APPENDIX A

Amy Eddy, District Judge
Department No. 1
Flathead County Justice Center
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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).

III

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 16th 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 B

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