ideology that are displayed with pride.

And when I talk about people who are gloved up, and I mean tattoos all the way down to their wrists, and I look at some of them, there's a multiple array of reasons that they have them.

One is, of course, the pride issue. A lot of gangs have their gang stuff. That's just simply a reflection of what they want to wear to reflect their allegiance to the philosophy that they're portraying with pride.

I don't think that's any different here. Sometimes when young kids get in, they don't have a real clear identity, so one of the purposes that they will have to follow through with obtaining and having prison tattoos put on them is to develop a sense of what it takes to fit in with the population; especially in this

case, he knows he's going to be with for the rest of his life.

That doesn't take away from the choices of the ideology portrayed by the images put on the body. And unlike clothing where you can wear clothing typically to reflect your personality in some ways, you cannot take off a tattoo like you can a sweater.

So to me and from what I've experienced with other inmates across the state is, they are a complete personal symbol of pride in their ideation and their ideologies.

THE COURT: How do you -- what conclusions, if any, did you draw from these referenced tattoos of Mr. Keefe's?

THE WITNESS: That he feels -- they would reflect a sense exactly as they show that they do; that is, a pride for wearing the results of his actions, and that is a feeling of being un- -- unfairly treated as a result of his actions; that is, "guilty until proven innocent." I hear that a lot. That is a suggestion of one who feels that they have been unfairly treated, misunderstood, and unappreciated.

THE COURT: All right. Thank you.

Mr. Parker?

MR. PARKER: Thank you very much,

Your Honor.

DIRECT EXAMINATION

BY MR. PARKER:

Q. Now, Dr. Page, you state that you've been doing this for 32 years now.

A. Yes.

Q. That goes back to 1987?

A. Right.

Q. What version of -- are you familiar, first and foremost, with the DSM, *Diagnostic and Statistical Manual of Mental Disorders*?

A. Yes.

Q. What version were you using back in 1987?

A. DSM-III and -III-R was coming out.

Q. Okay. So back when Mr. Keefe would have been convicted and they did -- they had psychological evaluations of him back in the past, they would have been using the DSM-III?

A. Or -III-R.

Q. Okay.

A. I'm trying to remember when the -III-R came out to replace the -III. There wasn't a whole lot of difference.

Q. What are they -- what are they using now? What are you guys using now?

A. We have the DSM-5 now, which is horrible.
Q. Okay. Why is it horrible?
A. They have dissected the meaning of the word "diagnostic criteria."
Q. Okay. Can you --
A. The entire --
Q. -- expand on that --
A. -- this is my opinion --
Q. -- a little bit?
A. Huh?
Q. Could you expand on that a little bit?
A. Well, they've taken some of the more relevant and easily understandable diagnostic criteria for the mental disorders and clustered them into largely neurological, neuropsychological, and cognitive-based disorders that I don't even understand.
Q. So -- okay.
A. I don't even use it anymore. When I make a diagnosis in a report, I report it -- do it as an annotated diagnostic that is explained by virtue of the symptom package that we see, which is, in my opinion, much more relevant than a label.
Q. Okay. So that leads us to an impression point there.
Back in 1986 when they're using the DSM-III or

the DSM-III-R, there was a definition in there regarding what's called "antisocial personality disorder."

Are you familiar with what that -- those criteria were --

A. Yes.

Q. -- back at that time?

A. Yes.

Q. Now, how does that compare with how it's -- it's dealt with now?

A. It's the same to the -- to a large degree. Can I just preface this with --

Q. Yes.

A. -- asocial -- antisocial personality or antisocial traits are largely misunderstood by people even in my field.

Q. Okay.

A. There's a difference between antisocial and asocial, and people use them, like, antisocial people don't like to be around people. They like to stay at home and avoid social contact. That's exactly not true.

Asocial is that definition. Antisocial means a disregard for the effect of one's actions on other people in favor of their own gain.

Q. Okay. And so you've reviewed the entirety of

Mr. Keefe's file.
A. Yes.
Q. Is that correct?
A. Correct.
Q. Including his mental health file from the DOC?
A. Yes.
Q. You reviewed the former PSI that was issued in 1986?
A. Yes.
Q. Included in those materials did you find a mental health evaluation from a Dr. Hossack --
A. Yes.
Q. -- which was also founded upon a diagnosis and an evaluation of Dr. Krajacich --
A. Right.
Q. -- Dr. Rich and others?
A. Yes.
Q. And those diagnostics -- those diagnostic evaluations, they span from the time Mr. Keefe is 13 years of age all the way to past the time he's 18; is that correct?
A. Right. Gus Hossack did his evaluation from Pine Hills.
Q. Okay. And that was done, what, March of 1985?
A. I'm not sure. I'd have to get the dates.

Q. Okay. But about the same time that he -- that he committed the crimes for which he's being sentenced today?

A. Right.

Q. So at that time, what did Dr. Hossack diagnose Mr. Keefe as having as far as a mental condition?

A. Well, he was just purely antisocial.

Q. Okay. And so what -- did he also use the word "psychopathic," and how does that fit into the -- the -- for all of us here in understanding that diagnostic?

A. It's just a descriptive term, sociopath, psychopath, used interchangeably. They're subtle differences, but most of the interpretation between the two terms are the same, and they allude to what a more specific clinical diagnostic definition would be antisocial personality disorder.

Q. Okay. And you're aware that Mr. Keefe was found guilty in 1986 of committing a triple homicide during a burglary. That was only 18 -- 88 days before his 18th birthday?

A. Correct.

Q. Now, given that Dr. Hossack said that he's got antisocial personality disorder, prior to his 18th birthday, is there a problem with that?

A. It was considered, and probably still is --

although the new research really does expand the age range from understanding how a brain in an adolescent male is developed over time to a later age range or group.

Back then we considered that the diagnostic criteria for a personality disorder of any kind could not be made prior to the age of 16.

So after 16, although I saw it done, we really -- we really called it traits before their 16th, or more specifically, an antisocial personality disorder in a person under the age of 16 was typically referred to as a "conduct disorder."

Q. Okay. And so you're saying after the age of 16. Dr. Hossack's report and analysis was done in March of 1985. Mr. Keefe being born on January 10th of 1968 would have made him 17 years old at the time?

A. Right.

Q. Okay. Now, are you also aware that Dr. Mozer, after Mr. Keefe's escape attempt from Montana State Prison, that he also did an evaluation of Mr. Keefe again?

A. Uh-huh.

Q. And what did Dr. Mozer have to say about Mr. Keefe while he was an adult?

A. I have to refer back to be more specific, before

I answer that --

MR. MILLS: And, Your Honor --

THE WITNESS: -- irresponsibly.

MR. MILLS: -- we'd object on due process confrontation grounds.

THE COURT: Overruled. And you can refer to your report, Doctor, if you need to.

THE WITNESS: Okay. I will. I don't have Mozer's report. I mean, I reviewed 1600 pages of documentation. I could not wheelbarrow those in today.

Q. (BY MR. PARKER:) Okay. I totally understand that. I do have a phrase from that report that I'd like to hear what your analysis of his statement would be --

A. Sure.

Q. -- if you could.

Dr. Mozer states: "A very typical antisocial. Minimizing of anything and everything that he has done. Examining Keefe's MMPI results, the MMPI essentially looks about as character-disordered as one could get."

A. And --

Q. "It certainly seems" -- I'm almost done with this -- "to suggest that we have here a thoroughly entrenched criminal mind, one capable of considerable violence and aggression."

MR. PARKER: And for the record, Your Honor,

that's -- there are Bates labels with regards to the DOC file and others, and that's Bates range 3061 and 3062, and we'll provide those in a moment.

THE WITNESS: I recall in that report that the MMPI resulted in an elevated 4 scale, which is the PD, or psychopathic deviance, scale. When we see that, it's pretty suggestive of an antisocial personality trait.

Q. (BY MR. PARKER:) Okay. And so that's done when he's already an adult, correct?

A. Yes. MMPI is an adult test. Although, there is a version for adolescents.

Q. Okay. Are you still using those diagnostic tools currently?

A. I'm not.

Q. Who is? Anybody?

A. Sure. It's widely known that the MMPI-2. Now, there's an MMPI-RF which is a smaller version. The regular MMPI we're talking about, that is typically used as a 580-item true/false test, 563, I think, something like that. It's -- it's obnoxious, and it doesn't give us anywhere near the same clinical information as the MCMI. That's why I use it.

Q. Okay. So you're familiar also with what Dr. Hossack said, and I'll quote from it. I'd like your

take on this as well.

"This diagnosis is being made because Keefe fits the diagnostic criteria. Even though he's not 18 years of age, Dr. Krajacich made the same diagnosis nearly three years ago at YEP."

A. Yeah.

Q. Okay. So given those criteria that you've talked about, the age ranges there, were Dr. Hossack and Dr. Krajacich wrong?

A. No.

Q. Okay. So it still holds true today?

A. You know, there's a thing called clinical judgment --

Q. Yeah.

A. -- that we use with experience and responsibility, not as a game.

But with -- with enough experience, clinical judgment is far superior to diagnostic criteria followed by the books. That -- that includes risk assessment instrument, data, and points of research.

So when you shoot three people to death, it's -- without having any kind of mitigation for self-defense, it's very difficult to not look at that over and above what a diagnostic criteria in a DSM would reveal.

Q. So are you saying then that since he -- a person

who shoots someone in the manner that Mr. Keefe did -- Dr. David McKay in the side and the back of the head, Dr. Marian McKay Qamar as she's running away from him, and Dr. -- and Mrs. Constance McKay as she's trying to care for her dying daughter -- is that something that you would say is typical of an antisocial or a psychopath?

A. Yes.

Q. So you stated in your report different phrases throughout it that kind of narrows down everything that you talk about right now in your analysis of Mr. Keefe.

And you talked about using diagnostic tools. You also talked about performing exercises during that report, correct? Such as, think back to when you're 17 and -- and tell me what you -- how you would have answered these questions.

MR. MILLS: Objection, it's leading.

THE COURT: Overruled. It's in the interest of expediency. I appreciate it.

Q. (BY MR. PARKER:) If, in fact, you were thinking of yourself, at the age of 51 right now, back to age 17, how would you answer these questions? Do you do that as well?

A. Yes.

Q. Okay. Is that a diagnostic tool?

A. Well, it's -- it's a forensic technique that I chose to use because it gave -- we were given a choice, either ask a person what they were like when they were 17, because nobody else knows better than the person who used to be 17, and then get their own verbal response based on a quick shot of memory or what they consider would make them look better if they needed to look better, which is all subjective information, or that same person can provide information laundered through an empirical database that could, my opinion, provide a little bit more clarity. He did a great job. He was very open, and when he --

Q. And you used the term "laundered" a second ago?

A. Right.

Q. You used this -- explain that term, if you could.

A. The instruments that I use are scored empirically with three modifying indices to comp- -- to compensate for what one might expect to be alternate bias. That is, if you are doing an evaluation for a workers' compensation, you might want to look worse than you maybe really are --

Q. Okay.

A. -- for gain, secondary gain.

If you're, alternatively, doing an evaluation for -- you know, to diminish the results of your actions

in a -- in a hearing like this, you might want to look better than you maybe really are.

So we use these instruments to accommodate for those response patterns and, underneath that, find more legitimate objective and valid data, okay?

Q. That makes sense. So you actually filed a report with the Court here --

A. Yes.

Q. -- answering a certain set of questions for the Court?

A. Yes.

Q. Can you recall or could you list for us what those questions were?

A. The Court asked to address the neuropsychological development of juvenile males as a potential factor involving the commission of the crime; and look at the history and developmental properties that may have had relevance in terms of the commission of the crime; to look at Mr. Keefe's mental and psychological condition at the time of the commission of the crime, which is what we colloquially refer to as a "psychological autopsy," for a better term. And that's difficult to do.

Mr. Keefe's chemical use or dependency properties at the time of the commission of the offense as in terms

maybe explaining, not mitigating, but as a factor involved.

Q. And about that, I -- we'll get to your conclusions in a second, but I want to just pause on that, given the slurry of questions that were asked of Mr. Hides about abusive home and alcohol use, anything else like that.

Did you learn anything about his alcohol use at the time of this murder -- these murders?

A. Yeah. He was not intoxicated, by his own admission.

Q. Okay. Please continue.

A. And -- okay.

Q. Just go through the other criteria, and we'll come back to those in a minute.

A. Yeah, okay. And, finally, any treatment or recommendations that surface as a result of my research and investigation into Mr. Keefe's current and past mental condition.

Q. Okay. So, generally, what I find in your report -- this is going to be a quote from your report, and I want to see if I'm doing it accurately or not.

You state: "Overall, this profile does not represent significant signs of psychopathology. It does present consistent signs of what one would expect in an

individual who has been programmed and controlled over a substantial number of years."

A. Right.

Q. Now, does that mean that Steven Wayne Keefe is not a psychopath?

A. No.

Q. So it's possible that you just didn't see those features presented during your diagnostic evaluation of him?

A. He presented as a person with a very accommodated, adapted quality necessary to make it well in the environment that he was in for years. That says nothing about what he might be outside of that environment, and there is no way to know that until he gets there.

Q. And so, just in layman's terms, what's the best way -- what's the best way to predict future behavior?

A. History.

Q. And what is Mr. Keefe's history, as far as you understand?

A. Horrible antisocial acts as a juvenile, repeated.

Q. About three -- is it accurate to say that he's had about three crimes per month from the time he was 13 to the time he was 18, before he committed this triple homicide?

A. I don't know that. I have no trajectory or history of frequency and duration of criminal activity, other than what I have read in PSIs. I mean, it's huge. It's horrible.

I -- doing parole board evaluations, I always look at criminal history to make recommendations for parole plan acceptance and adaptation. And I don't see many criminal records on inmates who are looking for parole that are as long as his was at 17.

MR. PARKER: Okay. Now, I'm going to approach, if I can, Your Honor?

THE COURT: You may.

Q. (BY MR. PARKER:) I'm going to show you what I've previously marked as State's Exhibit 7.

Have you seen this document before, Dr. Page?

A. I have.

Q. Okay. And what does it purport to be?

A. Well, it's a mental health statement for a screening by a social worker in 2003 at the prison.

Q. Okay.

MR. PARKER: Your Honor, at this point in time, we'll move for admission of State's Exhibit 7.

THE COURT: Any objection?

MR. MILLS: No, Your Honor.

THE COURT: Exhibit 7 is admitted.

(State's Exhibit 7 was admitted into evidence.)

Q. (BY MR. PARKER:) So there is a portion of this that is highlighted here. And you and I had a conversation, correct, about this highlighted section?

A. Correct.

Q. Okay. Could you please read that highlighted section for the record?

A. Sure.

Q. Or would it be of assistance --

A. No.

Q. -- would it --

THE COURT: I can read it right here. I see it --

MR. PARKER: Okay.

THE COURT: -- in front of me.

MR. PARKER: Thank you very much.

Q. (BY MR. PARKER:) So this -- the gist of this is that in 2003 he admits that he killed three people, reluctantly?

A. Yes.

Q. Okay. And he doesn't know why he did this thing, trying to figure that out?

A. Right.

Q. Okay. Do you also understand at the time of

trial, he said he wasn't even in the McKay house at all?

A. Right.

Q. Okay. So basically when you were speaking to him, he gave you a new story, too, didn't he?

A. Yes.

Q. Now, I don't know if it's necessary that you get into the specific facts of that new story, given the Court's direction here.

THE COURT: No. I don't need to hear any testimony about the new story. I mean, I've precluded evidence of it altogether --

MR. PARKER: Right.

THE COURT: -- because there's no facts to support it.

MR. PARKER: Well, what we'd like to do is ask your guidance on this, Your Honor. With regards to his analysis of this rehabilitation context, the fact that this is stated, given these other things that he's stated in the past, is that something that would be allowable?

THE COURT: I don't know why it would be relevant to me. I mean, I'm basing my decision on the facts that were established through the trial, that were affirmed on appeal, and so I just don't think it's necessary.

MR. PARKER: Okay. Thank you, Your Honor. We'll move past that, then.

Q. (BY MR. PARKER:) So you've heard lots of testimony today and cross-examination about this whole context of rehabilitation.

Is there a diagnostic definition that you would use in your practice for the term "rehabilitation"?

A. Well, the first thing I consider when considering the term is "habilitation."

Q. Okay.

A. Because just like sexual reoffense, criminal reoffense, establishing a risk of reoffense, you can't do so responsibly without the -- establishing an initial offense. Reoffense means again, so I don't know what the definition of either is.

Q. Okay.

A. I've looked -- in fact, I've spent some time not only online but discussing this question with a number of attorneys over the past month, including OPD lawyers, which have access to some of the best --

MR. MILLS: Objection, Your Honor. We've not had any access to information he's about to rely on.

THE COURT: Overruled.

THE WITNESS: That we could not find an actual operational, understandable definition of what

rehabilitation is.

We assume that it is a hypothetical declaration of somebody who has been cured of the problems that they initially had.

Q. (BY MR. PARKER:) Okay. So are you aware of whether they have -- you've worked with prisoners and parolees and everything like this for years, whether there's a step-by-step process that Montana State Prison would use to say, you know, X, Y, Z, you're rehabilitated?

A. Yeah, I don't think there is anything like that, because there's no real definition of what rehabilitation is. It's an assumption.

Q. Okay. So would a person who has nearly 20 years of write-up history and has a very short period of time on the back end of having some clear conduct, which may be in doubt as well, indicate that person is rehabilitated?

A. I don't know what the term is. He may well do well. He may have -- and I -- I applaud Mr. Keefe for going through the programming and the time and being as responsible as he has been. According to the many professionals at MSP that I interviewed personally that have had direct contact with him for, you know, decades, I just don't see how that it can translate into any way

to predict his behavior outside of the same very, very secure setting. And he may well succeed and blow us away.

Q. But you just don't know?

A. We'll never know.

Q. And we have his past to look at, right?

A. That's why I recommended that if there is an opportunity for Mr. Keefe to walk the streets again, that we help him to defend against his past by very gradually and programatically, systematically, and therapeutically letting him show himself, not just us, what he can do to accomplish freedom in a responsible manner.

Q. And so did you actually make the statement that Mr. Keefe was rehabilitated in your report?

A. If I did, I don't remember it. No, I didn't. It's not --

Q. Do you believe --

A. -- in writing anywhere.

Q. Do you believe that now?

A. I couldn't say anybody was ever rehabilitated until somebody comes up with a silver platter and shows me the absolute operational definition of what the word means.

Q. Okay. Thank you very much.

With regards to -- are you aware that former warden -- a former warden of Montana State Prison conducted an analysis of your analysis and recommended that Mr. Keefe be released within a year of a step-down program?

A. Well, I would modify that to say that I --

Q. Please tell us your perspective.

A. I read ex-Warden Mahoney --

THE COURT: You know I don't think we need to spend much time on that. I mean, we're not -- this -- this isn't the parole board proceeding, and so I just think you can move on, Mr. Parker.

MR. PARKER: Very good. Thank you. I don't have anything else, then, for Dr. Page at this time.

THE COURT: All right. Thank you.

Cross-examination?

CROSS-EXAMINATION

BY MS. EHRET:

Q. Good afternoon.

A. How are you?

Q. Fine. How are you?

A. Good.

Q. As you know, my name is Elizabeth Ehret.

A. Yep.

Q. We've met before, correct?

A. Right.
Q. And in particular, we met at Montana State Prison on January 15th and February 25th. And thank you for, you know, braving the winter. It was pretty awful.
A. It was nuts.
Q. Yes, it was.
So the first thing that I want to ask is: Can tattoos also be about displaying pain or serving as a reminder of mistakes?
A. Yeah.
Q. And did you speak with Mr. Keefe about his tattoos?
A. No.
Q. So your opinion of the tattoos is based on an opinion that's not formed by conversations with Mr. Keefe?
A. Correct.
Q. And turning to the State's Exhibit 7, I just want to read one line and -- on the bottom of the page and under "assessment," last line. "He continues to wrestle with the nature of his crime and appears to use his religion, as well as his own efforts, to come to grips with this and also tries to help other people who are incarcerated."
Did I read that correctly?

A. Yep.
Q. Thank you. So this is the first opportunity I've had to speak with you in a formal setting such as this, correct?
A. Right.
Q. And I haven't had the opportunity to depose you?
A. Right.
Q. And you are not testifying as an expert for the Petitioner or the Respondent?
A. Right.
Q. But you're here as a court-appointed expert?
A. Right.
Q. And are your ultimate conclusions contained in the final mental health evaluation that you provided to the Court and the parties?
A. Yes.
Q. And did you receive any assistance from the State in preparing or editing your report?
A. No.
Q. Turning to your report, as you discussed, you were tasked with comparing his current psychological condition with his condition at the time of the commission of the offenses, correct?
A. Right.
Q. And are juveniles, as a whole, cognitively

different from adults in their capacity for reasoning and understanding?

A. Yes.

Q. And is this why making the comparison between a juvenile and adult development is important?

A. Well, it's -- it's one of the elements to consider when looking at disposition for the future. It really doesn't have anything to do with helping the victims of a massive crime deal with their own terror.

Q. But in terms of looking at the mental and psychological condition of an individual, it is important to consider whether or not they are a juvenile or an adult, because that stage of development or where they are in that stage of development is important?

A. Yes. It depends, but yes. I mean, that's why we have transfer hearings for juveniles.

Q. And on the whole, do children tend to be more impulsive than their adult counterparts?

A. Yes.

Q. In fact, their limitations also extend to other executive functioning, such as decision-making?

A. Yes.

Q. And are juveniles less likely to make the right decision whether or not that decision is impulsive?

A. You know, it's such a generalized thing. I

couldn't answer that because there's juveniles that are really brilliant, so to generalize and say that is kind of irresponsible.

Q. So I'd like to turn to your report, which I believe you have a copy in front of you.

A. Uh-huh.

Q. Page 4 in the first paragraph and the last line, quote: "The issue of competence in legal standards focuses on one's ability to appreciate the relevance of one's own decision-making related to the consequences of those decisions, and their ability to use the information in comparing alternative options and weighing the risks and the benefits of making such a choice."

Did I read that correctly?

A. You did.

Q. And so is that reflective of the idea that children tend to be more impulsive than their adult counterparts?

A. The ability to self-regulate and premeditate in a responsible manner is different sometimes. There are just as immature adults in the world. So generalizing, this is basically on research pools of people, yeah, so -- go ahead.

Q. So as a whole, though, juveniles tend to be more

impulsive than their adult counterparts --

A. Yeah.

Q. -- as a whole?

A. I would say that's probably, generalized, accurate.

Q. Okay. And for males, is it fair to say that they're developing the part of their brain responsible for executive functioning; that is, decision-making, until around age 26?

A. Probably.

Q. And would it also be fair to say that juveniles' personalities are not yet fully formed and are, in fact, likely to change during the developmental period?

A. Yes.

Q. And so turning to -- we're going to talk a little bit about the DSM-5.

A. Hmm.

Q. So, in general, the DSM-5 is accepted by the psychiatric community as the universal guideline for diagnoses -- diagnosis?

A. It's one of them.

Q. And the DSM-5 has been updated from previous editions based on improved understanding of psychiatric conditions which is based on the evolution of research over the years about psychiatric conditions?

A. Yeah.
Q. And so recognizing the fluctuations in personality and development in juveniles, the DSM-5 excludes all juveniles from an antisocial personality diagnosis, all individuals under the age of 18?
A. That's fine.
Q. Is -- is that correct, that the DSM-5 excludes all people under the age of 18 from an antisocial personality diagnosis?
A. Sure.
MR. PARKER: Objection, Your Honor. I believe we've asked and answered this at length.
THE COURT: Overruled.
Q. (BY MS. EHRET:) And so any antisocial personality disorder diagnosis given to Mr. Keefe before he turned 18 would be against regular psychiatric practice?
A. Back then it was considered state of the art, so I look at -- back then as those diagnostic criteria were valid and accurate, and if we were to take a 17-year-old today and decide whether or not he were culpable by virtue of his ability to self-regulate and understand the effect of his actions on others, it would require an individual assessment and diagnostic of that person.
Q. But as the DSM-5 has evolved to match our

evolving understanding of juvenile development, it would be against regular practice, under our current understanding of an antisocial personality disorder diag- -- diagnosis, excuse me, that it would be against regular psychiatric practice to?

A. I would say it would probably be considered more responsible to use the word "traits" than dis -- "personality disorder."

Q. And this evolving understanding that's prohibited an antisocial personality disorder diagnosis for those under the age of 18 is a recognition of the fact that juveniles' brains change over time?

A. Right.

Q. And even where someone qualifies for an antisocial personality disorder diagnosis, symptoms might decrease or remit as individuals age, correct?

A. Yes. Anything is treatable or monitorable. So, like, any personality disorder that goes into, like, outpatient treatment is not really all curable. It is all monitorable. It's -- it's treated over time.

Q. And particularly with respect to their likelihood to engage in criminal behavior?

A. Can you say that again, please?

Q. Yeah. So the likelihood to engage in -- that someone will engage in criminal behavior even with an

ASPD diagnosis would decrease over time?

A. We do know that risk of reoffense among the criminal element decreases significantly over time. In fact, certain age brackets have been clustered as decreasing risk among those chunks of ages. So the more mature a person gets chronologically, the more mature they apparently get in terms of their ability to make good decisions later in life.

Q. And that's also reflective of the general understanding that older adults are less likely than teenagers to recidivate or take risks with health and safety?

A. Correct.

Q. And overall juveniles are different in their -- with respect to their capacity for decision-making than adults?

A. Right.

Q. And you conducted some objective measurements of Mr. Keefe, correct?

A. Yes.

Q. And that included, as you've described, the Millon Clinical Multiaxial Inventory, Third Edition?

A. Correct.

Q. And that is a test that, among other things, provides an objective basis for helping diagnose

personality disorders?

A. Correct.

Q. And is it your practice to report your diagnosis or diagnoses that are revealed by your assessment as part of your report for sentencing hearings?

A. It depends. And, like I said, usually I will do an annotation instead of a direct DSM-5. There's no multiaxial system anymore, so it's like, you know, you have to use the criteria based on the book.

But I find it to be almost useless in terms of its potential for communicating appropriate treatment in the future, and that's why we diagnose, to imply treatment.

Q. But you did not report any diagnoses here?

A. Right.

Q. And that's because when you evaluated Steven, it did not reveal any diagnosable conditions?

A. Correct.

Q. But according to the diagnostic criteria for antisocial personality disorder in the DSM-5, antisocial personality disorder is a fixed condition that remains for a person's life?

A. I -- that's fine.

Q. I think we're going to need a "yes" or "no" answer. So --

A. I don't --
Q. -- would you agree --
A. -- believe anything is fixed for life in any individual.
Everybody can change, and everybody will mature. And it just depends on the pathway that they decide to take as they mature. I know that's not what you want to hear; but ...
Q. Well, but specific to antisocial personality disorder, it's recognized in the DSM-5 that that is a fixed condition that remains for a person's life?
A. Okay. Yes. I'll just --
Q. But you --
A. -- say "yes."
Q. But you did not report that as a diagnosis?
A. Correct.
(Telephone rings.)
THE COURT: My apologies for that. It somehow got connected to the courtroom telephone, but you can continue.
MS. EHRET: Thank you.
Q. (BY MS. EHRET:) So as part of your evaluation, you spoke with -- to people other than Mr. Keefe, correct?
A. Yes.

Q. And is it fair to say that speaking to third-party reporters is important because they provide both perspective and information that the subject of your report cannot?

A. Yes, if they're objective.

Q. And is it fair to say that third-party reporters are particularly important in the forensic setting?

A. Usually. There are -- some are helpful; some are not. But it's our task to determine objective versus subjective information and weigh it accordingly.

Q. And that's something that's included in your training and years of expertise to be able to make that determination between objective and subjective?

A. It's pretty easy.

Q. Would it also be fair to say that people who have had the opportunity to observe Mr. Keefe for a number of years, even decades, might have had helpful information in assessing whether Mr. Keefe has changed since the age of 17?

A. Sure.

Q. And also helpful in providing information about Mr. Keefe as he was at the age of 17?

A. Yes.

Q. And you did not speak with either Warden Mike Mahoney or CO Robert Shaw, correct?

A. I left the identities of the people that I interviewed anonymous for their own protection and confidentiality.

Q. Were you provided with their contact information?

A. Yes.

MS. EHRET: May I have a moment, Your Honor?

THE COURT: You may.

(Off-the-record discussion between Petitioner's Counsel.)

Q. (BY MS. EHRET:) Regarding Warden Mike Mahoney, I understand that you would like to keep the identities confidential of the people you did interview, but I'm wondering whether or not you had conducted an interview -- or did you not conduct an interview with Warden Mike Mahoney?

A. I did not.

Q. And did you not conduct an interview with CO Robert Shaw?

A. I have to look back. I don't remember, but I -- I'll say no, because I probably -- if you say I didn't, I believe you.

Q. And were you provided with the contact information for Warden Mike Mahoney and CO Robert Shaw?

A. Yes.

Q. And say -- did you not speak with Vera Sickich,

Mr. Keefe's mother?

A. I don't know. I -- I'll say no.

Q. And did you speak with any other friends or family members of Mr. Keefe?

A. No.

Q. So you did not speak with any of these individuals, just listed, who knew him at the time of his crime and who could speak to his life at that time?

A. Correct.

MS. EHRET: And, Your Honor, given what you indicated at the beginning of the hearing, I'm going to skip the questions with Dr. Page discussing the details of the crime. But please note that we did have significant questions regarding those details.

THE COURT: I understand.

Q. (BY MS. EHRET:) As part of your evaluation, you compiled a social history of Mr. Keefe?

A. I talked with him a great deal about his social history, but I also reviewed previous data that had more extensive social history than I got.

Q. But in your report that you provided to the Court, you included a social history --

A. Yes.

Q. -- of Mr. Keefe?

Is it fair to say that you concluded in that

social history that nothing was suggestive of a traumatic event or significant developmental issue that would have mitigated Mr. Keefe's criminal actions?

A. Yes.

Q. And I assume that conclusion applies to what the State has conceded in their sentencing memoranda, that Mr. Keefe's childhood was unstable and difficult?

A. Yes.

Q. And that also holds for what Mr. Keefe's family members described to Mary Fay, the abuse and torture of Mr. Keefe by his stepfather?

A. Yes.

Q. And that also holds for the fact that his mother and stepfather were alcoholics?

A. Yes.

Q. And that his stepfather, the only father figure he ever had, died when Mr. Keefe was 15?

A. Right.

Q. And that when he was hit so hard by a schoolteacher he had his teeth knocked out?

A. Right.

Q. And that he lived, for a time, in an abandoned house?

A. Yes.

Q. And that he also ran away from home -- had run

away from home at the time of his crimes?

A. Right.

Q. And for when Mr. Keefe was a young child, one of his boyfriends picked him up, literally, by his ears and slammed him into the ceiling?

A. One of his mom's boyfriends.

Q. Thank you.

A. Did you say "his boyfriend"?

Q. I'm not -- I don't know, but let me rephrase the question.

And so your conclusion holds for when Mr. Keefe was a young child, one of his mother's boyfriends picked Mr. Keefe up, literally, by the ears and slammed him against the ceiling?

A. Yes.

Q. And is it fair to say, especially initially, in initial discussions, patients are under likely -- or likely to underreport traumas?

A. No. I haven't found that.

Q. Are you familiar with the research around trauma victims and their underreporting, such as the article from January 2005 by Michael McCart in the *Journal of Adolescent Health* titled: "Assessment of Trauma Symptoms Among Adolescent Assault Victims"?

A. Very familiar?

Q. You are familiar?
A. Yeah.
Q. And the fact that that study found that one in five young trauma victims are likely to underreport experiencing trauma, and males, particularly, are more likely to underreport?
A. It depends. But I am telling you from experience that recantations are often made by victims of trauma and then reaffirmations follow that, followed by recantations. So there's no way to make any sense out of what you're saying, other than the research may suggest that a failure to report trauma is not uncommon at all. Because reporting trauma is traumatic and people like to defend themselves against re-traumatization, and it's absolutely individually specific and has no relevance in the research pools.
In other words, you've got to look at the individual before making any reasonable sense out of those statements.
Q. But even given the variances that we just discussed, it is still your opinion that Mr. Keefe didn't have -- experience any traumatic or significant developmental issues that would have mitigated his criminal actions?
A. With the exception of the abuse by the

stepfather, I would say that most, if not all, of his negative experiences occurred as a result of his own behaviors.

Q. But you didn't believe that the abuse by his stepfather constituted a traumatic --

A. No, not to the point that it would cause him to kill three people out of anger.

Q. But in terms of trauma that he has experienced, you did not consider that to be traumatic?

A. I don't -- I don't know. It might have been. I'm sure it was traumatic. Everybody has problems, and you're trying to say that there's some kind of link between his traumatic experience with his stepfather and his choice to murder three people. And I'll say no, that's not a relevant reason.

Q. But in terms of looking at Mr. Keefe as he stood at the time that the crimes were committed and looking at his overall experiences with trauma, is that -- would you consider that to be something that he experienced as a traumatic event?

A. Yes.

Q. And your evaluation indicated that Mr. Keefe is inclined to meet expectations placed upon him, particularly in regards to his behavior, correct?

A. Today?

Q. Yes.
A. Yes.
Q. And as he sat before you, Mr. Keefe was a person who values conformity to the rules?
A. Yes.
Q. And has Mr. Keefe received any disciplinary write-ups in the last 11 years?
A. I found nothing on the record, and I spoke with a number of people who would know.
Q. And is it significant to you that he has not had any disciplinary write-ups in the last 11 years?
A. I think it is. I think it's to his credit, and I don't have any reason to believe that it's not because he genuinely wanted to straighten his life up.
Q. So you believe that the fact that he hasn't had any disciplinary write-ups is reflective of an effort to, as you said, to straighten his life up?
A. It shows that he has the ability to decide how to act. That's the way I would want to put it.
Q. And did your interviews with institutional officials indicate that Mr. Keefe shows respect for authority?
A. Yes.
Q. And did your evaluation find that he has responded to efforts to rehabilitate his behavior during

his period of incarceration?

A. As soon as you give me a definition of rehabilitation, I will answer that question.

Q. So I'd like to turn to your report on page 15, and it's what you labeled as "Section 1" and line 1 there.

A. Right.

Q. And so I'm going to start in -- from the beginning: "Empirically measuring differences between Mr. Keefe's psychological profile at the age of 17 and his current profile at the age of 51, along with research in the area of neuropsychological development and maturation are consistent in suggesting that he has responded to efforts at rehabilitation over a 33-year period of incarceration"?

A. Yes.

Q. Did I read that correctly?

A. Yes.

Q. And have you found that Mr. Keefe has shown evidence of increased maturity over the course of his incarceration?

A. Yes.

Q. And have you found that "Mr. Keefe is at low risk to recommit acts of violence should he be released"?

A. Under the conditions that I recommended, not if

he were released to even a prerelease facility at this point. So you had to put that into context.

Q. But given specific conditions that might be assigned by the parole board and are outside of the context of this hearing, you would find Mr. Keefe to be at low risk to recommit certain acts of violence?

A. Yeah, I think he could be placed into a strategic position to where he would be supervised well enough to be a low risk. And I say that because people who have the right conditions and supervision typically have more to lose by reoffending than they have to gain. And that's the -- that's the idea behind, I guess, if you call it rehabilitation.

Q. And you found that Mr. Keefe is not a significant threat to society?

A. Under the conditions that I mentioned, he would not likely be able to commit a significant and heinous crime, and I don't think he would want to. And I don't know that he would have the same purpose today that he did back then, you know?

Q. Yes. And does Mr. Keefe show you that he is prone to aggression or violence?

A. Not today.

Q. And in your opinion, with the gradual reentry, mediated by the parole board, could Mr. Keefe succeed

outside the confines of prison?

A. Yes.

Q. And in your opinion, is Mr. Keefe a different person than he was at the age of 17?

A. Yes.

MS. EHRET: Thank you. May I have a moment, Your Honor?

THE COURT: Sure.

(Off-the-record discussion between Petitioner's Counsel.)

Q. (BY MS. EHRET:) I have one more question.

Does mitigation require a nexus to the crime? Yes or no?

THE COURT: I don't know what that question means.

Q. (BY MS. EHRET:) Let me rephrase. Is it necessary for circumstances that can be mitigating to also have a relationship with the crime that was committed?

A. I still don't understand your question, and I apologize for being an idiot. If -- if a person is drunk or high at the time of the commission of a crime, that is a mitigating circumstance where they might otherwise not have committed it, but it's not an excuse.

Q. Let me rephrase again.

A. Okay.

Q. Do situations that can be seen as mitigating circumstances always have a direct relationship with the circumstances of a crime as they were committed?

THE COURT: That really calls for the application of legal principles, and the answer to that question is no.

MS. EHRET: Thank you very much.

THE COURT: You're welcome.

MS. EHRET: I have no other questions.

THE WITNESS: Thanks.

THE COURT: You're welcome.

MR. PARKER: We have no redirect, Your Honor.

THE COURT: Thank you. Dr. Page, you may step down. I appreciate -- again, you were retained by the Court in this, and your analysis and testimony is very helpful to me. So I appreciate your time and all the energy you put into this case, so thank you very much.

THE WITNESS: It's an honor.

THE COURT: You can step down. Thank you.

THE WITNESS: Do you need this, Judge?

THE COURT: Thanks.

(Witness stepped down.)

THE COURT: All right. Mr. Parker?

MR. PARKER: We have no further witnesses at this time, Your Honor.

THE COURT: Let's -- I need to give the Court staff a break, so let's just take a 10-minute recess. And then we'll come back on the record, and the Defense can present its witnesses.

THE BAILIFF: All rise.

(A short recess was taken.)

THE COURT: All right. Thank you. Be seated.

Both sides need to -- you're going to need to expedite your questioning and make it more efficient on both sides, and -- otherwise, you're going to leave yourself five minutes to make recommendations to the Court.

I do need to take a victim impact statement. I do need to hear from Mr. Keefe, if he chooses to make a statement, so I'd encourage the parties both in their direct and cross-examination to start to move this along, because we're going to finish this sentencing today.

And so the Defense may call its first witness.

MR. MILLS: So, Your Honor, before we do

that, I have a couple of matters.

THE COURT: Sure.

MR. MILLS: First, Mr. Keefe, under the due process clause of the U.S. Constitution and Montana Constitution, moves to set aside any eligibility for a life without the possibility of parole sentence because the State has failed to meet its burden to establish his irreparable corruption.

THE COURT: The -- that motion is denied.

MR. MILLS: Thank you, Your Honor. Secondly, I wanted to address a standard that you mentioned at the end of the State's case, the nexus requirement between any mitigation evidence and having a cause related to the commission of the offense.

We'd object to any imposition of that type of requirement under both the cruel and unusual punishment and --

THE COURT: I've already ruled in your favor on that. I mean, I've already said that there's certainly mitigating circumstances that come up that can be considered under the analysis of the U.S. Supreme Court that don't necessarily have anything to do with the crime.

MR. MILLS: Thank you, Your Honor. I misunderstood your answer then. I apologize. Thank

you.

And then thirdly, Your Honor, you quoted paragraph 41 of the Steilman dissent, and for the proposition that the Court's task with resentencing must decide many cases --

(Court reporter interruption.)

MR. MILLS: Pardon me. I'm sorry. I'll move to the subsequent sentence that says: *Montgomery* has suggested an answer to this problem as well.

THE COURT: I understand. Look, I read it, and I know exactly -- and I'm going to cite that when I go through my legal analysis here and exactly what *Montgomery* says and why it says that.

MR. MILLS: Thank you, Your Honor. And I just also wanted to point the Court, because you'd asked for -- you did say that you didn't see any briefing on this, so I wanted to point the Court both to our funding application and also to the last two paragraphs of *Montgomery* where it talks about Mr. Montgomery participating in the prison programming is exactly the kind of evidence the Court would want to consider when assessing whether or not someone has been rehabilitated, whether they are someone who is irreparably corrupt.

THE COURT: All right. Thank you. You may call your first witness.

MR. MILLS: All right. Thank you, Your Honor. Before we call our first witness, I provided these, just a moment ago, a number of exhibits for the Court here. If I may approach?

THE COURT: You may. Is there any objection to any of these exhibits, Mr. Parker?

MR. PARKER: Your Honor, we -- we've seen all of these before, and the only thing that we object to, as we stated earlier, is about whether or not these were -- most of these were actually even written by the people.

THE COURT: All right. That goes to the weight of the evidence. Beyond that, any other objection?

MR. PARKER: No.

THE COURT: Then Petitioner's Exhibits 1 through 22 are admitted.

(Petitioner's Exhibits 1 through 22 were admitted into evidence.)

THE COURT: I have not admitted Exhibit 23, however, because the witness that you presented it to knew nothing about the document.

MR. MILLS: And we didn't move for the admission, to be clear, Your Honor.

THE COURT: All right. Thank you.

MR. MILLS: And also, Your Honor, we would move for judicial notice of that exhibit, in light of your previous comment. It's a commonly available Department of Justice report.

THE COURT: Well, it doesn't have any context. I mean, I don't have any testimony to explain it. I don't know what the investigation at Pine Hills was about. I wasn't involved with it, and there's nothing that's been determined as a result of it. There was a court decision or something like that, but what I've been presented with is a letter from the U.S. Department of Justice to Governor Stan Stephens at the time. I don't have any context to it.

MR. MILLS: Thank you, Your Honor.

THE COURT: You're welcome.

MR. MILLS: I would also want to note for the record that a number of people are here in support of Mr. Keefe. I just wanted to recognize that members of his family are here, including his mother and his aunt.

I also want to recognize that a number of people from his religious community are here, including Moe Wosepka and his group from Helena, the Catholic religious group, and Rowan Conrad and a number of members of his meditation group are here in support of

Mr. Keefe.

THE COURT: And I want to assure everyone who is here who took the time to write me a letter, I took the time to read every word of what was submitted to me.

MR. MILLS: Okay. Thank you, Your Honor.

THE COURT: You're welcome.

MR. MILLS: With that, we will call our first witness, Mr. James Michael Mahoney.

MR. PARKER: We renew our objection.

MR. MILLS: Excuse me. I beg your pardon. I beg your pardon, Your Honor. I've pitched them out of order. Mr. Robert Shaw. Although, I suspect we'll hear a very similar objection.

MR. PARKER: I mean, I'm deaf in my left ear. I didn't hear anything.

MR. MILLS: Oh, pardon me. Mr. Robert Shaw, first. I mentioned them out of order. Sorry.

MR. PARKER: Thank you.

THE COURT: All right, sir.

ROBERT RAYMOND SHAW,

after having been first duly sworn or affirmed under oath, was questioned and testified as follows:

THE WITNESS: I do.

THE CLERK: You can sit up there.

DIRECT EXAMINATION

BY MR. MILLS:

Q. Good afternoon.

A. Good afternoon.

Q. Please state your name for the record.

A. Robert Raymond Shaw.

Q. And could you tell us how you're employed?

A. I'm currently retired.

Q. And could you tell us what you're retired from?

A. Montana State Prison as a correctional professional for nearly 28 years.

Q. Of nearly 28 years?

A. 28, yes.

Q. And what were your roles at the -- with the Montana State Correctional?

A. I started as a correctional officer, advanced to a sergeant, was a correctional supervisor, case manager, unit manager, ran the diagnostic unit and the work units.

Q. And when did you retire from that?

A. December 22nd of 2017.

Q. And what institutions were you assigned to?

A. Montana State Prison.

Q. Any others?

A. I had a satellite assignment at Warm Springs for

a small period of time.
Q. But largely MSP?
A. Montana State Prison.
Q. And who have you spoken to about your testimony today? Anyone in advance of the hearing today?
A. I've spoke with -- I'm sorry.
Q. Did you talk to me about your testimony in advance? Did I interview you about your testimony?
A. Yes.
Q. Did you talk to Jim Sullivan about your testimony?
A. Yes, I did.
Q. What are your previous experiences testifying in court?
A. Basically, just coroner's inquests.
Q. And in your previous experience speaking in court, would that ever have been in support of an inmate?
A. No.
Q. And who would it have been in support of?
A. The State.
Q. In your experience at the Montana State Prison, approximately how many prisoners would you say you've come into contact with?
A. Thousands.

Q. How did you come to know Mr. Keefe?
A. Keefe was an inmate in Close Unit 2 when I started as a correctional officer in 1990.
Q. And please tell us about your responsibilities at that time.
A. I overseen the movement of the units, observed behavior, and reported that to the supervisors, kind of an overall operation. We were the first responders to inmate problems.
Q. Would you say you had close contact with Mr. Keefe during that time period?
A. Yes.
Q. And what were your impressions of Mr. Keefe when you first met him back in 1990?
A. Kind of naive, problematic. I mean, I -- you know, liked to involve himself into the convict code.
Q. And what is the convict code?
A. The convict code is basically an inmate philosophy that designates staff as the enemy and to get away with unauthorized behavior.
Q. And how common was it to see an inmate to practice the convict code?
A. All the time.
Q. And why might an inmate engage in adherence to that code?

A. To intermingle with the peers upon his blocks and be able to be safe, not be threatened, and to meld in with the others.

Q. Would that -- would adhering to that code present problems to the institution and for you --

A. It could --

Q. -- as a correctional officer?

A. -- yeah.

Definitely, yes.

Q. And did you -- did Mr. Keefe experience problems based on his adherence to that code?

A. Yes.

Q. What type -- what type of problems?

A. Disciplinary problems.

Q. And when you met Mr. Keefe, you were aware he had already been convicted of an escape attempt?

A. Yes.

Q. For Mr. Keefe, how long did this behavior, this adherence to the convict code, continue?

A. I noticed a change in behavior probably in the late '90s, right around 2000.

Q. And during that timeframe, what was your responsibility in terms of interacting with Mr. Keefe?

A. I was a sergeant at that point in time where I was overseeing the operations of the housing unit.

Q. And so -- and what did you see change about him?
A. He was more dedicated to rehabilitative processes. He was -- he was distancing himself from negative influences. He was starting to maintain periods or longer periods of clear conduct. He was becoming part of -- you know, just his own identity and not having to belong with other people.
Q. Is it fair to say that every -- every parting of ways with the rules results in an infraction or finding that makes it into someone's record?
A. No.
Q. But is it, nonetheless, fair to say that a long history without something on one's record is, nonetheless, reflective of good behavior?
A. That's correct.
Q. What kind of programming did you see Mr. Keefe involve himself in?
A. Well, he involved himself in college courses. He did anger management, CP&R.
Q. What's CP&R?
A. CP&R is a cognitive advancement program that deals with coping-type issues and problem-solving.
Q. And did you say you saw a change in Mr. Keefe as a result of this programming?
A. Yes.

Q. And was Mr. Keefe involved in any jobs?
A. Yes.
Q. Can you tell me about his work with the Inmate Welfare Fund?
A. He was -- the Inmate Welfare Fund is a voted-in thing by inmates. It's established with criterion through the staff to represent inmate and staff interactions to establish progress and to -- to make that communication, to make things better.
Q. Is it a way for inmates to communicate their concerns to their representatives so that staff can interact with the representative to come up with solutions?
A. Yes.
Q. And was Mr. Keefe a part of developing those solutions?
A. Yes.
Q. Was he elected because he was a heavy --
A. No.
Q. -- within the prison?
How do you know that?
A. He's never acted as a heavy, identified as a heavy. He's never participated against anybody, you know, that's --
Q. Might inmates --

A. -- been with --
Q. -- want to elect someone who abides by the convict code to the Inmate Welfare Fund?
A. They might want to, but they wouldn't meet the criterion of the staff.
Q. So there's a check on that?
A. That's correct.
Q. And there was never any problem with that with Mr. Keefe?
A. No.
Q. Are you familiar with Mr. Keefe's work in a canine dog training program?
A. Yes.
Q. Can you tell me some about that?
A. He participated in the dog program in Shelby, Montana, up at --
Q. What was that program?
A. It was basically training dogs for, like, blind and veterans and stuff like that to show interaction and coping skills on how to progress forward with -- with compassion.
Q. And are you familiar with Mr. Keefe's election with regards to MCE?
A. Yes, I was aware.
Q. What's that?

A. MCE is a different representative that's elected by -- from his work status, so there would be one for, like, the housing unit and then one for, like, where -- the one for the MCE would be -- he would be a work representative to accomplish the same things.

Q. Okay. So it's just a different area of the institution, inmates elected him to communicate problems of that area of the institution to staff?

A. That's correct.

Q. And what were Mr. Keefe's responsibilities both with the IWF and the MCE in terms of reporting back to his fellow inmates?

A. Once the determination was made, he was the first responder to go back to identify what the issues were with the problems, whatever was decided. And then what I would do is follow up with a memo or minutes from the meetings to establish that, and he would have to distribute them.

Q. And in some ways was it his responsibility to make the case for the decisions that staff would make --

A. Sometimes.

Q. -- to his fellow inmates?

A. Yes.

Q. And were those decisions usually granting whatever the requests were?

A. No, just the opposite.
Q. No. Stepping back to the canine dog program, is that something Mr. Keefe was passionate about?
A. He was emphatic with it. I mean, that was kind of his calling to it. I mean, that's what he loved. That's -- you know, that's what he identified as, you know, being his gold down -- down the road.
Q. After Mr. Keefe started engaging in programming and after this change that you noted in the late 1990s and 2000s, how did his overall behavior change?
A. He became more interactive with staff. He took advice better. He became more advanced within the programming. He wanted to assist other offenders. His identity with that is that he knew that he wasn't getting out of prison, and that he seen all the recidivism coming back with all these reoffenders. And he figured if he could help out one at that point in time that, you know, then he did something positive.
Q. Now, you mentioned that he knew he wasn't getting out of prison, and he was engaged in programming.
Is there some significance to those two facts? So he was not getting out of prison and yet he was engaged in programming, is there anything unusual about that?
A. It is. For a person that -- that got the

sentence that Mr. Keefe has got, usually we deterred away from programming due to, you know, people trying to get in. We were giving people opportunities that were getting out that could apply that education rather than just frivolously giving it out within the institution to whoever wanted it.

Q. But Mr. Keefe did want to better himself, is what you're --

A. Yeah. He was adamant. He wanted to make a positive change.

Q. And through that programming you witnessed a positive change?

A. Yes, I did.

Q. And how does his behavior compare to other lifers?

A. He distanced himself away from a lot of the negative behavior. There's not that -- that pressure to have to fit in. He's kind of his own entity. He just kind of does his own thing and is left alone. You know, he's got more clear conduct than most people have time.

Q. More clear conduct than most people have time, did you say?

A. That's correct.

Q. Without getting into any details about the nature of his offense, is that something that Mr. Keefe had an

opportunity to talk with you about?

A. Yes.

Q. And would it be something -- when would it have been that he first talked about that with you?

A. I'm not sure when the first time would have been. I'd say, you know, recently within assignment to C unit as the manager, we did classifications, for a while there twice. You know, we would reassess twice a year, and then it was reduced to once a year. But we would go into dynamics of his behavior and what the dynamics are but what the progress was.

Q. Based on your observations of Mr. Keefe in that context, is it clear to you that he's remorseful for his conduct?

A. Yes.

MR. MILLS: Your Honor, request to approach?

THE COURT: You may.

Q. (BY MR. MILLS:) Please take a moment to review what's been marked for identification at this point as Petitioner's Exhibit 24.

MR. PARKER: No objection, Your Honor.

THE COURT: It's admitted.

(Petitioner's Exhibit 24 was admitted into evidence.)

MR. MILLS: Thank you, Your Honor.

Q. (BY MR. MILLS:) Mr. Shaw, can you tell us what this -- this is?

A. It looks like a request from Steven Keefe wanting to approach his victims.

Q. And what's the date of that?

A. Bottom date -- the response date is 12 -- it looks like 12/15 of '15.

Q. December 2015. And in that report, does it indicate that this is a subject that he's raised with you before?

A. Yes.

Q. Do you remember that interaction with him?

A. I do, briefly.

Q. And what was the nature of that interaction?

A. He wanted to write his victims, and we kind of were discouraging that because we didn't know the process or if the victims would want to be contacted.

Q. Uh-huh.

A. So he was given direction to go through an alternate deal to give out his empathy, and it would be evaluated by staff.

Q. Based on your observations of him at that time when he was talking to you about making this outreach, what was his purpose for doing so?

A. He wanted to get -- what he stated he wanted to

do is to give the victims some peace. If there was something that he could do to -- to quell some of their fears or answer any questions to make it easier to cope, he wanted to do that.

Q. Would part of that have been reconciliation as well?

A. Yes.

Q. When was the last time that you were in contact with Mr. Keefe?

A. Probably right before I retired.

Q. And when was that again?

A. December 22nd of 2017.

Q. And what was your -- what was your impression of Mr. Keefe at that time?

A. He wanted to make a positive change; that he had a glimmer of hope that this hearing would -- would someday occur.

Q. Uh-huh.

A. But he was prepared to spend out his -- his time in prison and was looking at alternatives of maybe a progression to where he could work himself to the work dorm and work out and get some more privileges that way.

Q. And you said you interacted with thousands of inmates?

A. That's correct.

Q. Compared to -- well, do you see Mr. Keefe as a risk?

A. Low risk.

Q. Low risk. Would you be happy to have Mr. Keefe as a member of your own community?

A. Yes.

MR. MILLS: Just a moment, Your Honor.

No further questions.

THE COURT: Mr. Parker, any questions?

MR. PARKER: None, Your Honor. Thank you.

THE COURT: Thank you. You may step down, sir.

(Witness stepped down.)

THE COURT: The Petitioner may call its next witness.

MR. MILLS: Thank you, Your Honor. Petitioner calls James Michael Mahoney.

MR. PARKER: We renew our objection, Your Honor, with regards to any expert testimony here. He's not an expert in any of these areas, as well as he's not supposed to be an expert in this hearing.

THE COURT: All right. You can make a specific objection, but to the overall testimony, it's overruled.

JAMES MICHAEL MAHONEY,

after having been first duly sworn or affirmed under oath, was questioned and testified as follows:

THE WITNESS: I do.

THE CLERK: You can have a seat.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. MILLS:

Q. Good afternoon.

A. Good afternoon.

Q. Could you state your name for the record.

A. It's James Michael Mahoney.

Q. And what training and experience, if any, do you have in corrections and rehabilitation?

A. My -- I have worked in corrections in Montana for a little over 30 years, and in that timeframe I was appointed warden in October of '95. I probably went to annual conferences sponsored by the National Institute of Corrections over 40 hours long in different subjects.

I am certified by the training academy in Montana on everything from detention officer basic through administration. I think there's five categories that you can become certified in operations.

Q. And in your experience as warden at Montana State Prison, did you have some responsibilities for

recommendations of inmate placement, and did you work closely with the parole board on transfer of inmates that had been granted parole?

A. Yes, with qualifications. I've worked closer with inmate classification when I was the associate warden of classification and treatment. When I was in that position every Monday, the deputy warden and I would review classification reports based on custody level within the institution. Classifications were reviewed on a regular basis.

As a quick example, inmates in max had their custody reviewed every 30 days and then every six months with regular reviews. And if an inmate had a disciplinary infraction, he could be recommended for a review of his classification as part of the sanction and a disciplinary report.

Now, I also worked after the '91 riot with a lady named Patricia Hardeman [phonetic], and we transferred the classification system from a subjective to an objective classification system, based on risk and needs scores. And I worked very closely with her. So I know that's longwinded, but there's a lot to the classification.

Q. And that's something you helped develop?

A. Yes.

Q. And either in your capacity as warden or other corrections professional capacities, have you had the occasion to testify in court?

A. I've been called on to testify many times in my capacity as warden.

Q. Would that have been as a witness for the inmate?

A. No.

Q. For the State?

A. Yes.

Q. And you've indicated that you've participated in parole hearings. Would it have been more than a thousand parole hearings?

A. You know, whatever the math is on 24 years, monthly parole board hearings. Every month I attended the hearings, yeah.

MR. MILLS: Your Honor, in addition to asking Mr. Mahoney to testify about his interactions to Mr. Keefe, we are offering Warden Mahoney as an expert in corrections and rehabilitation.

MR. PARKER: We object to that.

THE COURT: Well, the determination of whether or not a particular individual has been rehabilitated is both a factual and legal determination, and so to the extent that it encroaches on legal concepts, you know, that's obviously my domain.

I'll let you ask him questions, and if I feel that they are sort of crossing the line, then I'll let you know.

MR. MILLS: Thank you, Your Honor.

THE COURT: So the objection is overruled for now.

MR. PARKER: Thank you, Your Honor.

Q. (BY MR. MILLS:) Very briefly. You heard Dr. Page testify. Were you willing to talk to Dr. Page?

A. Was I willing to talk to him? Yes.

Q. Did Dr. Page call you?

A. You know, he called me once, and we missed. And then I tried calling him back about three or four times. We just never connected.

Q. Turning to Mr. Keefe, would you give us an overview of your -- of your findings about Mr. Keefe?

A. You know, much similar to Dr. Page, he arrived at the institution and immediately made a real impression for himself in a very negative way. He tied himself to a couple of inmates who felt that they had recognized a deficiency in our perimeter security system between Tower 1 and the old administration building, and got involved with two other individuals in an escape attempt and was charged and found guilty of attempted escape.

And really I believe that was a bit of an

epiphany for Inmate Keefe. I think he started to realize, after having experienced maximum security, that was not a lifestyle that he wanted to subscribe to, and as a lifer, that he wanted to pay attention to that.

And then learned quickly that within the classification system that his attitude and his behaviors would be a driving force in what level of custody and what area in the institution he would reside, so I -- I think that that really helped him start a foundation of making some mental changes about how he was going to approach his incarceration.

Q. And he's made those changes?

A. I believe that he has.

Q. Has he chosen to do something constructive with his time?

A. You know, Mr. Keefe has done a lot of constructive things and in some respects got caught up in an overcrowded prison system. And by that I mean, in addition to doing time at Montana State Prison, Mr. Keefe got transferred to Tennessee and did time at the private prison in Shelby and may have even done a small stint at the Missoula Regional Prison.

And the reason I bring that up is in each one of those areas, he always had a job and was always willing to program and do different things.

As an example in Shelby, he worked and went to school to do computer programming classes, which may be very close to the equivalent to college entry-level coursework.

And he engaged in the dog training program and really excelled at that. And, in fact, to the point when he was returned to Montana State Prison, the director of that program left a message that if Montana State Prison was ever interested in trying to emulate that program or start a dog training program at Montana State Prison, that he would be a good inmate to take in as a trainer in that program, that he excelled at that and did very well.

Q. In your decades of experience in corrections, would that have been an unusual recommendation?

A. That would be a very atypical recommendation, yes.

Q. But a strong one?

A. And very strong, yes.

Q. You heard some testimony earlier today about Mr. Keefe's history at the food factory.

Is it fair to say that there were some problems in the administration on the -- on the Correctional Enterprises side with the boot factory?

A. The boot factory was a program that was bought

into Correctional Enterprises. And, again, just to clarify for the Court, that Correctional Enterprises is a separate division from Montana State Prison. It is funded as a proprietary fund, which means it develops and brings in the money, that it supports itself, versus Montana State Prison which is run off of the general fund.

Correctional Enterprises adjoins Montana State Prison with a single-fence perimeter and has programs there. And outside the fence, the State has over 30,000 acres, a dairy farm, and other programs. And we brought in the -- when I say "we," collectively, Gayle Lambert, the administrator for Correctional Enterprises, and I, as the warden, agreed we would bring in the boot program as another training opportunity for the inmate population.

In the example that was used earlier, unfortunately, we had some issues with the owner of the program not wanting to strictly adhere to all the security policies associated with operations at Montana State Prison and would routinely do unorthodox things, like tell inmates it would be okay to wear boots if you made them so that you could be a better boot maker; if you wore them, you would know how they feel and you would know better how to adjust things that you

do as you make the boots; and maybe even told inmates it would be okay if they wore them home.

Now, when they did that, that was the responsibility of my security staff to catch when they were leaving the single-fenced perimeter to come back inside the double-fenced perimeter, to catch people wearing boots that would be considered contraband. But they were getting mixed messages, because that supervisor from time to time, I think, did exercise discretion that he really didn't have about what could go on in that boot --

Q. And that contract was terminated based on a range of problems?

A. Yes.

Q. Thinking about your role as both the warden and associate warden, what is the purpose of providing job opportunities to inmates?

A. Work assignments for inmates covers a multitude of areas. From a security standpoint, having an inmate occupied during the day and not idle, to me, is a very good security system. It's part of the security process, that an inmate being productive from a treatment standpoint, an inmate who can see a final product, that's something he can be proud of and works on building healthy self-esteem.

From developing a marketable job skill, I will back on industries. An inmate who goes through that program and that works in the furniture shop, as an example, will learn how to make custom furniture. I still believe that Montana Correctional Enterprises makes the finest office furniture available in Montana. You'll find it all over the capital, and it permeates all the state and county governments.

Q. How is Mr. Keefe as a worker?

A. Mr. Keefe has a reputation of having a very strong work ethic.

Q. And has he internalized the lessons of having -- and embodied the purposes of having jobs in Montana State Prison?

A. You know, two jobs that come to mind that showed me Mr. Keefe started moving out of some of the adolescent narcissism, if you will, was when he went to work for the school in the reading for the blind program.

And that's basically a program where we have a sound booth, and inmates will be screened. And if they're deemed -- have the ability to read at an appropriate level, they will read books into the -- onto tape in the sound booth, and they will be used by libraries for blind people who want to check out books

on tape.

Q. And why is that significant for Mr. Keefe?

A. Because it really involves him thinking about things that go beyond the scope of how it impacts him. That impacts other people's lives, and I think he thought about, this is something that I can do to contribute to society even though I'm looking at spending the rest of my natural life being incarcerated.

MR. PARKER: Your Honor, we're going to continue to object at this point. He's trying to enter into the mind of Mr. Keefe here and explaining as an expert.

THE COURT: Overruled.

Q. (BY MR. MILLS:) Were you finished? I'm sorry. I think --

A. You know --

Q. -- there was a different job.

A. -- it -- to summarize, it really shows that he was moving beyond thinking about himself.

And the other thing is the dog program -- where, again, not his testimony, mine -- that he was responsible for this animal, its custody, its care, and its training. And so that went beyond the scope of what he -- just being responsible for himself, and that required more maturity on his part to do that.

Q. And to your knowledge, is Mr. Keefe engaged in other kinds of programming besides job programming?

A. You know, he's been involved with religious activity programming. Mr. Shaw talked about some of the treatment programs that he was involved with. He also did STEPS, which is a program we brought in from Pacific Institute from Seattle. And I think that program had a lot of impact on getting Mr. Keefe to think beyond "what's good for me" and looking at developing a goal or a mission in his life to do things, like trying to mentor young guys coming in to not get involved with the wrong crowd in the institution and do their own time.

Q. Have you witnessed Mr. Keefe change and improve over time?

A. You know, I believe Mr. Keefe -- as was testified by Dr. Page, that it's part of a natural process, some of which he gets credit for and part of it is life. But he -- going from 17 years old to a 41-, 51-year old man, he's -- he has matured and grown up and changed his behaviors.

Q. What are your overall impressions of Mr. Keefe as an inmate?

THE COURT: I think that's cumulative. I mean, he's testified to that.

MR. MILLS: Very good.

Q. (BY MR. MILLS:) You've mentioned your interactions with the parole board.

Have you had an opportunity to review Dr. Page's recommendations with regards to a reentry program?

A. I briefly looked at Dr. Page's report, and I submitted some of my own.

MR. PARKER: We're objecting on that basis.

THE COURT: And you know what, I didn't let Dr. Page get into that because this isn't a parole hearing. It's not -- we're not at that point.

So in terms of whatever recommendations might be made by people to a parole board, if it gets to that, that's for another day.

MR. MILLS: Thank you, Your Honor.

Q. (BY MR. MILLS:) What are your overall impressions -- oh, pardon me. Before we get to that, there was testimony about tattoos.

Do inmates get tattoos?

A. That's a very sensitive subject to me. As the warden, I was vehemently opposed to tattooing and had a real problem with it. The problem in the last 10, 15 years in corrections in general, and certainly in Montana, it's taken on a new dimension that people don't believe there are security threat groups or gangs in Montana, and there are.

People don't believe it because of the names, LVL, -13s, the Norteños, Sureños, but it's very much involved with the drug traffic from the coast into Montana. And so why it's problematic and a security issue is, if you put Norteños on the same block as Sureños, you're going to have problems; you're going to have bloodshed. So it becomes a big issue for institutional security to know that.

To that end, I sent a lieutenant off years ago and made him this -- to get training on being able to identify. So when an inmate comes into Montana State Prison, they're strip searched and very well documented what tattoos they have on them, and staff are trained to look all the time for fresh tattoos to see.

With Mr. Keefe having traveled to all the other institutions I talked about, I can't assess what may have happened while he was in Tennessee or Shelby or another correctional facility.

Q. But there's no indication to you, based on your interactions with him and based on observing his interactions with other inmates over decades, that he's involved in security threat groups of the kind --

A. No, I do not believe he's part of a gang.

Q. I -- how long have you known Mr. Keefe?

A. Pretty much for the time that he was there that I

was there, yeah.

Q. Is he the sort of person you would want in your community?

A. You know, if he is deemed appropriate for release and, again, with the proper planning, I think he would be much as Dr. Page said, I think he could be successful.

MR. MILLS: Just a moment.

Nothing further, Your Honor.

THE COURT: Any questions, Mr. Parker?

MR. PARKER: Really just a short series, Your Honor, very short.

CROSS-EXAMINATION

BY MR. PARKER:

Q. Mr. Mahoney, you just stated a moment ago that you take the tattooing issue very, very seriously.

Back in 1995, you actually reduced Mr. Keefe's tattooing infraction from Class 3 down to Class 2 -- or a Class 2 down to a Class 3. Do you recall that?

A. For the record, not to be belligerent, but it would be a Class 1 to a Class 2.

Q. Well, I could show you a document.

A. Okay.

MR. PARKER: If I may I approach?

THE COURT: Sure.

Q. (BY MR. PARKER:) This is already in evidence, and it's Exhibit 10. If you can tell on the last page there whether or not that is actually your signature.

A. Yes, it is.

Q. And it's dated March of 1995. And you did, in fact, reduce it?

A. Yes.

MR. PARKER: Thank you. Nothing further.

THE COURT: All right. Any redirect?

MR. MILLS: No, Your Honor.

THE COURT: Thank you, Mr. Mahoney.

THE WITNESS: Thank you.

THE COURT: You may step down.

(Witness stepped down.)

THE COURT: Does the Petitioner have any other witnesses?

MR. MILLS: We do not, Your Honor.

THE COURT: All right. At this time, Mr. Parker, I'd like to take a victim impact statement, if a member of the McKay family would like to make a statement.

Again, unfortunately, I don't have the flexibility today to take multiple victim impact statements, and I recognize that this crime has affected so many members of the McKay family. I've received

dozens of letters from them. I've read them all.

But for the purposes of making an official victim impact statement here in court, I'd ask that the family designate one person to make that statement to the Court.

MR. PARKER: Thank you very much. And Mûna Qamar will make that statement, Your Honor.

THE COURT: All right. Would you feel more comfortable sitting up here or would you rather stand there? Wherever you feel most comfortable, ma'am.

MS. QAMAR: I'll just do it here.

THE COURT: All right. Thank you.

MS. QAMAR: When I was three years old, my mother and grandparents were murdered by Steven Wayne Keefe. He shot my grandfather in the back of the head.

My mother came into the room, saw her father murdered, and ran for her life. He shot at her five times as she fled. She tried to escape but was unable to get the front door open. He shot her in the back.

My grandmother came out of the cellar to find her own daughter dying and knelt beside her. Keefe shot her, too. I was sleeping alone, helpless when my family was murdered nearby.

I know these details because when I was a teenager, hungry for any information I could find about

my mother, I Googled her name. I found a record of Keefe's appeal from 1988. Feeling into the terror and fear in their last moments is something that my family has been trying to protect me from since it happened.

Those images did terrify and haunt me, but they also gave shape to an event in my life that previously had been a black hole in my memory, the shadowy feeling of dread and doom with nothing to grasp onto, something repressed and not spoken about.

When I lost my mother, my aunt and uncles lost their sister and parents. My father lost his wife. From one day to the next, my whole world was shattered, and everyone still in it was experiencing suffering and pain, too.

Everyone was traumatized by this callous murder, so no one talked about it. They were frozen in their grief. It's not their fault, but I didn't get the help that I needed to cope with heart-wrenching loss. Family taboo robbed me of a context and freedom to talk about it, to process, and to heal. I missed out on knowing my mother through their memories because it was too painful for them.

My father, someone who I knew loved me, who I could trust, was someone I instinctively knew I couldn't ask. I sensed the depth of his grief and

thought by not asking about her, I was protecting him. As a child, I knew my mother had been murdered. Beyond that, I didn't have the tools to express what that experience meant for me. I remember crying alone in my room, feeling a deep sense of loss, but also not knowing exactly what I had lost, because I didn't know her.

My family didn't talk about it, but it still creeped into my daily existence. An innocent question from a peer about family, and I would blurt out: "My mother was murdered when I was three." Terrified, but at the same time not wanting to lie, then I would face the horror and shock that came over the person, and then sometimes their disbelief. How could I speak of something so awful so calmly? But I didn't know how to be. They were expecting something of me, and I was so confused. It was stigmatizing.

In order to be okay of the world, I had to close off my heart. I shut down and forgot, in order to survive. I don't have any early childhood memories.

But not processing something like that catches up with you. I began to have panic attacks. They started in high school, and they drastically increased in severity in my 20s.

After I lost my father, I finally started seeing a therapist, and it has taken me years to accept

and start to understand how this loss has shaped my life, to be able to talk about it, to start asking questions. From one day to the next, my world was shattered. The most important person in my three-year-old life was ripped away from me. How could this not have a profound effect on a little being?

Processing that experience and understanding that effect is something I'm still struggling with. I know that it has impacted my ability to form relationships, both friendships and romantic. I protected myself by building up walls and by learning to be emotionally alone, to hold the trauma by myself. I don't let people in easily. Relationships require trust, believing you won't be hurt by anyone, abandoned, safer to be alone.

Only now as a mother myself am I able to feel compassion for myself as a little girl. It's abstract in a way until you are a mother or a wife to know how profound that bond is. I'm now able to feel into that connection, how wrenching and awful it would be to have that severed from my own child and husband.

A year and a half ago before my son was born, I found a baby book from my childhood. In the back pages I discovered a note from my father. The first evidence and insight into his experience. Over

30 years after my mother's murder and 13 after my father's death, he finally communicated the depth of his own loss to me. Another vague understanding I had as a child finally made concrete.

This is what he wrote: October 31st, 1985. Two weeks ago, on October 15th, your beautiful mother and my wife was taken away from this world. I cry every day, and I pray that I can give you enough love.

Minka, Machi, and Grandpa Dave are gone forever, and you ask why. I cry. We both went to see them lying peacefully. You ran to mommy and touched her and asked why. I cried and you cried, but you seemed to understand. Minka always wanted to return to Montana, and now she has. She rests with her mother and father on a windswept hill in Great Falls.

Mûna, your mother loved you more than anything and you loved her. Minka was gentle and courageous and elegant and intelligent. And I never loved another woman more, and I always knew that we would stay together as long as we lived. Someday you will be very proud of her.

Mûna, your memories of your mother will fade. Her beautiful voice singing to you, French phrases that intrigued you, frolicking with her in the swimming pool, your joy when she would call on the

telephone or come home from work, lying on her lap in the mornings at the kitchen table, hugging her at night as she took you to bed, the cries of joy when she picked you up from school.

As you grow older, you will share many of your mother's wonderful attributes because she's a part of you. I'm sad that you couldn't know her better. On our last days together, we were joyful. We took a vacation to the west coast of Vancouver Island. We finally got to camp in the Broken Group, just the three of us. It was adventurous and beautiful and peaceful. We were outside with eagles, seals, gulls, trees, standing in the waves. This is what we loved best.

Your mother would have finished her pediatric residency in a few months, and we would have started a new life together. Now, you and I will start a new life by ourselves. Mûna, you and I have suffered a great loss, but thank God, we still have each other. You give me so much happiness, and I will do my best to make you happy. Your dad.

It has taken a long time for me to feel safe enough with someone to let them in, to find peace and a partner to start to build a life and family. That same juncture that my father described when his world was ripped apart is where I am now. I found peace and

happiness, through these last months, experienced joy in a way that I didn't allow myself to before then.

I remember basking in it for a moment, wondering how long it would last. A week later my uncle called me and told me about this resentencing. Fear and doom started to creep up, along with panic and unease. Fear of being where I am now in a room with my own personal bogeyman, and just the terror and fear and anxiety over the possibility of his release. The one thing that gave me a sense of safety, knowing he would always be in jail, slipping away. If you put him up for parole, he -- what he has done will continue to terrorize me and my family.

In 1986, Steven Wayne Keefe was sentenced to three terms of life imprisonment to be served consecutively for the murder of my mother and grandparents, and 50 years for other crimes. He was deemed a dangerous offender, not eligible for parole.

In his 1998 appeal, this decision was upheld, and I ask you to uphold this decision for the third and final time.

THE COURT: Thank you.

Mr. Mills, does your client wish to make any statements to the Court?

MR. MILLS: Yes, Your Honor.

THE COURT: You can just move the microphone close to him. He can make that from counsel table.

THE DEFENDANT: I just want to express my deepest sympathy to the McKay family for what happened. I take full responsibility for what happened. There's not a day goes by that I don't think about what happened.

I can't -- I can't begin to understand your stress. I can't begin to -- all the pain and suffering you went through. There's nothing I can do to bring these people back, but the only thing I can do is live for what -- what I have, you know, done all these years, and I've -- I've made a better person. I'm a better person today than I ever was.

I made a lot of mistakes when I was younger, and I've grown up a lot. I've done, you know, as many things as I could possibly do to better myself. There's nothing I can do to undue the pain and suffering that you went through, and I am so sorry for that.

But I wish that -- you know, I ask for your forgiveness. You don't have to give that to me, but I beg for your forgiveness. And that's all I can say.

THE COURT: All right. Thank you, sir.

Mr. Parker, at this point, I'll take the recommendations of the parties. I'm going to need the

parties to limit their recommendations and any arguments they wish to make to 15 minutes per side.

MR. PARKER: Should I come to the lectern?

THE COURT: Please.

MR. PARKER: Your Honor, we briefed this matter to death so I'm not going to revisit the law here, except to touch upon the fact that *Miller* and *Montgomery* require us to take into account the future of the youth and how the juvenile mind is different from the adult mind. We've done that through an expert. We've taken that into account here this time.

We've corrected, then, the former sentencing procedure, and that places us back in the circumstance of a regular sentencing hearing. It's where we're at now. We've talked ad infinitum with witnesses here about different things that we feel are indicative of an individual who is not repentant, who has not accepted responsibility, who is still a danger.

Even Mr. Keefe's statement just a moment ago, he refers to "what happened," "I take responsibility for what happened," not that "I murdered three people during a burglary," which is what he was convicted of.

Now, I understand the case law on this, that he may maintain his innocence. The Court doesn't have

to -- cannot take into consideration the fact that he maintains that innocence, but the reality is that he's not maintained his innocence.

He first stated in 1985 and '86, I wasn't even there. I wasn't at the scene of this crime. The FBI manipulated the ballistics on the firearms that I stole from a burglary in another location that I was tied to, and that's why I'm in prison. That lasted for the bulk of 20 years.

2003, he then reluctantly admits, yes, I did this. And this is the point that Your Honor was making earlier, now he's got a new story, absolutely; a story that has been molded and shaped to fit into the case law that he believes will get him some kind of relief from a life sentence without parole.

It is a lie. He has continued to lie. He will continue to lie. He will continue to harm people, if he is released. If he's given that parole eligibility, at a minimum, he'll continue to victimize these individuals, this family who should not have to go through this again and again and again. And that's what the reality is if he's granted the possibility of parole.

The case law states that it's a unique, very small class of individuals who do these crimes when

they're juveniles that deserve life without the possibility of parole. Mr. Keefe has shown himself for the 20-plus years and the time that he was in prison that he's exactly that same person that he was.

Then he tells -- tells Tim Hides, well, the ACLU comes to me and says, you better behave yourself for the next bit of time; otherwise, you're out of luck.

Mr. Keefe's PSI indicates to us that he will never admit to things unless he's absolutely cornered, and he will behave himself and modulate his behavior to reach a goal that benefits himself.

Dr. Page has indicated that he's likely still psychopath. He likely still fits that antisocial personality disorder type. When we get into the context of irreparable corruption versus transient immaturity, the crime itself is so heinous that that, under our case law, allows us in a regular sentencing hearing now to give him life without parole.

It is astounding that Mr. Keefe has tried to paint himself as a hero who saved Mûna Qamar. Those are the facts that you're aware of, that everyone else is aware of here who actually is practicing [sic] about this. It didn't come out during this hearing, and I hope the Court will take that into consideration; that this perpetuation of a lie, this perpetuation of a harm

about what he claims now happened, not what he did, has to be a consideration of his character. And the Court may certainly assess his character, his behavior, and his pattern of actions throughout these years.

Nothing he has done -- learning how to behave yourself in prison is what's expected the same day you walk in. You're expected to follow the rules. These prisoners after -- sometimes they get tired of behaving incorrectly. But for Mr. Keefe, that path not only led to having a shank in his possession, having a slingshot in his possession, stealing things, being undisciplined, drinking and making alcohol, for years, those kind of infractions.

And the tattoos here, I can't underemphasize who -- who would say, I didn't kill three people; I'm a hero, actually; I was just along with my brother-in-law. Who would memorialize their body for the rest of their life with the emblem of death, the death of three individuals that he murdered in a callous, unfeeling, horrific manner?

Life without the possibility of parole is the only sentence that actually makes any sense for what Steven Wayne Keefe has done.

Your Honor is very correct that this new cockamamie story speaks volumes about everything that

counsel for Mr. Keefe has tried to skirt. Look what he's done in prison. He could be okay outside. But at the same time, he -- he doesn't see the harm in that story itself. He sees things from a perspective of what benefits Steven Wayne Keefe.

That has not changed. That is unlikely to change. In fact, we see no evidence of that having changed. Learning how to run a forklift, getting your CDL, and learning how to control dogs in a prison are not the same thing as rehabilitation. It's not a diagnostic term. However, I think all of us can sit here and go, well, there's a person who has changed his life. Maybe to some degree, varying degrees, but that does not mean that Steven Wayne Keefe is rehabilitated in any way, shape, or form. There is no evidence of that.

He still fits the diagnostic criteria. Dr. Page's statement that he just, in fact, didn't see the presentation of it during their interview and conduct of these things, that's one thing. But it doesn't preclude the previous diagnoses. They were accurate. They stand accurate today, according to Dr. Page. Because of that, we have someone who again and again and again tells lies and does things that only benefit himself.

From the time he was 13 to the time he was 18, he committed three crimes per month, and we're not just talking about stealing a Snickers bar from the store. He's stealing motorcycles; he's stealing cars; he's burglarizing places. He's victimizing his own mother.

In fact, in the first PSI it says that most of his crimes were to abuse his mother, were to punish his mother. One of those crimes, according to the PSI, he's waiting in the ducting in his mother's work so he can burglarize that place.

He lied in wait, in multiple locations, stole a .44 Magnum, emptied its cylinder, killing the first two victims, reloaded, and then killed the third. That's what the evidence of this case said. If that's not a person who is permanently incorrigible, I don't know what it is.

Steven Wayne Keefe needs to spend the rest of his life locked away from the rest of us. This is not something that just happened. This is something that he did. Everything else from that point on has been a manipulation and a fraud. And what he has shown here through the things that he has submitted, some letters of which aren't even written by the people who are in support, it's another machination, which is a

continuation of the scheme that we've seen throughout the pleadings in this case, despite being told again and again and again, we're not going to talk about this; we're not going to have a new trial; we're not going to do that.

A person who is incorrigible doesn't stop when they're told something is wrong. They fail to recognize that something is wrong. This is Mr. Keefe's strategy. We have to look at permanent incorrigibility here, and that speaks volumes, Your Honor.

The State recommends that he remain in prison for the rest of his life, without the possibility of parole.

THE COURT: Thank you.

Mr. Mills?

MR. MILLS: Yes, Your Honor, briefly. And thank you for the assistance with getting the audio/video equipment.

THE COURT: Sure.

MR. MILLS: This is just marked for identification. We're not moving to admit it, but I have a paper copy for you.

THE COURT: Thank you.

MR. MILLS: And just moving over here to get --

THE COURT: No problem.

MR. MILLS: Your Honor, ultimately, Mr. Keefe's journey is about transcending some things. We've heard a lot of testimony about his early years. You've heard State's witnesses disregard some of the relevance of that information.

When Mr. Keefe was an infant, his mother moved him to Helena, and the family immediately became homeless. In school, one of Keefe's teachers hit Keefe hard enough to knock his teeth out. His stepfather tortured him. He never met his biological father. His mother was an abusive alcoholic.

Mr. Keefe was born into a dysfunctional family and was born into a chaotic home. Here is Mr. Keefe with his siblings. Mr. Keefe is the younger of the two boys.

Your Honor, males between the age of 14 and 16 are the youth most prone to risky, antisocial behavior. We heard a lot about the ways the turbulence inside the Keefe home were manifested in Keefe's actions outside the Keefe home.

He engaged in joyriding, stealing money from his parents. His delinquency also reflects desperation, stealing soup, stealing a dollar, acting out, as Dr. Page noted in his report, to gain the attention of

his mother. This period was defined not just by impulsive actions but poor decision-making that is the hallmark of youth. This was the darkest period of Mr. Keefe's life.

Mr. Keefe committed the instant offense and is responsible for the deaths of Marian McKay, David McKay, and Constance McKay.

Mr. Keefe entered the Montana State Prison after being convicted, of course. Newly in the prison, he was surrounded by adult inmates and was hit hard enough to suffer a skull fracture. Abiding by the convict code, he refused to name the perpetrator and even delayed treatment for several days.

In the same timeframe, under the influence of two older inmates, Mr. Keefe unsuccessfully attempted to walk out of prison and climb the perimeter fence.

Your Honor, we know that the part of the brain that controls decision-making does not mature in males until the mid-20s. Shortly after Mr. Keefe turned 25, this is what MSP staff had to stay: "The team members who have worked closely with Mr. Keefe feel strongly that he has earned a chance at reduced custody, recommend A unit. Note: Mr. Beatty wants to retain him as a library aide in low side library."

His prison records note that on May 9th,

1995, he wants to help -- wants to understand his offense. He wants to come to grips with it.

He expressed that interest to prison staff. They noted it, and they also noted that he began connecting with Catholicism. In 1998 he began attendance -- regular attendance to Catholic Mass. And the Court, of course, has a letter from Moe Wosepka about Mr. Keefe's involvement in a Catholic program and Rowan Conrad about Mr. Keefe's meditation practice.

In addition to growth through personal reflection and spirituality, Mr. Keefe's work ethic and employment history is remarkable.

In 1999, he was a school tutor, and a supervisor noted, quote, "Steve has a good attitude and is willing to learn how to program a variety of tasks." And we heard Warden Mahoney and Mr. Shaw talk about what an exceptional worker Mr. Keefe is today.

Your Honor, we heard some testimony about his ongoing efforts to make sense of the pain that he's caused through the years. Here we have an example from 2003. The prison record notes that "he continues to wrestle with the nature of his crime and appears to use religion, as well as his own efforts to come to grips with this and also tries to help other people who are incarcerated."

In 2005, Mr. Keefe worked in the boot factory, and we see a note here from 2005 where he's trying hard to improve every day.

And then in 2007, he's doing an excellent job. They note change and improvement over time, and the State has admitted a photo of boots from that factory.

Mr. Keefe has a remarkable record of clear conduct, far predating the U.S. Supreme Court jurisprudence about juvenile life without parole, far predating my admission as a lawyer, far predating anything in this case.

Mr. Keefe has earned his certificate in the canine program that you've heard about, his advanced certificate, and, you know, was recommended to -- to bring that program to Montana State Prison, a remarkable recommendation for any inmate.

And he, throughout his time, has engaged in a number of programming activities geared towards improving himself and geared towards helping him come to leave the darkness that was characteristic of his youth.

I recall Warden Mahoney's observation that Mr. Keefe's responsibility and care both in the library program and in his reading books and in the canine program demonstrated his substantial personal growth.

Mr. Keefe is widely regarded as a good employee, an exceptional worker, and there are many examples of this. But one of them, the kind of recognitions he's received for his competence in the workplace.

Mr. Keefe just by having no hope of release, no mandate to engage in programming, obtained his HiSET, his GED, on June 6th, 2014. And there he is receiving the diploma.

On March 31st, 2015, Mr. Keefe was elected as an inmate representative from Montana Correctional Enterprises. We also heard, of course, from Mr. Shaw about Mr. Keefe's efforts as part of the Inmate Welfare Fund. And we've learned that Mr. Keefe has served as a leader within the institution, collaborating with inmates and the correctional professionals to solve problems across many areas of the institution.

Your Honor, the man before you today is someone whose development was repeatedly interrupted by the chaotic home that he was born into. The poverty, abuse, torture, alcoholism that defined his home life was compounded by exposure to violence at school and entry into juvenile programs whose damaging practices were ultimately condemned.

He internalized that chaos, tragically, and

in a period when juveniles are most at risk to do so, committed a number of delinquent acts, including perpetrating the horrible crimes for which he's already served over three decades.

Some of the acts themselves reflect the chaos of his home development -- home environment, like the times when the police were called upon to respond to fights with his alcoholic and abusive stepfather; or when having fled home, he was arrested for living in an abandoned house. Others reflect poor decision-making that is characteristic of a juvenile in such an environment.

It took leaving that environment and the passage of time for Mr. Keefe's healing process to bear fruit. We heard Warden Mahoney and Mr. Shaw testify that many inmates, particularly young ones, make poor decisions early on in their incarceration. And we know that the part of Mr. Keefe's brain that's responsible for decision-making was not mature until his mid-20s.

As Dr. Page put in his report, once Mr. Keefe was free from his adolescent years his, quote, "gradual emotional and psychological maturation, along with the benefits from programs while incarcerated and his natural progression to self-improvement are notable." Change, growth, progress.

In his early 20's, MSP staff noted that Mr. Keefe was wrestling with the impact of his crime, coming to grips with it, engaging with religion. We know that Mr. Keefe is not claiming innocence, that he has, at least 15 years ago -- pardon me. I'll withdraw that last comment. We know that he has recounted his remorse and accepted responsibility to a number of different people within MSP.

He spoke with Mr. Shaw about his desire to reconcile with the survivors, expressing his responsibility and remorse and submitted the victim to the accountability bank in an explicit attempt to make amends.

Mr. Keefe has made great progress away from the dark days of his teenage years and down the path towards rehabilitation. He long ago abandoned the convict code. He has over a decade of clear conduct, more clear conduct than most inmates have time. He's a model inmate. Correctional professionals who know him well find his progress across a range of activities to be notable.

He's adapted a positive, constructive attitude towards life, serving as mediator between staff and other inmates and developing amicable solutions and conveying those solutions to his fellow inmates. He has

the respect of inmates and officers alike.

He's a hard worker whose acquired a range of skills he's eager to employ, to contribute in some small way beyond the prison walls. He sought out programming and internalized those messages, growing into a man who has recognized the power of pursuing personal growth and improvement despite having no hope of relief -- release.

And finally, Your Honor, we hope that our request is modest. We want Mr. Keefe to have an opportunity to plead his case to the parole board. Warden Mahoney has endorsed Dr. Page's gradual reentry plan, and the man before you today is not permanently incorrigible and asks for hope for redemption.

THE COURT: Thank you. I have some lengthy legal and factual remarks to put on the record. And before I pronounce the sentence, I think it's important for everyone to understand what has happened factually and legally in the over three decades since Mr. Keefe killed three innocent people.

Before we do that, however, I want to just take a moment to recognize to the McKay family that I understand that this hearing is re-traumatizing the pain that you've experienced every day for nearly 34 years.

While I know that your pain is never gone, most people don't expect for it to become so acutely

real again three decades later. For that, I'm sorry. Please understand that this hearing that's being conducted today is required by the law, and most of the time, the law is not sympathetic. But please know that I've read your letters, and they're very meaningful to me.

I can't possibly begin to fathom your pain and your loss, but I know that it's very real, and I understand that you're hurting today. And I thank you for coming.

The facts established at the trial in this matter are undisputed. The Court incorporates by reference the facts that were cited by the Montana Supreme Court in Mr. Keefe's conviction appeal. See *State v. Keefe*, at 232 Mont. 258, in 1988.

To this day the triple homicide committed at the hands of Mr. Keefe shocks the Great Falls community. Homicides are rare, and triple homicides are almost nonexistent, except for this case. As a near lifelong resident of Great Falls myself, I'm unaware of any other triple homicide in this community besides this case.

Since the time that this homicide was committed, the United States Supreme Court has weighed in on juvenile sentencing on several occasions.

In 2005 in *Roper v. Simmons* the U.S.

Supreme Court held that it is unconstitutional under the Eighth Amendment, prohibition against cruel and unusual punishment, to impose the death penalty on juveniles.

In 2010 the U.S. Supreme Court held in *Graham v. Florida* that it is unconstitutional to sentence juveniles to life without possibility of parole on non-homicide offenses.

In 2012 the United States Supreme Court held in *Miller v. Alabama* that it is unconstitutional to impose mandatory life without parole sentences on juveniles.

And, finally, in 2016 in *Montgomery v. Louisiana*, the United States Supreme Court held that its ruling in *Miller* that a mandatory life sentence without parole should not apply to persons convicted of murder as juveniles and should be applied retroactively. That opinion, the *Montgomery* opinion, it is said affects over 2,000 cases nationwide. This is one of them.

The Montana Supreme Court weighed in on these issues in 2017 in *Steilman v. Michael*. In that case the Montana Supreme Court extended the U.S. Supreme Court precedent and held that a juvenile sentence, regardless of whether it is mandatory or discretionary, that it is functionally equivalent of a life sentence, requires a court to analyze the sentence

under the constitutional principles of *Montgomery* and *Miller*.

Now, with that legal background in mind and to comply with the binding precedent of the United States Supreme Court, this Court must resentence Mr. Keefe in accordance with Montana law, considering the development of these U.S. Supreme Court juvenile sentencing factors.

In its *Miller* opinion the United States Supreme Court requires that sentencing judges take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison. It draws a distinction between a child's character and an adult's character because the child's personality traits are less fixed, and a child's actions are less likely to be evidence of irretrievable depravity.

In *Montgomery* the U.S. Supreme Court expounded on this by requiring a hearing where youth and its attendant characteristics are considered as sentencing factors. A life without parole sentence is unconstitutionally cruel and unusual punishment for all juvenile homicide offenders, except those rare children whose crimes reflect irreparable corruption. That's the holding of the Supreme Court in its *Montgomery* opinion.

In *Steilman* the Montana Supreme Court suggests the following factors need to be considered by a sentencing court with these principles in mind, the list is nonexhaustive, and it is based on the *Steilman* court's discussion of why a life without parole sentence might be unconstitutional under Montana's old sentencing framework.

A court must consider, for instance, the offender's chronological age and its hallmark features, such as immaturity and the failure to appreciate risks and consequences.

It must take into account the family and home environment that surrounds the offender and from which he cannot usually extricate himself no matter how brutal or dysfunctional it may be.

The Court must consider the circumstances of the offense, including the extent of the offender's participation and the way familial and peer pressures may have affected him.

The Court should consider if the juvenile offender might have been charged and convicted of a lesser offense but wasn't because of incompetencies associated with youth. Some examples are the ability to deal with police officers or prosecutors, including on a plea agreement, or with a juvenile's capacity to assist

his attorneys. And the Court must consider, and this word is important, the possibility of rehabilitation.

The Court considers these issues under Montana's general sentencing policies enacted by the Montana legislature. The correctional and sentencing policy established by the Montana legislature requires courts to punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable, to protect the public, to reduce crime, and increase the public's sense of safety by incarcerating violent offenders and serious repeat offenders.

Courts must provide restitution, reparation, and restoration to victims of the crime.

And, finally, courts must encourage and provide opportunities for the offender's self-improvement, to provide rehabilitation, and reintegration into the community.

The Court first considers Mr. Keefe's age at the time he murdered three people. Mr. Keefe was 17 years old and 88 days short of his 18th birthday.

Mr. Keefe was mature beyond his age. He held a full-time job. He lived independently and away from his parents.

Mr. Keefe was very familiar with the

juvenile criminal justice system, having been convicted of 47 crimes. While these were juvenile convictions, the United States Court of Appeals for the Ninth Circuit in *U.S. v. Edwards*, at 734 F.3d 850, in 2013 held that it is constitutional for a sentencing court to consider juvenile convictions in sentencing on adult convictions.

There is no way to say it, other than the fact that crime was a way of life for Mr. Keefe. He knew the consequences of his actions, and he disregarded them. Mr. Keefe exhibited a conscious disregard for the rights of others, the rules of society, and eventually, the lives of others in his community.

The Court next considers Mr. Keefe's childhood. The testimony on this point is mixed. There's no doubt that while Mr. Keefe struggled in areas of his childhood, there is no indication that he was exposed to serious extensive sexual abuse, for instance, drug use, or other acts of parental abuse and neglect.

Now, while there is evidence that his stepfather was abusive, there is no evidence of significant developmental experiences, traumatic events, or other life-changing situations that would mitigate the heinously violent crimes that he committed.

The Court also considers whether Mr. Keefe suffered from substance use disorders. Mr. Keefe

admittedly consumed alcohol as a minor and occasionally smoked marijuana. But as the presentence investigation indicated at the time, Mr. Keefe did not attribute any of his crimes to the influence of drugs or alcohol, and there is no evidence, on the record, that Mr. Keefe suffered from any substance use or chemical dependency disorder.

The Court also considers Mr. Keefe's mental health. It is undisputed that at the time he murdered three people, Mr. Keefe was a social deviant who was rebellious, irresponsible, and a psychopath with no conscience. At the time of the crimes, psychologists describe Mr. Keefe as antisocial, minimizing anything and everything that he has done.

The Court recognizes that Mr. Keefe's mental health has stabilized in the three decades of incarceration. Of course, he is stable now. While Mr. Keefe's mental health at the time of these crimes is questionable, it is one of many factors for the Court to consider.

In considering the circumstances of the offense, as the Court previously emphasized, the Court gives zero credence to Mr. Keefe's recently concocted explanation that he was simply present during the murders and provided the guns to others.

As I stated previously, this is a legal and factual fiction. Mr. Keefe murdered three innocent people in cold blood. He did it mercilessly and without hesitation or remorse. He has no defense, no explanation, and no excuse. He did not stop with one victim: He killed; he killed; and he killed.

This was a brutal, heinous, abhorrent crime of the worse proportions. The Great Falls community has never seen anything like the violence that Mr. Keefe perpetrated in this case, and it continues to reverberate through this community's conscience to this day.

Mr. Keefe desires for this Court to consider evidence that he has been rehabilitated. Again, there is no showing that a hindsight analysis is the appropriate or correct legal standard. As emphasized previously to the contrary, the U.S. Supreme Court requires a sentencing court, in sentencing a juvenile to a potential sentence of life without the possibility of parole, to consider, quote, "the possibility," end quote, of rehabilitation. The use of the word "possibility," of course, suggests that the Court make this determination at the time of sentencing, not some undetermined look-back point in the future.

If there was a juvenile before this Court

today being sentenced for committing three murders and life without the possibility of parole was being considered, the Court would evaluate the factors enunciated previously in the context of where the juvenile is today.

There is absolutely no statute, no case law, no precedent that sets forth that at some undetermined point in the future that a juvenile is entitled to a look-back or a hindsight review of whether or not those determinations made at the time of sentencing were correct. But that's exactly what Mr. Keefe is asking for here today, which places him in an enviable position, compared to juvenile offenders who would be sentenced today. They would not be entitled to this hearing, because the Court would be considering all of those factors as it existed on the record before the Court when they were convicted.

Now, counsel mentioned the *Montgomery* opinion, and in *Montgomery*, the Court referenced a petitioner demonstrating rehabilitation through post-sentencing conduct. This excerpt of the *Montgomery* opinion, however, refers to the presentation of this information at a parole hearing, not a resentencing hearing such as this one.

Again, there is no legal support for the

proposition that this Court should resentence Mr. Keefe based on his prison conduct rather than on the record that existed when he was sentenced by applying the new legal standard to the facts that existed at the time of sentencing.

Regardless, even if the Court were to consider all of the evidence that's been presented of Mr. Keefe's rehabilitative efforts, the Court is unmoved. I am not convinced that he accepts full responsibility for his crime.

And I might add, while not determinative, the Court notes that Mr. Keefe has tattooed three skulls on his body. These tattoos were not present when he was originally sentenced, as reflected in the original PSI. Now, while there might be a multitude of explanations for these tattoos, and Mr. Keefe certainly has a right to tattoo whatever he wants on his body, this is totally shocking. The Court also notes that he has chosen to tattoo the expression, quote, "guilty until proven innocent," end quote, on his body, along with an image of the Grim Reaper. The Court can't begin to interpret Mr. Keefe's rationale for these permanent expressions, but it certainly offers insight into how he views his life and circumstances, which is not favorable to his position here today. Interestingly, courts across the

United States have held that tattoos are relevant evidence of a defendant's character for sentencing purposes.

In my written judgment, I will cite the cases from the Nevada Supreme Court, the Kentucky Supreme Court, and the Texas Court of Appeals supporting that proposition. The Kentucky Supreme Court observed aptly that tattoos, like bumper stickers, are a manifestation of a person's attitude toward the world around them. And the Texas Court of Appeals observed that a defendant's choice of tattoos, like his personal drawings, can reflect his character and/or demonstrate a motive for his crime. Now, I interpret those tattoos as evidence of Mr. Keefe's bravado about these killings and his total lack of genuine remorse.

Mr. Keefe is the only offender in the Montana State Prison serving a life without parole sentence for juvenile crimes. When the United States Supreme Court said that life without parole for juvenile offenders is inappropriate in all but the most egregious cases, it was referring to this case.

Beyond any doubt, this Court finds that Mr. Keefe's crimes do not reflect transient immaturity, but rather they represent irreparable corruption and permanent incorrigibility as defined by the U.S. Supreme

Court.

It is the sentence and judgment of this Court that to Count I, deliberate homicide for the murder of David McKay, the Court commits Mr. Keefe to the Montana State Prison for life. Mr. Keefe is ineligible for parole.

To Count II, deliberate homicide for the murder of Constance McKay, the Court commits Mr. Keefe to the Montana State Prison for life. Mr. Keefe is ineligible for parole. This sentence is consecutive.

To Count III, deliberate homicide for the murder of Marian McKay Qamar, the Court commits Mr. Keefe to the Montana State Prison for life. Mr. Keefe is ineligible for parole. This sentence is consecutive.

To Count IV, burglary, the Court commits Mr. Keefe to the Montana State Prison for 10 years. This sentence is consecutive.

Because Mr. Keefe committed these offenses with a dangerous weapon, to Count I, deliberate homicide, the Court commits Mr. Keefe to the Montana State Prison for an additional 10 years. This sentence is consecutive.

To Count II, deliberate homicide, the Court commits Mr. Keefe to the Montana State Prison for an

additional 10 years. This sentence is consecutive.

To Count III, deliberate homicide, the Court commits Mr. Keefe to the Montana State Prison for an additional 10 years. This sentence is consecutive.

To Count IV, burglary, the Court commits Mr. Keefe to the Montana State Prison for an additional 10 years. This sentence is consecutive.

The reasons the Court imposes a life without parole sentence for crimes that Mr. Keefe committed as a juvenile are stated on the record.

The Court imposes a parole restriction because of the seriousness of the crimes. Mr. Keefe murdered three people in cold blood. This is one of the worst crimes in Cascade County history.

The Court also imposes the parole restriction for the safety of the victims' family.

Mr. Keefe's lengthy criminal history also justifies parole restriction. Mr. Keefe is not supervisable in the community, and therefore, this parole restriction is required.

For these reasons, Mr. Keefe shall remain in prison for the remainder of his life. This is the judgement of the Court. We'll be in recess.

THE BAILIFF: All rise.

(Court is adjourned.)

CERTIFICATE OF REPORTER

STATE OF MONTANA)
) ss.
County of Cascade)

I, Angela Nurre, Official Court Reporter for the State of Montana, residing in Great Falls, Montana, do hereby certify:

That the foregoing transcript taken on April 18, 2019 consisting of pages 1-183 is a true and accurate record of the proceeding given at the time and place hereinbefore mentioned;

That the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription, to the best of my ability.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of this the 14th day of May, 2019.

/s/ Angela Nurre
_____
Angela Nurre
Official Court Reporter

C

J

K

APPENDIX K

Sentence, Order to Close File, and Order Exonerating Bond, Montana Eighth Judicial District, Cascade County, No. ADV-17-0716 (May 10, 2019)

STATE OF MONTANA } ss
County of Cascade }

I hereby certify that the instrument to which this certificate is attached is a true, correct and complete copy of the original in the office of the Clerk of the District Court.

Witness my hand and seal of the District Court of Cascade County this 10 day of May, 20 19

FAYE McWILLIAMS, Clerk of Court

By _____ Deputy Clerk

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STEVEN WAYNE KEEFE, Petitioner, vs. LEROY KIRKEGARD, Warden, Montana State Prison, Respondent.	Cause No. ADV-17-076 **SENTENCE, ORDER TO CLOSE FILE, and ORDER EXONERATING BOND** **THE CLERK IS DIRECTED TO CLOSE THE FILE**

On April 18, 2019, the date set for re-sentencing herein, the above-named Petitioner Steven Wayne Keefe appeared in custody and was represented by his counsel, John Mills, Elizabeth Ehret and Alex Rate. The Respondent was represented by Assistant Attorney General Chad Parker and Anna Saverud.

Mr. Mills moved the Court to release Mr. Keefe from one or both of his wrist shackles during the hearing. The Court DENIED the motion for security reasons.

The parties discussed the logistics of the hearing. The Court advised that it allotted four hours for this resentencing hearing and discussed the division of time. The Court further advised that the purpose of this hearing was not for a re-trial as the facts of this case were established by the jury in 1986. The Court advised it would not allow any testimony of Mr. Keefe's newly

contrived defense that he was just an accomplice in this case. The Court recognizes full well that the strategy is to establish that Mr. Keefe was an alleged accomplice who was a teenager acting under the influence of unnamed adults in the murder of these three innocent victims. There are no facts in the record to support this defense and the Court views it as nothing more than a last-ditch effort by Mr. Keefe to inject mitigating facts into this proceeding that were never established at trial. Candidly, the Court finds Mr. Keefe's newfound cockamamie defense to be offensive and it certainly does him a disservice in his attempt to convince this Court of his legal position. The assertion that anyone other than Mr. Keefe pulled the trigger of the gun that killed these three innocent victims is nothing more than a figment of Mr. Keefe's imagination. The Court disallows any testimony or evidence to that effect.

Regarding Mr. Keefe's alleged rehabilitation, the Court allows some leeway for Petitioner's counsel to make a record that Mr. Keefe has been rehabilitated in prison. Although the Court will allow that leeway, there is no law presented to the Court in the sentencing memoranda that it is proper for the Court to consider those issues. If a juvenile was sentenced to life imprisonment without parole today, the Court would make findings on the record as it existed at sentencing. There is no legal support for the notion that every juvenile sentenced to life imprisonment without parole is entitled to a hindsight look-back at some undetermined future point to determine if the court's findings were correct. Mr. Keefe is asking for this Court to sentence him based on the person he is today, not based on the facts that existed in 1986. The Court is far from convinced that is the law and has been unable to locate any legal support for that assertion. It certainly seems logical under the existing precedent that Mr. Keefe is entitled to resentencing based on the facts that existed at the time and the law that has developed in the

meantime. This comports with the Montana Supreme Court's analysis of these issues in *Steilman v. Michael,* 2017 MT 310, 389 Mont. 512, 407 P.3d 313. In her dissent on other issues, Justice McKinnon explained, "[c]ourts tasked with resentencing must decide – in many cases decades after the sentence imposed became final-whether, at the time of the commission of the offense, the offender fit within the class of juveniles who were irreparably corrupt." This observation comports with the plain language of the U.S. Supreme Court cases at issue requiring this determination be made based on the circumstances that existed at the time of the crime, not affording the benefit of hindsight at some future date.

With those observations in mind, the Court proceeded with the hearing.

James Bruckner, retired police officer, was duly sworn and testified on behalf of the Respondent. Respondent's Exhibits 1 through 6 (photos of the victims) were marked, offered, and admitted without objection.

John Sullivan, DCI agent, was duly sworn and testified on behalf of the Respondent.

Tim Hides, Adult Probation & Parole Officer, was duly sworn and testified on behalf of the Respondent. Respondent's Exhibits 7 (mental health screening) and 8 (DOC disciplinary report and appeal) were marked and offered. Mr. Mills objected. The Court OVERRULED Mr. Mills' objection and Exhibits 7 and 8 were admitted. State's Exhibits 9 (letter from Petitioner's mother) and 10 (DOC major misconduct violation report) were marked, offered and admitted without objection.

Dr. Robert Page, Ph.D., Forensic Psychologist, was duly sworn and testified as a Court-appointed expert. Petitioner's Exhibits 1 through 22 (letters, pictures, and miscellaneous articles) were marked, offered and admitted without objection.

Robert Shaw, former Montana State Prison officer, was duly sworn and testified on behalf of the Petitioner. Petitioner's Exhibit 23 (letter from Assistant Attorney General) was marked, offered, and admitted without objection.

James Michael Mahoney, former Montana State Prison warden, was duly sworn and testified on behalf of the Petitioner.

M.M., the victim's daughter/granddaughter, gave her victim impact statement to the Court.

Counsel gave their sentencing recommendations to the Court. The Defendant made a brief statement to the Court.

Before pronouncing sentence, it is important to understand what has happened factually and legally in the three decades since Mr. Keefe murdered three people. The Court is aware that this hearing is re-traumatizing the pain experienced by the McKay family for nearly 34 years. While the Court knows the pain is never gone, most people don't expect for it to become acutely real again three decades later. For that, the Court is sorry. The Court asked that those present understand that this proceeding is required by the law and, most times, the law does not adequately express sympathy. But, please know, the Court has read all of the sentencing letters and cannot possibly fathom the pain and loss, but knows the pain is very real and understands how the friends and family of the victims are hurting today.

The facts established at trial are undisputed and are set forth in pages 2 through 4 of the State's Sentencing Memorandum. To this day, the triple homicide committed at the hands of Mr. Keefe shocked the Great Falls community. Homicides are rare and triple homicides are almost

non-existent – except for this case. As a near lifelong resident of Great Falls, the Court is unaware of a triple homicide in this community besides this tragic case.

Since that time, the U.S. Supreme Court has weighed in on juvenile sentencing on several occasions. In 2005, in *Roper v. Simmons*, 543 U.S. 551, the U.S. Supreme Court held that it is unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment to impose the death penalty on juveniles. In 2010, the U.S. Supreme Court held in *Graham v. Florida*, 560 U.S. 48, that it is unconstitutional to sentence juveniles to life without possibility of parole on non-homicide offenses. In 2012, the U.S. Supreme Court held in *Miller v. Alabama*, 567 U.S. 460, that it is unconstitutional to impose mandatory life without parole sentences on juveniles. Finally, in 2016, in *Montgomery v. Louisiana*, 136 S.Ct. 718, the U.S. Supreme Court held that its ruling in *Miller* is applied retroactively. This opinion potentially affects over 2,000 cases nationwide. The Montana Supreme Court weighed in on these issues in *Steilman*. In that case, the Montana Supreme Court extended the U.S. Supreme Court precedent and held that a juvenile sentence, regardless of whether it is mandatory or discretionary, that is functionally equivalent to a life sentence requires a court to analyze the sentence under the constitutional principles of *Montgomery* and *Miller*.

With that legal background in mind and to comply with the binding precedent of the U.S. Supreme Court, this Court must re-sentence Mr. Keefe in accordance with Montana law, considering the U.S. Supreme Court juvenile sentencing factors.

In *Miller*, the U.S. Supreme Court requires judges to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 479-80. It draws a distinction between a child's character and an adult's

because the child's personality traits are less fixed, and a child's actions are less likely to be evidence of irretrievable depravity. *Id.* at 471. In *Montgomery*, the U.S. Supreme Court expounded on this by requiring a hearing where youth and its attendant characteristics are considered as sentencing factors. A life without parole sentence is unconstitutionally cruel and unusual punishment for all juvenile homicide offenders except those rare children whose crimes reflect irreparable corruption. *See Montgomery*, 136 S. Ct. at 735.

In *Steilman*, the Montana Supreme Court suggests the following factors for consideration by a sentencing court. The list is non-exhaustive, and it is based on the Court's discussion of why a life without parole sentence might be unconstitutional under the old sentencing framework. *See Steilman*, ¶17 (citing *Miller*, 567 U.S. at 477-78).

Under *Steilman*, a sentencing court considers the offender's chronological age and its hallmark features, such as immaturity, impetuosity, and failure to appreciate risks and consequences; the family and home environment that surrounds the offender – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional it may be; the circumstances of the offense, including the extent of the offender's participation and the way familial and peer pressures may have affected him; whether the juvenile offender might have been charged and convicted of a lesser offense but wasn't because of incompetencies associated with youth. Some examples are the ability to deal with police officers or prosecutors (including on a plea agreement) or the juvenile's capacity to assist his attorneys; and the possibility of rehabilitation. *Id.*

The Court further analyzes these issues under Montana's sentencing policies as enacted by the legislature.

The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;

(b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

Mont. Code Ann. § 46-18-101(2).

The Court first considers Mr. Keefe's age at the time he murdered three people. Mr. Keefe was 17 years old and just 88 days short of his 18th birthday. Mr. Keefe was mature beyond his age. He held a full-time job. He lived independently and away from his parents. Mr. Keefe was very familiar with the criminal justice system, having been convicted of 47 crimes. While these were juvenile convictions, the United States Court of Appeals for the Ninth Circuit in *U.S. v. Edwards,* 734 F.3d 850 (9th Cir. 2013), held it is constitutional for a sentencing court to consider juvenile convictions in sentencing on adult convictions. Crime was Mr. Keefe's way of life. He knew the consequences of his actions and disregarded them. Mr. Keefe exhibited a conscious disregard for the rights of others, the rules of society, and eventually, for the lives of others in the community.

The Court next considers Mr. Keefe's childhood. While Mr. Keefe struggled in areas of his childhood, there is no indication that he was exposed to serious, extensive sexual abuse, drug use, or other acts of abuse and neglect. While his stepfather was abusive, there is no evidence of

significant developmental experiences, traumatic events or other life changing situations that would mitigate the heinously violent crimes he committed.

The Court considers whether Mr. Keefe suffered from substance use disorders. Mr. Keefe consumed alcohol as a minor and occasionally smoked marijuana, but as the PSI indicated at the time, Mr. Keefe did not attribute any of his crimes to the influence of drugs or alcohol. There is no evidence that Mr. Keefe suffered from any chemical dependency disorder.

The Court considers Mr. Keefe's mental health. It is undisputed that at the time he murdered three people, Mr. Keefe was a social deviant, who was rebellious, irresponsible and a psychopath with no conscience. At the time of the crime, psychologists described Mr. Keefe as antisocial, minimizing anything and everything that he has done. The Court recognizes that Mr. Keefe's mental health has stabilized in his three decades of incarceration; of course, he is stable now. While Mr. Keefe's mental health at the time of these crimes is questionable, it is one factor of many that the Court considers.

Considering the circumstances of the offense, as previously emphasized, the Court gives zero credence to Mr. Keefe's recently concocted explanation that he was simply present during the murders and provided the gun to others. This is a legal fiction. Mr. Keefe murdered three innocent people in cold blood, execution style. He did it mercilessly and without hesitation or remorse. He has no defense, explanation or excuse. He did not stop with one victim, he killed and killed and killed. This was a brutal, heinous, abhorrent crime of the worst proportions. The Great Falls community has never seen anything like the violence that Mr. Keefe perpetrated in this case and it continues to reverberate through this community's conscience to this day.

Mr. Keefe desires for this Court to consider evidence that he has been rehabilitated in the decades since he killed these people. Again, there is no evidence that a hindsight analysis is the legal standard. To the contrary, a sentencing court is to consider the *possibility* of rehabilitation, suggesting that a court make this determination at sentencing, not at some undetermined look-back point in the future. *Steilman,* ¶17 (citing *Miller,* 567 U.S. at 477-78). Regardless, even if the Court were to consider Mr. Keefe's rehabilitative efforts, the Court is unmoved. Mr. Keefe's refusal to accept full responsibility for his crime speaks loudly and persuasively to the Court.

Also, while not determinative, the Court notes that Mr. Keefe has tattooed three skulls on his body. The Court notes that these tattoos were not present when he was originally sentenced as reflected in the original PSI. While there may be a multitude of explanations for these tattoos and Mr. Keefe certainly has the right to tattoo whatever he wants on his body, this is totally shocking. The Court also notes that he has chosen to tattoo the expression, "Guilty until proven innocent" on his body, along with an image of a grim reaper. The Court cannot begin to interpret Mr. Keefe's rationale for these permanent expressions and he offered no explanation at the hearing, but it certainly offers insight into how he views his life and circumstances. Regardless, this fact is not favorable to his position. Courts have held that tattoos are relevant evidence of a defendant's character for sentencing purposes. *See Bollinger v. State,* 901 P.2d 671 (Nev. 1995); *Brown v. Commonwealth,* 313 S.W.2d 577 (Ky. 2010) ("Tattoos, like bumper stickers, are manifestations of a person's attitude toward the world around them."); *Conner v. State,* 67 S.W.3d 192 (Tex. Ct. App. 2001) ("A defendant's choice of tattoos, like his personal drawings, can reflect his character and/or demonstrate a motive for his crime.") These tattoos are evidence of Mr. Keefe's bravado about these killings and his total lack of genuine remorse.

Mr. Keefe is the only offender in the Montana State Prison serving a life without parole sentence for juvenile crimes. When the United States Supreme Court said that life without parole for juvenile offenders is inappropriate in all but the most egregious cases, it was referring to this case. Beyond a reasonable doubt, the Court finds that Mr. Keefe's crimes do not represent transient immaturity, but rather they represent irreparable corruption and permanent incorrigibility as defined by the U.S. Supreme Court. *See infra*, at p.5.

No legal reason was given why sentence should not be imposed at this time for the offenses of **COUNT I: DELIBERATE HOMICIDE, Felony, COUNT II: DELIBERATE HOMICIDE, Felony, COUNT III: DELIBERATE HOMICIDE, Felony, and COUNT IV: BURGLARY, Felony**.

The Court, having heard recommendations by counsel, testimony on behalf of the parties, the victim impact statement, and having reviewed the pre-sentence investigation report, renders its judgment as follows.

IT IS HEREBY ORDERED that the Defendant is sentenced for **COUNT I: DELIBERATE HOMICIDE, Felony, for the murder of David McKay,** to **life without parole at the Montana State Prison**. The Court imposed an additional **ten (10) years at the Montana State Prison** for the use of a weapon during the commission of the offense. This sentence shall run **consecutive** to any other sentence Mr. Keefe is currently serving.

IT IS HEREBY ORDERED that Steven Wayne Keefe is sentenced for **COUNT II: DELIBERATE HOMICIDE, Felony, for the murder of Constance McKay,** to **life without parole at the Montana State Prison**. The Court imposed an additional **ten (10) years at the Montana State Prison** for the use of a weapon during the commission of the offense. This

sentence shall run **consecutive** to COUNT I and any other sentence the Mr. Keefe is currently serving.

IT IS HEREBY ORDERED that Steven Wayne Keefe is sentenced for **COUNT III: DELIBERATE HOMICIDE, Felony, for the murder of Marian McKay Qumar,** to **life without parole at the Montana State Prison**. The Court imposed an additional **ten (10) years at the Montana State Prison** for the use of a weapon during the commission of the offense. This sentence shall run **consecutive** to COUNTS I and II and any other sentence Mr. Keefe is currently serving.

IT IS HEREBY ORDERED that Steven Wayne Keefe is sentenced for **COUNT IV: BURGLARY, Felony,** to **ten (10) years at the Montana State Prison**. The Court imposed an additional **ten (10) years at the Montana State Prison** for the use of a weapon during the commission of the offense. This sentence shall run **consecutive** to COUNTS I, II and III and any other sentence Mr. Keefe is currently serving.

The reasons for this sentence are as stated on the record.

The Court imposed a parole restriction because of the seriousness of the crimes. Mr. Keefe murdered three people. This is one of the worst crimes in Cascade County history. The Court also imposed a parole restriction for the safety of the victims' family. Mr. Keefe's lengthy criminal history justifies the parole restriction. Mr. Keefe is not able to be supervised in the community, and therefore a parole restriction is required.

For the reasons above, Mr. Keefe shall remain in prison for the remainder of his life.

An Order of Incarceration was executed in open court.

THE CLERK IS DIRECTED TO CLOSE THE FILE.

ANY BOND IN THIS CASE SHALL BE EXONERATED.

DATED this 6th day of May, 2019.

GREGORY G. PINSKI
DISTRICT COURT JUDGE

c: AAG/Chad Parker/Anna Saverud, Asst. Atty Gen., P.O. Box 201401, Helena, MT 59620
DC/John Mills, Phillips Black, Inc., 836 Harrison Street, San Francisco, CA 94107
DC/Alex Rate/Elizabeth Ehret, ACLU of MT, P.O. Box 9138, Missoula, MT 59807
Steven Wayne Keefe, c/o Counsel
CCSO
GFPD
State I.D.
Department of Corrections/Montana State Prison
Adult Probation and Parole

APPENDIX L

State v. Keefe, 478 P.3d 830 (Mont., Jan. 8, 2021)

FILED
01/08/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 19-0368

DA 19-0368

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 8

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN WAYNE KEEFE,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADV 17-0076
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John R. Mills (argued), Genevie Gold, Phillips Black, Inc., Oakland, California

Elizabeth K. Ehret, Attorney at Law, Missoula, Montana

Alex R. Rate, ACLU of Montana, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Roy Brown (argued), Assistant Attorney General, Helena, Montana

Colleen E. Ambrose, Bureau Chief, Department of Corrections, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Great Falls, Montana

For Amici Montana Association of Criminal Defense Lawyers:

Colin M. Stephens, Smith & Stephens, P.C., Missoula, Montana

For Amici Juvenile Law Center:

Benjamin M. Darrow, Darrow Law PLLC, Missoula, Montana

Marsha L. Levick, Juvenile Law Center, Philadelphia, Pennsylvania

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Argued: September 11, 2020
Submitted: September 22, 2020
Decided: January 8, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Defendant and Appellant Steven Wayne Keefe (Keefe) appeals the May 6, 2019 Sentence, Order to Close File, and Order Exonerating Bond issued by the Eighth Judicial District Court, Cascade County, which, in relevant part, re-sentenced him to life without parole for three counts of deliberate homicide committed when he was a juvenile.[1]

¶2 We restate the issues on appeal as follows:

1. *Whether the District Court's failure to appoint Keefe his own expert violated Keefe's right to due process.*

2. *Whether there was sufficient evidence for the District Court to conclude Keefe was irreparably corrupt and permanently incorrigible.*

3. *Whether the issue of whether Keefe was irreparably corrupt and permanently incorrigible must be presented to a jury.*

¶3 We affirm in part, reverse in part, and remand for a new sentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 On October 15, 1985, Keefe, then 17 years old, broke into a house near Great Falls intending to commit a burglary. Once inside, he shot and killed three people—David J. McKay, his wife Constance McKay, and their daughter Marian McKay Qamar. The next day, Keefe was arrested on charges related to previous burglaries he had committed and transferred to the Pine Hills School for Boys. While at Pine Hills, Keefe told other residents he murdered three people while burglarizing a house near Great Falls. On March 21, 1986, Keefe was charged with three counts of deliberate homicide for the murders of the McKay

[1] We have amended the caption of this case to "more accurately reflect the actual alignment or status" of the parties. M. R. App. P. 2(4).

family. The State amended the complaint on June 10, 1986, to add a burglary charge. Keefe was bound over from Youth Court to stand trial before the District Court as an adult. The matter went to trial in October 1986, and Keefe was ultimately convicted by the jury on all counts on October 22, 1986.

¶5 The District Court sentenced Keefe to three consecutive life terms without the possibility of parole at the Montana State Prison (MSP), with an additional ten years on each count for use of a weapon, on the deliberate homicide convictions, as well as an additional consecutive ten years, along with the ten-year enhancement for use of a weapon, on the burglary charge—a total sentence of three consecutive life terms plus 50 years. Keefe appealed his conviction to this Court in 1987, asserting the District Court erred by admitting evidence of his other crimes. We affirmed his conviction in 1988. *See State v. Keefe*, 232 Mont. 258, 759 P.2d 128 (1988).

¶6 On January 25, 2017, Keefe filed a petition for postconviction relief in the District Court, asserting his 1986 sentence of life without the possibility of parole was unconstitutional in light of the United States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). The Supreme Court's decisions in *Miller* and *Montgomery* collectively held that mandatory sentences of life without parole for juvenile offenders were unconstitutional "for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469). *Montgomery* held that *Miller* was to be applied retroactively because *Miller* "announced a substantive rule of constitutional law,"

Montgomery, 577 U.S. at ___, 136 S. Ct. at 734, and those juveniles already sentenced to life without parole "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736-37. Proceedings before the District Court in the present case were stayed while this Court considered, and ultimately decided, *Steilman v. Michael*, 2017 MT 310, 389 Mont. 512, 407 P.3d 313. In *Steilman*, we held that the mandates of *Miller* and *Montgomery* "apply to discretionary sentences in Montana." *Steilman*, ¶ 3.

¶7 After this Court decided *Steilman*, the District Court lifted its stay on proceedings and issued its Memorandum and Order Re: Petition for Postconviction Relief, which determined Keefe must be resentenced in light of *Miller*, *Montgomery*, and *Steilman* because the original sentencing hearing did not consider Keefe's youth, background, mental health, or substance abuse. Keefe filed several motions before resentencing.[2] Relevant to the present proceeding, Keefe sought state funds for an expert and mitigation

[2] The motions included: Motion to Proceed Ex Parte and Under Seal to Seek State Funds for Expert and Mitigation Services; Motion for Jury Sentencing and Requiring a Finding Beyond a Reasonable Doubt; Motion for Sentence Eligibility Finding Pursuant to *Miller* and *Montgomery*; Motion to Exclude the Heinous or Senseless Aspects of the Crime to Support a Finding of Irreparable Corruption; Motion to Apply Presumptive Sentencing; Motion to Strike Juveniles' Eligibility for Life Without the Possibility of Parole in Light [of] MT's Statute's Failure to Limit the Pool of Offenders Eligible for that Sentence; Motion to Categorically Exempt Juveniles from Life Without the Possibility of Parole; Motion in Limine to Apply the Confrontation Clause, Limit Prior Testimony, and to Exclude Evidence of Prior Bad Acts; and Renewed Ex Parte and Sealed Motion for State Funds for Expert and Mitigation Services. While the District Court allowed Keefe to proceed under seal and seek state funds for expert and mitigation services, the District Court uniformly denied Keefe's other motions in its January 15, 2019 Consolidated Order Denying [Defendant]'s Motions.

services and sought a jury determination of whether he was "irreparably corrupt" beyond a reasonable doubt pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). On December 13, 2018, the District Court issued its Consolidated Order Re: Expert Testimony and Fees, which ordered the probation and parole office to perform an updated presentence investigation and appointed Dr. Robert Page as an independent expert to prepare a mental evaluation of Keefe as it determined the mental health information from Keefe's original sentencing was "outdated in light of the intervening decades' advances in the fields of psychology and neuroscience." The District Court's order directed Dr. Page to consider, at a minimum:

1) The brain development of juveniles as a mitigating factor;

2) The effect of Keefe's developmental experiences on his commission of the crime;

3) An examination of Keefe's mental health prior to and contemporaneously with his commission of the crime;

4) An examination of Keefe's chemical dependency history prior to and contemporaneously with his commission of the crime; and

5) Any treatment recommendations related to Keefe's rehabilitation.

The District Court denied Keefe's motion for state funds to procure his own expert and his motion for a jury to determine whether he was "irreparably corrupt" in its January 15, 2019 Consolidated Order Denying [Defendant]'s Motions.

¶8 The District Court held a resentencing hearing on April 18, 2019. At the hearing, former Cascade County Sheriff's Deputy James Bruckner, Montana Department of Justice Department of Criminal Investigation Agent John Sullivan, Probation and Parole Officer

Tim Hides, Dr. Page, former MSP supervisor Robert Shaw, and former MSP Warden James Mahoney testified. At the conclusion of the hearing, the District Court orally resentenced Keefe to three consecutive life terms at MSP, along with an additional consecutive 50 years for the burglary and weapons enhancements, without the possibility of parole. The District Court's written Sentence, Order to Close File, and Order Exonerating Bond followed on May 6, 2019. On June 7, 2019, Keefe filed a Motion for Reconsideration Before a New Judge, which the District Court denied with a written order on June 11, 2019. Keefe appeals. Additional facts will be discussed as necessary below.

STANDARD OF REVIEW

¶9 Motions requesting an examination by a psychiatrist where the existence of a mental disease or defect is not at issue fall within the discretion of the trial court, and we review those decisions for an abuse of discretion. *State v. Hill*, 2000 MT 308, ¶ 21, 302 Mont. 415, 14 P.3d 1237 (citations omitted). An abuse of discretion occurs when a court acts arbitrarily or unreasonably, resulting in substantial injustice. *State v. Grimshaw*, 2020 MT 201, ¶ 17, 401 Mont. 27, 469 P.3d 702 (citing *State v. Holland*, 2019 MT 128, ¶ 8, 396 Mont. 94, 443 P.3d 519).

¶10 This Court reviews criminal sentences for legality. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897 (citing *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26). We review a claim that a sentence violates the constitution de novo. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 387 Mont. 224, 392 P.3d 607 (citation omitted). "We review the district court's findings of fact on which its sentence is based to determine whether they are clearly erroneous." *State v. Hamilton*, 2018 MT 253, ¶ 14, 393 Mont.

102, 428 P.3d 849 (citing *State v. Shults*, 2006 MT 100, ¶ 34, 332 Mont. 130, 136 P.3d 507).

¶11 We review de novo whether a district court violated a defendant's constitutional rights at sentencing. *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657 (citations omitted).

DISCUSSION

¶12 This case involves the resentencing of Keefe for a triple homicide he committed while a juvenile. For these murders, Keefe was sentenced to three consecutive life terms without the possibility of parole. Keefe served approximately 30 years on his sentences before filing his 2017 petition for postconviction relief. During the intervening years, the U.S. Supreme Court issued several decisions which recognized the inherent differences which must be considered by a court when sentencing a juvenile. In accordance with those principles, the Supreme Court (1) banned the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005); (2) banned life without parole for juvenile offenders who committed a nonhomicide crime in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010); (3) banned mandatory life without parole sentences for juveniles in *Miller*; and (4) determined the substantive protections of *Miller* must be applied retroactively in *Montgomery*.

¶13 The collective thrust of Supreme Court jurisprudence on this issue over the last several years is a recognition that juveniles are "constitutionally different from adults in their level of culpability," and those differences must be considered by a sentencing court. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736. Due to those differences, even juveniles

who commit heinous crimes, such as Keefe, cannot be sentenced to life without parole unless they are "irreparably corrupt" and "permanently incorrigible" as such a punishment would violate the Eighth Amendment's ban on "cruel and unusual punishments." U.S. Const., Amend. VIII; *see also* Mont. Const. art. II, § 22 ("Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted."). With these heady constitutional principles in mind, we turn now to Keefe's appeal of the District Court's order which resentenced him to life without parole for the three homicides he committed while a juvenile.

¶14 *1. Whether the District Court's failure to appoint Keefe his own expert violated Keefe's right to due process.*

¶15 Keefe was initially represented in his petition for postconviction relief, pro bono, by private counsel. He then entered into an agreement with the Office of Public Defender (OPD), whereby OPD would represent him, with his original counsel continuing as contract counsel for OPD. Keefe sought state funds to hire a mitigation expert, a forensic psychiatrist, an adaptive functioning expert, a substance abuse expert, and a psychologist. The District Court, who had already appointed Dr. Page as an independent expert to examine Keefe, denied Keefe's motion. Dr. Page assessed Keefe, produced a written report, and testified at the resentencing hearing.

¶16 Keefe appeals, asserting he had a constitutional right to the appointment of such experts to aid his defense pursuant to the Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985). The State argues *Ake* is inapplicable to Keefe's resentencing proceeding because Keefe does not have a constitutional right to a psychiatrist

to aid in his defense when his sanity is not at issue. We agree with the State on this issue and conclude *Ake* is not implicated by the resentencing proceeding here.

¶17 In *Ake*, the Supreme Court held

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

Ake, 470 U.S. at 83, 105 S. Ct. at 1096. This Court has previously recognized that "[t]he Supreme Court's holding in *Ake* applies only upon a preliminary showing that the defendant's sanity will be an issue at trial." *Hill*, ¶ 25 (citing *Ake*, 470 U.S. at 74, 105 S. Ct. at 1091-92). The Supreme Court has further clarified when Ake is applicable: (1) the defendant must be indigent; (2) the defendant's mental condition must be relevant to the punishment he might suffer; and (3) the defendant's sanity at the time of the offense must be in question. *McWilliams v. Dunn*, 582 U.S. ___, ___, 137 S. Ct. 1790, 1798 (2017) (citations omitted). If *Ake*'s threshold criteria are met, "a State must provide a mental health professional capable of performing a certain role: 'conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense.'" *McWilliams*, 582 U.S. at ___, 137 S. Ct. at 1794 (quoting *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096).

¶18 In this case, the threshold criteria of *Ake* are not met, and therefore Keefe was not entitled to his own team of experts to assist in his defense before resentencing. While Keefe was indigent, and his youthful mental condition was relevant to determining whether he was "irreparably corrupt" and "permanently incorrigible," Keefe's sanity has never been at issue—either at Keefe's original trial and sentencing or at resentencing. In addition, the District Court appointed Dr. Page to examine Keefe as an independent, neutral expert and the Supreme Court has declined to answer whether "a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties." *McWilliams*, 582 U.S. at ___, 137 S. Ct. at 1799.

¶19 Dr. Page conducted an independent and neutral examination of Keefe prior to the resentencing hearing. Dr. Page also testified at the resentencing hearing, where he was questioned by the District Court as well as counsel for both the State and Keefe. Dr. Page, though he declined to determine whether Keefe was in fact "rehabilitated," testified favorably to Keefe in several regards. He noted Keefe's turbulent upbringing and juvenile rebelliousness, but noted—after Keefe's initial struggles and continued lawlessness in his first years in prison—that Keefe "has matured through the process of his incarceration" and acquired an effective work ethic; has not displayed proneness toward aggression or violence; completed beneficial therapeutic programs; and shows respect for authority and follows the rules. Dr. Page concluded Keefe had "a relatively low risk to commit future acts of violence" as long as Keefe remained supervised and recommended a gradual reintroduction to society if he was granted parole. Overall, Dr. Page's testimony was

favorable to Keefe as he found Keefe had a low risk to reoffend and could be reintegrated into society if granted parole.

¶20 Keefe's right to due process was not violated by the District Court appointing Dr. Page as a neutral expert to examine him, because *Ake* is not applicable to the present case. Dr. Page's independent examination satisfied due process requirements, and the State was not required to provide Keefe with a team of experts to assist with his defense at resentencing.

¶21 *2. Whether there was sufficient evidence for the District Court to conclude Keefe was irreparably corrupt and permanently incorrigible.*

¶22 "The *Miller* Court outlined five factors of mandatory sentencing schemes that prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Steilman*, ¶ 16 (citation and internal quotation marks omitted).

> Mandatory life without parole for a juvenile [1] precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. [2] It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. [3] It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. [4] Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And [5] finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 567 U.S. at 477-78, 132 S. Ct. at 2468 (internal citations and quotations omitted). In *Steilman*, we held that "*Miller*'s substantive rule requires Montana's sentencing judges

to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole[.]" *Steilman*, ¶ 17.

¶23 *Miller* did not categorically bar life without parole as a punishment for juvenile offenders. "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734. "Because juveniles have diminished culpability and greater prospects for reform," the Supreme Court has explained, "'they are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471, 132 S. Ct. at 2464 (quoting *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026). As *Montgomery* noted, the *Miller* Court explained three significant gaps between juveniles and adults:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievable depravity."

Montgomery, 577 U.S. at ___, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 471, 132 S. Ct. at 2464).

¶24 At the resentencing hearing, and in its written Sentence, Order to Close File, and Order Exonerating Bond, the District Court noted that it believed it was "improper" to consider whether Keefe had rehabilitated in prison and that there was "no legal support" for the notion that a juvenile offender, such as Keefe, who was being resentenced after

originally being sentenced to life without parole could have his post-offense conduct considered at sentencing.[3] The District Court therefore disregarded the substantial evidence of Keefe's rehabilitation in the 30-plus years since the homicides. Because of this disregard for evidence of rehabilitation, Keefe's resentencing hearing did not comply with the mandates of *Miller* and *Montgomery* by concluding Keefe was "irreparably corrupt" and "permanently incorrigible" without fully considering relevant evidence.

¶25 The State argues the District Court did adequately consider the *Miller* factors at resentencing, but we are not persuaded by this argument in light of the District Court's explicitly stated conclusion that it would not consider evidence of Keefe's post-offense rehabilitation. If a district court fails to adequately consider any of the *Miller* factors, a remand for resentencing is appropriate. In this case, to conclude the District Court erred, we need only consider the fifth *Miller* factor: "the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 567 U.S. at 478, 132 S. Ct. at 2468.

¶26 As a preliminary matter, we note the appearance of impropriety created by the District Court setting a four-hour sentencing hearing, and then, at the start of that hearing, notifying the parties they only had three hours to present their cases because the District Court would need an hour to read its findings and ruling. While this is not conclusive

[3] While the District Court allowed Keefe to present evidence regarding his post-offense rehabilitation in prison at the resentencing hearing, it specifically declined to consider the positive evidence of rehabilitation presented. As discussed below, the District Court did consider evidence of negative behaviors by Keefe after he committed the homicides. Justice McKinnon's Dissent similarly considers the evidence of negative post-offense conduct as relevant to the possibility of rehabilitation, but disclaims the relevance of the undisputed evidence of Keefe's rehabilitation in the years since the offenses. Dissent, ¶ 63. All post-offense conduct—good and bad—should be considered when resentencing for an offense committed as a juvenile. Such did not occur here.

evidence the District Court had pre-judged the matter, at a minimum it gives the appearance of impropriety and should be avoided.

¶27 At the resentencing hearing, and in his report, Dr. Page testified extensively about Keefe's prospects of rehabilitation. As noted above, while Dr. Page declined to conclusively determine whether Keefe had been, or could be, "rehabilitated" as a philosophical matter, he did testify to Keefe's maturation over his lengthy period of incarceration. Dr. Page concluded that "[e]mpirically measured differences between Keefe's psychological profile at the age of 17 and his current profile at the age of 51, along with research in the area of neuropsychological development and maturation are consistent in suggesting that he has responded to efforts at rehabilitation over a 33 year period of incarceration." Dr. Page found Keefe could succeed outside of prison and was a different person now than he was when he committed the triple homicide in 1985. The *Miller* and *Montgomery* holdings, in essence, establish a presumption against life without parole sentences for juveniles unless they are "irreparably corrupt" or "permanently incorrigible." Here, the District Court concluded Keefe to be "irreparably corrupt" and "permanently incorrigible" without considering the unrebutted evidence of Dr. Page and former MSP supervisor Shaw and Warden Mahoney that Keefe has in fact matured and made progress towards rehabilitation and that he could be successful outside of prison.

¶28 The State argues that the District Court did not have to consider post-offense evidence of rehabilitation, and that, even if it did, Keefe has not shown rehabilitation.[4] The

[4] The Dissent appears to agree with the State on this point, claiming—in spite of the District Court's statements it would not consider post-offense evidence of rehabilitation—that the District

District Court, and the State, both clearly agreed that it was proper to consider Keefe's post-offense behavior when that behavior was negative, such as his early history of disciplinary infractions at the prison. The State, and the District Court, repeatedly made mention of, and gave weight to, tattoos Keefe has gotten while incarcerated as evidence of a lack of remorse. On the whole, the District Court clearly considered post-offense evidence when resentencing Keefe. It simply chose to disregard the rehabilitation evidence presented.[5]

¶29 While not binding on this Court, we find the Ninth Circuit's decision in *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) (en banc), instructive on the issue of whether it is proper for a court resentencing a juvenile serving a sentence of life without parole to consider post-offense rehabilitation. In *Briones*, the Ninth Circuit stated:

> The eighteen years that passed between the original sentencing hearing and the resentencing hearing provide a compelling reason to credit the sincerity of Briones's efforts to rehabilitate himself. Briones was sentenced in 1997; *Miller* was not issued until 2012. Thus, for the first fifteen years of Briones's incarceration, his [life without parole] sentence left no hope that he would ever be released, so the only plausible motivation for his spotless prison

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Court "considered the prospects of rehabilitation at the time of Keefe's original sentencing and at his resentencing[.]" Dissent, ¶ 65. Under the logic presented by the Dissent, Keefe's resentencing hearing was all for show, particularly when the District Court specifically declined to consider the undisputed post-offense rehabilitation evidence presented. This imbalance is clearly constitutionally impermissible as only those youthful offenders who are "irreparably corrupt" and "permanently incorrigible" may be sentenced to life without parole. Retroactively labeling an offender who has rehabilitated to be "irreparably corrupt" and "permanently incorrigible" based on the severity of his crimes while ignoring those labels are inaccurate violates the protections of *Miller* and *Montgomery*.

[5] The Dissent, in finding the District Court did consider Keefe's post-offense rehabilitation evidence, appears to confuse the undisputed fact the District Court *heard* the evidence with the undisputed fact the District Court specifically stated it refused to *consider* that evidence and was under no legal authority to do so.

> record was improvement for improvement's sake. This is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible, yet the record does not show that the district court considered it. This alone requires remand.

Briones, 929 F.3d at 1066-67 (emphasis in original). Here, Keefe was sentenced in 1986—26 years before *Miller* was decided. It is undisputed that Keefe struggled and continued to act out in his early years at the prison, but had begun to mature and rehabilitate approximately two decades before the Supreme Court issued *Miller*. Though the State and the District Court insinuated Keefe's lack of trouble at the prison over the last several years was solely due to the advice of counsel and hope for release provided by *Miller*, such an insinuation is unfounded based upon our review of the record. Keefe's last infractions came years before both *Miller* was decided and years before he ever met his counsel. At the time Keefe began making efforts to rehabilitate himself and stopped committing infractions at the prison, he had no hope of being released and was only making improvement for improvement's sake. Dr. Page testified to his improvement over the years, and so did two MSP employees who knew Keefe for years—former MSP supervisor Shaw and former MSP Warden Mahoney. "This is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is *permanently* incorrigible[.]" *Briones*, 929 F.3d at 1067 (emphasis in original). Unlike *Briones*, where the record showed the district court failed to consider post-offense rehabilitation evidence, the record here shows the District Court explicitly refused to consider such evidence.

¶30 "If subsequent events effectively show that the defendant *has* changed or *is* capable of changing, [a sentence of life without the possibility of parole] is not an option." *Briones*,

929 F.3d at 1067 (emphasis in original). We agree with the *Briones* court that post-offense evidence of rehabilitation is clearly required to be considered by a court resentencing a juvenile who is serving a sentence of life without parole. Because *Miller* commands a resentencing court to consider "the possibility of rehabilitation" before a juvenile can lawfully be sentenced to life without parole, evidence of rehabilitation in the years since the original crime must be considered by the resentencing court. This is consistent with the sentencing policy of Montana which does not merely provide for punishment, protection of the public, and restitution, but also for rehabilitation and reintegration of offenders back into the community:

> The correctional and sentencing policy of the state of Montana is to:
>
> (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;
>
> (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;
>
> (c) provide restitution, reparation, and restoration to the victim of the offense; *and*
>
> (d) *encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.*

Section 46-18-101(2), MCA (emphasis added). Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances including any "fact that exists in mitigation of the penalty." Section 46-18-304(2), MCA.[6] At the time of

[6] While this statute specifically refers to the death penalty, the Supreme Court in *Miller* "imported the Eighth Amendment requirement 'demanding individualized sentencing when imposing the death penalty' into the juvenile conviction context, holding that 'a similar rule should apply when

sentencing or resentencing, the court applies the sentencing policy considering all of the aggravating and mitigating circumstances existing at the time of sentencing. The sentencing court must take into account aggravating circumstances—such as the nature and severity of the offenses here—and mitigating circumstances—including all of the *Miller* factors which include rehabilitation success shown to have occurred by the time of sentencing. Section 46-18-101(3)(d); *see also Miller*, 567 U.S. at 489, 132 S. Ct. at 2475 (holding a sentencing judge "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles"). In this case, that did not happen and the District Court did not "adequately consider the mitigating characteristics of youth set forth in the *Miller* factors[.]" *Steilman*, ¶ 17. By refusing to consider post-offense evidence of rehabilitation, the District Court violated Keefe's constitutional rights at the resentencing hearing. Accordingly, Keefe is entitled to a new resentencing hearing which appropriately considers the *Miller* factors.[7]

¶31 We note here the trauma the McKay family has endured as a result of Keefe's offenses and are mindful the reopening of this case 34 years later has been emotionally difficult. We sincerely wish the District Court had avoided the path it took and had rather

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a juvenile confronts a sentence of life (and death) in prison.'" *Campbell v. Ohio*, ___ U.S. ___, 138 S. Ct. 1059, 1060 (2018) (Sotomayor, J., respecting the denial of certiorari) (quoting *Miller*, 567 U.S. at 475, 477, 132 S. Ct. at 2467, 2468).

[7] While the Chief Justice's Concurrence and Dissent raises additional important constitutional issues involving the interplay of Article II, Section 15, and Article II, Section 22, of the Montana Constitution, such are not squarely before us. The constitutionality issues as raised and analyzed in the Chief Justice's Concurrence and Dissent were not presented and addressed at the district court level. On remand, the parties are free to raise these issues before the District Court where it can squarely address them.

fairly and objectively considered the *Miller* factors including the uncontested evidence of Keefe's rehabilitation progress. While we do not take this decision lightly, we are bound to uphold the constitutional rights of juvenile defendants—even those who commit the most severe offenses. Because the 2019 resentencing hearing did not do so, it must be vacated and remanded for resentencing in accordance with this opinion.

¶32 *3. Whether the issue of whether Keefe was irreparably corrupt and permanently incorrigible must be presented to a jury.*

¶33 Although we have determined the District Court erred in determining Keefe was "irreparably corrupt" and "permanently incorrigible" and are reversing his sentence on that basis, we must address whether the issue of the irreparable corruption of a minor is a fact which must be found by a jury. Keefe has argued, pursuant to *Apprendi*, that he is constitutionally entitled to have a jury determine whether he is, in fact, "irreparably corrupt" before a possible life without parole sentence. We disagree.

¶34 "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63. In *Steilman*, we "conclude[d] that *Miller*'s substantive rule requires Montana's *sentencing judges* to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole[.]" *Steilman*, ¶ 17 (emphasis added).

¶35 As noted above, the Supreme Court has not categorically barred the punishment of life without parole for juvenile offenders, but "did bar life without parole, however, for all

but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734. Here, neither "irreparable corruption" nor "permanent incorrigibility" are facts which could increase a possible sentence. Rather, youth is a mitigating factor which can reduce the possible sentence for deliberate homicide in Montana. In accordance with *Miller* and *Steilman*, a jury is not required to determine irreparable corruption and permanent incorrigibility—that determination is properly left to the resentencing judge.

CONCLUSION

¶36 The District Court did not err when it appointed a neutral expert for the resentencing hearing or when it denied Keefe's request for a jury to determine whether he was "irreparably corrupt" and "permanently incorrigible." The District Court did err, however, when it found Keefe to be "irreparably corrupt" and "permanently incorrigible" after the sentencing hearing as it failed to consider *Miller* factors including undisputed evidence of rehabilitation progress. Keefe is therefore entitled to a new resentencing hearing.

¶37 Affirmed in part, reversed in part, and remanded for a new resentencing hearing.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER

Chief Justice Mike McGrath, concurring and dissenting.

¶38 I concur with the majority Opinion insofar as it reverses the District Court's resentencing. However, I dissent to the majority's decision to remand to the District Court for yet another sentencing. Moreover, in my view, the Montana Constitution and the rationales underlying the *Miller* and *Montgomery* decisions warrant stronger protection for youthful defendants facing a lifetime in prison.

¶39 Growing understanding of the psychology and brain development of young people has led the United States Supreme Court to acknowledge that the biological effects of youth include a "lack of maturity and an underdeveloped sense of responsibility" and demand special constitutional protections in criminal sentencing. *See Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1195 (2005) (quotation omitted) (holding death penalty for juvenile offenders unconstitutional); *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 2026 (2010) (holding life without parole sentences for juvenile offenders in nonhomicide cases unconstitutional). The Court has built on these holdings to recognize that juveniles are "constitutionally different from adults for purposes of sentencing," *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 2464 (2012), as they bear "diminished culpability and greater prospects for reform." *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (quotation omitted). These considerations "diminish the penological justifications for imposing" a mandatory life without parole sentence, rendering such sentences disproportionate under the Eighth Amendment's ban on cruel and unusual punishment. *Miller*, 567 U.S. at 472-73, 132 S. Ct. at 2465-66. According to the United States Supreme Court, life without parole for homicide crimes committed by juveniles can be imposed only

in "exceptional circumstances" upon the rare juvenile whose crime reflects "permanent incorrigibility" or "irreparable corruption." *Montgomery*, 136 S. Ct. at 734, 736 (citing *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469).

¶40 The *Miller* and *Montgomery* holdings, in my view, are properly interpreted as establishing a presumption against life without parole sentences for juveniles that can be overcome only by a finding, supported by competent evidence, that the juvenile is "entirely unable to change" with "no possibility" of rehabilitation. *See Commonwealth v. Batts*, 163 A.3d 410, 435, 452 (Pa. 2017) (citing *Montgomery*, 136 S. Ct. at 733); *see generally* Alice Reichman Hoesterey, *Juvenile (In)Justice: Confusion in* Montgomery's *Wake: State Responses, the Mandates of* Montgomery*, and why a Complete Categorical Ban on Life without Parole for Juveniles Is the Only Constitutional Option*, 45 Fordham Urb. L.J. 149, 175-77 (2017). The *Montgomery* Court repeatedly admonished that life without parole must be a "rare" sentence for juvenile offenders, unconstitutional in the "vast majority" of juvenile homicide cases and justifiable only in "exceptional circumstances." *Montgomery*, 136 S. Ct. at 726, 733-34, 736. *Miller* and *Montgomery's* central reasoning is that the lack of maturity and impulse control that are characteristic of youth render such offenders both less culpable and less fixed than fully matured adults. *Miller*, 567 U.S. at 471-72, 132 S. Ct. at 2464-65 (elaborating how juvenile and adult minds are fundamentally distinct, in particular in the "'parts of the brain involved in behavior control'" (quoting *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026)); *Montgomery*, 136 S. Ct. at 733. These conclusions essentially establish an empirical presumption against life without parole sentences for juvenile offenders.

¶41 Furthermore, the *Miller* Court noted that identifying the rare permanently incorrigible youth can only be done with "great difficulty" and that youthful defendants are already at a disadvantage when attempting to navigate the criminal justice system. *Miller*, 567 U.S. at 477-79, 132 S. Ct. at 2468-69 (citations omitted). The upshot of this reasoning is that the constitutional protections put forth in *Miller* and *Montgomery* cannot allow vulnerable young defendants facing a lifetime in prison to be saddled with the burden of establishing the nearly unprovable, but very likely correct, proposition that they are not among the exceedingly rare number of youths who are truly permanently incorrigible.

¶42 Here, the State did not overcome what in essence is the presumption against a life without parole sentence for a juvenile offender with evidence proving that Keefe was among the exceptionally few irreparably corrupt youthful offenders. To the contrary, unrebutted evidence showed that Keefe was quite capable of rehabilitation. Dr. Page's evaluation and testimony demonstrated that Keefe had matured during incarceration from an uncompassionate youth exhibiting "characteristic carelessness and antisocial acts" to a 51-year-old with an "effective work ethic" and no "demonstrated proneness towards aggression or violence." Dr. Page concluded that Keefe now had a relatively low risk to commit future acts of violence and could be reintegrated into society if granted parole.

¶43 Furthermore, the Montana Constitution's explicit protections for juveniles should compel this Court to go further and conclude that all life without parole sentences are per se unconstitutional for juvenile offenders. In *Graham*, the United States Supreme Court held that life without parole sentences for juvenile offenders are per se unconstitutional for nonhomicide cases. *Graham*, 560 U.S. 48, 130 S. Ct. 2011. It considered, but rejected, a

case-by-case approach like the one the majority here directs the District Court to undertake. *See Graham*, 560 U.S. at 78, 130 S. Ct. at 2032. The *Graham* Court found that predictions of juvenile development were too error prone, that sentencing courts faced with brutal crimes would give insufficient weight to the mitigating factors of youth, that youthful offenders are inherently less culpable and more disadvantaged in criminal proceedings than adults, and that, ultimately, the only reliable way to discover whether a juvenile has the potential to reform is to afford the individual the opportunity to demonstrate as much. *Graham*, 560 U.S. at 77-79, 130 S. Ct. at 2032-33. This reasoning is equally applicable to homicide crimes, as Keefe's case demonstrates and as the *Miller* Court went on to acknowledge. *Miller*, 567 U.S. at 473, 132 S. Ct. at 2465 ("[While] *Graham's* flat ban on life without parole applied only to nonhomicide crimes . . . . none of what it said about children . . . is crime-specific."); *see generally* Hoesterey, *supra*, at 185-88. While the United States Supreme Court declined to consider whether the United States Constitution required extending the per se ban on juvenile life without parole sentences to homicide cases, *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469, the heightened protections for juveniles found in the Montana Constitution should compel this Court to adopt the reasoning laid out in *Graham* here.

¶44 The federal Bill of Rights is by and large a restraint on governmental power, forbidding the federal government from, for example, establishing a religion, conducting unreasonable searches and seizures, or taking private property without just compensation. *See* U.S. Const. amends. I, IV, V. In contrast, Article II of the Montana Constitution contains a Declaration of Rights *provided to individuals*. Relevant here, Article II, Section

22, of the Montana Constitution protects all Montana citizens from cruel and unusual punishments while Article II, Section 15, of the Montana Constitution specifically grants all fundamental rights enjoyed by adults to persons under age eighteen, but, moreover, encourages laws which enlarge the protections of youth.

¶45 As noted above, the United States Supreme Court has already found that a sentence of life without parole for juveniles implicates the proportionality element of the prohibition on cruel and unusual punishments. In the Montana charter, the right of youthful offenders to be free of such punishments is magnified by the special constitutional consideration afforded to juveniles.

¶46 Article II, Section 15, of the Montana Constitution provides:

> Rights of persons not adults. The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

¶47 During the 1972 Constitutional Convention debate, the discussion of Section 15 clearly emphasized the importance of protecting juveniles under the new Constitution. Delegate Monroe, the committee chair and sponsor of the provision, stated

> What this section is attempting to do is to help young people to reach their full potential. Where juveniles have rights at this time, we certainly want to make sure that those rights and privileges are retained; and whatever rights and privileges might be given to them in the future, we also want to protect them.

Montana Constitutional Convention, Verbatim Transcript, March 8, 1972, Vol. V, p. 1750.

¶48 Delegate Monroe went on: "It seems to me that Montana can be the leader among all the states in recognizing the rights of people under the age of majority." Montana

Constitutional Convention, Verbatim Transcript, March 8, 1972, Vol. V, p. 1750. The provision was adopted with overwhelming delegate support. Montana Constitutional Convention, Verbatim Transcript, March 8, 1972, Vol. V, pp. 1752-53.

¶49 Delegate Monroe also noted that Section 15 provided that, "[i]n such cases where the protection of the special status of minors demands it, exceptions can be made on clear showing that such protection is being enhanced." Montana Constitutional Convention, Verbatim Transcript, March 8, 1972, Vol. V, p. 1750. Imposition of a punishment that denies an individual any hope of life outside prison walls is a case where the special status of minors demands the enhancement of their protection.

¶50 These constitutional principles warn against condemning a youth to spend a lifetime behind bars based on nothing more than a sentencing court's apparent ability to divine the young individual's supposed "irreparable" or permanently "incorrigible" nature. Predicting the development of a teenager and the prognosis for rehabilitation, as suggested by *Montgomery* and *Miller*, is a tall order, if not an impossible task.[1] Asking a court, based on professional opinion, to determine whether a teenager is irreparably corrupt or permanently incorrigible seems more like the quest for the Holy Grail than a scientifically-based inquiry. Or, given the severe consequences at hand, perhaps medieval methods for determining whether a defendant is a witch are more appropriate analogies to the nature of such an inquiry.

[1] These terms are no more useful to a prognosticator than the mostly abandoned term: a child "with a malignant heart."

¶51 The District Court's erroneous attempt to resentence 51-year-old Keefe by reaching back in time to forecast 17-year-old Keefe's prospects for rehabilitation from the time of the offense, all the while ignoring actual indicators of success in subsequent decades, aptly demonstrates the futility of engaging in such prognosticating in the first place. The evidence presented at the resentencing demonstrated that the violent, anti-social traits of 17-year-old Keefe had little to no bearing on the character traits of the fully-matured Keefe several decades later. At the time of the offense, an observer may have reasonably thought Keefe to be beyond hope of rehabilitation, a conclusion apparently adopted by the District Court at resentencing.

¶52 However, evidence presented at Keefe's resentencing revealed that such an observer would have been proven wrong in the intervening decades. This dissonance aptly demonstrates that predicting an adolescent's potential for rehabilitation is risky business. The District Court's exercise was analogous to standing among drought-parched crops while ruefully reviewing a Farmer's Almanac predicting a wet growing season. Important constitutional interests of this nature cannot be subject to the outcomes of such doubtful prophesying.

¶53 Even if judicial predictions of teenage incorrigibility were not so dubious, life without parole would still be an inappropriate sentence for a youthful offender. The *Miller* decision acknowledged that the defining characteristics of youthfulness, in and of themselves, "diminish the penological justifications for imposing" a life without parole sentence. *Miller*, 567 U.S. at 472-73, 132 S. Ct. at 2465. In essence, juvenile status itself, regardless of the application of the *Miller* factors, is inherently at odds with such a sentence

under accepted rationales for punishing members of society. Under Montana law, offenders are sentenced in order to inflict punishment proportionate with the crime, protect the public, restore victims, and encourage rehabilitation and reintegration of the offender into society. Section 46-18-101(2), MCA. As a juvenile offender, Keefe has "diminished culpability," *Montgomery*, 136 S. Ct. at 733, rendering the severest punishments disproportionate. Dr. Page indicated that Keefe has matured while incarcerated in a way that is consistent with a successful response to rehabilitation efforts and that Keefe could be released with relatively low risk to society. Whether his sentence was imposed for the purposes of punishment, the protection of society, or rehabilitation,[2] Keefe has served his time and these ends have been reached. The denial of parole eligibility to a youthful offender such as Keefe serves no further legitimate penological purpose.

¶54 I recognize there are many situations where young people, by virtue of the crimes they commit and other pertinent circumstances, should be treated by the court system as adults. Our juvenile courts are not adequate for all cases, including the present one. However, *Miller* and *Montgomery*—as well as the Montana Constitution's special protection for juveniles—require that the analysis does not end there but, instead, recognize the special constitutional status of adolescents. The courts have recognized that status as it relates to the development of young people under the age of majority for many years. *See, e.g.*, *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967). It is time to recognize that our Constitution has granted even greater protections in this regard.

[2] Sadly, not even a sentence of life without parole can restore the victims of this horrific crime.

¶55 This Court has, prior to the *Miller* decision, ordered a district court, on remand, to strike a 60-year parole restriction for a crime committed by a juvenile. *State v. Olivares-Costar*, 2011 MT 196, 361 Mont. 380, 259 P.3d 760. I agree with the majority to remand this case to the District Court. While I would strike the "without parole" provision of the sentence, given the necessity of providing the District Court with a majority Opinion, I acknowledge that the District Court has discretion to conduct a new hearing.

/S/ MIKE McGRATH

Justice Dirk Sandefur specially concurring in part and dissenting in part.

¶56 I concur with the Court's holdings that, in reviewing Keefe's life sentence without parole for compliance with the Eighth Amendment to the United States Constitution, the District Court did not erroneously fail, in light of the manifest absence of a sufficient showing of resulting prejudice, to appoint an expert to unilaterally assist him in lieu of an independent expert report to the court, and that Keefe had no constitutional right to have a jury determine the ultimate constitutional question of whether he is irreparably corrupt and incorrigible. I further concur that the District Court erroneously failed to consider evidence of Keefe's post-sentencing rehabilitation under the unique procedural circumstances of this case and, based on that evidentiary error, with the Court's ultimate reversal of the District Court's reimposition of a life sentence without possibility of parole.

¶57 I would squarely hold, as the Majority essentially does, that *Miller* and *Montgomery* effectively established an Eighth Amendment presumption that life in prison without possibility of parole is cruel and unusual punishment, as applied to juvenile offenders, absent an affirmative evidentiary showing by the state, and corresponding finding by the sentencing court, that the juvenile offender is irreparably corrupt and incorrigible. I also concur with the special concurrence of Chief Justice McGrath, and would so further hold, that the cited provisions of the Montana Constitution effect a similar Montana constitutional presumption regarding juvenile offenders, independent of the United States Constitution.

¶58 I would thus more specifically hold that, regardless of the evidentiary error noted by the Majority, the State failed to meet its burden, on the extraordinary Eighth Amendment review warranted in this particular case, of presenting sufficient evidence to affirmatively overcome the Eighth Amendment and independent Montana constitutional presumptions that life in prison without possibility of parole is cruel and unusual punishment of a juvenile offender. I would therefore ultimately hold that the District Court erroneously reimposed an unconstitutional life sentence without possibility of parole on a juvenile offender. However, rather than remanding for resentencing, I would merely remand for entry of an amended judgment striking and excluding the offending parole eligibility restriction.

¶59 A sentence or sentencing provision that contravenes a constitutional right or exceeds, or does not comply with, a governing statutory authorization or limitation is illegal. *See State v. Olivares-Coster*, 2011 MT 196, ¶¶ 18-22, 361 Mont. 380, 259 P.3d

760; *State v. Garrymore*, 2006 MT 245, ¶¶ 149-50, 334 Mont. 1, 145 P.3d 946.[1] If an illegal sentence or sentencing provision is correctable other than by merely striking the illegal portion of the sentence, then the proper remedy for correcting the illegality is remand for resentencing. *State v. Heafner*, 2010 MT 87, ¶ 11, 356 Mont. 128, 231 P.3d 1087. However, if correctable by striking the illegality from the original sentence without affecting the balance of the sentence, the proper remedy is reversal and remand with instruction for entry of an amended judgment striking and excluding the illegality. *Heafner*, ¶¶ 11-12.

¶60 In *Heafner*, upon sentencing the defendant to concurrent prison terms for accountability to aggravated burglary, accountability to aggravated assault, and witness tampering, the district court illegally imposed various conditions of supervision in the event of parole. *Heafner*, ¶¶ 3 and 6. Rejecting the State's assertion that remand for resentencing was the proper remedy, we reversed and remanded for entry of an amended judgment striking and excluding the illegal parole conditions. *Heafner*, ¶¶ 8 and 11-13.[2] *See also State v. Lehrkamp*, 2017 MT 203, ¶¶ 37-41, 388 Mont. 295, 400 P.3d 697 (reversing and remanding for an amended judgment striking parole conditions not included in the oral pronouncement of judgment).

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[1] *But see State v. Beaudet*, 2014 MT 152, ¶ 17, 375 Mont. 295, 326 P.3d 1101 (distinguishing between illegal and merely objectionable sentences and sentencing provisions for purposes of contemporaneous object/waiver rule and procedural *Lenihan* rule). *Accord Garrymore*, ¶ 90.

[2] We also separately reversed a non-specific restitution award and remanded for reconsideration and imposition of a definite amount of restitution. *Heafner*, ¶¶ 12-13.

¶61 In *State v. Petersen*, 2011 MT 22, 359 Mont. 200, 247 P.3d 731, upon imposing a base 100-year sentence for deliberate homicide, the district court erroneously imposed an additional 10-year statutory weapons enhancement in disregard of the statutory prerequisite that the State include the weapons enhancement in the charging Information. *Petersen*, ¶¶ 1, 4, and 13. Pursuant to *Heafner*, we reversed and remanded for entry of an amended judgment striking the illegal weapons enhancement, thereby preserving the base 100-year sentence originally imposed. *Petersen*, ¶ 16. As in *Heafner*, we held that remand for resentencing was not the proper remedy because striking the illegal sentencing provision was the only way to correct the illegality. *Petersen*, ¶ 16.

¶62 Similarly in *Olivares-Coster*, upon sentencing a seventeen-year-old defendant to two consecutive life sentences for deliberate homicide and attempted deliberate homicide (two concurrent counts), we held that the district court erroneously restricted his parole eligibility pursuant to an otherwise applicable mandatory parole restriction statute, but without consideration of a separate statutory exception for offenders less than eighteen-years-old. *Olivares-Coster*, ¶¶ 11-14 and 20. Concluding that the most straightforward way to correct the erroneous portion of the sentence was to simply strike the offending parole restriction, we reversed and remanded for entry of an amended judgment to that end. *Olivares-Coster*, ¶¶ 20 and 22 (by analogy to *Heafner* and *Peterson*). In rejecting the State and dissent assertion that the appropriate remedy was remand for resentencing and consideration of whether a *discretionary* parole restriction might yet be appropriate, we held that remand for resentencing "would be futile" because the record clearly indicated that the district court had already "explicitly declined" to otherwise

consider a discretionary parole restriction in its oral pronouncement of sentence. *Olivares-Coster*, ¶¶ 19-20.[3]

¶63 Here, on postconviction review over thirty years after the fact, the District Court correctly concluded pursuant to *Miller* and *Montgomery* that Keefe's original 1987 sentence (3 consecutive life sentences without parole for deliberate homicide, a consecutive 10-year sentence for burglary, and 4 consecutive 10-year weapons enhancements (40 years)) was unconstitutional in violation of the Eighth Amendment prohibition against cruel and unusual punishment. The court thus vacated the original sentence for resentencing for due consideration as to whether Keefe is in fact irreparably corrupt and incorrigible for Eighth Amendment purposes. The State did not subsequently challenge that determination.

¶64 However, on resentencing, the District Court rejected and ignored unrebutted testimony of the independent court-appointed forensic psychologist and former Warden of the Montana State Prison regarding Keefe's maturation and demonstrated amenability to rehabilitation and community supervision. The court thus reimposed the original sentence without material change on the same grounds originally considered and imposed. Whether on the Majority's cited ground for reversal, or a more straight-forward recognition that the

[3] *Accord Vernon Kills on Top v. Guyer*, No. OP 18-0656, 2019 WL 3451280, *2 and *5 (Mont. July 30, 2019) (reversing and remanding for entry of an amended judgment striking double jeopardy based illegal sentence (aggravated kidnapping LWOP) but preserving the balance of the original sentence (deliberate homicide-life sentence with no parole restriction)), *reh'g denied*, *Vernon Kills on Top v. Guyer*, No. OP 18-0656, 2019 WL 5057500, *3 (Mont. Oct. 8, 2019) (denying State petition for rehearing seeking remand for resentencing on both offenses).

State failed to meets its evidentiary burden of providing irreparable corruption and incorrigibility on Eighth Amendment review, the sentence reimposed by the District Court on resentencing in 2019 is just as illegal as the same sentence it previously found illegal in violation of the Eighth Amendment.

¶65 As in *Olivares-Coster*, *Peterson,* and *Heafner*, Keefe's illegal sentence is now constitutionally correctable only by striking his parole restriction, thus not affecting the balance of his base sentence and thereby merely affording him an *opportunity* for parole in the ordinary course of Montana law.[4] As in *Olivares-Coster*, remand for yet a *third* sentencing is unnecessary and futile because the District Court has already had an opportunity to correct the fundamental *Miller-Montgomery* error in this case and emphatically declined to do so upon intentional disregard of unrebutted evidence manifestly fatal to overcoming the determinative constitutional presumptions. Irrespective of its patently erroneous conclusion that *favorable* evidence of Keefe's post-offense development, maturation, and conduct was not relevant to whether he is irreparably corrupt

[4] As correctly noted by the original sentencing judge (Hon. Thomas McKittrick) in 1987, Keefe's crimes were among the most heinous, senseless, and irreparably harmful to the victims and their family as any conceivable. As with the infamous Charles Manson murders in California, the Montana Parole Board may never see fit to grant Keefe parole, even if eligible. But that is not the constitutional point. The constitutional point of *Miller* and *Montgomery* is that even an incomprehensibly heinous juvenile offender should at least have the *opportunity* for parole, whether ultimately successful or not, absent affirmative *proof beyond the mere heinous facts of the crime* that the juvenile offender is in fact irreparably corrupt and incorrigible. *See also Roper v. Simmons*, 543 U.S. 551, 569-71, 125 S. Ct. 1183, 1195-96 (2005) (noting significant differences between juvenile and adult offenders in heinous crimes for purposes of Eighth Amendment cruel and unusual punishment); *Steilman v. Michael*, 2017 MT 310, ¶¶ 26-33, 389 Mont. 512, 407 P.2d 313 (Wheat, J., dissenting) (discussing implications of *Miller* and *Montgomery* and remand for striking of offending juvenile offender parole restriction as proper remedy).

and incorrigible, the District Court arbitrarily discredited and dismissed the unrebutted contrary evidence unambiguously on the merits, without any record justification or basis for discrediting its veracity, credibility, or weight. Under these peculiar circumstances, remand for yet another resentencing will futilely accomplish nothing more than unnecessarily prolonging the inevitable on the manifestly static evidentiary record, thereby unnecessarily causing further emotional distress to the victims' family, inflammation of public sentiment, delay, and public expense. The State does not assert that it will have any new evidence to bring to bear and has made no showing of any reason why yet another resentencing over 30 years after the fact is necessary to correct this constitutional error in any manner other than by striking and excluding Keefe's parole restriction. I therefore dissent from the Court's remand for resentencing and would instead simply remand for entry of an amended judgment striking and excluding the restrictions on Keefe's parole eligibility.

/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, concurring and dissenting.

¶66 I join the Court's opinion on Issues One and Three; I dissent from the Court's resolution of Issue Two and conclude that Keefe received an individualized resentencing where "youth and its attendant characteristics" was considered as constitutionally required. After Keefe's resentencing for a triple homicide, and considering all of Keefe's "features" of youth, I conclude that the sentence imposed was not disproportionate under the Eighth Amendment.

¶67 This case concerns the scope of the rule enunciated in *Miller* and declared retroactive in *Montgomery*. More particularly, it asks what procedures a state must afford a postconvicition petitioner in a *Miller-Montgomery* resentencing hearing in order to comply with the substantive rule established in *Miller* that renders life without parole disproportionate for the vast majority of juveniles given their "diminished culpability and heightened capacity for change . . . ." *Miller*, 567 U.S. at 479. Under *Miller*, only those juveniles whose crimes reflect "permanent incorrigibility" are constitutionally eligible for life without parole. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726. *Miller* and *Montgomery* establish that the Eighth Amendment requires a sentencing court consider the circumstances and attendant characteristics of youth before imposing a sentence of life without parole on a juvenile homicide offender. *Miller* and *Montgomery* each dealt with mandatory sentencing schemes that left the sentencing court with no discretion but to indiscriminately sentence all offenders to life without parole. *Miller* reasoned that by making youth irrelevant, as it is in a mandatory sentencing scheme, there is "too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479. *Miller* relied on cases holding the Eighth Amendment "categorically" forbids certain punishments for a class of offenders or type of crime. *Miller*, 567 U.S. at 470. For example, the death penalty may not be imposed for crimes other than murder, and it may not be imposed on those who are intellectually disabled or those under the age of eighteen. *Miller*, 567 U.S. at 470. *Miller* also relied on cases prohibiting the mandatory imposition of capital punishment and which required instead that "sentencing authorities . . . consider the characteristics of a defendant and the details of his offense before sentencing him to death."

Miller, 567 U.S. at 470. *Miller* drew on its precedent and concluded that juveniles are "constitutionally different" for sentencing purposes, just as death is constitutionally different. *Miller*, 567 U.S. at 481. Sentencers, therefore, must have the opportunity to consider the "mitigating" circumstances of youth before imposing the harshest sentence a youth can receive (life without parole), just as mitigating circumstances are considered in adult capital punishment cases. *Miller*, 567 U.S. at 489.

¶68 *Miller* established that a sentence of life without parole is disproportionate for all juveniles, except those juveniles whose crimes reflect "irreparable corruption." *Miller*, 567 U.S. at 479-80. *Miller* requires that the sentencing be individualized so the sentencer can assess and decide which class of juveniles the offender is in: those juveniles who cannot be subjected to life without parole because their crimes reflect "transient immaturity," or the rare juvenile who can be constitutionally sentenced to life without parole because their crimes reflect irreparable corruption. *Miller*, 567 U.S. at 479-80. *Miller* did not ban life without parole for all juvenile murderers, only those rare juveniles whose crimes reflect permanent incorrigibility. The task at resentencing is for the sentencing court to decide in which group the juvenile offender belongs, guided by factors identified in *Miller*. In neither *Miller* nor *Montgomery* did the Court mandate the procedure state courts are to follow to ensure that only "permanently incorrigible" youth are sentenced to life without parole; instead, the Court allowed states, under principles of federalism, to "develop[ ] appropriate ways to enforce" the process of distinguishing between the two classes of offenders. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735. However, the *Montgomery* Court warned that adherence to principles of federalism "should not be

construed to demean the substantive character of the federal right at issue." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735.

¶69 As *Miller* addressed a mandatory sentencing scheme, the *Miller* Court listed several non-exhaustive "hallmark features" of youth that sentencing courts are *precluded* from considering under *mandatory* sentencing schemes. Those features include:

> 1. "immaturity, impetuosity, and failure to appreciate risks and consequences";
> 2. "the family and home environment that surrounds . . .from which [a juvenile] cannot usually extricate himself—no matter how brutal or dysfunctional";
> 3. "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him" or whether "he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth"; and
> 4. "the possibility of rehabilitation."

Miller, 567 U.S. at 477-78. Conversely, state courts conducting *Miller-Montgomery* resentencing hearings have applied these "hallmark features" of youth as *factors to consider* at resentencing. *Miller*, itself, did not require a sentencing court to consider or assess any one feature of youth over another, or make one feature more important than others. *Miller* does not require any one particular feature of youth to predominate over others; rather, very simply, a sentencing court "misses too much if [it] treats every child as an adult." *Miller*, 567 U.S. at 477. Here, after accurately explaining the implications of *Roper*, *Miller*, *Montgomery*, and *Stielman*, to Keefe's resentencing, the District Court considered, and addressed in its written order, each feature of youth. I turn to those features now.

¶70 The District Court found that, at the time of the offense, Keefe was criminally sophisticated; developmentally mature; and assertive of his independence, indeed living on his own. Keefe had already committed 50 offenses as a juvenile and was well-versed in the criminal justice system. The record supports the District Court's findings, and Keefe admitted, that he rehearsed his criminal activities before executing them. He knew the consequences of his actions and chose to disregard them. The psychological evaluations conducted for Keefe's original sentencing and his postconviction resentencing supported the District Court's findings that Keefe did not act impulsively; that he exhibited considerable self-control and calculation; and that Keefe committed his crimes with full knowledge of what would result, but simply did not care.

¶71 The District Court next considered Keefe's childhood, family, and home environment. After considering challenges Keefe faced as a youth, the District Court concluded there was no evidence of "significant developmental experiences, traumatic events, or other life-changing situations that would mitigate the heinously violent crimes that he committed." Regarding any peer or family influences impacting Keefe, Dr. Page explained that "[i]t does not appear that Mr. Keefe experienced abnormally strong, negative, or chronic influences that would have had an anomalous impact on his decision making . . . [and] most, if not all, of [Keefe's] negative experiences occurred as a result of his own behaviors."

¶72 The District Court next considered the circumstances of the triple homicide. After first noting Keefe's chronological age at the time of the offense being 88 days short of his eighteenth birthday, the District Court explained that Keefe had "murdered three innocent

people in cold blood"; that "[h]e did it mercilessly and without hesitation or remorse"; and that he did not stop with one victim, but killed three times. First, Keefe shot Dr. McKay in the back of the head as he was preparing to set out glasses for a family gathering; next, Keefe shot Dr. McKay's daughter, Dr. Marian McKay Qumar, twice as she attempted to flee—once in the back and again in the ankle; and finally, Keefe shot Dr. McKay's wife, Constance, in the back as she lay over her dying daughter. Keefe committed these murders alone and without an accomplice. He acted deliberately and with premeditation. He was sober during the homicides. The District Court found the nature of the crimes particularly abhorrent because Keefe "did not stop with one victim. He killed, he killed, and he killed." Finally, given the circumstances of the offense, Keefe would not be entitled to a lesser offense than deliberate homicide.

¶73 Regarding Keefe's prospects for rehabilitation, reports filed in preparation for the original sentencing indicate Keefe had an anti-social personality disorder, extensive criminal history, and had failed in every treatment facility he was placed. The PSI recommended a sentence of life without parole. At the resentencing hearing, the District Court allowed Keefe to present evidence of prison rehabilitative efforts, but concluded that even if it were proper to consider Keefe's rehabilitative efforts in prison, Keefe's lack of remorse, ideations through tattoos, and changing stories of his offense, demonstrated his claims of rehabilitation were not credible. Keefe tattooed his body with three skulls, the grim reaper, and the phrase "guilty until proven innocent." These tattoos were not present when Keefe was originally sentenced. Dr. Page concluded these permanent markings speak to Keefe's pride in the murders he committed and his belief he

was treated unfairly. The District Court interpreted the tattoos as "evidence of Keefe's bravado about [the] killings and his total lack of genuine remorse." The District Court found that Keefe's recent claims of being only an accomplice to a now-deceased person demonstrate that Keefe has not accepted responsibility for his crimes and is not committed to rehabilitation.

¶74 Based on the foregoing evidence and findings, the District Court specifically found that Keefe was one of those juveniles whose "crimes [did] not represent transient immaturity, but rather they represent irreparable corruption and permanent incorrigibility as defined by the United States Supreme Court."

¶75 This Court concludes that the District Court disregarded evidence of Keefe's rehabilitation and did not fully consider relevant evidence. Although the District Court addressed and considered the relevant factors of youth, this Court bases its conclusion on the District Court's discussion of whether postconviction evidence of rehabilitation was relevant to Keefe's *Miller-Montgomery* resentencing. Evidence of *postconviction* rehabilitation, even if it is relevant, is only an *aspect* of *one* feature ("the possibility of rehabilitation") of youth. Here, the District Court considered the prospects of rehabilitation at the time of Keefe's original sentencing and at his resentencing, in addition to all the other factors of youth. Regardless, and in spite of its initial reluctance, the District Court allowed evidence of Keefe's postconviction rehabilitation, appointed an independent expert to examine Keefe, ordered an updated PSI, and allowed Keefe to present any and all witnesses he wanted. The District Court, therefore, considered Keefe's potential for rehabilitation in light of all the other evidence produced and relevant to the other "features" of youth. The

District Court was "unmoved" by Keefe's evidence of postconviction rehabilitation in prison, determined it not to be credible, and concluded Keefe has not "accept[ed] full responsibility for his crime." Through its discussion of each of the "hallmark features" of youth, the District Court demonstrated it understood the requirements of *Miller* and *Montgomery*, and of Montana law. The District Court assessed the presented evidence relevant to *all* the factors of youth and concluded that Keefe's "crimes do not represent transient immaturity, but rather they represent irreparable corruption and permanent incorrigibility as defined by the United States Supreme Court." This Court has pointed to no error in the District Court's findings; Keefe received a resentencing hearing where factors of youth were considered; and Keefe's resentencing complied with *Miller*, *Montgomery*, and Montana law. A remand to consider additional evidence on an aspect of one factor that the District Court found not credible is misguided.

¶76 In my opinion, Keefe received a resentencing hearing that considered the "hallmark features" of youth, as set forth in *Miller* and *Montgomery*, and adopted by this Court. He now contends that the District Court reached the wrong result in resentencing him to life without parole and faults the District Court for not weighing more heavily the purported evidence of his rehabilitation. Indeed, Keefe was an adult who has been incarcerated for decades when he was resentenced. Taking advantage of this lapse in time, Keefe asks this Court to consider his experience in the years since his crime. We should be mindful that Keefe's request for relief comes in the form of a petition for postconviction relief. The postconviction court asks the same questions as the original court. While an argument can be made that a sentencing court is not constitutionally required to assess

Keefe's subsequent experience in prison, the District Court nevertheless considered this evidence. The District Court did not find Keefe's evidence of rehabilitation credible and found overwhelmingly that consideration of the other features weighed heavily against Keefe. Here, Keefe received exactly what the Eighth Amendment requires: an individualized sentencing where the sentencing judge considered youth and its attendant characteristics before imposing a sentence of life without parole. The District Court specifically addressed the requirements of *Miller* and *Montgomery* and concluded that Keefe fit into the small and rare class of offenders whose crimes reflect "irreparable corruption," and not "transient immaturity." I cannot find a legally supportable basis upon which to substitute what I might have done at sentencing for that of the District Court.

¶77 I would affirm the District Court's sentence and deny Keefe's request for a third resentencing. I dissent.

/S/ LAURIE McKINNON

Justice Jim Rice joins in the Concurrence and Dissent of Justice McKinnon.

/S/ JIM RICE